HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

Case S146/2024

BETWEEN:

JOHN BRUCE KAIN
Appellant

and

R&B INVESTMENTS PTY LTD AS TRUSTEE FOR THE R&B PENSION FUND & ORS
First Respondent

DAVID FURNISS
Second Respondent

BLUE SKY ALTERNATIVE INVESTMENTS LIMITED ACN 136 866 236 (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)
Third Respondent

ROBERT WARNER SHAND
Fourth Respondent

ERNST & YOUNG (A FIRM) ABN 75 288 172 749
Fifth Respondent

CHUBB INSURANCE AUSTRALIA LIMITED ACN 001 642 020
Sixth Respondent

DUAL AUSTRALIA PTY LTD ACN 107 553 257 ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S BEING: (1) LIBERTY MANAGING AGENCY LIMITED FOR AND ON BEHALF OF SYNDICATE 4473; (II) ASTA MANAGING AGENCY LTD FOR AND ON BEHALF OF SYNDICATE NO. 2786 EVE; AND (ID HARDY (UNDERWRITING AGENCIES) LIMITED, MANAGING AGENT FOR AND ON BEHALF OF LLOYD'S SYNDICATE HDU 382
Seventh Respondent

ZURICH AUSTRALIAN INSURANCE LIMITED ACN 000 296 640
Eighth Respondent

XL INSURANCE COMPANY SE ARBN 083 570 441
Ninth Respondent

SUBMISSIONS OF THE ASSOCIATION OF LITIGATION FUNDERS OF AUSTRALIA SEEKING LEAVE TO INTERVENE OR BE HEARD AS *AMICUS CURIAE*

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PARTS II AND III: BASIS OF INTERVENTION / LEAVE TO BE HEARD AND REASONS FOR LEAVE

2. The **Association** of Litigation Funders of Australia seeks leave to intervene in support of the First and Second Respondents. As the representative body of litigation funders in Australia, the Association has an interest in the outcome of the proceedings (viz. the proprietary or financial interests of its members in Common Fund Orders (**CFOs**) made in representative proceedings under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA**)).[1]

3. These proceedings have the potential to significantly impact the way in which class actions are funded in Australia (and therefore significantly impact the Association and the commercial activities of its members). That follows from the legal and economic significance of the proceedings to the Australian class action litigation funding market (**Market**); namely, in considering (i) the court's statutory power to make CFOs at an early stage of representative proceedings (**Commencement CFOs**) (Ground 1 of the First and Second Respondents' Notice of Contention (**NOC**)); (ii) the power to make settlement or judgment CFOs in equity (Ground 2 of the NOC); (iii) the power to make "Solicitors' CFOs" (the ground of appeal and Ground 3 of the NOC); and (iv) whether the court has power under s 1337P(l) of the *Corporations Act 2001* (Cth) to apply s 33ZDA of the *Supreme Court Act 1986* (Vic) (Ground 4 of the NOC). While the Association's proposed submissions are confined to Ground 1 of the NOC, there is much overlap with the question of the power to make Solicitors' CFOs (the ground of appeal and Ground 3 of the NOC).

4. Alternatively, the Association would seek to be heard as *amicus curiae*. The Association's proposed legal submissions in **Part IV** below are capable of significantly assisting the Court in respect of matters not fully argued in the parties' submissions.[2] In particular, the

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1 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37, [2] (the Court) (citing *Levy v Victoria* (1997) 189 CLR 579, 600-605 (Brennan J)).

2 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37, [7] (the Court).

Association has sought to:

a. supplement the First and Second Respondents' written submissions on the possible re-opening of *BMW Australia Ltd v* ***Brewster***;[3]

b. in doing so, provide a fuller account of the real-world consequences of *Brewster*, in support of a submission directed to the third consideration discussed in *John v Federal Commissioner of Taxation.*[4] That proposed submission is supported, in part, by the Affidavit of John Walker affirmed 10 February 2025.[5] The Association is in a unique position to provide assistance to the Court on those matters, by reason of the expertise and experience of its members.

5. The confined nature of the Association's proposed submissions means that a grant of leave would not add materially to the parties' preparation for the hearing or the length of the oral hearing itself.[6]

PART IV: PROPOSED SUBMISSIONS

A. CONSIDERATIONS RELEVANT TO REOPENING *BREWSTER*

6. The First and Second Respondents' written submissions address *Brewster* at paragraphs [38]-[53]. In support of those submissions, the Association makes the following additional submissions, which apply the considerations summarised in *John v FCT*[7] and related cases.

7. There are, of course, several considerations relevant to the question of overruling a

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3 *Brewster* (2019) 269 CLR 574.

4 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 (***John v FCT***), 438-439 (Mason CJ, Wilson, Dawson, Toohey, and Gaudron JJ).

5 There remains an unresolved question whether this Court, on an appeal under s 73 of the *Constitution*, may receive evidence to support an application to re-open an existing authority: *Mickelberg v The Queen* (1989) 167 CLR 259, 271 (Mason CJ), and 281-282, 288 (Deane J, albeit dissenting). *Cf* issues of general importance (e.g. the practical consequences of decisions) in special leave applications: *Eastman v The Queen* (2000) 203 CLR 1, [182] (Gummow J); *Roads and Traffic Authority v Cremona* [2002] HCA 38, [7] (Kirby J). The issue has arisen in this Court, but has not been resolved: see *Commonwealth of Australia v Yunupingu (on behalf of the Gumatj Clan or Estate Group) & Ors* [2024] HCATrans 048, lines 180-199; [2024] HCATrans 050, lines 11095-11118. See also, as regards the place of *amicus curiae* in the making of submissions on relevant factual matters: *Levy v Victoria* (1997) 189 CLR 579, 604 (Brennan J) and The Hon Justice Michelle Gordon AC, "Taking Judging and Judges Seriously: Facts, Framework and Function in Australian Constitutional Law" (Monash University Lucinda Lecture, 2 August 2022) 45.

6 *Roadshow Films v iiNet Ltd* (2011) 248 CLR 37, [4] (the Court).

7 *John v FCT* (1989) 166 CLR 417, 438-439 (Mason CJ, Wilson, Dawson, Toohey, and Gaudron JJ).

decision of this Court: (i) "the earlier [decision] did not rest upon a principle carefully worked out in a significant succession of cases"; (ii) "there were differences in the reasoning that led to the earlier [decision]"; (iii) "the earlier [decision] had achieved no useful result but considerable inconvenience"; and (iv) "the earlier [decision] had not been independently acted on in a manner which militated against reconsideration",[8] which requires attention to who may be "adversely affected if the [decision is] overruled".[9]

8. The Association submits that regard to those matters favours reopening *Brewster* to the extent it stands for the proposition that Commencement CFOs cannot be made.

The first John v FCT consideration

9. *Brewster* arose out of two sets of proceedings commenced in the Supreme Court of NSW and the Federal Court. An issue arose as to whether s 33ZF of the FCA and s 183 of the *Civil Procedure Act 2005* (NSW) (**CPA**), both which relevantly provided that a court may make any order that it thinks appropriate or necessary to ensure that justice is done in a representative proceeding, could be relied upon to make a Commencement CFO. By majority, the court ruled that a Commencement CFO could not be made pursuant to either s 33ZF of the FCA or s 183 of the CPA.

10. The Association submits that *Brewster* does not depend on a principle that has been carefully worked out in a succession of cases. This submission is less a critique of their Honours' reasoning as it is a comment on *Brewster's* origins; it was the first time that the Court had examined s 33ZF of the FCA and CFOs more generally,[10] and this created the rule against making Commencement CFOs using s 33ZF of the FCA and s 183 of the CPA. As the first of a new line of cases, *Brewster* necessarily "stands alone".[11]

11. It is perhaps also of some importance here that *Brewster* could have been (but was not) resolved "by reference to long-standing, established approaches to legal principle"[12] –

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8 *The Commonwealth v* ***Hospital Contribution Fund*** (1982) 150 CLR 49, 56-58 (Gibbs CJ); *John v FCT* (1989) 166 CLR 417, 438-439 (Mason CJ, Wilson, Dawson, Toohey, and Gaudron JJ); *Imbree v McNeilly* (2008) 236 CLR 510, [45] (Gummow, Hayne, and Kiefel JJ).

9 *Hospital Contribution Fund* (1982) 150 CLR 49, 58 (Gibbs CJ).

10 Similarly, in *Imbree v McNeilly* (2008) 236 CLR 510, the relevant issue (the standard of care owed by a learner driver to a supervising passenger) had only been considered by this Court once before in *Cook v Cook* (1986) 162 CLR 376, which the appellants sought to be overruled.

11 *John v FCT* (1989) 166 CLR 417, 439 (Mason CJ, Wilson, Dawson, Toohey, and Gaudron JJ).

12 *Brewster* (2019) 269 CLR 574, [232] (Edelman J).

noting in particular the parties' attention to cases like *Cominos v Cominos*[13] and *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc*[14] about unguided (and implied conditions on) statutory judicial discretions. Had the decision found its place within that line of authority, more significant obstacles may have arisen in terms of the first *John v FCT* consideration.

12. The case was instead resolved by a shorter process of statutory construction. This is reflected most clearly in the plurality's reasons (citations omitted; emphasis added):[15]

> In the resolution of this issue, textual and contextual considerations must be addressed together with considerations of purpose. These considerations all point to the conclusion that ss 33ZF and 183 do not empower the making of a CFO. That conclusion can be reached without reliance upon any implication to narrow the scope of their operation, whether by reference to the principle of legality or otherwise. Nor is it dependent upon acceptance of the appellants' attempt to invoke the approach to construction for which *Anthony Hordern* stands as authority. Nor is it necessary to accept that the task of ensuring "that justice is done in the proceeding" is confined to the resolution of the substantive issues in dispute between the parties.

13. That approach has a further significance. It is of course true that the power to overrule is restrained, and exercised only "after the most careful scrutiny of the precedent authority in question and after a full consideration of what may be the consequences of doing so".[16] In statutory construction cases, however, "[i]t is no part of a court's function to perpetuate error and to insist on an interpretation which, it is convinced, does not give effect to the legislative intention".[17] In this, the Court has a "fundamental (and constitutional) responsibility" to avoid that result.[18] It is convenient, at this point, to address why the Association submits that the statutory construction exercise in *Brewster* miscarried, having regard to the text, context, and purpose of s 33ZF.[19]

14. *First*, as part of its textual analysis of s 33ZF, the plurality read the collocation,

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13 *Cominos v Cominos* (1972) 127 CLR 588, 593-594 (Walsh J), 599 (Gibbs J), 603-604 (Stephen J), 607-609 (Mason J). See also the cases cited at *Brewster* (2019) 269 CLR 574, [123], FN 129 (Nettle J).

14 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404, 421 (Court).

15 *Brewster* (2019) 269 CLR 574, [48] (Kiefel CJ, Bell, and Keane JJ). See also Nettle J (at [124]) and Gordon J (at [136]-[148]). Justice Gageler described the issue (at [107]) as "an important but, at the end of the day, narrow point of statutory construction".

16 *Queensland v The Commonwealth* (1977) 139 CLR 585, 602 (Stephen J); *Esso* (1999) 201 CLR 49, [55] (Gleeson CJ, Gaudron, and Gummow JJ).

17 *John v FCT* (1989) 166 CLR 417, 439-440 (Mason CJ, Wilson, Dawson, Toohey, and Gaudron JJ) (citing *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, 13 (Mason J)); ***McNamara** (McGrath) v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646, [42] (McHugh, Gummow, and Heydon JJ).

18 *McNamara* (2005) 221 CLR 646, [42] (McHugh, Gummow, and Heydon JJ).

19 *ENT19 v Minister for Home Affairs* (2023) 278 CLR 75, [86] (Gordon, Edelman, Steward, and Gleeson JJ).

"appropriate or necessary to ensure that justice is done in the proceeding" in the section as "words of limitation",[20] before then examining:

a. "Contextual considerations"; namely:

   i. sections 33M(b) and 33N of the FCA, which "are legislative recognition that, at some point, the cost of identifying group members may simply be too high or too difficult compared to the value of the claims" (emphasis added), the solution to which is to halt the representative proceeding, not to make a CFO;[21] and

   ii. the lack of criteria in either the FCA or CPA for determining whether the "complex relationship" that exists between group members and a litigation funder should be established and, if so, the terms on which that might occur;[22] importantly, "neither the FCA nor the CPA provides any criteria for the fixing, even provisionally, of a rate of remuneration for the litigation funder that is 'appropriate or necessary'";

b. "Considerations of purpose"; namely:

   i. that the defects in the law targeted by the Australian Law Reform Commission (**ALRC**) – in its seminal report upon which Pt IVA of the Act was largely, but not wholly, based[23] – "did not include the absence of sufficient incentive for litigation funders to fund litigation";[24]

   ii. CFOs are not, according to the plurality (and Gordon J) the obvious solution to the 'free rider' problem (as compared to FEOs);[25] and

   iii. there being no warrant in the legislative scheme to relieve the commercial

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20 *Brewster* (2019) 269 CLR 574, [19], [21], [46], [58], [70] (Kiefel CJ, Bell, and Keane JJ) (especially [46], citing ***McMullin*** *v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1, 4 (Wilcox J)). While agreeing generally with the plurality's reasons, Nettle J did not address the construction question directly: see [125].

21 *Brewster* (2019) 269 CLR 574, [62]-[65] (Kiefel CJ, Bell, and Keane JJ).

22 *Brewster* (2019) 269 CLR 574, [66] (Kiefel CJ, Bell, and Keane JJ). The provisions demonstrating this absence, according to the plurality, are discussed at [67]-[81].

23 ALRC, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) (**ALRC Report No 46**).

24 *Brewster* (2019) 269 CLR 574, [83] (Kiefel CJ, Bell, and Keane JJ).

25 *Brewster* (2019) 269 CLR 574, [88] (Kiefel CJ, Bell, and Keane JJ), and [168]-[169] (Gordon J).

anxieties of litigation funders in the process of 'book-building'.[26]

15. Leaving for a moment these contextual considerations and considerations of purpose (which are dealt with in the paragraphs below), it is notable that four Justices did not characterise the collocation in 33ZF as "words of limitation".[27] Quoting Wilcox J (formerly Chair of the ALRC Division which produced the report that led to Pt IVA) in *McMullin*, Gageler J said that the combination of (i) the words used in s 33ZF, and (ii) the (contextual) factor that the provision is located within Div 6 of Pt IVA (entitled "Miscellaneous") and bears the heading, "General power of Court to make orders, means "that s 33ZF(1) was intended to confer on the Court the widest possible power to do whatever is appropriate or necessary in the interests of justice being achieved in a representative proceeding" (emphasis added).[28] Justice Edelman also observed that the words used in s 33ZF in indicated that "a wide power" has been conferred on a superior court.[29] The Association submits that that represents the correct approach to the construction of s 33ZF. In short, that collocation is simply a compound phrase which expresses in broad and designedly open textured terms that essential judicial function of administering justice as and when needed in representative proceedings.

16. The other point to mention here is that, in the context of a power to make CFOs at the settlement and judgment stages of representative proceedings, the "words of limitation" in s 33ZF of the FCA do not appear in ss 33V and 33Z(1)(g).[30] Section 33V(1) – contained within Div 2 of Pt IVA – provides that "[a] representative proceeding may not be settled or discontinued without the approval of the Court." "If the Court gives such approval", s 33V(2) provides for or otherwise reflects a power to make "such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court" (emphasis added). Section 33Z(1)(g) – contained within Div 4 of Pt IVA – provides that the Court "may […] make such other order as the Court thinks just" (emphasis added).

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26 *Brewster* (2019) 269 CLR 574, [94] (Kiefel CJ, Bell, and Keane JJ).

27 *Brewster* (2019) 269 CLR 574, [106]-[118] (Gageler J), [125] (Nettle J), [146]-[147] (Gordon J), [232] (Edelman J). Of the majority, Nettle and Gordon JJ did not rely on the "words of limitation" argument but instead focused more broadly upon the context and purpose of Pt IVA of the FCA.

28 *Brewster* (2019) 269 CLR 574, [99] (Gageler J).

29 *Brewster* (2019) 269 CLR 574, [181] (Edelman). His Honour cited, for example, the reasons of Iacobucci and Arbour JJ in *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 SCR 3 at [24], in which their Honours, in speaking of the power in s 24 of the *Canadian Charter of Rights and Freedoms* to grant a remedy that the court considers "appropriate and just in the circumstances", said that "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion".

These provisions contain (or reflect) a wide judicial discretion.[31] The relevant discretion hangs on the word, "just" (an evaluative and protean term) that, in the case of s 33V(2) is embedded in the collocation, "just with respect to the distribution of any money paid under a settlement or paid into the Court". Further, the words, "with respect to" are both ambulatory and generous. Facially, ss 33V(2) and 33Z(1)(g) are sufficiently capacious for the purpose of accommodating a power to make a CFO (at least at the settlement and judgment stages of representative proceedings), arguably even more so than s 33ZF.

17. *Secondly*, the majority Justices largely passed over the word, "thinks" in s 33ZF(1), which prefaces the collocation. Apart from reposing a trust in judicial discretion, the word, "thinks" is, as Gageler J observed, "legislative endorsement of the notion that the Court's thinking might adapt to changing circumstances and might develop through time with experience" (emphasis added).[32] This idea is traceable to *McMullin*,[33] in which Wilcox J said (emphasis added):

> In enacting Pt IVA […] Parliament was introducing into Australian law an entirely novel procedure. It was impossible to foresee all the issues that might arise in the operation of the Part. In order to avoid the necessity for frequent resort to Parliament for amendments to the legislation, it was obviously desirable to empower the Court to make the orders necessary to resolve unforeseen difficulties; the only limitation being that the Court must think the order appropriate or necessary to ensure "that justice is done in the proceeding".

18. That idea also has roots in ALRC Report No 46, which admits that "the [proposed] procedure is, to an extent, experimental" and "[t]he proposed reforms should be tested in the Federal Court to allow any necessary 'fine tuning' before they are extended to other courts exercising federal or Territory jurisdiction."[34]

19. *Thirdly*, the use of the word, "justice" in the collocation in s 33ZF is significant. While this term eludes definition, the term is inextricably connected to judicial power and the judicial function.[35] Further, the term, "justice" in s 33ZF(1) relates to a relevant

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32 *Brewster* (2019) 269 CLR 574, [100] (Gageler J).

33 *McMullin* (1998) 84 FCR 1, 4 (Wilcox J). See also *Muswellbrook Shire Council v Royal Bank of Scotland Nv* [2013] FCA 616,[17]-[18] (Bennett J); *Turner v TESA Mining (NSW) Pty Ltd (No 2)* [2022] FCA 435, [30]-[31] (Murphy J).

34 ALRC Report No 46, [81].

35 Se e.g. *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 175-176 (Isaacs J); *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400, [178] (Hayne J); *Rizeq v Western Australia* (2017) 262 CLR 1, [126] (Edelman J) (citing Du Ponceau who made the connection in 1884 between "judicial power" and "the right of administering justice through the laws").

"proceeding" – i.e. one "commenced by a representative party on behalf of group members whose consent is not required but who must be given notice of and an opportunity to opt out of the proceeding".[36] This suggests its meaning: it "extends necessarily to ensuring that procedural justice and substantive justice are done as between the representative party and the group members in the conduct of the representative proceeding" (emphasis added).[37] It logically follows that s 33ZF(1) extends to making any order the court thinks appropriate or necessary to ensure that procedural justice (including access to justice) is done in the proceeding. This is consistent with a fundamental objective of Pt IVA: that representative proceedings should "enhance access to justice, reduce the costs of proceedings and promote efficiency in the use of court resources" (emphasis added).[38]

20. The Association submits that that logical link between the word, "justice" (in s 33ZF), procedural justice, and therefore access to justice, considerably diminishes the force of the observation made by the plurality that the mischief targeted by the ALRC "did not include the absence of sufficient incentive for litigation funders to fund litigation".[39] With respect, that takes an unduly narrow view of what the ALRC recommended and why. That is so for several reasons. The first reason is that while the "ALRC was alive to the possibility that a representative proceeding might be funded by third parties",[40] the ALRC recognised that it was limited by "the law of maintenance which, so far as it relates to legal costs, prohibits a person who has no interest in the litigation from financing a party unless there is a legally justifiable motive for such interference".[41] The absence of express reference to the position of litigation funders merely reflects the fact that the ALRC was operating within those then existing legal constraints. The second, and more important, reason is that, as explained at paragraph [18] above, the ALRC itself recognised that the "the [proposed] procedure is, to an extent, experimental" and may require "necessary 'fine tuning'". The third reason is that ALRC Report No 46 repeatedly emphasises the importance of a legal system's ability to provide "effective [access to] legal remedies",[42] and recognises that "[i]f people cannot afford to enforce their rights", because of "the

36 *Brewster* (2019) 269 CLR 574, [108] (Gageler J).
37 *Brewster* (2019) 269 CLR 574, [109] (Gageler J).
38 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 November 1991, 3174.
39 *Brewster* (2019) 269 CLR 574, [83] (Kiefel CJ, Bell, and Keane JJ).
40 *Brewster* (2019) 269 CLR 574, [83] (Kiefel CJ, Bell, and Keane JJ).
41 ALRC Report No 46, [316].
42 ALRC Report No 46, [14], [26], [57], [59], [62]-[63], [67], [238], [321], and [324].

high cost of legal services", then "the legal system is ineffective to that extent".[43] It is thus of little moment that the ALRC omitted to make recommendations specifically addressed to third-party litigation funding of representative proceedings. Reflecting the possible need for evolution recognised by the ALRC itself, the (designedly) ambulatory nature of s 33ZF was directed to developments of that very kind, regardless of whether they could be said to have then been anticipated at some "low level of generality".[44]

21. Furthermore, the plurality did not bring to account the two-fold 'purposes' of the *Federal Court of Australia Amendment Bill 1991*, as outlined by the then Attorney-General in his Second Reading Speech: (i) "to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions", and (ii) "to deal efficiently with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent" (emphasis added).[45] Therefore, it is, with respect, not to the point that there is no warrant in the legislative scheme to relieve the commercial anxieties of litigation funders;[46] the point is that there is a warrant for linking the legislative scheme to procedural justice and the 'economic' viability of proceedings for group members (and therefore access to justice). This is precisely why Gageler J concluded that it is "[u]nrealistic" to disconnect an order that can support the "commercial viability" of proceedings from "justice" in the sense used in s 33ZF(1).[47]

22. *Fourthly*, noting that the purpose of a statutory provision is connected with its place in the structure of the statute,[48] it is of some significance that the plurality did not bring to account the fact that s 33ZF can be found in a Part of the FCA (Pt IVA) that represents a protective or supervisory jurisdiction for the benefit of group members.This is evident, for example, in the procedural fairness protection in s 33X(5), which empowers the court to make an order giving notice of a matter. It is also evident in s 33V(2) – in which "representative proceeding may not be settled or discontinued without the approval of the

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43 ALRC Report No 46, [14].

44 *Brewster* (2019) 269 CLR 574, [171], [205] (Edelman J).

45 Commonwealth, Parliamentary Debates, House of Representatives, 14 November 1991, 3174-3175 (Duffy).

46 *Brewster* (2019) 269 CLR 574, [94] (Kiefel CJ, Bell, and Keane JJ).

47 *Brewster* (2019) 269 CLR 574, [110] (Gageler J).

48 See e.g. *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378, [25] (French CJ and Hayne J).

Court" (emphasis added) – as well as 33Z(1)(g), which amounts to a residual judicial discretion ("make such other order as the Court thinks just") at the point of judgment. Both provisions underscore the court's critical role in supervising legal costs and funding charges at that point of settlement or judgment.[49] The idea that this protective jurisdiction extends beyond a handful of provisions, and covers Pt IVA more generally, finds support in the decisions of various intermediate appellate courts[50] and ALRC Report No 46.[51]

23. While it is perhaps obvious that s 33ZF forms part of this protective or supervisory jurisdiction, this raises a question whether CFOs, made at an early or late stage of proceedings, are fit for that purpose. The Association submits that they are. As Gageler J explained in *Brewster*, it remains appropriate and necessary to order that the representative party and group members each bear a specified proportionate share of a specified, reasonable remuneration to be paid to the litigation funder for funding the proceeding if and when their claims are realised as a result of it.[52] Before *Brewster*, it was never the case that a court-approved (i.e. CFO) rate was 'once-and-for-all'.[53] That rate was expressed provisionally, which permitted it to be notified to group members to inform their 'opt out' rights;[54] the final rate would be fixed at the end of the proceedings, following an informed assessment of what was "fair and reasonable" in the circumstances. This only highlights how Commencement CFOs (if within power) remain closely supervised throughout the proceedings and how their making can be seen to cohere with the statutory purpose of that set of provisions.

24. *Fifthly*, while the plurality correctly highlighted the absence of (statutory) criteria governing the "complex relationship" between litigation funders and group members, the courts have, since *Money Max*, demonstrated their ability to develop their own criteria for assessing the appropriateness of funding rates in CFOs. Whether that is permissible under s 33ZF turns, of course, on the proper scope of the power (examined in the preceding

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49 ***Elliott-Carde*** *v McDonald's Australia Limited* (2023) 301 FCR 1, [133] (Beach J). See generally *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, [8] (Court).

50 See e.g. ***Money Max*** *Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, [171] (Court); *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2017) 252 FCR 1, [90] (Court).

51 ALRC Report No 46, [157]-158], [162], [179], [196], [218], [221], [248], and [320].

52 *Brewster* (2019) 269 CLR 574, [112] (Gageler J); see also Edelman J at [173] (proportionate sharing of "risk and cost").

53 See e.g. *Perera v GetSwift Ltd* (2018) 263 FCR 1, [248] (Lee J); *Evans v Davantage Group Pty Ltd (No 4)* [2021] FCA 1634, [22]-[23]; Walker, [39].

54 See e.g. *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885, [6] (Lee J).

paragraphs) as well as the courts' institutional competence and ability to resolve difficult questions about the appropriateness of the financial remuneration of parties and stakeholders to litigation.[55] In *Brewster*, the dissentients, Gageler and Edelman JJ, persuasively explained why the task required in evaluating a Commencement CFO is not beyond the institutional competence of courts. As Gageler J observed, "courts have become accustomed to assessing appropriate rates of remuneration for the funding of pending litigation, including by reference to litigation risk", and referenced court-approved arrangements between third-party funders and liquidators before investigating company affairs or pursuing claims on behalf of the company,[56] one of which concerned IMF (now Omni Bridgeway) as the funder.[57] According to this line of authority, courts must undertake a multi-factorial assessment, which includes consideration of "the level of the financier's [i.e. funder's] 'premium'".[58] For his part in *Brewster*, Edelman J reached even further back; noting that courts have long held powers to make orders "for remuneration of work, based upon well-accepted principles of justice in the proceeding, in circumstances where work was not requested and where remuneration is dependent upon success".[59] His Honour cited, for example, "actions by maritime salvors, bailees, tenants, trustees, liquidators, and solicitors".[60] His Honour also referred to the courts' power to review terms in costs agreements for unreasonableness as another analogy.[61] In addition to the courts' supervisory power to approve contracts entered into by liquidators on behalf of companies in liquidation,[62] and the examples addressed by Edelman J in *Brewster*, it is worth noting the similar processes undertaken: (i) by State Supreme Courts, which have an "inherent equitable jurisdiction" to determine the

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55 *Brewster* (2019) 269 CLR 574, [115] (Gageler J) and [188]-[202] (Edelman J); cf [151]-[152] (Gordon J).

56 *Brewster* (2019) 269 CLR 574, [115] (Gageler J) (citing *Buiscex Ltd v Panfida Foods Ltd (In liq)* (1998) 28 ACSR 357, 362-364 (Hodgson CJ); *Re ACN 076 673 875 Ltd (rec and mgr apptd) (In liq) (Bendeich as liq, Greatorex intervening by leave)* (2002) 42 ACSR 296, [16]-[33] (Austin J); and *Hall v Poolman* (2009) 75 NSWLR 99, [150]-[151] and [172] (Court).

57 *Re ACN 076 673 875 Ltd (rec and mgr apptd) (In liq) (Bendeich as liq, Greatorex intervening by leave)* (2002) 42 ACSR 296.

58 *Re Addstone Pty Ltd (in liq)* (1998) 83 FCR 583, 594 (Mansfield J). Indeed, in *Re ACN 076 673 875 Ltd (rec and mgr apptd) (In liq) (Bendeich as liq, Greatorex intervening by leave)* (2002) 42 ACSR 296, Austin J (as his Honour then was) said (at [32]) "[t]he cases show that the court is able to make its own assessment of the reasonableness of the premium". The line of cases is summarised by Black J in *Re Kevin Jacobsen Pty Ltd (in liq)* [2016] NSWSC 538 at [42].

59 *Brewster* (2019) 269 CLR 574, [188] (Edelman J).

60 *Brewster* (2019) 269 CLR 574, [196] (Edelman J).

61 *Brewster* (2019) 269 CLR 574, [200]-[201] (Edelman J). See also *Woolf v Snipe* (1933) 48 CLR 677, 678-679 (Dixon J).

62 *Corporations Act 2001* (Cth), s 477(2B).

remuneration of trustees, even allowing "the court to authorise payment of remuneration at a higher rate than that originally allowed by the trust instrument";[63] and (ii) in a claim for a *quantum meruit*, in which the court will award such amounts considered to be just[64] or such amount as the claimant is "reasonably deserved to have".[65] These powers embody an (almost) axiomatic assumption that judicial power is muscular and versatile.[66] Further, as Gageler J observed in *Brewster*, there is no reason to be anxious about scrutinising the financial returns of parties to a funding agreement; it is not just possible but appropriate, because the court has a duty to safeguard and advance the interests of group members which may mean interrogating the terms of the proposed undertaking as well as the rate and structure of the "specified reasonable remuneration" (emphasis added).[67]

25. It is further worth noting that, to assist it in evaluating "reasonable remuneration" when making a CFO, the court can draw upon various procedural aids (to "more effectively discharge its judicial function"[68]), such as court-appointed referees[69] (a possibility entertained by a majority of this Court in *Wigmans v AMP Ltd*[70] in carriage disputes) potentially with market capital or finance expertise,[71] or contradictors (also capable of advocating for group members' interests).[72]

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63 *Application of Sutherland* (2004) 50 ACSR 297, [12] (Campbell J) (citing *Re Duke of Norfolk's Settlement Trusts; Perth (Earl) v Fitzalan-Howard* [1982] Ch 61).

64 *Hoenig v Isaacs* [1952] 2 All ER 176, 182 (Denning LJ).

65 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 251 (Deane J).

66 See e.g. *The Queen v Joske; Ex parte Shop Distributive and Allied Employees' Association* (1976) 135 CLR 194, 215-216 (Mason and Murphy JJ).

67 *Brewster* (2019) 269 CLR 574, [114] (Gageler J) (citing, for comparative purposes, *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, [1] (Gleeson CJ), and [88]-[89] (Gummow, Hayne, and Crennan J).

68 *Bolitho v Banksia Securities Ltd (No 6)* (2019) 63 VR 291, [123] (John Dixon J).

69 As is the approach, e.g., with assessing the reasonableness of legal costs as part of settlement approvals: *Lifeplan Australia Friendly Society Limited v S&P Global Inc* [2018] FCA 379, [41] (Lee J); *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* (2018) 132 ACSR 258, [91] (Murphy J); *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527, [122]-[123] (Murphy J); *Prygodicz v Commonwealth of Australia (No 2)* (2021) 173 ALD 277, [338] (Murphy J).

70 (2021) 270 CLR 623, [119] (Gageler, Gordon, and Edelman JJ).

71 So much was recommended by the Parliamentary Joint Committee on Corporations and Financial Services in its report, *Litigation funding and the regulation of the class action industry* (December 2020) (**PJCFS Report**), Recommendations 13-14.

72 See e.g. *Kelly v Willmott Forests Ltd (in liquidation) (No 5)* [2017] FCA 689, [4] (Murphy J); *Bolitho v Banksia Securities Ltd* (No 6) (2019) 63 VR 291, [110]-[123]. See also Jeremy Kirk SC, 'The Case for Contradictors in Approving Class Action Settlements' (2018) 92 *Australian Law Journal* 716, 726-728; Michael Legg, "The Rise and Regulation of Litigation Funding in Australian Class Actions" (2021) 14 *Erasmus Law Review* 221, 227.

26. *Sixthly*, the majority,[73] in their analysis of various purposive considerations, did not examine in detail how s 33ZF might reflect the court's inherent equitable jurisdiction. Yet, as Gageler J (with respect correctly) observed, the Federal Court, being a court of equity[74] capable of doing justice between a party to and the beneficiaries of litigation, "should have power to order the fair apportionment of those expenses".[75] These equitable origins were helpfully examined by Lee J (sitting as a member of the Full Federal Court) in ***Klemweb Nominees*** *Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited*.[76] Additionally, it is important to consider how a court of equity would conceptualise the position of a group member. In *Elliot-Carde*,[77] Beach J observed that no group member possesses (short of the court's intervention) an ascertained interest in the settlement fund created by a class action; each member requires judicial assistance to claim their share of the fund. Each claim is thus closely analogous to that of a beneficiary.[78] In line with the maxim that "she who seeks equity must do equity", it would therefore be inequitable for a person who has created or realised a valuable asset not to have their costs, expenses and fees incurred in producing the asset paid out of the very fund or property that that person's efforts have created.

27. *Seventhly*, there appears to be an assumption underlying both the plurality's and Gordon J's reasons in *Brewster* that FEOs produce better outcomes for group members and that the accepted availability of those orders addresses the mischief said to be addressed by the making of CFOs.[79] Some further insight into the practical operation of those matters

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73 The plurality simply says that "[t]he funder has no right to that money [i.e. claim proceeds] under contract or under equitable principles" (emphasis added): *Brewster* (2019) 269 CLR 574, [87] (Kiefel CJ, Bell, and Keane JJ). There is no discussion of this inherent equitable jurisdiction in Gordon J's reasons.

74 FCA, s 5(2).

75 *Brewster* (2019) 269 CLR 574, [111] (Gageler J).

76 (2019) 137 ACSR 441, [127]-[129] (Lee J). His Honour joined with the Court's orders: [35].

77 *Elliott-Carde* (2023) 301 FCR 1, [106] (quoting Lee J in *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625 at [39]).

78 *Cf* Edelman J in *Brewster* (2019) 269 CLR 574 who (at [190]) drew a vivid "analogy" using the example, given by Lord Scott of Foscote in *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 at [41], "of a locksmith who is requested to open a locked cabinet 'which is believed to contain valuable treasures but to which there is no key'". No agreement is reached, but the locksmith designs the key which unlocks the cabinet and reveals the treasure. The litigation funder is in an analogous position in respect of group members. His Honour recognised though the "potential obstacles" ([192]-[193]) to characterising a CFO "that involves remuneration as a proportionate share of the award to be an award of restitution in the category of unjust enrichment".

79 *Brewster* (2019) 269 CLR 574, [86]-[88] (Kiefel CJ, Bell, and Keane JJ); [134]-[135], [168]-[169] (Gordon J).

is provided by Mr Walker who explains that FEOs and CFOs are not comparable and no funder treats the two as equivalent.

28. The first distinction is that the costs associated with a funding agreement will not always be the same in claims funded by way of a CFO or FEO: these claims may have different requirements which affect their cost structure. For example, if a funder expects they may only obtain a FEO at the conclusion of proceedings that only incentivises them to engage in 'book-building';[80] that is because funders seek to maximize the number of group members included in the funding agreement, thereby increasing the total commission portion of the 'Funding Agreement Costs'. This drives up 'book-build' costs, which are then passed on to group members. In Mr Walker's experience, class actions funded by FEOs, compared to CFOs, often involve excessive and costly 'book-building', which is expensive, time-consuming, and delays case resolution.[81]

29. The second distinction is that claims that rely solely on a FEO will not proceed if the 'book-build' is expected to produce relatively few signed-up group members (thereby rendering the claim economically unviable).[82] This usually occurs in situations where: (i) potential registrants cannot be identified and contacted within a reasonable time frame, (ii) material participation rates are affected by group characteristics, socio-economic factors, and vulnerabilities (e.g. in mass tort claims) combined with a relatively complex funding agreement; and (iii) the claim value of each group member is relatively low.[83]

30. The third distinction is an important one: in making a FEO a court will not interrogate the fairness or otherwise of the (contractual) funding rate, as compared to making a CFO. As Murphy J has explained extra-curially, "if a funding equalisation order is proposed it will usually be at the funding rate in the funding agreements entered into by funded class members".[84] Because that (contractual) funding rate is unsupervised, it is usually higher

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80 Walker [52]. See also ***Davaria*** *Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501, [64] (Lee J).

81 Walker [52]. See also *Davaria* (2020) 281 FCR 501, [64] (Lee J).

82 Walker [53]. See also *Perera v GetSwift Ltd* (2018) 263 FCR 1, [25] (Lee J).

83 Walker [53]. See also Vicki Waye and Michael Duffy, "The Fate of Class Action Common Fund Orders: The Policy, Procedural and Constitutional Issues of a Legislative Revival" (2021) 40(2) *The University of Queensland Law Journal* 215, 226.

84 The Hon Justice Bernard Murphy, "Navigating through the principles and practicalities of GCOs, CFOs and NWNF", (Speech, Commercial Law Association, 18 March 2022, 9) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-murphy/murphy-j-20220318>, 8. See also Walker [55].

than the court-approved rate in a CFO.[85]

31. Mr Walker's views are supported by a body of decisions of the Federal Court, which are cogent and persuasive. For example, in *Uren v RMBL Investments Ltd (No 2)*,[86] Murphy J explained that "a funding equalisation order is not always the appropriate counterfactual or comparator [to a CFO]". Similarly, in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs & mgrs apptd) (in liq) (No 3)*, Beach J noted that "discussion of any funding equalisation mechanism may be inapposite" if a CFO "is sought and granted close to the inception of the proceeding and where there is no book building through group members being signed up to funding agreements".[87] In these cases, the court will consider a range of factors before making a FEO or CFO, such as (i) the distribution and weighting of losses as between the funded and unfunded group;[88] (ii) whether the funding agreement entitles the funder to recover from the "grossed up" amount redistributed to funded group members from unfunded group members' recoveries;[89] and (iii) whether other expenses are included in the contractual obligations of funded group members under the funding agreement (e.g. project management fees) that would be imposed upon the unfunded class under an FEO.[90] Therefore, if there is an assumption underpinning the plurality's and Gordon J's reasons in *Brewster* that FEOs produce better outcomes for group members than CFOs, that, with respect, is incorrect. To the extent that contextual matter played a part in the construction reached by their Honours, it is a further reason for doubting its correctness.

32. *Finally*, there is nothing in the terms of s 33ZF(1) itself to suggest it is <u>not</u> capable of accommodating the interlocutory (and therefore contingent) nature of Commencement CFOs. As Edelman J explained in *Brewster*,[91] Commencement CFOs can only be made on an interlocutory basis and must be revisited at the end of proceedings. That is consistent with the judicial task of asking whether it is "appropriate or necessary to ensure

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85 Walker [55]. See also PJCFS, [9.46], and [9.83]-[9.85].

86 *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647, [65] (Murphy J).

87 ***Blairgowrie Trading*** *Ltd v Allco Finance Group Ltd (recs & mgrs apptd) (in liq) (No 3)* [2017] FCA 330, [105] (Beach J); *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527, [162] and [167]-[168] (Murphy J); *Pearson v Queensland* [2017] FCA 1096, [30]-[31] (Murphy J).

88 *Money Max* (2016) 245 FCR 191, [55]-[60] (Court); *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527, [162] (Murphy J).

89 *Blairgowrie Trading* [2017] FCA 330, [99](d) (Beach J); *Money Max* (2016) 245 FCR 191, [55]-[60] (Court); *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527, [168] (Murphy J).

90 *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527, [167]-[168] (Murphy J).

91 *Brewster* (2019) 269 CLR 574, [213] and [222] (Edelman J). See also Walker, [40].

that justice is done in the proceeding", which has no temporal limit other than "the proceeding" itself; the appropriateness or necessity of an order may be more or less justified at different points in the proceeding and for different periods. Commencement CFOs are also consistent with the nature of interlocutory relief itself, which may be available even if, as Edelman J explained,[92] they are not a step in the process of determining the legal interests of the parties and even if they do not finally resolve matters in controversy between the parties. Interlocutory orders can be made on a pre-emptive basis, anticipating a final order, where there are good reasons of convenience to do so.[93] Commencement CFOs have a similar effect and are thus unexceptional in that regard.

The second John v FCT consideration

33. Before examining this second consideration, it is important to keep in mind that *Brewster* contains five sets of reasons: the majority's reasons were delivered by Kiefel CJ, Bell, and Keane JJ, while Nettle and Gordon JJ each provided separate reasons; Gageler and Edelman JJ dissented, and again each provided separate reasons. The Association submits that the reasons of the majority Justices reflect fundamentally different approaches to Commencement CFOs and CFOs generally.

34. *First*, among the majority, it was only Gordon J who found that s 33ZF does not allow for the making of a CFO at all, "even when taken at its widest".[94] While the plurality (and possibly Nettle J)[95] found that a CFO could not be made "at the outset of a representative proceeding",[96] they also suggested that a CFO might be permissible at a later stage.[97] *Secondly*, it was only the plurality that reasoned that a Commencement CFO could not be made given the absence of criteria to "guide" the discretion to fix the rate of a funder's remuneration.[98] By contrast, Gordon J recognised that "[j]udicial decisions over time might build up a body of precedent showing that a particular funding rate was

92 *Brewster* (2019) 269 CLR 574, [215] (Edelman J).
93 *Brewster* (2019) 269 CLR 574, [215] (Edelman J).
94 *Brewster* (2019) 269 CLR 574, [146]-[147] (Gordon J).
95 *Brewster* (2019) 269 CLR 574, [125] (Nettle J).
96 *Brewster* (2019) 269 CLR 574, [3] (Kiefel CJ, Bell, and Keane JJ).
97 *Brewster* (2019) 269 CLR 574, [1] and [68] (Kiefel CJ, Bell, and Keane JJ).
98 *Brewster* (2019) 269 CLR 574, [37], [59] (Kiefel CJ, Bell, and Keane JJ).

considered 'appropriate' by the courts for the market conditions that then applied".[99] Her Honour's comments were, with respect, prescient: there is now a mature body of case law about approving funding rates in CFOs as appropriate (and GCOs) at the end of proceedings.[100] *Thirdly*, among the majority, it was only Gordon J said that the objective of avoiding additional costs incurred in 'book-building' is unrelated to what is appropriate or necessary to ensure that justice is done in the proceeding.[101]

35. Those strains between the various aspects of the majority reasoning in *Brewster* bear upon the force with which a belief is held that the result or ratio decidendi in that earlier decision cannot be justified[102] – the point being that such a conclusion may more readily be drawn in such a case than would be the case, say, where a decision is reached by unanimous reasoning. For the reasons given above, that is the conclusion that should be drawn here.

The third John v FCT consideration

36. The Association submits that *Brewster* has not produced any useful result and has rather resulted in considerable inconvenience in several respects.

37. *First*, by doubting the basis for ordering <u>any</u> CFO (not just Commencement CFOs) using s 33ZF, *Brewster* generated a degree of uncertainty that has spread among class action practitioners,[103] litigation funders,[104] trial judges,[105] and even lawmakers,[106] and which has, as a consequence, impacted the commercial viability of many class actions. *Brewster* now means that litigant funders approach 'open' class actions with some hesitation; this is because funders are now reliant on obtaining orders at the <u>conclusion</u> of proceedings to

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99 *Brewster* (2019) 269 CLR 574, [151] (Gordon J); *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21, [92] (Court).

100 See generally Vince Morabito, *Group Costs Orders and Funding Commissions* (Report, January 2024), 27-38.

101 *Brewster* (2019) 269 CLR 574, [161]-[163] (Gordon J); *cf* [91]-[93] (Kiefel CJ, Bell, and Keane JJ).

102 *Vunilagi v R* (2023) (2023) 97 ALJR 627, [161] (Edelman J).

103 See e.g. Peter Cashman and Amelia Simpson, "Research Paper #3: Class Actions and Litigation Funding Reform: the views of Class Action Practitioners" [2020] *University of New South Wales Law Research Series* 73, 7.

104 See e.g. Miklos Bolza, "Funder to Continue Backing Westpac Insurance Class Action, for Now", *Lawyerly* (Online, 12 February 2020 <https://www.lawyerly.com.au/funder-to-continue-backing-of-westpac-insurance-class-action-for-now/>.

105 See e.g. *Mckay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461, [34] (Beach J).

106 See e.g. PJCFS Report, Recommendation 7 and [9.119]-[9.124].

recover their capital and be remunerated for taking on litigation risk.[107] This uncertainty limits the capital that would otherwise be available, which is offered at higher prices than if Commencement CFOs were available or the position clarified.[108] Limited capital in this context mean limited access to justice.[109]

38. *Secondly*, the holding in *Brewster* that there was no power to make Commencement CFOs produces inconvenience in the way that it limits competition between funders (and prevents greater competition over funding rates). Justice Beach made this point in *Elliott-Carde* among competing claims:[110] the winning action will usually be the one "having pitched for the lowest CFO, with all else being equal", so court control over commission rates (in CFOs) "drive[s] down the commission rates".[111]

39. *Thirdly*, *Brewster* appears to have led to 'forum-shopping' in that more class actions are now being commenced in the Supreme Court of Victoria, given the statutory availability of (and certainty provided by) GCOs.[112] Procedurally, a GCO resembles a Commencement CFO: s 33ZDA of the *Supreme Court Act 1986* (Vic) gives the Supreme Court of Victoria a power to determine at an early stage of the proceedings (subject to Court approval at the conclusion of proceedings), the rate at which a sum representing

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107 Walker, [45]. Mr Walker explains (at [24]) that "Non-Recourse Funding" reflects the many risks of funding and conducting a class action; for example: (i) the risk of competing claims and failure in a carriage motion dispute; (ii) the delays and potential cost blow outs compared to budgets arising from procedural rules; namely, class action procedures requiring parties to register sufficient group members, which creates commercial viability risk; (iii) a potential favourable decision for the defendant and possible adverse costs orders; (iv) the claim proceeds being insufficiently large to have justified the investment; (v) the risk of an appeal (or appeals) from a favourable decision; (vi) the risk that any favourable judgment cannot be enforced; and (vii) funds available from capital markets at viable price points.

108 See e.g. Peter Cashman and Amelia Simpson, "Research Paper #3: Class Actions and Litigation Funding Reform: the views of Class Action Practitioners" [2020] University of New South Wales Law Research Series 73, 5, 7-8, 18, 33. See also Walker, [46].

109 Walker, [67]. See also *Money Max* (2016) 245 FCR 191, [82] (Court) (their Honours recognised the "important role of litigation funding in providing access to justice").

110 *Elliott-Carde* (2023) 301 FCR 1, [125]-[126] (Beach J).

111 See also *R&B Investments Pty Ltd (Trustee) v Blue Sky (Reserved Question)* (2024) 304 FCR 395 (**AJ**), [117] (Court) (citing Ben Slade *et al*, "Post-Brewster Jurisprudence – The Future of the Common Fund Doctrine" (2022) 96 *Australian Law Journal* 430, 431); *Davaria* (2020) 281 FCR 501, [64] (Lee J); *Mckay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461, [28] (Beach J) ("I do not recall a reported case prior to *Money Max* where any efforts were made as part of judicial case management to reduce the contractual commission rates, which were usually around 35 to 40%. Judges seemed to accept all of this as a fait accompli and applied funding equalisation mechanisms. […] But common fund orders addressed that vice to the advantage of group members. It gave the Court direct control over the commission rate. Thereafter, there has only been downward pressure on commission rates" (emphasis added)).

112 Walker, [47].

legal fees can be recovered. A GCO allows solicitors conducting class actions in the Supreme Court of Victoria to benefit from a court-ordered share or percentage of claim proceeds to (i) cover the costs of providing legal services and disbursements and (ii) account for the litigation risk assumed in filing and conducting the claim.[113] GCOs were made possible by the *Justice Legislation Miscellaneous Amendments Act 2020* (Vic), which came into effect on 2 July 2020.

40. Mr Walker's evidence is that GCOs and Commencement CFOs provide similar benefits:[114] (i) both ensure that claims start from a commercially viable footing (since both orders entail an early balancing of risk to reward); (ii) in both, apart from administrative costs, costs, disbursements, and reward for assuming litigation risks are encapsulated within a single funding rate (to the extent that a CFO is sometimes expressed as an "all-in" rate, as opposed to an amount that is sought for the funder's commission, in addition to recovery of its invested capital), which class members can easily understand; (iii) both encourage capital creation which enhances competition in the Market and forces down fee commission rates; and (iv) since fee commission rates are easily understood, group members have better information before having to decide whether to opt out of representative proceedings. Moreover, there is growing evidence that GCOs in Victoria reduce costs to class members.[115] Faced with a single funding rate (viz. the fee commission rate) in a GCO, it is becoming more apparent that group members are bearing lower costs overall.[116] Put another way, while GCOs have a slightly higher than median funding rate, the single deduction they represent can produce better returns for group members.[117]

41. Importantly, there is evidence that CFOs produce the same result: they permit better outcomes for group members by reducing, or outright avoiding, additional costs. In *Klemweb Nominees*,[118] Lee J explained that CFOs "maintain control over disproportionate deductions from modest settlements, prevent windfalls, and ensure the court's protective and supervisory role in relation to group members is given effect." A

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113 Walker, [48]. See also *Allen v G8 Education Ltd* [2022] VSC 32, [17] (Nichols J).
114 Walker, [62].
115 AJ, [113] (Court).
116 AJ, [113] (Court) (citing Vince Morabito, *Group Costs Orders and Funding Commissions* (Report, January 2024), 27-28).
117 AJ, [114]-[115] (Court).
118 *Klemweb Nominees* (2019) 137 ACSR 441, [140]; *CJMcG Pty Ltd atf CJMcG Superannuation Fund v Boral Ltd* [2021] FCA 350, [50] (Lee J).

similar point was made by Murphy J in *Caason Investments Pty Limited v Cao (No 2)*:[119] the proposed CFO was "a simpler and more transparent mechanism for fairly apportioning funding charges". In this way, CFOs (in all their variations) are consistent with the objectives of Pt IVA: they reduce costs and, especially in the case of Commencement CFOs, are more likely to produce a single decision by applying a single funding rate across a class at an early stage of the proceedings.[120]

42. If Commencement CFOs offer similar benefits to GCOs – which are currently limited to proceedings in the Supreme Court of Victoria – then an obvious (and inconvenient) consequence of *Brewster* is that it effectively denies these potential benefits to group members in representative proceedings commenced in other jurisdictions.

The fourth John v FCT consideration

43. The Association submits that *Brewster* has not been acted on in a manner which militates against reconsideration. If anything, litigants have sought to avoid its strictures (e.g. by seeking GCOs in Victoria and see also the points made by the First and Second Respondents in their written submissions at [48]). In the present case, the Respondents' solicitors have stated they will seek a GCO if they do not obtain a Solicitors' CFO.[121]

PART V: ESTIMATED TIME

44. In the event that the Court grants leave for the Association to appear at the hearing of the appeal, it is estimated that 15 minutes would be required for the presentation of oral argument.

Dated: 11 February 2025

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119 [2018] FCA 527, [159]-[174], especially [168] (Murphy J).
120 See e.g. ALRC Report No 46, [92].
121 AJ, [14] (Court).

ANNEXURE TO INTERVENER'S / AMICUS CURIAE'S SUBMISSIONS

No	Description	Version	Provision(s)	Reasons for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
	Commonwealth Provisions				
1.	*Corporations Act 2001* (Cth)	As at 28 May 2024 (Compilation No 130, 22 May – 11 June 2024)	s 477	As at date of the Full Court hearing	N/A
2.	*Federal Court of Australia Act 1976* (Cth)	Current (Compilation No 59, 11 Dec 2024)	s 5 Pt IVA; ss 33V, 33X, 33Z, 33ZF	Currently in force; provisions unchanged since Full Court hearing	N/A
	State Provisions				
3.	*Civil Procedure Act 2005* (NSW)	Current (Version No 41, 1 July 2024)	s 183	Currently in force; provisions unchanged since Full Court hearing	N/A
4.	*Justice Legislation Miscellaneous Amendments Act 2020* (Vic)	As made	N/A	For illustrative purposes	N/A
5.	*Supreme Court Act 1986* (Vic)	Current (Version 110, 29 Mar 2024)	s 33ZDA	Currently in force; in force as at date of Full Court hearing	N/A