HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

Matter No S152/2019

BMW AUSTRALIA LTD — APPELLANT

AND

OWEN BREWSTER & ANOR — RESPONDENTS

Matter No S154/2019

WESTPAC BANKING CORPORATION & ANOR — APPELLANTS

AND

GREGORY JOHN LENTHALL & ORS — RESPONDENTS

BMW Australia Ltd v Brewster
Westpac Banking Corporation v Lenthall
[2019] HCA 45
Date of Hearing: 13 & 14 August 2019
Date of Judgment: 4 December 2019
S152/2019 & S154/2019

ORDER

Matter No S152/2019

1. *Appeal allowed.*

2. *Set aside the orders made by the Court of Appeal of the Supreme Court of New South Wales on 1 March 2019 and 22 March 2019 and, in their place, order that:*

(a) the question stated for separate determination be answered: "No"; and

(b) the first respondent pay the applicant's costs of the application for, and the hearing of, the separate question.

3. The first respondent pay the appellant's costs of the appeal to this Court.

Matter No S154/2019

1. Appeal allowed.

2. Set aside orders 3 and 4 made by the Full Court of the Federal Court of Australia on 1 March 2019 and, in their place, order that:

(a) the appeal be allowed;

(b) orders 1 and 2 made by Lee J on 28 September 2018 be set aside and, in their place, the application for a common fund order be dismissed with costs; and

(c) the respondents pay the appellants' costs of the appeal.

3. The respondents pay the appellants' costs of the appeal to this Court.

On appeal from the Supreme Court of New South Wales (S152/2019) and the Federal Court of Australia (S154/2019)

Representation

J K Kirk SC with T O Prince for the appellant in S152/2019 (instructed by Ashurst Australia)

J C Sheahan QC with E Holmes and R Mansted for the first respondent in S152/2019 (instructed by Quinn Emanuel Urquhart & Sullivan)

Submitting appearance for the second respondent in S152/2019

A Leopold SC and S J Free SC with C G Winnett for the appellants in S154/2019 (instructed by Allens)

J T Gleeson SC with W A D Edwards and Z C Heger for the first to fourth respondents in S154/2019 (instructed by Shine Lawyers)

N C Hutley SC with B K Lim and S K Tame for the fifth respondent in S154/2019 (instructed by Roberts & Partners Lawyers)

S B Lloyd SC with D P Hume and K N Pham for the Attorney-General of the Commonwealth, intervening in both matters (instructed by Australian Government Solicitor)

K L Walker QC, Solicitor-General for the State of Victoria, with M A Hosking for the Attorney-General for the State of Victoria, intervening in both matters (instructed by Victorian Government Solicitor)

J A Thomson SC, Solicitor-General for the State of Western Australia, with E J Cavanagh and B J Tomasi for the Attorney-General for the State of Western Australia, intervening in both matters (instructed by State Solicitor's Office (WA))

G A Thompson QC, Solicitor-General of the State of Queensland, with F J Nagorcka for the Attorney-General of the State of Queensland, intervening in both matters (instructed by Crown Law (Qld))

CATCHWORDS

BMW Australia Ltd v Brewster
Westpac Banking Corporation v Lenthall

Practice and procedure – Representative action – Orders – Where s 33ZF of *Federal Court of Australia Act 1976* (Cth) and s 183 of *Civil Procedure Act 2005* (NSW) provide that in representative proceeding court may make any order court thinks appropriate or necessary to ensure justice is done in proceeding – Where representative proceedings commenced in Federal Court of Australia and Supreme Court of New South Wales – Where proceedings funded by litigation funders – Where litigation funders entered into litigation funding agreements with small number of group members – Where representative parties in each proceeding applied for common fund order – Whether s 33ZF of *Federal Court of Australia Act* and s 183 of *Civil Procedure Act* empower Federal Court of Australia and Supreme Court of New South Wales to make common fund order.

Words and phrases – "access to justice", "appropriate or necessary to ensure that justice is done in the proceeding", "award of damages", "book building", "common fund", "common fund order", "distribution of moneys recovered", "equitable sharing of costs", "fair and reasonable to all group members", "free riding", "funding commission", "funding equalisation order", "interests of justice", "litigation funding", "representative proceeding", "risk", "unfunded group members".

Civil Procedure Act 2005 (NSW), Pt 10, ss 157, 162, 165, 166, 172, 173, 175, 177, 178, 179, 183, 184.
Federal Court of Australia Act 1976 (Cth), Pt IVA, ss 33C, 33J, 33M, 33N, 33U, 33V, 33X, 33Z, 33ZA, 33ZB, 33ZF, 33ZJ.
Judiciary Act 1903 (Cth), s 79.

1 KIEFEL CJ, BELL AND KEANE JJ. The principal issue in these appeals is whether, in representative proceedings, s 33ZF of the *Federal Court of Australia Act 1976* (Cth) ("the FCA") and s 183 of the *Civil Procedure Act 2005* (NSW) ("the CPA") empower the Federal Court of Australia and the Supreme Court of New South Wales respectively to make what is known as a "common fund order" ("CFO"). Such an order is characteristically made at an early stage in representative proceedings and provides for the quantum of a litigation funder's remuneration to be fixed as a proportion of any moneys ultimately recovered in the proceedings, for all group members to bear a proportionate share of that liability, and for that liability to be discharged as a first priority from any moneys so recovered.

2 This issue was resolved in the affirmative against the appellants in these appeals by the courts below, in Matter No S154 of 2019 ("the Westpac appeal") by the Full Court of the Federal Court of Australia, and in Matter No S152 of 2019 by the Court of Appeal of the Supreme Court of New South Wales ("the BMW appeal"). Because the principal issue was resolved in favour of the respondents, two further issues arose for determination by the courts below: the first being whether the sections infringe Ch III of the *Constitution* and the principle in *Kable v Director of Public Prosecutions (NSW)*[1] respectively, and the second being whether the sections are contrary to s 51(xxxi) of the *Constitution*.

3 Properly construed, neither s 33ZF of the FCA nor s 183 of the CPA empowers a court to make a CFO. Section 33ZF of the FCA and s 183 of the CPA each provide relevantly that in a representative proceeding, the court may make any order the court thinks appropriate or necessary to ensure that justice is done in the proceeding. While the power conferred by these sections is wide, it does not extend to the making of a CFO. These sections empower the making of orders as to *how* an action should proceed in order to do justice. They are not concerned with the radically different question as to whether an action *can* proceed at all. It is not appropriate or necessary to ensure that justice is done in a representative proceeding for a court to promote the prosecution of the proceeding in order to enable it to be heard and determined by that court. The making of an order at the outset of a representative proceeding, in order to assure a potential funder of the litigation of a sufficient level of return upon its investment to secure its support for the proceeding, is beyond the purpose of the legislation.

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1 (1996) 189 CLR 51.

4 It follows that each appeal must be allowed. As a result, the further issues determined by the courts below and agitated again by the parties in this Court do not arise for determination.

5 There is considerable commonality of issues and arguments in the appeals; the relevant provisions of the FCA and the CPA are in all but identical terms. It is therefore convenient to deal comprehensively with the issues and arguments in the two appeals together, after first summarising separately the circumstances giving rise to each appeal and the reasons for decision of each of the courts below.

The Westpac appeal

Background

6 In October 2017, the first to fourth respondents commenced, on behalf of themselves and numerous group members, representative proceedings under Pt IVA of the FCA against Westpac Banking Corporation and Westpac Life Insurance Services Ltd (together, "Westpac")[2]. In the proceedings, the first to fourth respondents allege that they relied on advice from Westpac's financial advisers to purchase insurance policies from Westpac Life. They contend that the financial advisers breached their statutory and fiduciary obligations to them (and group members) by failing to advise them of equivalent or more advantageous insurance policies offered by third-party insurers[3]. It appears that there may be in excess of 80,000 group members, each with a claim for damages in the range of $2,000 to $15,000[4].

7 The first to fourth respondents signed a funding agreement with the fifth respondent, JustKapital Litigation Pty Ltd ("JKL"), a litigation funder[5]. Only a small number of group members had entered into a funding agreement with the fifth respondent before the first to fourth respondents applied to the Federal Court of Australia for a CFO[6]. Notice of the application was given to group

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2 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 25 [3].

3 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 25 [3].

4 *Lenthall v Westpac Banking Corporation* (2018) 363 ALR 698 at 704 [14]-[15].

5 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 25 [4].

6 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 25 [5].

members[7]. No reasoned objection to the making of a CFO was received from group members[8]. The appellants objected to the making of a CFO.

8 The evidence was that only one litigation funder other than JKL had been approached by the first to fourth respondents, but discussions with that funder did not progress to negotiating terms on which funding might be provided for the litigation[9]. No other funder had shown interest in funding the proceedings[10]. Approximately $1.2 million had already been spent by JKL on legal costs, and the likely total legal costs disclosed in the retainer with JKL were between $6.5 and $9 million[11].

9 Section 33ZF(1) of the FCA (s 183 of the CPA being in all but identical terms) provides:

> "In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding."

10 Subject to an undertaking by JKL to be bound to the funding terms, the primary judge (Lee J) made a CFO pursuant to ss 23 and 33ZF of the FCA[12].

11 The CFO stipulated, among other things, and subject to further order, that any judgment or settlement sum ("resolution sum") will be pooled, and that group members will be required to pay from that pool[13] the lesser of:

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7 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 25 [4].

8 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 25 [5].

9 *Lenthall v Westpac Banking Corporation* (2018) 363 ALR 698 at 704 [14].

10 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 25 [6].

11 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 25 [6].

12 It was not suggested, either by the Full Court of the Federal Court or in argument in this Court, that s 23 of the FCA amplified the power conferred by s 33ZF of the FCA in any material way. Accordingly, these reasons will focus upon the scope of s 33ZF in its statutory context.

13 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 30-31 [20]-[22].

(a) three times the total expenditure on legal costs, disbursements, adverse costs orders and fees of the costs referee paid by JKL; or

(b) 25 per cent of the net resolution sum;

and an additional amount for each appeal.

12 The payments to JKL were prioritised as the first payments to be made from any resolution sum[14].

13 The CFO departed from the order sought by the first to fourth respondents only insofar as his Honour ordered that JKL's commission be calculated by reference to the *net* rather than *gross* resolution sum[15]. This was said to incentivise JKL to contain legal costs and to reflect the extent of the risk assumed by the funder[16].

14 Although the CFO set a commission rate for JKL, it was subject to the distribution "not exceeding any such amounts as the Court determines to be fair and reasonable in all the circumstances"[17].

15 The previous undertaking given by JKL removed the right it enjoyed under its funding agreement to withdraw from the funding arrangement upon giving 14 days' notice to group members[18]. JKL thus assumed, subject to further order, an obligation to fund the proceedings to their conclusion.

16 The appellants sought leave to appeal from the orders of Lee J to the Full Court of the Federal Court.

The Full Court

17 The Full Court (Allsop CJ, Middleton and Robertson JJ) granted leave to appeal but dismissed the appeal.

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14 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 30 [21], 31 [23].

15 *Lenthall v Westpac Banking Corporation* (2018) 363 ALR 698 at 712 [53].

16 *Lenthall v Westpac Banking Corporation* (2018) 363 ALR 698 at 712 [51].

17 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 31 [23].

18 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 31 [26]-[27].

18 In the Full Court, Westpac argued that s 33ZF could not be construed as empowering the court to issue a CFO. The Full Court rejected this argument[19], holding that the primary judge was correct to conclude that the question of the power of the court to make a CFO had been resolved in the affirmative by the Full Court of the Federal Court in *Money Max Int Pty Ltd v QBE Insurance Group Ltd*[20].

19 The Full Court reasoned that s 33ZF contains the "widest possible power", and, paraphrasing the language of s 33ZF, held that this power extends to "all procedures appropriate or necessary to deal with the matter on a just basis"[21]. It may be said immediately that this paraphrase is inaccurate in a significant respect. It elides the words of limitation "appropriate or necessary to ensure that justice is done in the proceeding".

20 The Full Court cited the principle of construction that wide statutory powers given to courts should not be read down absent clear indication in the statute's terms or context[22]. The Full Court rejected Westpac's argument that ensuring justice in the proceeding did not extend to encouraging a litigation funder to support the proceedings[23]. The Full Court held that Westpac's submission as to the scope of s 33ZF was[24]:

> "too narrow in restricting the order to the 'metes and bounds' of the proceedings, which we took to mean the pleaded issues for resolution. It is not an order restricted to a particular issue requiring resolution. It is 'justice' that is to be ensured in the proceeding. That is procedural or substantive justice; and the Court is to be satisfied that there is something in the proceeding that should be addressed in order to ensure that justice in the proceeding is done. There is no reason to limit that to the pleaded

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19 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 28 [11].

20 (2016) 245 FCR 191.

21 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 44 [86].

22 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 44 [86], citing *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421.

23 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 45 [90].

24 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 45 [90]-[91].

> issues. There is every reason to view as wide enough [sic] to deal, in a fair way, with circumstances that will remove a risk to the prosecution and vindication of the group's rights.
>
> ... An early order ... can place the group action on a known and stable foundation, and reduce or eliminate the risk of the action not proceeding."

21 Once again, the Full Court, by eliding the words of limitation, gave an expanded scope to the section so as to bring within it a concern as to whether a sufficient incentive was presented to a third-party funder to ensure that the proceedings would be pursued. In addition, Westpac's submission was understood by the Full Court to propose a limit upon the scope of the section by narrowing the phrase "justice is done in the proceeding" to the resolution of the pleaded issues. That was, with respect, to set up a straw man and then proceed to demolish it. As will be explained, the section can apply, on the natural and ordinary meaning of its words, to support any interlocutory procedural order necessary to ensure that the pleaded issues are resolved justly between the parties.

22 The Full Court addressed an argument advanced by Westpac to the effect that s 33ZF should be construed in conformity with the principle of legality so as not to allow interference with the proprietary rights of group members in the causes of action vested in them. It was held that a CFO conforms with, rather than undermines, the principle of legality. The Full Court concluded that a CFO "not so much takes away from, as supports and fructifies, rights of persons that would otherwise be uneconomic to vindicate"[25].

23 Westpac's further argument that the court's general power under s 33ZF is constrained by other provisions of Pt IVA of the FCA was also rejected. It was held that, while other provisions of the Act also empower the court to deal with distribution of moneys (or proceeds), in particular ss 33V and 33Z, it does not follow that a CFO can *only* be made at the conclusion of a case when s 33V or s 33Z is engaged. The Full Court held that there is nothing in those provisions evincing a statutory intention to deprive courts of the power to deal with distribution of proceeds at an earlier point of time, provisionally, in order that the ends of justice be met[26].

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25 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 46 [94].

26 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 46-47 [96].

The BMW appeal

Background

24 Mr Brewster, the first respondent, commenced representative proceedings in the Supreme Court of New South Wales against BMW Australia Ltd ("BMW") relating to the national recall of BMW vehicles fitted with defective airbags manufactured by Takata Corporation (or a related company)[27]. There are five other representative proceedings pending in the Supreme Court of New South Wales relating to vehicles recalled due to defects in their Takata-supplied airbags (Honda, Mazda, Nissan, Subaru and Toyota)[28].

25 As Mr Brewster alleges that BMW contravened the *Trade Practices Act 1974* (Cth) and the *Australian Consumer Law*[29], the BMW appeal proceeds on the basis that the Supreme Court of New South Wales was exercising its federal jurisdiction.

26 In the BMW matter, the class may comprise over 200,000 members, each with what appears to be a distinctly modest claim for damages[30]. The proceedings are funded by the second respondent, Regency Funding Pty Ltd ("Regency Funding"), a litigation funder. Only a small number of group members have entered into a litigation funding agreement with Regency Funding[31].

27 In August 2018, Mr Brewster applied for a CFO. Regency Funding, the solicitor firm for Mr Brewster, and Mr Brewster each offered to undertake to each other and to the Supreme Court to comply with their obligations under funding terms annexed to the proposed order[32]. Regency Funding agreed to bind itself to maintain the litigation[33]. Upon that undertaking the Supreme Court was

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27 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 172 [1]-[2].

28 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 172 [1].

29 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 172 [2].

30 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 172 [2], 173 [4].

31 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 172 [3].

32 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 176 [21].

33 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 176 [22].

asked to order that, subject to further order of that Court pursuant to s 183 of the CPA or its inherent jurisdiction, Mr Brewster and the group members be bound to pay from any resolution sum[34]:

(a) the legal costs, disbursements and administration expenses expended by Regency Funding;

(b) remuneration to Regency Funding in the amount of 25 per cent of so much of the resolution sum as remains after payment of the abovementioned expenses (or such other sum as the Supreme Court considers reasonable at the time of the approval of a settlement or judgment); and

(c) any GST upon these amounts;

prior to the distribution of the resolution sum to the group members.

28 Mr Scattini, the solicitor for Mr Brewster, filed an affidavit in support of the application in which he gave evidence of his experience that litigation funders:

> "often considered it was uncommercial to fund class action proceedings on an open class basis where large numbers of people had individually suffered relatively modest loss and damage ... due to the prohibitive transaction costs of funding such proceedings, the low expected return to each individual group member, and therefore the corresponding risk that the funder will obtain a very limited return. This meant it was effectively impossible to obtain funding for large consumer class action proceedings, such as the Takata Proceedings."

29 Evidently, the CFO was sought in those proceedings to assuage such a concern on the part of the litigation funder.

30 On the application of BMW, Sackar J removed into the Court of Appeal the separate question "[d]oes the Court have the power to make Order 1 sought in the Notice of Motion filed by the Plaintiff on 14 August 2018 (Common Fund Motion)?"[35]. The Court of Appeal heard the separate question in the BMW matter

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34 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 173 [7].

35 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 173 [9]-[10].

while sitting concurrently with the Full Court of the Federal Court hearing the Westpac matter[36].

The proceedings below

31 The Court of Appeal of New South Wales (Meagher, Ward and Leeming JJA) answered the question posed for separate determination in the affirmative, holding that the court has the power to make the CFO sought[37].

32 The Court of Appeal concluded that "there is no occasion to doubt the conclusion or reasoning in *Money Max* in any respect relevant to the existence of power"[38]. The Court noted that s 183 is worded "in the utmost generality" and ought not be narrowly construed[39].

33 The Court of Appeal rejected BMW's invocation of the principle of legality, observing that s 183 is located in a legislative regime which envisages an adjustment to the rights of persons with a cause of action because they may be made group members without their consent. Once it is accepted that the property rights of group members have already been interfered with in Pt 10 of the CPA, it would be incongruous to apply the principle of legality to narrow the protections put in place by Parliament to regulate the regime[40].

34 The Court of Appeal also rejected BMW's attempt to invoke the principle in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia*[41]. BMW had argued that the CPA confers only "one power"[42]

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36 The procedure adopted for the concurrent hearing of the matters is described in *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 24 [2]; *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 174-175 [13]-[17].

37 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 196 [117].

38 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 189 [82].

39 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 184 [56]-[57].

40 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 184-185 [58]-[62].

41 (1932) 47 CLR 1 at 7.

42 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 589 [59].

to deal with the distribution of any resolution sum (contained in ss 173, 177 and 178) so that s 183 must be confined by the restrictions in those provisions. The Court of Appeal observed that ss 173, 177 and 178 relate to proceedings being determined consensually or at the time of judgment. In contrast, there is no temporal limitation in s 183 and nothing to suggest that it does not extend to interlocutory orders made prior to settlement or judgment[43]. Further, even if ss 177 and 178 confer only a "single power" to distribute amounts paid by way of damages, a CFO made on an interlocutory basis does not qualify or preclude the exercise of that power at the conclusion of the proceedings[44].

35 The Court of Appeal held that the submission advanced by the first respondent to the effect that the power to make a CFO represented the culmination of the "original intent" underlying Pts IVA and 10 "goes too far"[45]. The Court held that, in any event, there was a general presumption that the legislation is "always speaking" in that the application of the provision could vary over time[46].

The submissions of the parties

36 In this Court, the appellants submitted that a CFO is an order of an extraordinary nature in that an application for a CFO requires the court to act, in effect, as a remuneration tribunal for litigation funders. It was submitted that an order made to maintain the viability of litigation is not one that ensures that justice is done "in the proceeding" because it does not advance the determination of the parties' legal rights and obligations. It was said that the principle of construction identified in *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc*[47] cannot be deployed to construe ss 33ZF and 183 more liberally than their text and context permit[48].

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43 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 186 [66].

44 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 186 [67].

45 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 186 [68].

46 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 188 [75]-[77].

47 (1994) 181 CLR 404.

48 Citing *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313.

37 The appellants argued that it is significant that on an application for a CFO, the court is required to fix a rate of return for the litigation funder without the benefit of practical criteria for doing so – the absence of such criteria being a contextual indication that neither s 33ZF nor s 183 was intended to authorise the involvement of the court at the outset of proceedings to promote the prosecution of the proceedings.

38 The appellants sought to invoke the principle in *Anthony Hordern* and submitted that Pt IVA of the FCA[49] and Pt 10 of the CPA[50] contain provisions that regulate in detail the court's powers in respect of the distribution of proceeds in representative proceedings, and that the limitations in these provisions cannot be circumvented by invoking the general power in s 33ZF or s 183.

39 BMW submitted that a CFO made at an early stage in the proceedings has an inherently infirm factual foundation because it cannot be known whether the pleadings will change, whether the matter will settle or go to trial, and, if the latter, how long the trial will take. Accordingly, it is not possible for a court to determine at an early stage what is "appropriate or necessary to ensure that justice is done in the proceeding".

40 The respondents emphasised that ss 33ZF and 183 are framed in the broadest terms. The principle in *Shin Kobe Maru* means that ss 33ZF and 183 should not be read down in the absence of clear indication in the terms or context of these provisions. It was submitted that the Full Court in the Westpac matter was correct to conclude that Parliament intended that courts would over time develop new procedures in response to the circumstances in which Pt IVA of the FCA or Pt 10 of the CPA was to work; and that task would be unduly inhibited by a narrow construction of s 33ZF or s 183.

41 The respondents submitted that the phrase "to ensure that justice is done in the proceeding" in each section is not limited to deciding the issues in dispute between the parties. A CFO was said to do "justice" in two ways. First, it helps remove a risk to the prosecution and vindication of group members' rights by placing the proceeding on a more stable foundation. Secondly, it promotes justice by ensuring that the benefits and burdens of the litigation are shared equally between group members. It was said in support of this contention that the law of restitution already recognises the right of some persons who intervene to assist

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49 See FCA, ss 33V, 33Z, 33ZA and 33ZJ.

50 See CPA, ss 173, 177, 178 and 184.

others, without legal compulsion, to recover moneys outlaid and, in some cases, to earn reasonable remuneration[51], as in the context of salvage. As to this contention, it may be said immediately that to point to the recognised entitlement to recompense for services actually rendered for the benefit of another does not advance the case for the making of orders in advance of the rendering of any service where the value of the service can only be a matter of surmise.

42 The respondents argued that the *Anthony Hordern* principle is inapplicable. While Pt IVA of the FCA and Pt 10 of the CPA contain specific provisions that expressly empower the court to make orders regarding the distribution of any resolution sum, those provisions do not limit s 33ZF or s 183. It was argued that:

(a) The provisions of the FCA and the CPA relating to distribution of a resolution sum deal with orders made after a determination of liability. They say nothing about orders made on an interlocutory basis.

(b) The making of a CFO does not undermine those provisions because any payment to the litigation funder remains subject to the approval of the court at the time of judgment or settlement.

(c) In any event, the provisions of the FCA and the CPA relating to the distribution of any resolution sum are not an exhaustive statement of the court's powers in relation to that subject matter.

The construction of ss 33ZF and 183

43 The determination of the true construction of s 33ZF of the FCA and s 183 of the CPA requires consideration of the text of these provisions in their context and having regard to the mischief that Pt IVA of the FCA and Pt 10 of the CPA were intended to remedy[52]. The scope of each of ss 33ZF and 183 is "not confined by matters not required by [their] terms or context; however, the terms

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51 Citing Mason, Carter and Tolhurst, *Mason and Carter's Restitution Law in Australia*, 3rd ed (2016) at 294-295 [811]; Mitchell, Mitchell and Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment*, 9th ed (2016) at 550-551 [18-03]; Edelman and Bant, *Unjust Enrichment*, 2nd ed (2016) at 316-319.

52 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

must be construed and the context considered"[53]. And context must be regarded in its widest sense to include the state of the law prior to the enactment of these sections[54].

44 There can be little doubt that when Pt IVA of the FCA was enacted, the Parliament could not have been understood to contemplate that s 33ZF might be invoked to support a CFO. That must be so because, at that time, an agreement to maintain legal proceedings by another in return for a piece of the action was unlawful under the laws against champerty in States other than Victoria[55]. But the question here is not about the intention with which these sections were originally enacted; rather, the question is whether, given the breadth and generality of their language, and the absence now of any objection on the ground of champerty, the making of a CFO falls, on a fair construction, within their terms[56].

45 In *Johnstone v HIH Ltd*[57], Tamberlin J rightly said that the power conferred on the court by s 33ZF is not limited to the actual determination of the matter in question in the proceeding, "but extends to encompass all procedures necessary to bring the matter to a fair hearing on a just basis". Section 33ZF has been invoked to support a wide range of procedural orders such as reinstating group members after they exercised the right to opt out under s 33J[58], requiring discovery from group members[59], regulating multiple class

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53 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 261 [12].

54 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456 at 465 [19].

55 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 425-432 [66]-[82].

56 *Lake Macquarie Shire Council v Aberdare County Council* (1970) 123 CLR 327 at 331; *R v G* [2004] 1 AC 1034 at 1054 [29]; *Aubrey v The Queen* (2017) 260 CLR 305 at 321-322 [29].

57 [2004] FCA 190 at [104].

58 *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2002] FCA 364 at [6].

59 *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 2]* [2010] FCA 176 at [15], [16], [23].

actions[60], and making a "funding equalisation order" ("FEO") to redistribute settlement funds from unfunded group members to all group members[61].

46 The power conferred by s 33ZF is broad, but it is essentially supplementary. And the words of limitation should not be ignored. In *McMullin v ICI Australia Operations Pty Ltd*, Wilcox J said[62]:

> "In enacting Pt IVA of the [FCA], 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'.
>
> ... The criterion 'justice is done', involves consideration of the position of all parties. An order preventing unfairness to a particular party may be necessary to ensure justice is done in the proceeding."

47 While it has rightly been acknowledged that the power conferred by each of s 33ZF and s 183 is broad, it is one thing for a court to make an order to ensure that the proceeding is brought fairly and effectively to a just outcome; it is another thing for a court to make an order in favour of a third party with a view to encouraging it to support the pursuit of the proceeding, especially where the merits of the claims in the proceeding are to be decided by that court. Whether an action *can* proceed at all is a radically different question from *how* it *should* proceed in order to achieve a just result.

48 In the resolution of this issue, textual and contextual considerations must be addressed together with considerations of purpose[63]. These considerations all point to the conclusion that ss 33ZF and 183 do not empower the making of a

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60 *Kirby v Centro Properties Ltd* (2008) 253 ALR 65 at 72 [31], 74 [37].

61 *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 4]* [2010] FCA 1029 at [27]-[28].

62 (1998) 84 FCR 1 at 4.

63 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 374-375 [35]-[39].

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.

Textual considerations

49 The orders contemplated by s 33ZF and s 183 are orders which may be thought to make certain that justice is done in the proceeding. An order the purpose of which is to ensure that the proceeding is able to go forward is not such an order. As was said by Wigney J in *Blairgowrie Trading Ltd v Allco Finance Group Ltd*[64]:

> "the only real rationale for making the order at this stage is to ensure the commercial viability of the proceeding from the perspective of the litigation funder. That has nothing to do with ensuring that justice is done in the proceeding."

50 The focus of the power conferred on the court by the text is upon ensuring, that is, making certain by the order, that justice is done in the proceeding as between the parties to it. As a matter of the ordinary and natural meaning of these words, they authorise an order apt to advance the effective determination by the court of the issues between the parties to the proceeding. Whether or not a potential funder of the claimants may be given sufficient financial inducement to support the proceeding is outside the concern to which the text is addressed.

51 The text of each of s 33ZF and s 183 assumes that an issue has arisen in a pending proceeding between the parties to it, and that the proceeding will be advanced towards a just and effective resolution by the order sought from the court. The construction of ss 33ZF and 183 for which the respondents contend departs from this assumption. The making of a CFO does not assist in determining any issue in dispute between the parties to the proceeding; it does not assist in preserving the subject matter of the dispute, or in ensuring the efficacy of any judgment which might ultimately be made as between the parties; it does not assist in the management of the proceeding in order to bring it to a

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64 (2015) 325 ALR 539 at 565 [135].

resolution. Nor does it assist in doing justice *between* group members in relation to the costs of litigation.

52 Court approval of arrangements with a non-party in order to enable a proceeding to be pursued at all could only be said to be appropriate or necessary to ensure that justice is done between the parties to the proceeding if one were to assume that maintaining litigation, whatever its ultimate merit or lack thereof, is itself doing justice to the parties. That would be to make an assumption about process for its own sake rather than the outcome of the process. Such an assumption cannot be attributed to the legislature having regard to the text of ss 33ZF and 183.

53 The making of a CFO is not apt to ensure that justice is done in the proceeding by regulating how the matter is to proceed; to the contrary, an application for a CFO is centrally concerned to determine whether the proceeding is viable at all as a vehicle for the doing of justice between the parties to the proceeding. That is a question outside the concerns of ss 33ZF and 183. As Wigney J explained in *Blairgowrie* in a passage that warrants citation at length[65]:

> "The requirement in s 33ZF that the order be 'appropriate or necessary' would ordinarily require, as a first step, the identification of a particular issue or problem in the proceeding that needs to be addressed. There would ordinarily have to be some specific reason or justification for making an order under s 33ZF. An order is unlikely to be either appropriate or necessary unless it is directed at resolving some issue or problem that has arisen or would, but for the order, arise.
>
> The particular issue or reason for making the order under s 33ZF must also be one that has arisen in, or relates to, 'the proceeding'. The section is not concerned with theoretical issues, or difficulties that may exist beyond the metes and bounds of the particular proceeding. It is not directed, for example, at resolving theoretical or practical problems concerning litigation funding that might occur in representative proceedings generally. Nor is it concerned with issues or problems concerning the rights or interests of third parties, such as litigation funders. Justice 'in the proceeding' would not ordinarily involve any consideration of the commercial interests of a litigation funder unless they gave rise to some issue or problem that has, or is likely to have, some direct impact on the proceeding.

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65 (2015) 325 ALR 539 at 560 [112]-[114].

> The criterion 'justice is done' also suggests that the particular issue or problem must somehow relate to the just hearing and determination of the claims, or the enforcement of the rights or subject matter in issue in the proceeding. That may involve a question of procedure, or it might involve a question involving the substantive rights and interests of the parties. A requirement that justice is done also suggests that the proposed order must be fair and equitable. That will ordinarily involve a consideration of the position of all parties".

54 It can be seen that the reasons of Wigney J did not seek to confine the scope of s 33ZF to the final determination of the ultimate issues between the parties. Of course, interlocutory orders apt to move the proceeding towards a just conclusion between the parties are within the scope of the sections. But to emphasise, as the respondents do, the interlocutory nature of the CFOs of present concern by pointing to their provisional effect is to highlight that the CFO is directed to whether the litigation funder is given sufficient financial incentive to enable the proceeding to proceed at all. An order directed to that concern is not brought within the scope of s 33ZF by the expedient of structuring it as a provisional or interlocutory order.

55 As to the practical effect of a CFO, BMW and the first to fourth respondents in the Westpac appeal argued that a CFO must be taken as a whole, or as a "package deal". That package includes provisions for meeting and sharing the costs of the representative proceeding. But it remains true to say that a central feature of the package is that the litigation funder assumes the financial risk of the failure of the claims by the representative parties in return for a commission fixed (provisionally at least) at a certain level to be paid by each group member out of the proceeds of the litigation. This last issue may be dealt with by the making of a FEO and will be discussed below.

Money Max

56 As Wigney J accepted in *Blairgowrie*[66], the broad power conferred by s 33ZF is not to be read down by making implications or imposing limitations which are not found in the express words of the provision.

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66 (2015) 325 ALR 539 at 558 [98], citing *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421 and *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 260-261 [11].

57 In *Money Max*[67], the Full Court of the Federal Court treated the decision of Wigney J in *Blairgowrie* as distinguishable on the facts of the case. In addition, the Full Court in *Money Max* addressed the concern by Wigney J as to the "difficulty of setting a funding commission rate at a stage when the reasonableness of that rate could not be known" and suggested that that difficulty might be met by providing in the CFO that the funding commission rate will be as approved by the court, with approval to occur at a time when the "[c]ourt is armed with better information, including information as to the quantum or likely quantum of settlement"[68].

58 The Full Court in *Money Max* did not come to grips with the observations made by Wigney J as to the textual limitations upon the power conferred by s 33ZF. Neither the reasons in *Money Max*, nor the arguments of the respondents in this Court, provide a satisfactory answer to them.

59 The difficulty attending the making of a CFO at the outset of the proceeding goes beyond the practical difficulty identified in *Money Max*[69]. Contrary to the view of the Full Court in that case, the problems that attend the fixing of the rate of the funder's remuneration at the beginning of the proceeding are not concerned solely with the factual and prudential aspects of the exercise of the discretion conferred by s 33ZF; they also involve the conceptual difficulty of an absence of criteria to guide the exercise of discretion by the court. In addition, there is the incongruity of reading such a power into s 33ZF or s 183 when other provisions of Pt IVA and Pt 10 make specific provision apt to accommodate that task but which operate at the conclusion of the proceeding. This incongruity is discussed in the course of considering the context in which these provisions appear.

Contextual considerations

60 In *Wong v Silkfield Pty Ltd*[70], Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ compared the provisions of Pt IVA of the FCA to the pre-existing procedures pursuant to which representative proceedings could be brought, and their Honours observed that Pt IVA "provides its own more detailed regime".

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67 (2016) 245 FCR 191 at 220-221 [144]-[145].

68 (2016) 245 FCR 191 at 221 [146]-[147].

69 (2016) 245 FCR 191 at 221 [146].

70 (1999) 199 CLR 255 at 260 [11].

The statutory context, in which each of ss 33ZF and 183 appears, shows that each section is a supplementary source of power. It is not to be supposed that each section does much the same work as other provisions of Pt IVA of the FCA and Pt 10 of the CPA, or that each was intended to meet the exigencies of litigation not adverted to at all by those other provisions.

61 Two aspects of the regimes in which ss 33ZF and 183 appear deserve particular attention: first, the extent to which the legislation contemplates the involvement of the court in deciding whether an action should proceed; and secondly, the extent to which the legislation provides for meeting and sharing the cost of representative proceedings between group members.

Should a proceeding proceed?

62 As to the first of these considerations, it is to be noted that Pt IVA and Pt 10 make specific provision for the role of the court in determining whether representative proceedings *should* or *should not* proceed and for the circumstances in which that intervention by the court may occur.

63 Part IVA of the FCA and Pt 10 of the CPA recognise that group proceedings may not "stack up" on a cost/benefit analysis. In that regard, s 33M(b) of the FCA (which is to the same effect as s 165(b) of the CPA) states that the court may stay a proceeding or direct that it no longer continue under Pt IVA where, on an application by the respondent:

> "the [c]ourt concludes that it is likely that, if judgment were to be given in favour of the representative party, the cost to the respondent of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of those amounts".

64 In addition, s 33N[71] of the FCA states that the court may, on application by the respondent or of its own motion, order that the proceedings no longer continue under Pt IVA if it is satisfied that it is in the interests of justice to do so because, among other things, "the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members"[72], or

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71 See CPA, s 166(1)(c) and (e).

72 FCA, s 33N(1)(c).

"it is otherwise inappropriate that the claims be pursued by means of a representative proceeding"[73].

65 These provisions 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. If that is the case, the solution contemplated by the legislation is to halt the representative proceeding, not to make a CFO because the process of book building is proving too expensive or too difficult.

Meeting and sharing costs

66 An application for a CFO invites the court to order the establishment of a complex relationship between group members and a litigation funder with whom the group members would otherwise have no relationship at all. There is no indication in either the FCA or the CPA of any criteria for determining whether such a relationship should be established, and if so, the terms on which that might occur. 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".

67 The court, in attempting to fix, even provisionally, a rate of remuneration at the outset of the proceeding must necessarily engage in a speculative exercise. In *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*[74], Gummow, Hayne and Crennan JJ observed that "to ask whether the bargain struck between a funder and intended litigant is 'fair' assumes that there is some ascertainable objective standard against which fairness is to be measured", and that this assumption was not well founded. In addition, the circumstance that the CFOs sought in the present cases were provisional is itself an indication both of the speculative nature of the exercise in which the courts are invited to engage, and that the concern driving the application for the order is the concern of the litigation funder to be sufficiently incentivised to assume the financial risks involved in supporting the litigation.

68 The provisions of Pt IVA of the FCA and Pt 10 of the CPA expressly provide for the making of orders distributing any proceeds of a representative proceeding. As will be seen, the occasion for the making of such an order is the conclusion of the proceeding. At that stage, if the group members happen to be indebted to a litigation funder for its support of their claims, the value of the

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73 FCA, s 33N(1)(d).

74 (2006) 229 CLR 386 at 434-435 [92].

litigation funder's support to the group members will be capable of assessment and due recognition. That stage is the appropriate occasion for orders for meeting and sharing the cost burden of the litigation because the value of the litigation and the extent of the burden will have been rendered certain. In contrast, an application for a CFO at an early stage of a proceeding necessarily involves speculation on the part of the parties and the court in respect of these matters; and attention to matters of concern to the litigation funder which may not be shared by, and may well be contrary to the interests of, group members.

69 It is reasonably to be expected that legislation intended to enlist the court in a task of this kind would make specific provision in that regard. That it has not done so is itself some contextual indication that the power to make such an order is not to be discerned in "gap-filling"[75] provisions such as s 33ZF or s 183. It has been accepted, in that regard, that s 33ZF cannot be understood as "a vehicle for rewriting" Pt IVA of the FCA[76].

70 It was submitted on behalf of the first respondent in the BMW appeal that the topics addressed in ss 168, 169, 170 and 177 of the CPA (which are to the same effect as ss 33Q, 33R, 33S and 33Z of the FCA respectively) also fall within the scope of s 183. According to this submission, Pt 10 of the CPA is "redundant where it is convenient". That submission is not helpful in seeking to come to grips with the meaning to be given to the words of limitation "appropriate or necessary to ensure that justice is done in the proceeding". Further, it exalts the role of s 183 (and s 33ZF) above that of a supplementary or gap-filling provision, to say that it may be relied upon as a source of power to do work beyond that done by the specific provisions which the text and structure of the legislation show it was intended to supplement[77]. The work which the respondents require s 183 (and s 33ZF) to do is beyond the scope of the other provisions of the scheme. As will be seen, those other provisions are engaged upon a different occasion and address materially different circumstances from those that are involved in the making of a CFO. Section 183 (and s 33ZF) cannot be given a more expansive construction and a wider scope of operation than the other provisions of the scheme. To accept this submission would be to use s 183 (and s 33ZF) as a vehicle for rewriting the scheme of the legislation.

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75 *Ethicon Sarl v Gill* (2018) 264 FCR 394 at 399 [17].

76 *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168 at 183 [52]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd* (2015) 325 ALR 539 at 558 [100].

77 Compare *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1 at 4.

71 As will be seen, the provisions of Pt IVA of the FCA and Pt 10 of the CPA do not involve the court in any predictive exercise, or in a concern as to whether a litigation funder may be sufficiently satisfied with the prospective return on its investment to assume the financial risk of pursuing the litigation. Much less do those provisions or the extrinsic materials reveal a concern that a desire on the part of a litigation funder to avoid the effort and expense of book building is a matter of concern for the court.

72 The provisions of Pt IVA of the FCA and Pt 10 of the CPA envisage the identification of all group members so far as that is possible. That identification facilitates the distribution of any proceeds of the proceedings, whether derived from a settlement or a favourable judgment. Section 33J of the FCA (which is to the same effect as s 162 of the CPA) is in the following terms:

> "**Right of group member to opt out**
>
> (1) The Court must fix a date before which a group member may opt out of a representative proceeding.
>
> (2) A group member may opt out of the representative proceeding by written notice given under the Rules of Court before the date so fixed.
>
> (3) The Court, on the application of a group member, the representative party or the respondent in the proceeding, may fix another date so as to extend the period during which a group member may opt out of the representative proceeding.
>
> (4) Except with the leave of the Court, the hearing of a representative proceeding must not commence earlier than the date before which a group member may opt out of the proceeding."

73 Under s 33J of the FCA, the court must fix a date before which a group member may opt out of a representative proceeding. Because that date will usually fall before the outcome of the action is known, the problem of "free riding" by group members who would seek to opt in to the proceeding only after a favourable outcome is achieved is addressed. As this Court has noted, the opt out model adopted by Pt IVA of the FCA and Pt 10 of the CPA is designed so that a representative proceeding may continue even if group members are unaware of it[78]; and group members "are under no obligation to identify

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78 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 31-32 [38]-[40].

themselves"[79]. That said, both legislative schemes do allow identification of all group members (as far as is possible) in order to distribute any proceeds. That this is so is apparent from ss 33V, 33X(3)-(4), 33Z and 33ZA of the FCA. Reference to the terms of these provisions confirms that the legislative scheme contemplates that the occasion for the making of orders in relation to distribution of the proceeds of the action is its successful completion.

74 Section 33V (which is in like terms to s 173 of the CPA) provides:

"**Settlement and discontinuance – representative proceeding**

(1) A representative proceeding may not be settled or discontinued without the approval of the Court.

(2) If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court."

75 Sections 33V of the FCA and 173 of the CPA expressly contemplate the making of an order at the conclusion of the proceedings.

76 Section 33X(1) (s 175(1) of the CPA is in materially the same terms) provides that notice must be given to group members of the commencement of proceedings and of their right to opt out before the date fixed under s 33J(1) (s 162(1) of the CPA). Section 33X(3) and (4) (s 175(3) and (4) of the CPA are in materially the same terms) provide:

"(3) If the Court so orders, notice must be given to group members of the bringing into Court of money in answer to a cause of action on which a claim in the representative proceeding is founded.

(4) Unless the Court is satisfied that it is just to do so, an application for approval of a settlement under section 33V must not be determined unless notice has been given to group members."

77 The same point may be made in relation to s 33Z of the FCA (which is to the same effect as s 177 of the CPA, save that s 33Z(1)(g) has no equivalent in s 177(1)). Section 33Z provides:

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79 *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 2]* [2010] FCA 176 at [31].

"**Judgment – powers of the Court**

(1) The Court may, in determining a matter in a representative proceeding, do any one or more of the following:

(a) determine an issue of law;

(b) determine an issue of fact;

(c) make a declaration of liability;

(d) grant any equitable relief;

(e) make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies;

(f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members;

(g) make such other order as the Court thinks just.

(2) In making an order for an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled.

(3) Subject to section 33V, the Court is not to make an award of damages under paragraph (1)(f) unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment.

(4) Where the Court has made an order for the award of damages, the Court may give such directions (if any) as it thinks just in relation to:

(a) the manner in which a group member is to establish his or her entitlement to share in the damages; and

(b) the manner in which any dispute regarding the entitlement of a group member to share in the damages is to be determined."

78 Similarly, s 33ZA of the FCA (which is in materially identical terms to s 178 of the CPA) provides:

"**Constitution etc of fund**

(1) Without limiting the operation of subsection 33Z(2), in making provision for the distribution of money to group members, the Court may provide for:

(a) the constitution and administration of a fund consisting of the money to be distributed; and

(b) either:

(i) the payment by the respondent of a fixed sum of money into the fund; or

(ii) the payment by the respondent into the fund of such instalments, on such terms, as the Court directs to meet the claims of group members; and

(c) entitlements to interest earned on the money in the fund.

(2) The costs of administering a fund are to be borne by the fund, or by the respondent in the representative proceeding, as the Court directs.

(3) Where the Court orders the constitution of a fund mentioned in subsection (1), the order must:

(a) require notice to be given to group members in such manner as is specified in the order; and

(b) specify the manner in which a group member is to make a claim for payment out of the fund and establish his or her entitlement to the payment; and

(c) specify a day (which is 6 months or more after the day on which the order is made) on or before which the group members are to make a claim for payment out of the fund; and

(d) make provision in relation to the day before which the fund is to be distributed to group members who have established an entitlement to be paid out of the fund.

(4) The Court may allow a group member to make a claim after the day fixed under paragraph (3)(c) if:

(a) the fund has not already been fully distributed; and

(b) it is just to do so.

(5) On application by the respondent in the representative proceeding after the day fixed under paragraph (3)(d), the Court may make such orders as are just for the payment from the fund to the respondent of the money remaining in the fund."

79 Section 33ZJ (which is in relevantly the same terms as s 184 of the CPA) provides:

"**Reimbursement of representative party's costs**

(1) Where the Court has made an award of damages in a representative proceeding, the representative party or a sub-group representative party, or a person who has been such a party, may apply to the Court for an order under this section.

(2) If, on an application under this section, 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.

(3) On an application under this section, the Court may also make any other order it thinks just."

80 In relation to s 177(1)(e) of the CPA in particular, which is equivalent to s 33Z(1)(e) cited above, it was argued on behalf of BMW that the reference to an "award of damages" encompassed any recovery of money including for debt and equitable compensation. It was said that the occasion for the exercise of the powers expressly conferred by s 177(1)(e) is the time for the making of final orders for any form of pecuniary relief as between the parties to the proceeding and as between the group members. Against this it was said that s 177(1)(e) does not apply to any funds recovered from the defendant, but only amounts consisting of damages strictly so-called. Upon this contention was advanced the further argument that because s 177(1)(e) does not make comprehensive provision for the distribution of all moneys recovered from the defendant at the conclusion of the proceeding, there is work for s 183 to do in supplementing s 177(1)(e) so as to comprehend moneys other than damages. And so it was said, if s 183 can have this operation at the conclusion of the proceeding, why should it not be available to support an interlocutory order at the outset of the proceeding?

81 This argument does not carry the respondents very far. Whether or not the powers expressly conferred by s 177(1)(e) are sufficiently comprehensive to authorise the distribution of damages, s 173(2) of the CPA is plainly intended to operate at the conclusion of the proceeding. In addition, s 173(2) readily comprehends sums of money recovered otherwise than by way of damages.

Considerations of purpose

Access to justice

82 The objectives of Pt IVA of the FCA were identified by the Australian Law Reform Commission ("the ALRC") prior to its enactment. They were two-fold: first, to enhance access to justice for claimants by allowing for the collectivisation of claims that might not be economically viable as individual claims; and secondly, to increase the efficiency of the administration of justice by allowing a common binding decision to be made in one proceeding rather than multiple suits[80]. Part IVA of the FCA, and later Pt 10 of the CPA, which emulated Pt IVA, pursued these objectives through the regime for representative proceedings tailored to address these defects in the law. Sections 33ZF and 183 do not empower the courts to rewrite Pt IVA and Pt 10 respectively in order to pursue other objectives in different ways.

83 The defects in the existing law targeted by the ALRC in order to improve access to justice simply did not include the absence of sufficient incentive for litigation funders to fund litigation. That is significant given that the ALRC was alive to the possibility that a representative proceeding might be funded by third parties[81]. The possibility that a group proceeding might not be brought because a litigation funder could not see the prospect of a sufficient return to support the proceeding cannot be said to be one of the "unforeseen difficulties" referred to by Wilcox J in *McMullin*[82]. The ALRC's report did not advert to the possibility of enlisting the aid of the court to fix, even provisionally, the terms on which financial support for the bringing of a proceeding might be secured. It would have been a large step in terms of policy to enlist the court charged with

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80 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) at [13], [18]; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 November 1991 at 3174-3175.

81 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988), ch 8. See esp at [315]-[318].

82 (1998) 84 FCR 1 at 4.

responsibility for the determination of the merits of the claims brought in a proceeding, in the making of arrangements to allow the proceeding to be pursued. It is hardly surprising then that the Parliament refrained from taking that course.

84 It may well be that some claims cannot attract funding, either because of a want of interest among group members or because litigation funders' assessments of the prospects of the claims lead them to decline the risk. But there is no suggestion, either in the legislation or in the relevant extrinsic materials, that it was thought to be a defect in the law requiring a remedy that all claims, no matter how dubious their merits or paltry the likely monetary recovery, were not being brought before the courts. Similarly, the possibility that claims are not brought because they do not "stack up" financially for group members or litigation funders is not a reason for concern that the legislation is not operating as it should.

Common fund orders and funding equalisation orders

85 To the extent that one aspect of the motivation for seeking a CFO is said to be to facilitate the equitable sharing of the costs of a representative proceeding, Pt IVA of the FCA and Pt 10 of the CPA recognise that the representative party ought not (necessarily) bear the entire costs of the proceeding[83]. These provisions allow the courts to prevent the practice of "free riding" by unfunded group members who might seek to take the benefit of the costs and risks assumed by the representative party and funded group members.

86 It may be accepted that the concern to prevent "free riding" is relevant to doing justice as between group members who are parties to the proceeding. But the equitable sharing of the expense of the proceeding may be achieved by the making of a FEO that reduces unfunded group members' awards by an amount equivalent to that paid by funded group members to the litigation funder. The cost of litigation is thus borne equitably between all group members. Group members necessarily stand in a relationship to one another as a result of the statutory scheme; the claims in the proceeding are litigated on behalf of all of them, and orders in the proceeding bind all of them[84]. Subject to the creation of sub-groups and the determination of individual questions[85], the statutory scheme

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83 FCA, s 33ZJ(2); CPA, s 184(2).

84 FCA, s 33ZB(b); CPA, s 179(b).

85 FCA, s 33Q; CPA, s 168.

treats them as one group. It is, therefore, just that the costs of the proceeding be spread amongst the members of that group.

87 In contrast, there is no reason why the amount taken from unfunded group members' awards should be directed to the litigation funder, much less that an order to that effect should be made at the outset of the proceeding rather than on the occasion contemplated by s 33ZJ(2) of the FCA and s 184(2) of the CPA. Unfunded group members have no contractual or other relationship with the funder. Nor have they any liability to the funder. The funder has no right to that money under contract or under equitable principles.

88 A CFO is thus not the obvious solution to the problem of "free riding". A CFO is apt to impose an *additional* cost on the group by requiring *more* money to be paid to the litigation funder than would otherwise be the case. The equitable spreading of the cost is, in fact, better achieved by the making of a FEO, which takes, as its starting point, the actual cost incurred in funding the litigation. While it must be accepted that the burden of the amounts that funded group members have agreed to pay to the funder under their agreements with the funder must be distributed fairly, a FEO is apt equitably to distribute those amounts whereas a CFO seeks to impose an additional cost by imposing new obligations on the unfunded group members.

89 A FEO is clearly available where a settlement is reached. A settlement must be approved by the court[86], and, in approving a settlement, the court must be satisfied that it is "fair and reasonable to *all* group members"[87]. A settlement that allows some group members to ride for free would not be fair and reasonable to the other group members.

90 Secondly, where a matter runs to judgment (rather than being settled), a FEO may be made under s 33ZF or s 183. That is because justice would not be done in the proceeding if it resulted in unfunded group members gaining a windfall by avoiding costs which others bore for their benefit. A FEO prevents that outcome by redistributing those costs. It falls squarely within the terms of ss 33ZF and 183. The same cannot be said of a CFO.

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86 FCA, s 33V; CPA, s 173.

87 *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [55] (emphasis in the original).

Book building: to build or not to build?

91 The process of book building involves "identification [of group members], contact, awareness creation and enrolment"[88]. Waye and Morabito state that book building is ordinarily done by "using the media and web communications with a view to persuading potential class members to register their interest or to enter into retainer and funding agreements"[89]. The authors cite a number of webpages set up by plaintiff law firms to advertise the class actions that they are running. The use of webpages to advertise class actions has been noted in case law[90]. Whether a litigation funder should not be required to incur expenditure (eg advertising) to seek to build its enterprise is not a concern that any provision of Pt IVA of the FCA or Pt 10 of the CPA invites the court to address.

92 The making of a CFO at an early stage of the proceeding may provide some assurance, even if only provisional, to a litigation funder of a particular level of return on its investment and so relieve the litigation funder of the expense and effort of canvassing the level of public interest in the proposed proceeding and making its assessment of the commercial viability of the proceeding in light of the likely balance of risk and reward.

93 The applications for the CFOs proposed in these appeals were prompted, as the Full Court in the Westpac matter appreciated, and as is apparent from the evidence of Mr Scattini in the BMW matter, by a desire to obviate the expense and difficulty involved in building a book. That motivation is understandable, particularly in circumstances where there may be little interest on the part of the potential group members in pursuing the claim. But while access to justice may be expected to be improved in a general way by the availability of litigation funding, it does not follow that the making of a CFO is necessary or appropriate to ensure that justice is done in a particular proceeding in accordance with Pt IVA of the FCA or Pt 10 of the CPA.

94 To the extent that a CFO may allow a litigation funder to avoid the burden of the process of book building by enlisting the court's aid, there is no warrant to

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88 Walker, Khouri and Attrill, "Funding Criteria for Class Actions" (2009) 32 *University of New South Wales Law Journal* 1036 at 1044.

89 Waye and Morabito, "Financial arrangements with litigation funders and law firms in Australian class actions", in van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (2017) 155 at 178.

90 *Bonham v Iluka Resources Ltd* (2017) 252 FCR 58 at 66-67 [24]-[27].

supplement the legislative scheme by judicial involvement to ease the commercial anxieties of litigation funders or to relieve them of the need to make their decisions as to whether a class action should be supported based on their own analysis of risk and reward. Until 2016, open class actions were brought and resolved without recourse to CFOs. A suggestion that book building is an exercise in "wasted costs" ignores the reality that group members will have to take action at some stage to obtain the actual payment of any monetary relief to which they have established an entitlement.

Orders

95 In the Westpac appeal, the appeal to this Court should be allowed. Orders 3 and 4 made by the Full Court of the Federal Court of Australia on 1 March 2019 should be set aside, and in their place it should be ordered that:

(a) the appeal be allowed;

(b) orders 1 and 2 made by Lee J on 28 September 2018 be set aside and, in their place, the application for a common fund order be dismissed with costs; and

(c) the respondents must pay the appellants' costs of the appeal.

The respondents must pay the appellants' costs of the appeal to this Court.

96 In the BMW appeal, the appeal to this Court should be allowed. The orders made by the Court of Appeal of the Supreme Court of New South Wales on 1 March 2019 and 22 March 2019 should be set aside, and in their place it should be ordered that:

(a) the question stated for separate determination be answered: "No"; and

(b) the first respondent must pay the applicant's costs of the application for, and hearing of, the separate question.

The first respondent must pay the appellant's costs of the appeal to this Court.

97 GAGELER J. Part IVA of the *Federal Court of Australia Act 1976* (Cth) ("the Federal Court Act") was enacted at the beginning of the last decade of the twentieth century[91] in the expectation that the representative procedure for which it provides would "enhance access to justice, reduce the costs of proceedings and promote efficiency in the use of court resources"[92]. The Part was developed on the basis of an earlier report of the Australian Law Reform Commission[93].

98 Some years into the operation of Pt IVA of the Federal Court Act, Wilcox J, who had chaired the Division of the Australian Law Reform Commission which produced the report, explained[94]:

> "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'."

99 His Honour was referring to the power conferred on the Federal Court by s 33ZF(1) of the Federal Court Act, which provides that "[i]n any proceeding ... conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding". Section 33ZF is located within Div 6 of Pt IVA, headed "Miscellaneous", and bears the heading "General power of Court to make orders". Those two features, Wilcox J noted, "support the conclusion, that would in any event arise from its wording, 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"[95].

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91 Section 3 of the *Federal Court of Australia Amendment Act 1991* (Cth).

92 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 November 1991 at 3174.

93 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988).

94 *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1 at 4.

95 *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1 at 4.

100 The reference in s 33ZF(1) to what the Federal Court "thinks" is peculiarly apposite to indicate legislative endorsement of the notion that the Court's thinking might adapt to changing circumstances and might develop through time with experience[96]. What the Court might think appropriate or necessary in a contemporary setting is not hidebound by what Parliament might have expected that the Court would have thought appropriate or necessary at the time Pt IVA was enacted[97].

101 Unforeseen at the time that Pt IVA was enacted and unaddressed in the detail of the representative procedure for which Pt IVA provides was the rise, following the decision of this Court in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*[98], of the phenomenon of third-party litigation funders providing the financial resources needed to conduct representative proceedings in return for sharing in the proceeds. Third-party litigation funders who have entered into contractual funding arrangements with representative parties, and often also with some or all of the individual members of represented groups, have become increasingly common. The Australian Law Reform Commission has recently reported that the number of litigation funders operating in the Australian market has grown steadily since 2006 to approximately 25 active funders in 2018. From 2013 to 2018, the percentage of funded representative proceedings pending grew to 64 per cent, with funded proceedings constituting 78 per cent of all representative proceedings commenced in 2018[99].

102 The unfolding story of how the Federal Court has adapted its procedures in response to the rise of litigation funding has been told by Lee J in the Federal Court[100] and need not be retold by me. The story is one of adoption, testing, evaluation and modification of a range of innovative procedures, all occurring within the pre-existing structure of Pt IVA. Parallel processes have been occurring in the Supreme Courts of those States whose Parliaments have in this century made parallel provision for representative proceedings through the enactment of legislation modelled on Pt IVA. Part 10 of the *Civil Procedure Act*

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96 cf *Hughes v The Queen* (2017) 263 CLR 338 at 377 [110].

97 cf *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 622.

98 (2006) 229 CLR 386.

99 Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Report No 134 (2018) at 65-66 [2.66].

100 *Perera v GetSwift Ltd* (2018) 263 FCR 1 at 9-15 [10]-[29].

2005 (NSW) ("the Civil Procedure Act"), which commenced in 2011[101], is an example[102].

103 In issue in these appeals from synchronous decisions of the Full Court of the Federal Court[103] and the Court of Appeal of the Supreme Court of New South Wales[104] is the capacity of s 33ZF(1) of the Federal Court Act and its almost identically worded counterpart, s 183 of the Civil Procedure Act, to allow for the making of a "common fund order" ("CFO") of a type first sanctioned by the Full Court of the Federal Court in 2016[105].

104 A CFO of the type in issue is an order made by a court at an early stage of a representative proceeding, in advance of the fixing of a date before which group members must exercise their rights to opt out of the proceeding. The order is made on the application of a representative party, who is in an existing contractual relationship with a third-party litigation funder, and on the giving of an undertaking to the court by the litigation funder to be bound for the duration of the proceeding to funding terms approved by the court. The funding terms require the litigation funder to fund the costs of conducting the representative proceeding, including by paying the costs and disbursements that are charged by the representative party's solicitor, providing any security for costs that might be required in the proceeding and meeting any costs orders that might be ordered against the representative party in the proceeding. By force of the order, the representative party and group members are required to pay to the litigation funder, out of such amount or amounts as may be jointly or severally obtained by them by way of settlement of, or judgment in, the proceeding, such amount or amounts by way of reimbursement for funded costs and by way of funding commission as are identified in the funding terms. The funding commission to be

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101 Schedule 6.1 [2] read with s 2(2)(b) of the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) and New South Wales, *Commencement Proclamation*, 2011 No 118, 2 March 2011.

102 See also Pt 4A of the *Supreme Court Act 1986* (Vic), introduced by s 13 of the *Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000* (Vic), and Pt 13A of the *Civil Proceedings Act 2011* (Qld), introduced by s 10 of the *Limitation of Actions (Child Sexual Abuse) and Other Legislation Amendment Act 2016* (Qld).

103 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21.

104 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171.

105 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 at 209 [78], 225 [168].

paid to the litigation funder includes a premium for litigation risk. Although interlocutory in the sense that it is able to be varied or revoked by the court during the course of the proceeding, the order is final in the sense that it is framed in terms which would operate absent variation or revocation to compel payment to the litigation funder by the representative party and group members immediately upon an amount or amounts by way of settlement or judgment coming into existence prior to any distribution to them.

105 The Full Court and the Court of Appeal were each unanimous in concluding that a CFO of that type is capable of being thought appropriate or necessary to ensure that justice is done in a representative proceeding and so is capable of being made under s 33ZF(1) of the Federal Court Act or s 183 of the Civil Procedure Act as the case may be. Neither the Full Court nor the Court of Appeal was asked to consider whether a particular CFO made or sought to be made should be made or should have been made in the proper exercise of discretion. Both Courts were asked to and did address only the question of power.

106 My opinion is that a CFO can be thought appropriate or necessary to ensure that justice is done in the proceeding, and so can be made in the exercise of the power conferred by s 33ZF(1) of the Federal Court Act or s 183 of the Civil Procedure Act.

107 Finding myself in dissent in this Court and in substantial agreement with the views expressed in the materially identical and unanimous reasons for decision of the Full Court and of the Court of Appeal on an important but, at the end of the day, narrow point of statutory construction, I will keep my reasons brief. There being no material difference between the scope and operation of s 33ZF(1) within the context of Pt IVA of the Federal Court Act and the scope and operation of s 183 within the context of Pt 10 of the Civil Procedure Act, I will confine my attention to the former.

108 Turning first to the language of s 33ZF(1), it is important to recognise at the outset that the power the provision confers is applicable only in a representative proceeding conducted under Pt IVA. The nature of such a proceeding is that it is permitted to be commenced by a representative party on behalf of group members[106] whose consent is not required[107] but who must be given notice of and an opportunity to opt out of the proceeding[108]. It is not a

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106 Section 33C of the Federal Court Act.

107 Section 33E of the Federal Court Act.

108 Section 33J of the Federal Court Act.

necessary feature of a representative proceeding that there be conscious disagreement between each group member and the person against whom relief is sought in the proceeding as to the matter or matters substantively in issue in the proceeding[109]. Nor is it a necessary feature of a representative proceeding that each group member actually knows and approves of the proceeding[110]. Subject to powers conferred on the Court to order that the proceeding not continue as a representative proceeding[111], or to order that another group member be substituted as the representative party or to make such other orders as it thinks fit where it appears to the Court on application that the representative party is not able adequately to represent the interests of the group members[112], a representative proceeding once commenced is permitted to be continued by the representative party who commenced it so as to result in a judgment which, for better or for worse, binds all group members who have not exercised a right to opt out of the proceeding[113]. The representative party takes the group members in tow, and they sink or swim together.

109 That being the nature of the proceeding to which the provision is uniquely directed, the notion of "ensur[ing] that justice is done in the proceeding" employed in the expression of the power conferred by s 33ZF(1) cannot be confined to ensuring that justice is done in the resolution of the matter or matters in issue between the representative party and the group members, on the one hand, and the person against whom relief is sought in the proceeding, on the other hand. The notion 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. So much is confirmed by the ability of the Court to exercise the power of its own motion or on application by any party or any group member.

110 In so far as the power extends to ensuring that procedural justice is done as between the representative party and the group members in the conduct of the representative proceeding, the power cannot be divorced from the principal object of Pt IVA of enhancing group members' access to justice. The power is sufficient to enable the Court to fashion such orders as it thinks appropriate or necessary to ensure that such arrangements for the funding of the proceeding as

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109 *Femcare Ltd v Bright* (2000) 100 FCR 331 at 354-355 [97].

110 *Femcare Ltd v Bright* (2000) 100 FCR 331 at 345-347 [58]-[63].

111 Sections 33L, 33M and 33N of the Federal Court Act.

112 Section 33T of the Federal Court Act.

113 Section 33ZB(b) of the Federal Court Act.

are sought to be put in place by the representative party are adequate to protect the interests that group members have in the timely and efficient realisation of their claims. To my mind, it introduces an unrealistic dichotomy to postulate that an order that serves to shore up the commercial viability of the proceeding from the perspective of the litigation funder can have nothing to do with enhancing the interests of justice in the conduct of the representative proceeding.

111 In so far as the power extends to ensuring that substantive justice is done as between the representative party and the group members in the conduct of the representative proceeding, the power is sufficient to enable the Court to fashion such orders as the Court thinks appropriate or necessary to ensure that expenses incurred in carrying on the litigation are shared fairly between the representative party and those group members who ultimately benefit from the representative proceeding. That the Court, as a court of law and equity[114], should have power to order the fair apportionment of those expenses is consistent with the power historically exercisable by a court of equity "in doing justice as between a party and the beneficiaries of his litigation"[115]. The court's discretion extended to ordering that expenses (including but not confined to legal costs) incurred by a representative party be paid out of funds distributable amongst the represented class[116]. And there was no reason in principle why the court could not make such an order prospectively in anticipation of funds distributable amongst the represented class coming into existence as a result of the representative proceeding "to empower" the representative party "to go on with the cause"[117].

112 Putting those considerations together, I see no reason why the Court, on the application of the representative party, cannot think it appropriate or necessary to ensure that justice is done in a representative proceeding: first to accept an undertaking to fund the proceeding given to the Court by a third-party litigation funder who is in a contractual relationship with the representative party, and second to order that the representative party and group members are each to bear a specified proportionate share of a specified reasonable remuneration to be

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114 Section 5(2) of the Federal Court Act.

115 *Sprague v Ticonic National Bank* (1939) 307 US 161 at 167.

116 *National Bolivian Navigation Co v Wilson* (1880) 5 App Cas 176 at 210-211; *Batten v Wedgwood Coal and Iron Co* (1884) 28 Ch D 317 at 325.

117 See *Australian Securities and Investments Commission v GDK Financial Solutions Pty Ltd (In liq) [No 4]* (2008) 169 FCR 497 at 502 [15], quoting *Jones v Coxeter* (1742) 2 Atk 400 at 400 [26 ER 642 at 642]. See generally *Australian Securities and Investments Commission v GDK Financial Solutions Pty Ltd (In liq) [No 4]* (2008) 169 FCR 497 at 499-502 [3]-[14].

paid to the litigation funder for funding the proceeding if and when their claims are realised as a result of it.

113 Provided that interests of group members are adequately represented at the time of its making, I see no reason why the Court cannot think that making such an order early in the proceeding will advance the interests of justice: by placing the funding available to the representative party on a secure footing, by reducing uncertainty on the part of all concerned about how the Court might exercise statutory discretions to distribute the cost of funding the proceeding at the conclusion of the proceeding, and by allowing group members to make more informed decisions about their potential returns at the time of choosing whether or not to opt out of the proceeding.

114 The commercial interest that the litigation funder has in securing a return on the litigation funder's investment gives no reason for the Court to be squeamish[118]. The commercial interest gives reason for the Court to scrutinise the terms of the proposed undertaking and the rate and structure of the proposed remuneration with particular care for the protection and advancement of the interests of group members.

115 To the extent that making a CFO involves the Court in an evaluation of the appropriateness of the payments to be made to the litigation funder in the event of success in the proceeding, I reject the suggestion that making a CFO requires the Court to embark on an inquiry which is beyond its institutional competence, which involves the Court in inappropriate speculation, or which is inadequately guided by the broad statutory standard of what the Court thinks appropriate or necessary to ensure that justice is done in the representative proceeding. Especially in the exercise of supervisory powers to approve contracts entered into by liquidators on behalf of companies in liquidation[119], courts have become accustomed to assessing appropriate rates of remuneration for the funding of pending litigation, including by reference to litigation risk[120]. There is a strong argument that litigation risk, and with it the appropriate premium to be paid to a litigation funder for assuming that risk, is more accurately assessed at

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118 cf *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 407 [1], 433-434 [88]-[89].

119 See now s 477(2B) of the *Corporations Act 2001* (Cth).

120 eg, *Buiscex Ltd v Panfida Foods Ltd (In liq)* (1998) 28 ACSR 357 at 362-364; *Re ACN 076 673 875 Ltd (rec and mgr apptd) (In liq) (Bendeich as liq, Greatorex intervening by leave)* (2002) 42 ACSR 296 at 300-304 [16]-[33]. See also *Hall v Poolman* (2009) 75 NSWLR 99 at 140 [150]-[151], 144 [172].

the beginning of litigation than at the end when hindsight bias is not easy to exclude.

116 Nothing in the detail of any of the other provisions of Pt IVA is undercut by conceding to s 33ZF(1) that scope of operation. "It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words"[121]. That is so for s 33ZF(1) just as it is so for each of the other provisions of the "detailed regime" of Pt IVA[122]. Few of the powers conferred by Pt IVA are so "limited and qualified"[123] as to exclude the operation of other, more generally expressed powers located within the Part or elsewhere in the Federal Court Act. None of them is so limited or qualified as to confine the scope of s 33ZF(1) in any relevant respect.

117 In relation to a representative proceeding which ends in a settlement approved by the Court under s 33V(1), the discretion conferred on the Court by s 33V(2) to "make such orders as are just with respect to the distribution of any money paid under a settlement" cannot be read as exhaustive or as incapable of being exercised taking into account a prior or contemporaneous exercise of power under s 33ZF(1). In relation to a proceeding which ends in judgment, and assuming without deciding that the "damages" to which s 33Z refers encompass any monetary amount which the Court might order by way of judgment, s 33Z(2)'s requirement that "the Court must make provision for the payment or distribution of the money to the group members entitled" cannot be read as excluding such order for payment out of the money to which the group members are entitled as the Court might think appropriate to be made under s 33ZF(1) to ensure that justice is done in the proceeding or as the Court might think just under s 33ZJ(3). As to the power of the Court under s 33ZJ(3) to make any order it thinks just on the application of the representative party where the Court has made an award of damages, there is no reason why it could not itself be exercised to order payment to a third party who provided funding for the proceeding and there is no reason why it could not so be exercised taking into account a prior or contemporaneous exercise of power under s 33ZF(1).

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121 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421. See also *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 at 279 [17] fn 23 and the cases there cited.

122 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 260-261 [11].

123 cf *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7.

118 Neither alone nor in combination do ss 33V, 33Z and 33ZJ therefore prevent a CFO made under s 33ZF(1), in the absence of variation or revocation, taking effect in accordance with its terms. The power of the Court at any stage to order the notice of any matter to be given to a group member or group members[124] is ample to ensure that procedural fairness is afforded to group members in the making of such an order.

119 The constitutional objections raised by the appellants do not withstand scrutiny and do not warrant elaborate responses. As to the suggested want of judicial power, it is sufficient to bring s 33ZF(1) within the judicial power of the Commonwealth that it confers power on the Federal Court as an incident of a strictly judicial proceeding to be exercised by reference to the Court's assessment of the interests of justice in that proceeding[125]. I agree with the observation of the Full Court[126] that "it is difficult to conceive of a function or standard more appropriate to the judicial branch of government than considering and deciding (upon application and evidence) what is appropriate or necessary to do justice in a proceeding".

120 As to the suggested intrusion of s 33ZF(1) into the forbidden territory of s 51(xxxi) of the *Constitution*, it is sufficient to keep s 33ZF(1) outside the scope of the operation of s 51(xxxi) that the subject-matter of s 33ZF(1) is "the adjustment of the competing rights, claims or obligations of persons in a particular relationship"[127] through an exercise of such a judicial power. The same is to be said of s 183 of the Civil Procedure Act, as picked up in a representative proceeding in federal jurisdiction in the Supreme Court by s 79 of the *Judiciary Act 1903* (Cth)[128].

121 I would dismiss each appeal with costs.

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124 Section 33X(5) of the Federal Court Act.

125 cf *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 150-151.

126 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 48 [100].

127 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 161.

128 *Rizeq v Western Australia* (2017) 262 CLR 1 at 14 [16], 15 [21], 16 [24], 17 [28], 34 [84], 35-36 [87]-[89], 41 [103]; *Masson v Parsons* (2019) 93 ALJR 848 at 857-858 [30]; 368 ALR 583 at 593.

122 NETTLE J. Comparison of the plurality's reasons for judgment with the dissenting judgment of Gageler J shows that there are cogent arguments either way as to whether s 33ZF(1) of the *Federal Court of Australia Act 1976* (Cth) ("the FCA Act") confers a power broad enough to sustain a common fund order ("CFO") of the kind in issue in these matters.

123 On the one hand, as the reasons of Gageler J demonstrate, there is nothing new or of itself remarkable about open-textured legislative provisions which leave courts with a large measure of significantly unguided discretion in making orders considered to be appropriate to do justice in all the circumstances of a given case[129]. Generally speaking, provisions of that kind may be seen to reflect a legislative intention to confer on courts the widest possible power to do what is appropriate to achieve justice in the circumstances.

124 On the other hand, as the plurality reason, seen in the context of Pt IVA of the FCA Act as a whole – as of course s 33ZF(1) must be construed – the broad generality of s 33ZF(1), compared to the detail and specificity of other provisions such as ss 33J, 33M, 33N, 33U, 33V, 33X, 33Z and 33ZA, suggests that s 33ZF(1) is in the nature only of a supplementary power to do what is necessary or incidental to achieve the objectives at which those other more detailed, specific provisions are aimed[130].

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129 See, eg, *Cominos v Cominos* (1972) 127 CLR 588 at 593-594 per Walsh J, 599 per Gibbs J, 603-604 per Stephen J, 607-609 per Mason J; *Mitchell v The Queen* (1996) 184 CLR 333 at 346 per Dawson, Toohey, Gaudron, McHugh and Gummow JJ; *Baker v The Queen* (2004) 223 CLR 513 at 532 [42] per McHugh, Gummow, Hayne and Heydon JJ; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 54 [24] per French CJ. See also Zines, *The High Court and the Constitution*, 4th ed (1997) at 195, quoted in *Thomas v Mowbray* (2007) 233 CLR 307 at 351 [91] per Gummow and Crennan JJ.

130 See *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 per Gavan Duffy CJ and Dixon J, 20-21 per McTiernan J; *R v Wallis* (1949) 78 CLR 529 at 543-544 per Latham CJ, 550 per Dixon J; *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 256 per Dixon J (Webb J agreeing at 259), 265-266 per Kitto J. See also *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 586-587 [54]-[55], 589 [59] per Gummow and Hayne JJ; *Victorian Building Authority v Andriotis* (2019) 93 ALJR 869 at 884 [90] per Gageler J; 372 ALR 1 at 21.

125 I favour the latter view. The power conferred by s 33ZF is to make orders the purpose of which is to ensure justice is done in a representative proceeding. The limits of what may properly be described as the demands of justice in a particular case, and so the court's power under s 33ZF, must be determined by the text of the Act read as a whole, taking into account the relevant context and purpose. With respect to those who may take a different view, that has precious little to do with the entitlement to restitution of salvors under admiralty law[131] or of barristers and solicitors, who have long been subject to the "general jurisdiction of the Court … to regulate the charges made for work done"[132]. As the plurality observe, the provisions of Pt IVA, in which s 33ZF sits, make specific provision for the entities in respect of whom, and the point in time at which, orders distributing cost burdens and judgment or settlement proceeds may be made. None of those provisions expressly or impliedly contemplates the kind of CFOs sought in these matters nor the issues to which they were addressed. The context of s 33ZF strongly implies exclusion of a construction of that provision that permits of the making of a CFO.

126 The broader context of legislative history points to the same conclusion. For, whatever Parliament may have foreseen to be the consequences of its enactment of Pt IVA of the FCA Act, what Parliament could not, and therefore most certainly did not, foresee was that a majority of this Court would later give its imprimatur to the maintenance of group proceedings that are dependent "on a harnessing of the alleged wrongs of the plaintiffs and of the curial processes established to remedy alleged wrongs for the primary purpose of generating profits" for entrepreneurial litigation funders[133]. It is one thing to hold, as this Court did in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*[134], that representative proceedings involving a litigation funder are no longer considered invariably to be an abuse of process and contrary to public policy. It is, however, quite another thing to accept that the commercial interests of those funders formed part of the mischief that the introduction of Pt IVA was intended to confront. Plainly, the legislative purpose of the enactment of Pt IVA did not

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131 See *The Goring* [1988] AC 831 at 846, 857 per Lord Brandon of Oakbrook (Lords Bridge of Harwich, Fraser of Tullybelton, Ackner and Oliver of Aylmerton agreeing at 844-845, 857); Aitken, "*Negotiorum Gestio* and the Common Law: A Jurisdictional Approach" (1988) 11 *Sydney Law Review* 566.

132 *Woolf v Snipe* (1933) 48 CLR 677 at 678 per Dixon J.

133 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 496 [287] per Callinan and Heydon JJ.

134 (2006) 229 CLR 386.

extend to addressing uncertainties on the part of litigation funders as to the financial viability of funding such proceedings.

127 Nor is it to the point that the insertion of Pt 10 into the *Civil Procedure Act 2005* (NSW) occurred in 2010, following the decision in *Fostif*. The Parliament of New South Wales enacted a scheme governing the conduct of representative proceedings so substantially identical to that contained in Pt IVA that the two schemes are *in pari materia*. There is no reason to suppose that the Parliament of New South Wales intended the scope of operation of s 183 to extend to the making of orders to facilitate entrepreneurial litigation funders to generate profits by fomenting disputes which, but for the making of such orders, might never flare into controversy[135]. It may be presumed that the Parliament of New South Wales intended that s 183 should have an identical meaning and scope of operation to s 33ZF[136].

128 For these reasons, I agree in the orders that the plurality propose.

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135 See *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 487-488 [266] per Callinan and Heydon JJ.

136 See *Lennon v Gibson and Howes Ltd* [1919] AC 709 at 711-712 per Lord Shaw of Dunfermline; *Ramaciotti v Federal Commissioner of Taxation* (1920) 29 CLR 49 at 53 per Knox CJ (Isaacs and Rich JJ agreeing at 54); *Federal Commissioner of Taxation v ICI Australia Ltd* (1971) 127 CLR 529 at 541-542 per Walsh J. See also Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 128-129 [3.36].

129 GORDON J. These appeals concern two representative proceedings, each involving a litigation funder. The circumstances giving rise to the appeals are set out in the reasons of other members of the Court. It is unnecessary to repeat them except to the extent necessary to explain these reasons.

130 A legislative scheme allows representative proceedings to be commenced where seven or more people have claims against the same person, which are in respect of, or arise out of, the same, similar or related circumstances, and which give rise to a substantial common question of law or fact. That scheme is Pt IVA of the *Federal Court of Australia Act 1976* (Cth) ("the Federal Court Act") in the *Westpac* proceeding, and Pt 10 of the *Civil Procedure Act 2005* (NSW)[137] in the *BMW* proceeding. Each scheme contains a generally expressed power for the Court to make "any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding"[138]. The question in each appeal is whether this power allows the Court to make what has become known as a "common fund order" or a "CFO" in an open class representative proceeding.

131 The rationale or justification for a common fund order was explained by the primary judge in the *Westpac* matter[139] by quoting what his Honour had earlier said in *Perera v GetSwift Ltd*[140]:

> "Rather than the economics of a class action being dictated by the size of sign-up, a common fund order allows an open class representative proceeding to be commenced without the necessity to build a book of group members who have bargained away part of the proceeds of their claim. Instead of addressing the 'free-rider' problem by making 'funding equalisation orders' (to redistribute the additional amounts received 'in hand' by unfunded class members *pro rata* across the class as a whole),

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137 Part 10 of the *Civil Procedure Act* was based on Pt IVA of the Federal Court Act: New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 24 November 2010 at 28066. The text of the two schemes is almost identical, and so these reasons will refer to the text of Pt IVA of the Federal Court Act, except when identifying any relevant differences from Pt 10 of the *Civil Procedure Act*.

138 Federal Court Act, s 33ZF(1). The text of s 183 of the *Civil Procedure Act* is almost identical, save for the addition of the word "that" after the words "any order" and the reference to "proceedings" rather than "proceeding".

139 *Lenthall v Westpac Banking Corporation* (2018) 363 ALR 698 at 699-700 [3].

140 (2018) 263 FCR 1 at 14 [25].

> the Court [in *Money Max Int Pty Ltd v QBE Insurance Group Ltd*[141]] indicated its willingness to fashion a solution whereby the funder, who had borne the risks of the litigation, is recompensed from the common fund of proceeds obtained by the group as a whole."

132 His Honour identified two issues with open class actions: the economics of a class action and the problem of free riders. And his Honour identified two different answers to those issues: first, book building and a funding equalisation order; *or* second, the Court making a common fund order to "recompense" the litigation funder. Before considering the significance of these matters, it is appropriate to address what is meant by each of the terms used here – "book building", a "funding equalisation order" and a "common fund order".

133 The process of book building seeks to generate, capture and record interest in a specific class action. In this process, the representative party's solicitor and the litigation funder "undertake active efforts to persuade group members to enter into retainers with the [law] firm and funding agreements with [the litigation funder]" on particular terms[142]. And as the plurality explain, the interest is generated "using the media and web communications with a view to persuading potential [group] members to register their interest or to enter into retainer and funding agreements"[143]. The result of the book building – the number of group members who respond to those efforts and the manner in which they respond – reflects the interest in or demand for the litigation on the terms that have been offered by the law firm and the litigation funder. There is a range of responses. Some group members do not respond at all. Others register their interest but do not enter into contractual arrangements with the law firm or the litigation funder. Those group members are described as "unfunded". The balance – the "funded" group members – enter into contractual arrangements with the law firm and the litigation funder.

134 A funding equalisation order provides for deductions from the "amounts payable to unfunded [group] members [from their entitlement on settlement or judgment] of amounts equivalent to the funding commission that would otherwise have been payable by them had they entered into a funding

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141 (2016) 245 FCR 191.

142 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 173 [5].

143 Reasons of Kiefel CJ, Bell and Keane JJ at [91], quoting Waye and Morabito, "Financial arrangements with litigation funders and law firms in Australian class actions", in van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (2017) 155 at 178.

agreement" with the funder[144]. Such amounts are then "distributed pro rata across all [group] members, so that both funded and unfunded [group] members ... receive the same proportion of their settlement or judgment"[145]. Unfunded group members pay no commission to the funder, but such an order achieves equality of treatment between group members because unfunded group members do not receive any more than funded group members. A funding equalisation order is limited to redistributing actual costs incurred[146].

135 A common fund order, in general terms, is a set of court orders[147], usually made early in the life of an open class proceeding, which impose on the representative party, and all group members, an obligation to pay a litigation funder a pro rata share of the legal costs incurred *and* a funding commission at a specified rate from the common fund of any settlement or judgment in their favour. Such an order obliges all group members, including unfunded group members, to contribute to the legal costs *and* to pay the litigation funder a commission. For the reasons that follow, Courts do not have the power to make a common fund order.

The legislative scheme

136 Part IVA of the Federal Court Act is procedural, not substantive; it permits representative proceedings. Division 2 of Pt IVA is concerned with the commencement, and composition, of representative proceedings. Section 33C sets out the threshold requirements for a representative proceeding. It allows one or more persons to *commence* a representative proceeding, where there are seven or more persons with claims against the same respondent that are in respect of, or arise out of, the same, similar or related circumstances[148]. The representative proceeding may represent some or all of those who have such a claim.

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144 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 at 194 [5].

145 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 at 194 [5].

146 Costs are subject to the approval of the Court: Federal Court Act, ss 33V, 33Z; *Civil Procedure Act*, ss 173, 177.

147 cf *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 at 194 [3].

148 Federal Court Act, s 33C(1)(a), (b).

The claims of the applicant and the group members[149] must give rise to a substantial common issue of law or fact[150], but the group members need not necessarily share a common interest. Indeed, the claims need not be based on the same conduct. In practical terms, it is those seeking to generate, capture and record interest in a specific class action – the law firm and the litigation funder – that determine the group members to whom the proceeding, or proposed proceeding, relates; the nature of the claims to be made on behalf of those group members; the relief to be claimed; and the questions of law or fact common to the group members.

137 Consent is generally not required to be a group member[151]. Thus, s 33J provides that a group member may opt out of a representative proceeding and the Court must fix a date before which a group member may opt out[152]. Opting out is important: the hearing of a representative proceeding must *not*, except with the leave of the Court, commence earlier than the date before which a group member may opt out of the proceeding[153]. The integrity of the scheme therefore depends upon group members having the right to opt out.

138 That a representative proceeding might not be economic to litigate is expressly recognised by Pt IVA as a whole and, in particular, ss 33M and 33N. Section 33M provides that the Court may order that the proceeding no longer continue under Pt IVA, or stay a proceeding, on an application by the respondent if "the relief claimed in a representative proceeding is or includes payment of money to group members (otherwise than in respect of costs)", and "the Court concludes that it is likely that, if judgment were to be given in favour of the representative party, the cost to the respondent of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of those amounts"[154].

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149 Section 33A, in Div 1, defines "group member" to mean "a member of a group of persons on whose behalf a representative proceeding has been commenced".

150 Federal Court Act, ss 33C(1)(c), 33H(1)(c).

151 Federal Court Act, s 33E(1). There are certain persons from which written consent is required, including the Commonwealth, a State or a Territory: s 33E(2)(a).

152 Federal Court Act, s 33J(1), (2).

153 Federal Court Act, s 33J(4).

154 Federal Court Act, s 33M(a), (b).

139 Section 33N provides that the Court may, on application by the respondent or of its own motion, order that a proceeding no longer continue under Pt IVA where it is satisfied that it is in the interests of justice to do so because, among other things, "the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members"[155] or "it is otherwise inappropriate that the claims be pursued by means of a representative proceeding"[156]. If a representative proceeding is uneconomic to litigate, the answer provided by the statute is for the proceeding to cease to be a representative proceeding.

140 The existence of the power to stay a proceeding[157] where the costs of the proceeding, including the costs of identifying the group members entitled to the ultimate award and distributing to them the relevant amounts, are too high, or to order that a proceeding no longer continue under Pt IVA[158], recognises that some claims will simply be uneconomic to run. The Parliament provided, in effect, a viability threshold which, if not met, would cause the Court hearing the matter to order a stay of the matter or order that the proceeding no longer continue under Pt IVA. It did not provide any alternative means of ensuring viability of the matter.

141 A representative proceeding may not be settled or discontinued without the approval of the Court[159]. If the Court gives approval, s 33V(2) confers power on the Court to "make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court". But that provision does not envisage a Court making orders with respect to the economics of a proceeding by ensuring that a litigation funder obtains a particular return on funds invested.

142 Division 3 deals with notices to group members. The Court has a power to order notices at any stage[160]. Certain notices, however, are mandatory including: one giving group members the right to opt out prior to the hearing of a

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155 Federal Court Act, s 33N(1)(c).

156 Federal Court Act, s 33N(1)(d).

157 Federal Court Act, s 33M(d).

158 Federal Court Act, ss 33M(c), 33N.

159 Federal Court Act, s 33V(1).

160 Federal Court Act, s 33X(5).

representative proceeding[161]; one prior to the approval of a settlement (unless the Court is satisfied that it is just to dispense with this requirement)[162]; and one prior to the constitution of a fund consisting of the money to be distributed[163]. These notice provisions are an important aspect of the statutory scheme, though "the reality is that ... notice[s] may not have come to the attention of, or been fully appreciated by, all group members"[164].

143 The powers of the Court in *determining* a matter in a representative proceeding, usually following a final hearing, are addressed separately in Div 4. A judgment binds all group members described or identified in the judgment, except those who had opted out[165]. If the Court makes an award of damages for group members, the Court must make provision for the payment or distribution of the money to the group members entitled[166]. The Court *may* give directions as it thinks just in relation to the manner in which a group member is to establish his or her entitlement to share in the damages and the manner in which any dispute regarding the entitlement of a group member to share in the damages is to be determined[167]. Again, none of those provisions envisages the Court being engaged in making orders with respect to the economics of a proceeding by ensuring that a litigation funder obtains a particular return on funds invested.

144 Division 6 contains a series of miscellaneous provisions addressing matters including limitation periods[168], a savings clause[169] and reimbursement of a representative party's costs[170]. Section 33ZF, in Div 6, is the provision in issue

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161 Federal Court Act, ss 33X(1)(a), 33J(4).

162 Federal Court Act, s 33X(4).

163 Federal Court Act, s 33ZA(3)(a).

164 *Blairgowrie Trading Ltd v Allco Finance Group Ltd* (2015) 325 ALR 539 at 573 [180].

165 Federal Court Act, s 33ZB(b).

166 Federal Court Act, s 33Z(1)(e), (f) and (2).

167 Federal Court Act, s 33Z(4), read with s 33ZA.

168 Federal Court Act, s 33ZE.

169 Federal Court Act, s 33ZG.

170 Federal Court Act, s 33ZJ.

in these proceedings. It is headed "General power of Court to make orders" and provides:

> "(1) *In any proceeding* (including an appeal) *conducted under this Part, the Court may*, of its own motion or on application by a party or a group member, *make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding*.
>
> (2) Subsection (1) does not limit the operation of section 22[171]." (emphasis added)

145 Section 33ZF applies in any proceeding conducted under Pt IVA. It is a supplementary or gap-filling provision[172] that operates within the existing statutory scheme. It requires that the Court be satisfied that proposed orders are appropriate or necessary to ensure that justice is done in the representative proceeding. It does not empower a Court to make a common fund order.

Part IVA, threshold criteria and the role of s 33ZF

146 Section 33ZF(1) is a broad power and it may be accepted that it should not be read down by reference to limitations not found in the express words of Pt IVA[173]. But the text of the provision – that "*[i]n any proceeding ... conducted under [Pt IVA]*, *the Court may*, of its own motion or on application by a party or a group member, *make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding*" (emphasis added) – does not permit the making of a common fund order even when taken at its widest.

147 Considered in the context of Pt IVA as a whole and ss 33C, 33J, 33M, 33N, 33V, 33Z, 33ZA and 33ZB in particular, s 33ZF(1) as a supplementary or gap-filling power is a power to do what is appropriate or necessary to advance the objective of Pt IVA – to provide a procedure for representative proceedings. As has been seen, none of the provisions mentioned envisages a Court being engaged in making a common fund order.

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171 There is no equivalent to s 33ZF(2) of the Federal Court Act in the *Civil Procedure Act*. Section 22 of the Federal Court Act provides that the Court shall grant all remedies to which any party appears to be entitled so that all matters in controversy between the parties are completely and finally determined as far as possible. It may be put to one side.

172 *Ethicon Sarl v Gill* (2018) 264 FCR 394 at 399 [17].

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

148 As noted above, in the *Westpac* matter, the primary judge restated a view his Honour had previously expressed that "a common fund order allows an open class representative proceeding to be commenced without the necessity to build a book of group members who have bargained away part of the proceeds of their claim"[174]. The distinction sought to be drawn appears to be that in some cases proceedings can be commenced with a need to build a book, and in others they can be commenced without the need to build a book. But there is no mention in Pt IVA of any such distinction. A proceeding may be commenced under Pt IVA if it satisfies the threshold criteria in s 33C. It cannot be commenced on the possibility that the Court might be persuaded to make a common fund order to overcome the fact that the class action might otherwise be uneconomic or risky for a litigation funder.

Relationship between parties and non-parties

149 A common fund order seeks to have a Court craft a relationship between unfunded group members in a class action and a litigation funder who is not a party to the proceeding. Part IVA as a whole and s 33ZF(1) in particular does not allow the Court to set (or provide the statutory criteria to guide the Court in setting) the terms or contours of that relationship.

150 As the Court of Appeal of the Supreme Court of New South Wales recognised in the *BMW* matter[175], although all group members were to be immediately "bound" by the common fund order, "[l]ittle attention was given in argument to the nature of the binding effect of the order, if made, or the identity of the group members to whom it applied". As their Honours observed[176], if a common fund order were made, it would "give rise to a possible sanction of contempt, rather than the non-consensual imposition of contractual rights and obligations upon group members". Further, as the Court of Appeal observed[177], no attention had been given to the "nature of liabilities incurred by persons while a member of the [group] but who subsequently opt out". For example, do such persons continue to be bound by the obligation of confidentiality attaching to communications to them by the solicitors? The Court expressly recorded[178] that

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174 *Lenthall v Westpac Banking Corporation* (2018) 363 ALR 698 at 700 [3], quoting *Perera v GetSwift Ltd* (2018) 263 FCR 1 at 14 [25].

175 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 177 [24].

176 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 177 [25].

177 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 177 [26].

178 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 177 [26].

nothing in its reasons was to be understood as addressing such questions. But those questions need to be addressed. Part IVA does not deal with them directly or indirectly.

151 Setting the rate of commission to be paid to a funder is one element of that crafted relationship. The Full Court of the Federal Court in the *Westpac* matter suggested that what was required was "the development, on a case by case basis, on evidence led before the Court, of criteria of sufficient clarity, and of an appropriate nature upon which to exercise the power judicially and not idiosyncratically or personally"[179]. Judicial decisions over time might build up a body of precedent showing that a particular funding rate was considered "appropriate" by the courts for the market conditions that then applied. But that is not the statutory question. The question is whether the order sought is appropriate or necessary to do justice in the proceeding.

152 Those, and other, "potentially problematic aspects"[180] of common fund orders are strong indicators that a Court does not have the power to make such orders under the existing legislative scheme.

Funding

153 A common fund order might put the proceeding on a "known and stable foundation"[181] in terms of funding, make the action a more profitable venture for a funder or reduce the risk to the funder, but none of those outcomes is properly described as appropriate or necessary to ensure that justice is done in the proceeding.

154 Relatedly, to ask whether a funder will withdraw funding if a common fund order is not made is to ask the wrong question. A funder assesses whether to fund litigation. Once commenced, it is not appropriate or necessary to improve the economic position of the funder against the possibility that it will carry out a threat to proceed no further. The action as framed and instituted proceeds, or it does not.

155 The *Westpac* matter is instructive. The primary judge stated that the making of the common fund order was appropriate, not necessary, to ensure that justice is done in the proceeding because "[w]ithout an appropriate common fund order being made, a particular injustice would result, being the likely inability,

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179 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 46 [92].

180 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 178 [28].

181 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 45 [91].

absent funding, of the group members to have their claims advanced in this class action"[182].

156 Immediately preceding that statement, under the heading "[w]hy a common fund order should be made", his Honour summarised the reasons for the order. There were eight[183]: (1) the revised proposal "substantially mirrored the form of the funding terms" that his Honour had indicated were appropriate in another class action; (2) the litigation funder would "likely meet its obligations"; (3) "the funding rate (if calculated by reference to net recoveries) [was] reasonable in all the circumstances and it [was] not evident another funder would propose more favourable terms"; (4) "no conflict issues" arose; (5) "the solicitors [had] acted responsibly in the selection of the funder notwithstanding the only detailed discussion as to terms was with" the litigation funder, JustKapital Litigation Pty Ltd; (6) the proposed common fund order was "put forward by the applicants and their solicitors conscious [of] their duties to group members"; (7) "the legal costs [were] likely to be very considerable and without litigation funding it [was] likely that the proceeding would not advance to resolution at a mediation or on the merits"; and (8) "the making of the proposed order, and thus allowing an open class, [was] consistent with the policy objectives of Pt IVA".

157 That approach was misplaced. It proceeded from his Honour's assumption that his task was "to form a view on whether the proposal currently put forward is one which is in the interests of group members"[184]. That may be the task in assessing competing class actions[185], but that was not the task here. The statutory inquiry was whether the order sought was "appropriate or necessary to ensure that justice is done in the proceeding".

158 That it has been accepted that "[t]he subject of the claim [in a class action] may be ... no more significant than a joint enterprise seeking to use litigation as a means to make money"[186] demonstrates these points. How does a court assess whether the representative proceeding is no more than "a joint enterprise seeking to use litigation as a means to make money"? Why and how should a court assess

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182 *Lenthall v Westpac Banking Corporation* (2018) 363 ALR 698 at 715 [63].

183 *Lenthall v Westpac Banking Corporation* (2018) 363 ALR 698 at 713 [59], 714 [62].

184 *Lenthall v Westpac Banking Corporation* (2018) 363 ALR 698 at 705 [16].

185 *Perera v GetSwift Ltd* (2018) 263 FCR 1 at 33 [98].

186 *Abbott v Zoetis Australia Pty Ltd [No 2]* (2019) 369 ALR 512 at 513 [1].

the economics of a class action? Asking and answering these and similar questions is not appropriate or necessary in ensuring that justice is done in a proceeding.

159 The *BMW* litigation is illustrative of the problems. The group members on whose behalf the class action is brought are persons who acquired BMW vehicles fitted with Takata airbags which are the subject of recall. BMW is alleged to have contravened the *Trade Practices Act 1974* (Cth) and the *Australian Consumer Law*[187] by supplying vehicles with defective airbags to group members. The evidence disclosed that there *may* be in excess of 200,000 group members. However, by October 2018, only 33 BMW-owning group members had entered into a contract with the litigation funder and only 116 had shown interest in doing so. It was, as the Court of Appeal described it, a "tiny proportion of the whole"[188]. Indeed, the evidence disclosed that as at 15 September 2018, of the 114,406 unique visits to the Takata Airbag Class Action website, 4,136 persons have registered their interest in the proceedings but only 787 persons across six class actions have signed a funding agreement with the litigation funder.

160 It is relevant to ask why. Was it because, as was common ground, the *BMW* representative proceeding had a very large number of group members with very modest claims for damages, the airbags having been replaced? Or was it because there has been little or no book building in the form of active efforts seeking to persuade group members to enter into contractual arrangements with the law firm and the litigation funder? Logic suggests that it is a combination of both. Given the very modest claims for damages of most potential group members, it is hardly surprising that there is little appetite for litigation amongst them. And given the lack of appetite for litigation amongst potential class members, it may well be supposed that the litigation funder is reticent to incur costs in book building which may be largely wasted and prove irrecoverable. Far better from the litigation funder's point of view, no doubt, to obtain a common fund order which avoids the costs of book building and guarantees a handsome rate of return from the aggregate of damages which may ultimately be recovered.

161 The reasons given for the failure to take active steps to build the book were said to be the relatively high costs of building a book in a matter such as this, and safety (based on a desire to avoid confusion with the early stages of the recall of airbags). Neither claim appears at all convincing. On the question of

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187 *Competition and Consumer Act 2010* (Cth), Sch 2.

188 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 172 [3].

cost of book building, the unchallenged evidence of the solicitor acting for the representative applicant based on his past experience of the cost of book building activities in other proceedings was that it "would likely exceed $1 million" and that "[a]ll or part of such costs *may* ultimately be deducted from the possible recoveries of Group Members" (emphasis added). A person seeking to build a business usually incurs expenditure in seeking to establish that business. Given that the size of the potential return to the litigation funder in these proceedings is not insignificant, it is difficult to accept that the cost to build the book is prohibitively expensive. Whether the litigation funder then seeks to recover that cost from the group members is a separate issue.

162 Relevantly for present purposes, the solicitor for the representative applicant provided unchallenged evidence of a combination of methods which would, in his opinion, be "a low cost, efficient and effective means of notifying a large proportion of Group Members ... with little to no prejudice to the defendant[]". He also provided unchallenged evidence that those methods were "comprehensive, reasonable and appropriate methods of distribution which, in combination, [were] likely to bring the Common Fund Application to the attention of Group Members in accordance with sections 175 and 176 of the *Civil Procedure Act 2005* and paragraph 8.1 of Practice Note SC Gen 17". The listed methods included displaying the relevant material on a website, sponsored search listings on an internet search engine, and advertisements on social media as well as in newspapers.

163 It may be accepted that two of the identified methods involved displaying on the defendant's social media pages and websites a link to a page on the litigation funder's website. But putting those two methods to one side, the evidence does not detract from the fact that contact with group members was possible and proposed to be done in a variety of ways without incurring significant costs. And there is nothing to suggest that contact with group members to seek to build a book could not be done in substantially the same comprehensive manner at the same low cost. Indeed, when the application for a common fund order came before the Court in the *BMW* matter, there was an accompanying application for an opt-out notice to be distributed to group members, thereby closing the class. That application had been deferred.

164 If a litigation funder seeks a common fund order in order to avoid the costs of book building (and that is a very real incentive for a funder to seek such an order), that objective has no connection with what is appropriate or necessary to ensure justice is done in the proceeding.

165 As to the claim for the need for safety (to avoid confusion with the early stages of airbag recall), by the time the application for a common fund order came before the Court, the early stages of the recall were long past.

Analogies not useful

166 The Court of Appeal in the *BMW* matter noted that "Courts have and regularly exercise power to make interlocutory orders, which may be highly intrusive upon defendants, at an early stage in litigation, and without the benefit of findings as to the ultimate facts", including *Mareva* orders[189]. Seeking to draw analogies between the making of a common fund order and other orders made by courts in other contexts is unhelpful. The focus must be on the words of Pt IVA, a legislative scheme[190]. As has been explained, a common fund order seeks to craft a relationship between the litigation funder – a non-party to the proceeding – and unfunded group members who either do not know about the proceeding or, for whatever reason, have shown no interest in the proceeding. The statutory question is whether an order is appropriate or necessary to ensure that justice is done in a proceeding, not whether an order is more generally supportive of, or contrary to, justice. A common fund order is not an order that is appropriate or necessary to ensure that justice is done in a proceeding.

Free riders

167 At the start of these reasons, two issues were identified as justifications for a common fund order: the economics of an open class action and the problem of free riders. The economics aspect has been addressed. It is necessary to say something further about the problem of free riders – the unfunded group members who seek to take the benefit of the results of the litigation.

168 No solution to the problem of free riding by unfunded group members is perfect. But as the primary judge recognised in *Westpac*, until the courts indicated their "willingness to fashion a solution [of a common fund order] whereby the funder, who had borne the risks of the litigation, is recompensed from the common fund of proceeds obtained by the group as a whole"[191], the free rider problem was addressed by making funding equalisation orders to redistribute the additional amounts received "in hand" by unfunded class members pro rata across the class as a whole.

169 It was not suggested by any of the parties to these appeals that the legislative scheme did not allow for the making of a funding equalisation order.

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189 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 188 [78].

190 See [130], [136]-[145] above.

191 *Lenthall v Westpac Banking Corporation* (2018) 363 ALR 698 at 700 [3], quoting *Perera v GetSwift Ltd* (2018) 263 FCR 1 at 14 [25].

In short, there is already an accepted solution to the problems which the common fund order supposedly seeks to address.

Conclusion

170 For those reasons, I agree with the orders proposed by Kiefel CJ, Bell and Keane JJ.

EDELMAN J.

Introduction

171 Two things are clear in these appeals. First, the powers of a court in the relevantly identical s 33ZF(1) of the *Federal Court of Australia Act 1976* (Cth) ("the Federal Court Act") and s 183 of the *Civil Procedure Act 2005* (NSW) ("the Civil Procedure Act") are expressed in very wide terms, permitting orders that the Federal Court of Australia and the Supreme Court of New South Wales respectively think are "appropriate or necessary to ensure that justice is done in the proceeding". Secondly, the scope of the powers conferred by those provisions is not fixed by reference to understandings or expectations held in 1991[192] and 2010[193], when those provisions were introduced. The application of meaning is not confined by notions whose "time has passed"[194]. The essential meaning of the wide, open-textured words of s 33ZF(1) and s 183, the "concept", is always speaking so that the essential meaning is applied "taking into account changes in our understanding of the natural world, technological changes, changes in social standards and ... changes in social attitudes"[195]. The application should also include changes in the law since the legislation was enacted[196].

172 The primary issue in dispute in these appeals is whether the innovation of a common fund order in an open class representative proceeding can be an application of the power contained in those provisions. The issue can be divided into two sub-questions. The first question is whether the provisions empower the relevant court to make a common fund order at the conclusion of proceedings. If so, the second question is whether a common fund order could be made at the start of proceedings.

173 The background to these appeals is set out in the joint judgment of Kiefel CJ, Bell and Keane JJ. For the reasons below, in the preparation of which

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192 *Federal Court of Australia Amendment Act 1991* (Cth), s 3.

193 *Courts and Crimes Legislation Further Amendment Act 2010* (NSW), Sch 6.1 [2].

194 See *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 622.

195 *Owens v Owens* [2017] 4 WLR 74 at [39]; see also *Owens v Owens* [2018] AC 899 at 916-917 [30]-[32]. See also *Aubrey v The Queen* (2017) 260 CLR 305 at 321-322 [29]-[30]; *R v A2* (2019) 93 ALJR 1106 at 1135 [143]-[144], 1140-1141 [169]-[170].

196 See Burrows, *Thinking about Statutes: Interpretation, Interaction, Improvement (The Hamlyn Lectures)* (2018) at 29.

I obtained much assistance from the cogent judgments of the Full Court of the Federal Court of Australia[197] and the Court of Appeal of the Supreme Court of New South Wales[198], the proper interpretation of s 33ZF(1) of the Federal Court Act and s 183 of the Civil Procedure Act permits the Federal Court and the Supreme Court of New South Wales, respectively, to make a common fund order. Common fund orders can be, and therefore can be thought to be, "appropriate or necessary to ensure that justice is done in the proceeding" by requiring those who obtain the benefit of a litigation funding service, including the benefit of risk and cost incurred by the litigation funder, to bear a proportionate share of the reasonable remuneration for that service. Common fund orders also ensure that the remuneration for the service is reasonable.

174 The appellants had two subsidiary arguments: (i) that a common fund order is contrary to judicial power, and (ii) that a common fund order is an acquisition of property on other than just terms. These two subsidiary arguments were not strong. This Court dispensed with submissions from the interveners on those matters. Each argument is dismissed briefly towards the conclusion of these reasons.

175 I would dismiss each appeal.

The power to make a common fund order

176 Section 33ZF(1) provides:

> "In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding."

177 It was not in dispute that if s 33ZF(1) empowers the Federal Court to make a common fund order then s 183 of the Civil Procedure Act would also empower the Supreme Court to do so. These reasons generally focus upon s 33ZF(1) in Pt IVA of the Federal Court Act, the relevant provision in the appeal from the decision of the Full Court in the *Westpac* matter[199]. The 2010 regime that introduced Pt 10 of the Civil Procedure Act inserted s 183 in relevantly identical terms to s 33ZF(1). The 2010 regime was "substantially

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197 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21.

198 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171.

199 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21.

modelled on part IVA [of the Federal Court Act]" and was designed to "provide a greater level of certainty for both litigants and the court [than the previous provisions in New South Wales] and [to] enhance the community's access to justice"[200].

178 "Common fund order" is not a term of art. It loosely describes orders made by a court providing for the remuneration of a litigation funder, borne pro rata by the group members from a common fund of the proceeds recovered from the litigation. The order generally provides for the priority of payment to the litigation funder from the common fund, and for the quantum of the payment, which might include a proportion of the money recovered in the proceedings. Sometimes a common fund order is made by the court towards the conclusion of the proceedings, such as after reasons have been delivered or after a settlement has been reached[201]. On other occasions, a common fund order is made by the court at a relatively early stage in the proceedings[202].

179 The four core aspects of the common fund orders that were made early in the proceedings of each matter the subject of these appeals were identified by the Full Court in the *Westpac* matter[203]. They are typical characteristics: (i) the pooling of any settlement or judgment funds obtained by the applicants or group members; (ii) an order for priority of payment to the litigation funder from that pool; (iii) the treatment of the litigation funder as a service provider to the group with the remuneration of the litigation funder as the common responsibility of the applicants and the group arising from the realisation of their claims; and (iv) undertakings by the litigation funder, the solicitors and the representative parties to comply with their obligations under the funding agreement.

180 In some respects, the common fund orders in each appeal went beyond orders that ensured proportionate bearing of the cost of reasonable remuneration for a litigation funder. The orders contained annexures with substantive clauses

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200 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 24 November 2010 at 28066-28067.

201 See, eg, *Caason Investments Pty Ltd v Cao [No 2]* [2018] FCA 527; *Hodges v Sandhurst Trustees Ltd* [2018] FCA 1346.

202 See, eg, *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191; *Pearson v Queensland* [2017] FCA 1096; *Impiombato v BHP Billiton Ltd* [2018] FCA 1272.

203 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 30-32 [20]-[28].

that imposed obligations including confidentiality and dispute resolution[204]. The obligations in the annexures were akin to a contract imposed upon persons who had manifested no consent to it. As a principle of justice, it is one thing for a court to impose a duty to pay reasonable remuneration for non-gratuitous work done for another's benefit in order to ensure the proportionate distribution of an expense among those who benefitted from it. It is quite another matter for a court to impose general obligations upon persons without their consent, including requiring those persons to accept arbitration in place of, or as a precondition to, the exercise of their right of access to courts. However, since these appeals were generally argued by reference to the obligation in the common fund orders requiring group members to pay a pro rata proportion of a reasonable remuneration, and since these are dissenting reasons, it suffices to focus upon those four core aspects concerning remuneration of the litigation funder in considering whether s 33ZF(1) of the Federal Court Act empowers the making of common fund orders at the conclusion of proceedings and, if so, whether those orders can be made on an interlocutory basis.

A common fund order at the conclusion of the proceedings

The breadth of the power and considerations of justice

181 The words of s 33ZF(1) used by the Commonwealth Parliament, namely "the Court thinks appropriate or necessary to ensure that justice is done in the proceeding", confer a wide power on a superior court. 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", Iacobucci and Arbour JJ said that "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion"[205]. Further, as a power-conferring provision, the generality of the words of s 33ZF(1) should not be disapplied or denied "capacity to apply to circumstances" that fall within the ambit of its words[206]. The grant of powers in "Pt IVA is not to be read by making

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204 See *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 197-205 and the unreported schedule to the orders made in *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21.

205 *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 SCR 3 at 24 [24], quoting *Mills v The Queen* [1986] 1 SCR 863 at 965.

206 *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 284. See also *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 185, 202-203, 205; *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421.

implications or imposing limitations not found in the words used"[207]. The limitations are only that the orders must be capable of being thought to be "appropriate or necessary", in the sense of being "suitable or fitting"[208], for the purpose of ensuring that justice is done in the proceeding.

182 In representative proceedings where some group members, but not others, have entered an agreement with a litigation funder there is potential for injustice in two ways. Injustice could arise if the litigation funder were only able to recover a small portion of its costs because it was limited to recovery of remuneration from those persons with whom it entered an agreement. Alternatively, injustice could arise if the group members who entered an agreement with the litigation funder of the proceedings were forced to bear all of the costs of the litigation while other members of the group who had not entered into such agreements could take the benefit of the proceeds of the litigation free from its costs.

183 One solution to these potential matters of injustice is sometimes described as "fund equalisation orders". These orders were devised in the Court of Chancery in response to the situation where lawyers had entered cost agreements with some group members but not with others. The Court of Chancery adjusted the rights of all the parties to ensure that the costs incurred by the lawyers would be borne pro rata by all the group members who benefitted from the litigation. The orders required payment into a fund, held for the benefit of the group, of the costs received by the representative party to the suit. The representative party was then entitled to deduct his legal expenses from that fund, thus ensuring that the costs were borne pro rata by the group members[209].

184 The same fund equalisation approach can be taken to ensure that, upon success of a proceeding at judgment or settlement, the litigation funder is remunerated by all group members with the remuneration borne pro rata by all group members. This is achieved by deducting from the entitlements of those "unfunded" group members who had not entered contracts with the litigation funder the "amounts equivalent to the funding commission that would otherwise

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207 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 260-261 [11].

208 *Vella v Commissioner of Police (NSW)* [2019] HCA 38 at [50].

209 *National Bolivian Navigation Co v Wilson* (1880) 5 App Cas 176 at 211-212.

have been payable by them had they entered into a funding agreement"[210]. As Finkelstein J said in the *Multiplex* class action[211]:

> "fairness to the funded class members, without whom the proceedings could not have continued, requires that the non-funded group members are in no better position for having been unfunded for a matter of weeks prior to the in-principle settlement having been reached."

185 The fund equalisation solution has the benefit of spreading the remuneration of the litigation funder from those who would bear the cost of it under an agreement to all members of the group. But the fund equalisation solution suffers from the difficulty that it involves no necessary assessment by the court of the reasonableness of the remuneration costs incurred by the group members who enter into contracts with a litigation funder. Without such assessment, the group members who did not enter contracts might have unreasonable and excessive remuneration costs imposed upon them in the process of equalisation with those members who might have entered contracts in a "compliant" manner[212].

186 A different solution, designed to ensure justice to the litigation funder and also to all the members of the group, was for a court to make a common fund order providing for the reasonable remuneration of the legal service provider from the common fund. The remuneration of the litigation funder could be limited to that which is reasonable, even if the agreement with some group members exceeded a reasonable amount. Indeed, the imposed remuneration in the common fund order in the *BMW* appeal involved a smaller commission rate than the remuneration that had been agreed between the litigation funder and the group members[213].

187 The question in these appeals is whether it could be thought "appropriate or necessary to ensure that justice is done in the proceeding" for a court to make a common fund order which recognises a right for a third party service provider,

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210 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 at 194 [5].

211 *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 4]* [2010] FCA 1029 at [28].

212 Waye and Morabito, "Financial arrangements with litigation funders and law firms in Australian class actions", in van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (2017) 155 at 193.

213 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 176 [22].

namely a litigation funder, to recover a reasonable remuneration proportionately from group members, including by reference to the success of the action. The appellants' submission is that such an order could never be thought appropriate or necessary to ensure that justice is done in the proceeding. The appellants focused upon components of the order that they effectively treated as contrary to justice, in particular remuneration for work done without request and calculated by reference to the extent of success.

188 The basic reason why the appellants' submission cannot be accepted is that the rationale in justice for a common fund order can be illuminated by reference to long-standing orders, analogous to those "that any civilized system of law is bound to provide"[214]. Those orders are made despite the presence of all of the matters asserted by the appellants to be contrary to justice in a proceeding. Bearing in mind that the concept of justice in a proceeding is plainly one that can, and was expected to, evolve, it is a complete answer to the appellants' submissions to point to the existence of orders for remuneration of work, based upon well-accepted principles of justice in the proceeding, in circumstances where the work was not requested and where remuneration is dependent upon success. These orders are made in numerous circumstances where justice requires remuneration for unrequested intervention that rescues or preserves the property of another including actions by maritime salvors, bailees, tenants, trustees, liquidators, and solicitors.

The common fund order as a just order in the proceedings

189 The common fund order, in its original form in the United States, was an order that was said to be based upon the prevention of unjust enrichment that would result from court orders, including orders resulting in the unjust enrichment of group members entitled to the fund at the expense of those who provided the legal services. It was held 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" because "persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense"[215]. The reasonable fee could be recovered in the absence of a contract or a request for the provision of funding from the persons who have obtained the benefit of the successful claim[216].

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214 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 61.

215 *Boeing Co v Van Gemert* (1980) 444 US 472 at 478.

216 *Central Railroad & Banking Co of Georgia v Pettus* (1885) 113 US 116 at 126.

190 An analogy can be drawn using the example given by Lord Scott of Foscote in *Cobbe v Yeoman's Row Management Ltd*[217], 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". Although no agreement is reached, the locksmith designs a key which opens the cabinet and reveals the treasure. The locksmith is in the same position as a litigation funder in the litigation of a chose in action on behalf of persons with whom no agreement has been reached. The potential value of the litigation cannot realistically be "unlocked" without the litigation funder. Although no agreement is concluded between the locksmith and the owner of the locked cabinet, when the cabinet is opened and treasure is found, "[t]he owner has been enriched by his work and, many would think, unjustly enriched. For why should a craftsman work for nothing?"

191 With no accrued contractual rights held by persons who have not entered agreements with the litigation funder[218], it might be thought that Australian law could recognise a claim for restitution of unjust enrichment against the group members in such circumstances. This would extend, in a principled manner, a right to remuneration from the lawyer who performs the work to the litigation funder who engages the lawyer and incurs the risk. If so, it would not be difficult to conclude that a court could think it appropriate or necessary to make such an order to ensure that justice is done in the proceeding.

192 There are, however, at least three potential obstacles to characterising a common fund order that involves remuneration as a proportionate share of the award to be an award of restitution in the category of unjust enrichment. First, in Australian law, restitution within the category of unjust enrichment requires proof of an unjust factor such as mistake, duress, undue influence or failure of consideration that qualifies or vitiates the basis for another's right to retain the benefit or enrichment[219]. But in common fund order cases such factors are not usually relied upon as the basis for the litigation funder's entitlement and such factors were not relied on in these appeals. Secondly, in unjust enrichment an obligation to make restitution of the value of work done is not usually ordered if

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217 [2008] 1 WLR 1752 at 1773 [41]; [2008] 4 All ER 713 at 736.

218 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 at [64], [172], [179].

219 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 516 [30]; *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 at [168].

the work has not been requested by the party who obtains the benefit[220]. In common fund order cases, some members of an open group might not even be aware of the proceedings. Thirdly, as a response to unjust enrichment, the amount of a personal restitutionary award is usually the reasonable value of the work done at the time it was performed[221] as a sum certain[222]; it is not a partial share of future profit or future recovery. In common fund order cases, a common order for remuneration is expressed as a percentage of the recovery.

193 These potential obstacles were all relied upon by the appellants. But although they are obstacles to justifying a common fund order by reference to the Australian conception of restitution in the category of unjust enrichment, they are not obstacles to whether a common fund order could ever be thought to be "appropriate or necessary to ensure that justice is done in the proceeding". Justice in a proceeding is not confined by issues of taxonomy or classification. Indeed, even awards of restitution are not limited to actions that form part of the category of unjust enrichment[223]. Shorn of any such rigidity, the broad concept of justice being "done in the proceeding" can extend beyond the category of unjust enrichment and beyond awards that fit the recognised category of restitution. It can extend to some circumstances (i) where the calculation of reasonable remuneration includes a share of profits in the market value of work done and the risk incurred, particularly where that is the basis for such remuneration in the relevant industry[224] and (ii) where work has not been requested. This is particularly so where services are not conferred gratuitously and remuneration will only be recovered from a fund obtained upon success.

194 As the appellants pointed out, Australian law[225], like English law[226], does not recognise a general right to remuneration for work that increases the value of

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220 *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234 at 248; *Lumbers v W Cook Builders Pty Ltd (In liq)* (2008) 232 CLR 635 at 663 [79]-[80]; *Stewart v Atco Controls Pty Ltd (In liq)* (2014) 252 CLR 307 at 326-327 [47]-[48].

221 *Benedetti v Sawiris* [2014] AC 938 at 955-956 [14].

222 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 at [150].

223 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 at [213].

224 *Way v Latilla* [1937] 3 All ER 759. See also *Becerra v Close Brothers Corporate Finance Ltd* [1999] EWHC 289 (Comm).

225 *Stewart v Atco Controls Pty Ltd (In liq)* (2014) 252 CLR 307 at 326 [47]-[48].

226 *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234 at 248; *ENE Kos 1 Ltd v Petroleo Brasileiro SA [No 2]* [2012] 2 AC 164 at 176-177 [19]-[20].

another's property. Instead, the general rule denies remuneration to a person who acts to increase the value of another's property because "[l]iabilities are not to be forced upon people behind their backs"[227]. Underlying the general rule are principles that (i) a person should not be made worse off by being required to pay for unrequested actions of others that the person might not have wanted, and (ii) the law should not encourage the officious creation of liabilities.

195 However, powerful justifications for exceptions to the general rule arise where the underlying principles have little force because (i) the liability can only be recovered from a fund obtained from the success of the action, and (ii) remuneration for the action is of a type that the law, through legislation or general principle, supports. In the United States, the exceptions have been consolidated in a rule permitting recovery from an owner of property, not exceeding the value of the benefit obtained, where non-gratuitous services are successful and it would be reasonable to assume that they would have been desired by the owner[228]. Although English and Australian law have not yet recognised any consolidated rule permitting recovery, numerous exceptions to the general rule against remuneration for unrequested work have developed where the underlying principles that support it have little force or are outweighed by other principles.

196 One well-recognised example of such an exception is an award for unrequested intervention in the law of maritime salvage. A maritime salvage award is remuneration based upon the value of the property recovered where, without a duty to do so, a maritime salvor saves a ship or its cargo from peril or recovers them from derelict[229]. Salvage services operate as an exception to the general rule that a person should not have to pay for a service they did not request, and in fact may not have desired, because of the "strong maritime policy interest in rewarding salvors"[230].

197 Maritime salvage is not a unique instance of remuneration for unrequested intervention. Although the precise rules of salvage are obviously limited to

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227 *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234 at 248.

228 American Law Institute, *Restatement of the Law Third, Restitution and Unjust Enrichment* (2011) §21 at 295-296. See also Mitchell, Mitchell and Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment*, 9th ed (2016) at 550-551 [18-03].

229 *Robinson v Western Australian Museum* (1977) 138 CLR 283 at 330.

230 *Ministry of Trade of the Republic of Iraq v Tsavliris Salvage (International) Ltd (The "Altair")* [2008] 2 Lloyd's Rep 90 at 101 [57].

maritime law, justice does not stop at the shoreline; the same underlying reasoning is reflected in numerous categories of case on dry land which might have taken their "rise from marine adventure"[231]. An old view, that maritime salvage was an anomalous branch of the law of "quasi-contract", perhaps provoked by a "fear of the archaic embarrassments of the old learning"[232], ignored the recognition of numerous other categories of recovery of a reasonable remuneration for unrequested work including reasonably necessary and effective acts of preservation by bailees[233], tenants[234], trustees, and liquidators[235]. Reimbursement will also be awarded, in broad terms, to a person who intervenes and pays a bill of exchange that has been protested for non-payment for the honour of any party who is liable thereon or the person for whose account the bill is drawn. This right of recovery, embodied in s 73 of the *Bills of Exchange Act 1909* (Cth), is based on common law principles which were recognised nearly two centuries ago as analogous to the power of the master of a ship to raise

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231 *Prager v Blatspiel, Stamp and Heacock Ltd* [1924] 1 KB 566 at 568. See also Jackman, *The Varieties of Restitution*, 2nd ed (2017) at 141; American Law Institute, *Restatement of the Law Third, Restitution and Unjust Enrichment* (2011) §21 at 300; Dietrich, *Restitution: A New Perspective* (1998) at 183-184; Burrows, *The Law of Restitution*, 3rd ed (2011), ch 18; Virgo, *The Principles of the Law of Restitution*, 3rd ed (2015), ch 12; Mitchell, Mitchell and Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment*, 9th ed (2016), ch 18.

232 Birks, "*Negotiorum Gestio* and the Common Law" (1971) 24 *Current Legal Problems* 110 at 116 (footnote omitted), responding to Jackson, *The History of Quasi-Contract in English Law* (1936) at 46.

233 *Great Northern Railway Co v Swaffield* (1874) LR 9 Ex 132 at 136; *Sims & Co v Midland Railway* [1913] 1 KB 103 at 112; *Australasian United SN Co Ltd v Hiskens* [1914] VLR 684 at 705; *China Pacific SA v Food Corporation of India* [1982] AC 939 at 960-961; *J Gadsden Pty Ltd v Strider 1 Ltd (The "AES Express")* (1990) 20 NSWLR 57 at 65-67.

234 *Lee-Parker v Izzet* [1971] 1 WLR 1688 at 1693; [1971] 3 All ER 1099 at 1107, citing *Waters v Weigall* (1795) 2 Anst 575 at 576 [145 ER 971 at 971]; *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137 at 146-148; *Batiste v Lenin* (2002) 11 BPR 20,403 at 20,416 [47].

235 *In re Universal Distributing Co Ltd (In liq)* (1933) 48 CLR 171 at 174; *Stewart v Atco Controls Pty Ltd (In liq)* (2014) 252 CLR 307 at 317 [11]-[12].

money for repairs by pledging the credit of the ship's owners in cases of emergency[236].

198 Remuneration for unrequested intervention has also been recognised for legal work that benefits third parties. In *Ex parte Patience; Makinson v The Minister*[237], a solicitor claimed a charge against property based upon legal work that resulted in a decision increasing the amount of compensation for land that had been acquired by the Crown. One submission by the solicitor was that the increased amount of compensation could be charged against the land and was exigible against mortgagees of the land. Jordan CJ described the claim as one that had always been held to be "in the nature of a claim to salvage" and "made upon all the property recovered or preserved as the result of the solicitor's exertions and not merely on his client's interest therein".

199 The recognition of an award of a reasonable remuneration in these numerous instances of unrequested intervention has an obvious resonance with the calculation of the remuneration of a litigation funder. The well-recognised example of salvage can be used for a direct comparison although similar reasoning applies to the instances described above where remuneration is permitted for bailees, tenants, trustees, liquidators, and solicitors. Like the recognition by admiralty law of the legitimacy in public policy of salvage actions[238], litigation funding is no longer regarded as contrary to public policy[239] and is part of a scheme that seeks to enhance access to justice in a situation where each litigant's loss is not significant so that individual action is not economically feasible[240]. Like instances of salvage where the maritime salvor engages professional salvors in order to preserve the value of a ship or its cargo[241], the

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236 *Hawtayne v Bourne* (1841) 7 M & W 595 at 599-600 [151 ER 905 at 907]; *Prager v Blatspiel, Stamp and Heacock Ltd* [1924] 1 KB 566 at 569. See also Mitchell, Mitchell and Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment*, 9th ed (2016) at 575 [18-62].

237 (1940) 40 SR (NSW) 96 at 107, citing *Bulley v Bulley* (1878) 8 Ch D 479 at 484-485 (see also at 490-491) and *Greer v Young* (1883) 24 Ch D 545 at 548.

238 *The "Waterloo"* (1820) 2 Dods 433 at 435-436 [165 ER 1537 at 1538].

239 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 433-436 [88]-[95].

240 See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 November 1991 at 3174.

241 *The "Rosa Luxemburg"* (1934) 49 Ll L Rep 292 at 300.

litigation funder engages lawyers to act in order to preserve the value of rights held by the members of the group. Like instances of salvage[242], members of the group might have no contract with the litigation funder. Like instances of salvage, the assessment of the value of the service is not "an exact science"[243] and the value can increase by reference to the potential for financial losses including other lost opportunities[244]. Like instances of salvage, the criteria for the calculation of the award include the value of the rights preserved (the cause of action, the ship, or the cargo), the measure of success, the degree of risk involved, the time taken, and the expenses incurred[245].

200 Indeed, in one respect, the justice of ordering remuneration from a common fund to a litigation funder can be stronger than the cases of maritime salvors, bailees, tenants, trustees, liquidators, and solicitors. The order spreads the cost and risk of the litigation proportionately between all group members; otherwise those with contracts with the litigation funder would pay for the benefit and the other group members would receive a windfall. In that respect, the order shares the foundations of the doctrine of contribution, requiring pro rata burden sharing by those under co-ordinate liabilities, a doctrine that is "bottomed and fixed on general principles of justice"[246].

201 The analogy between these well-recognised instances where justice recognises remuneration for unrequested intervention and the instance of remuneration of a litigation funder is not defeated by the possibility that a common fund order might depart from the rate of remuneration that was agreed with some group members. For instance, where a maritime salvor had entered an agreement with the owner of the vessel or cargo being salvaged, the remuneration ordered by the court was not confined to the amount in the agreement. The admiralty court would not award a contractually agreed

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242 *The Liffey* (1887) 6 Asp MLC 255 at 256; *The Troilus* [1950] P 92 at 110.

243 *Semco Salvage and Marine Pte Ltd v Lancer Navigation Co Ltd* [1997] AC 455 at 467.

244 Rose, *Kennedy & Rose: Law of Salvage*, 9th ed (2017) at 619 [16-068]-[16-069].

245 Rose, *Kennedy & Rose: Law of Salvage*, 9th ed (2017) at 596-597 [16-009]. See, eg, *Fisher v The "Oceanic Grandeur"* (1972) 127 CLR 312 at 342-344.

246 *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 351, citing *Dering v Earl of Winchelsea* (1787) 1 Cox 318 at 321 [29 ER 1184 at 1185].

remuneration if it was sufficiently "exorbitant"[247] or "manifestly unfair or unjust"[248]. The same reasoning should apply to common fund orders; although the remuneration agreed with some group members might be strong evidence of a market rate, it is not conclusive of the reasonableness of the agreed rate.

202 The power to review terms in costs agreements for unreasonableness provides another analogy with common fund orders that depart from the remuneration that was agreed in a contract between the litigation funder and some group members. A court with inherent jurisdiction can examine the fairness and reasonableness of costs agreements between solicitor and client[249], including reducing the amount if it is "exorbitant"[250]. Although costs agreements between a solicitor and a client were treated by courts with "great jealousy"[251] due to the potential for undue influence, it is hard to see why a power to ensure "that justice is done in the proceeding" should not also permit an assessment of the fairness and reasonableness of remuneration in an agreement that provides access to justice. For the reasons discussed above, where costs are exorbitant or unreasonable the fund equalisation solution could not provide that justice in the proceeding.

203 Despite the long-standing existence of awards that support the justice of a common fund order and the breadth of s 33ZF(1) of the Federal Court Act, the appellants had three submissions why a court could never consider it appropriate or necessary to make a common fund order. First, they pointed to the existence of the torts of maintenance and champerty when s 33ZF(1) was enacted in 1991 to highlight that "litigation funding was not lawful when Pt IVA was enacted"[252]. Secondly, they relied upon the existence of express powers in Pt IVA of the

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247 *The "Helen and George"* (1858) Swab 368 at 369 [166 ER 1170 at 1171]. Compare *Cargo ex Woosung* (1876) 1 PD 260 at 269-270; see also at 263-264. See also *The Mark Lane* (1890) 15 PD 135 at 137.

248 *The Strathgarry* [1895] P 264 at 270. See also *Akerblom v Price* (1881) 7 QBD 129 at 132-133; *The Altair* [1897] P 105 at 108; *The Port Caledonia and The Anna* [1903] P 184 at 189.

249 *Clare v Joseph* [1907] 2 KB 369 at 376, referring to the general law position before the *Attorneys' and Solicitors' Act 1870* (UK), s 4. See also *Kowalski v Bourne* [2017] SASCFC 24 at [26].

250 *Saunderson v Glass* (1742) 2 Atk 296 at 298 [26 ER 581 at 582].

251 *Clare v Joseph* [1907] 2 KB 369 at 376.

252 *BMW Australia Ltd v Brewster* (2019) 366 ALR 171 at 189 [81].

Federal Court Act and the general scheme of Pt IVA in support of an implication limiting the application of s 33ZF(1). Thirdly, they argued that s 33ZF(1) should be limited in its application to common fund orders because of the principle of legality. Each of these submissions can be addressed in turn.

Maintenance and champerty

204 As to the submissions about maintenance and champerty, it can be accepted that one body of understanding in 1991 when s 33ZF(1) was enacted was that acts of maintenance or champerty were generally contrary to public policy. In States other than Victoria, where criminal and tortious liabilities for champerty were abolished in 1969[253], Parliament might not have been understood, by those who considered maintenance and champerty to be contrary to public policy, to contemplate that s 33ZF(1) could support a common fund order at the time of its enactment[254] although any such public policy in 1991, which was neither wholly secure nor unconfined[255], was clearly evolving beyond Victoria[256].

205 As explained in the introduction to these reasons, the short answer to this submission is that whatever the particular application that Parliament might be thought to have intended s 33ZF(1) to have in 1991 does not govern the application of the essential meaning of the provisions decades later when litigation funding is no longer seen as contrary to public policy[257]. It would be contrary to the purposes of a 2010 provision for the essential meaning to be characterised at a low level of generality based upon conceptions of justice in 1991. The concern of the provisions was to enhance access to justice including "to facilitate access to legal remedies and to promote efficiency in the

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253 *Abolition of Obsolete Offences Act 1969* (Vic), ss 2, 4.

254 See Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) at 114 [274].

255 *Findon v Parker* (1843) 11 M & W 675 at 682-683 [152 ER 976 at 979]; *Alabaster v Harness* [1895] 1 QB 339 at 342-343.

256 See, for instance, *Statutes Amendment and Repeal (Public Offences) Act 1992* (SA), Schedule, inserting Sch 11, cll 1(3), 3 into the *Criminal Law Consolidation Act 1935* (SA), abolishing maintenance, including champerty.

257 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 433-436 [88]-[95]; see also at 425-432 [66]-[82].

determination of legal rights and in court management"[258]. As the Full Court said in the *Westpac* appeal, quoting from Wilcox J in *McMullin v ICI Australia Operations Pty Ltd*[259]:

> "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'."

The existence of specific express powers and the scheme of Pt IVA

206 The next submission of the appellants relied upon what was described as the *Anthony Hordern* principle, derived from the decision of Gavan Duffy CJ and Dixon J in the case of that name[260]. The principle concerns in substance the same general language convention[261], or "ordinary usage"[262] of language, that is sometimes expressed as *generalia specialibus non derogant* and seeks to resolve inconsistency by preferring the specific provision to the general provision[263]. A general provision will usually be interpreted so that it does not contradict a specific power that imposes "conditions and restrictions which must be observed" in the exercise of the same power[264].

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258 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) at 133 [324].

259 (1998) 84 FCR 1 at 4, cited in *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 44 [85].

260 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1.

261 See *Brisbane City Council v Amos* (2019) 93 ALJR 977 at 989 [36]; 372 ALR 366 at 378.

262 *Effort Shipping Co Ltd v Linden Management SA* [1998] AC 605 at 627.

263 *Smith v The Queen* (1994) 181 CLR 338 at 348.

264 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7. See also *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 187-188 [84].

207 Two of the specific provisions which the appellants submitted to be inconsistent with a common fund order made under s 33ZF(1) of the Federal Court Act and s 183 of the Civil Procedure Act were, respectively, s 33V(2) and s 173(2). Focusing upon the provision in the Federal Court Act, s 33V(2) empowers the Federal Court, after approving a settlement, to "make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court". The basic flaw in the appellants' submission is that the scheme of Pt IVA is replete with broadly expressed powers. The broad power in s 33V(2) is no more exclusive of s 33ZF(1) than it is of s 33ZJ(3), which empowers the court to make any order that it thinks just in relation to reimbursement of the costs of a representative party. Indeed, like s 33ZJ(3), there are no apparent restraints or conditions within s 33V(2) that would prevent a common fund order from being made under that provision. Indeed, neither s 33V(2) nor s 33ZJ(3) is conditioned by a requirement that the justice be "in the proceeding". This might even suggest that these words in s 33ZF(1) should be understood as intended to be descriptive rather than prescriptive.

208 A related submission by the appellants was that a common fund order is inconsistent with the general scheme of Pt IVA of the Federal Court Act and Pt 10 of the Civil Procedure Act respectively. The appellants focused upon the provisions for recovery of damages[265] and for the reimbursement of costs of the representative party[266] and submitted that those provisions left no room for the operation of the general power in s 33ZF(1) of the Federal Court Act and s 183 of the Civil Procedure Act.

209 The immediate textual difficulty with this submission is that the provisions in Pt IVA of the Federal Court Act and Pt 10 of the Civil Procedure Act establishing this regime are plainly not intended to be a comprehensive scheme. The powers concerning costs themselves provide for the court to make "any other order it thinks just"[267]. Even more fundamentally, there is an obvious area where s 33ZF(1) must have a large area of operation in order to make the scheme operate effectively. This is in relation to awards other than damages. Section 33Z empowers the court to award damages[268], including in an aggregate amount for group members[269] provided that a reasonably accurate assessment can

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265 Federal Court Act, s 33Z; Civil Procedure Act, s 177.

266 Federal Court Act, s 33ZJ; Civil Procedure Act, s 184.

267 Federal Court Act, s 33ZJ(3); Civil Procedure Act, s 184(3).

268 Federal Court Act, s 33Z(1)(e).

269 Federal Court Act, s 33Z(1)(f).

be made of the total aggregate amount to which group members will be entitled under the judgment[270], with "provision for the payment or distribution of the money to the group members entitled"[271]. But s 33Z makes no provision for awards in representative proceedings of an account and disgorgement of a defendant's profits, orders to pay a debt, or orders for restitution of money, including restitution consequent upon court-ordered rescission.

210 In an attempt to treat the scheme as comprehensive, the appellant in the *BMW* matter submitted that the reference in the legislation to "damages" meant "any pecuniary claim". This submission attributes to the Parliament a bovine ignorance of fundamental concepts in private law in the expression of s 33Z despite, for example, the clear separation by Parliament in s 33C(2) of "damages" from "equitable relief" and the separation in s 51A(1) of "debt" from "damages". There is an elementary distinction between debt and damages, between a primary right and a secondary right, between a claim of entitlement and a claim based upon a breach, and between claims to compensate losses and claims to recover benefits. There would only be a need to treat Parliament as having ignored such basic distinctions if Parliament were taken to have intended s 33ZF(1) to have very limited operation. Even then, if "damages" were interpreted to include debts, accounts of profits and restitution, the expression still would not extend to orders for rescission of a contract and restitution of payments equivalent to those orders that could be made, outside class actions, under a provision such as the *Australian Consumer Law*[272].

211 For these reasons, the words of s 33ZF(1) must extend to a power to make orders concerning distribution of payments arising from disgorgement of profits, restitution, debts due, or rescission of a contract and restitution of payments made under it. In the latter instance, an analogy can be drawn with an order under s 12 of the *Contracts Review Act 1980* (NSW), which empowers a court that declares part of a contract to be void to make orders, "as may be just in the circumstances", against persons who are not parties to the contract but who are entitled to share in the benefits of the contract. The orders can be made even if the rights of those persons would be prejudiced and they have not had an opportunity to be heard, provided that the order is not "unjust in all the circumstances".

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270 Federal Court Act, s 33Z(3).

271 Federal Court Act, s 33Z(2).

272 *Competition and Consumer Act 2010* (Cth), Sch 2, s 237.

The principle of legality

212 The appellants' submission about the principle of legality can be shortly dismissed. The basis of the appellants' argument is that a common fund order impermissibly intrudes on a group member's proprietary rights by rendering the property less valuable by giving the litigation funder a right to the group member's interest in any judgment or settlement. The principle of legality is one of variable force in the attribution of meaning to words based upon past experience. The force of the principle of legality increases the more legislation impairs rights and the more "fundamental" or "important" the rights which are impaired[273]. Even if the principle of legality could be applied to constrict the application of a provision, rather than its essential meaning, the interference with the rights of group members in the reallocation of the fruits of litigation is based upon a court's perception of justice in the proceeding. It is not inconsistent with expectations based upon rationality and reason. Instead, it is consistent with the approach taken in salvage and analogous areas. And, as the Full Court observed in the *Westpac* appeal, a power to make a common fund order "supports and fructifies ... rights of persons that would otherwise be uneconomic to vindicate"[274]. It enhances the value of the rights of the group members just as the locksmith's services enhance the value of the rights of the owner of the locked treasure chest.

A common fund order on an interlocutory basis?

213 The common fund orders made in each appeal were interlocutory. To express the nature of the orders in clear terms, they operate only until settlement, final judgment or other order. The appellants relied upon this interlocutory nature and submitted that even if common fund orders could be made at the conclusion of the proceeding, they could not be made on an interlocutory basis. To do so, the appellants submitted, would not do justice "in the proceeding" because it would not aid in the determination of the parties' legal interests or in the resolution of matters in controversy between the parties.

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273 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 at [159]; *Federal Commissioner of Taxation v Tomaras* (2018) 93 ALJR 118 at 137 [101]-[102]; 362 ALR 253 at 276-277.

274 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 46 [94].

214 The appellants' submission was effectively that a common fund order could not ever be thought to be appropriate or necessary to do justice in the proceeding if it were made on a pre-emptive basis. The appellants were not suggesting, and could not have suggested, that the orders were not made "in the proceeding" because they were orders against a non-party. As Mason CJ and Deane J, with whom Gaudron J agreed, said in *Knight v FP Special Assets Ltd*[275], in reasoning concerning orders for payment of a party's costs by a non-party which is equally applicable to payment by a party of a non-party's costs and remuneration, there are:

> "a variety of circumstances in which considerations of justice may, in accordance with general principles relating to awards of costs, support an order for costs against a non-party. Thus, for example, there are several long-established categories of case in which equity recognized that it may be appropriate for such an order to be made."

215 The appellants' submission takes too narrow a view of the expression "in the proceeding". Interlocutory orders in a proceeding can be appropriate or necessary to do justice in the proceeding for principled reasons of convenience even if 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. In other words, interlocutory orders can be made on a pre-emptive basis, anticipating a final order, where there are good reasons of convenience to do so.

216 An obvious instance where a pre-emptive order on an interlocutory basis is made for reasons of convenience is an interlocutory injunction, which anticipates final orders and which can either prohibit conduct or require conduct. The stronger the prima facie case of the applicant, and therefore the greater the likelihood of success, the less that will be needed for the balance of convenience to favour the grant of the interlocutory injunction[276].

217 Factors of convenience can also favour a pre-emptive award of costs. In Chancery, where costs were a general law creation, a pre-emptive costs order could be made where a payment of costs was needed by the plaintiff to fund the proceeding[277]. This power to order payment of some or all of the costs of an action that has not been finally determined is so exceptional that the power has rarely been exercised. However, this does not deny the existence of the power.

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275 (1992) 174 CLR 178 at 192 (footnote omitted).

276 *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 154; *Samsung Electronics Co Ltd v Apple Inc* (2011) 217 FCR 238 at 261 [67].

277 *Jones v Coxeter* (1742) 2 Atk 400 at 400 [26 ER 642 at 642].

In *Australian Securities and Investments Commission v GDK Financial Solutions Pty Ltd (In liq) [No 4]*[278], Finkelstein J made a pre-emptive costs order for reasons which included that the applicant would ultimately have been entitled to those costs irrespective of the result of the action.

218 The making of a common fund order on an interlocutory basis has a far less intrusive effect upon persons such as the appellants than a pre-emptive order for costs. The persons subject to the order are not required to make any immediate payment. Indeed, putting to one side the aspects of the common fund orders in these appeals that concern matters other than remuneration, such as confidentiality and dispute resolution obligations, the order imposes no final liability upon the group members and does not require them to do anything. The order must also be revisited at the conclusion of the proceedings. Hence, as an interlocutory order, the common fund order is far less exceptional than a pre-emptive costs order and more akin to a routine *Beddoe* order[279] in its effect of reducing the risks of proceeding without imposing any further burden on the opposing parties.

219 An interlocutory order must nevertheless advance the purpose of justice in the proceeding and, with the requirement in s 33ZF(1) that it be thought to be "appropriate or necessary to ensure that justice is done in the proceeding", must be suitable or fitting for that purpose. In *Jackson v Sterling Industries Ltd*[280], this Court considered an interlocutory order that required the respondent to provide security for the satisfaction of a judgment in order to preserve the assets available for execution after a judgment in favour of the appellant. A majority of this Court held that the order was not "appropriate" because it went further than preserving the assets for potential execution and purported to confer security over them[281].

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278 (2008) 169 FCR 497 at 500 [7]. See also *Berkett v Cave* [2001] 1 NZLR 667 at 670 [12]-[13]; *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 SCR 371 at 408 [65], 411-412 [77]-[78]. Compare *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 at 2626 [77]; [2005] 4 All ER 1 at 24.

279 *In re Beddoe; Downes v Cottam* [1893] 1 Ch 547. See also *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66.

280 (1987) 162 CLR 612.

281 (1987) 162 CLR 612 at 626-627.

The order was not "framed so as to come within the limits set by the purpose which it can properly be intended to serve"[282].

220 The primary judge and the Full Court in the *Westpac* matter identified two purposes for making a common fund order on an interlocutory basis[283]: (i) greater information for group members to make an informed decision before the date required for opt out; and (ii) avoidance of the risk for litigation funders that upon settlement or judgment in favour of the funded party a court might reduce, even unconsciously, the likelihood (and, I would add, potential magnitude) of adverse costs orders due to the benefit of hindsight. Each of these matters is explained further below. As to the first purpose, the importance of information for a group member arises because, with limited exceptions, a person can be a group member without consent[284]. Prior to the commencement of the hearing[285], the court must give group members notice of the commencement of the proceeding and the right to opt out[286]. But a group member can only opt out of the proceeding by providing written notice before a date that is set by the court[287]. Part IVA places no obligation upon any person to inform group members of any of the proposed terms, or likely terms, of remuneration of the lawyers or litigation funders. If a common fund order could only be made at the conclusion of the proceeding then a group member could be required to make a decision about whether to opt out without knowing anything about the likely remuneration of the litigation funder from any common fund recovered.

221 As to the second purpose, the possibility of "hindsight bias"[288] by a court is real. Plainly, the risk at the time of agreement should be assessed by reference to the circumstances prevailing at the time of agreement – not at the conclusion

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282 (1987) 162 CLR 612 at 625.

283 *Lenthall v Westpac Banking Corporation* (2018) 363 ALR 698 at 707-708 [29]; *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 27-28 [10], relevantly quoting *Perera v GetSwift Ltd* (2018) 263 FCR 1 at 65-66 [244]-[245].

284 Federal Court Act, s 33E.

285 Federal Court Act, s 33J(4).

286 Federal Court Act, s 33X(1)(a).

287 Federal Court Act, s 33J(1), (2).

288 *Lenthall v Westpac Banking Corporation* (2018) 363 ALR 698 at 707-708 [29]; *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at 27-28 [10], quoting *Perera v GetSwift Ltd* (2018) 263 FCR 1 at 65-66 [245].

of the proceedings, when the parties have the benefit of full knowledge. By the time that the proceedings have concluded there is no longer any risk of success or failure of the proceedings. The pre-emptive, although provisional, exercise of the power to make a common fund order, once the court is apprised of all the relevant facts other than the success of the proceeding, reduces the possibility of hindsight bias that arises by assessing risk when success is known rather than at the time when the risk is incurred.

222 In light of the minimal prejudice to the appellants in the making of a common fund order as a prima facie rate of remuneration and the provisional nature of the interlocutory common fund order, which must be revisited at the conclusion of the proceeding, a common fund order made on an interlocutory basis can be seen to fall within the limits of the two purposes which it is properly intended to serve.

Judicial power

223 The appellants submitted that if s 33ZF(1) of the Federal Court Act and s 183 of the Civil Procedure Act empowered the court to make a common fund order then those provisions would purport to permit the exercise of non-judicial power. Although a State court might exercise non-judicial power in some circumstances where a federal court cannot, it suffices to explain why the appellants' submissions cannot succeed even in relation to s 33ZF(1) of the Federal Court Act.

224 The appellants broadly relied on three reasons. First, they said that a common fund order empowered the creation of new rights rather than the enforcement of existing rights. Secondly, they submitted that a common fund order involved the exercise of a discretion by reference to policy considerations rather than by reference to legal principle. Thirdly, they submitted that an interlocutory common fund order would not affect any right or interest because it would only operate until it was reassessed at final judgment.

225 The first submission misunderstands the distinction between the "adjudication of existing rights and obligations" and "the creation of rights and obligations"[289]. The latter is concerned with an attempted judicial creation of new rights whilst simultaneously concluding that those rights should never have previously existed. By contrast, it is entirely within judicial power for courts to create new rights, in the sense of recognising and giving effect to rights that

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289 *Ha v New South Wales* (1997) 189 CLR 465 at 504; see also at 515. See also *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189.

differ from a previously settled understanding[290]. That is often how the common law develops.

226 As to the second submission, although the calculation of the rate of remuneration for a common fund order will be a difficult exercise and one upon which minds may differ, it must be exercised in accordance with the judicial process, by a process of balancing interests that is quintessentially judicial[291]. Although s 33ZF(1) is open-textured, such enquiries are a common exercise of judicial power. Examples of courts making assessments by reference to broad, open-textured criteria include the adjudication of whether conduct is "unconscionable", the "just and convenient" considerations involved in interlocutory injunctions, and the power of courts to make preventive orders. In any event, the requirements of propriety or necessity, and doing justice in the proceeding, ensure that the exercise of power is judicial.

227 The third submission must also be dismissed. At the very least, a common fund order made on an interlocutory basis for the two purposes described above supports or aids the exercise of judicial power and is therefore a permissible incident in the exercise of a strictly judicial power[292].

Just terms

228 The final submission of each of the *BMW* and *Westpac* appellants, respectively, was that s 183 of the Civil Procedure Act, which they submitted could only operate if picked up by s 79 of the *Judiciary Act 1903* (Cth) with a precondition of compliance with s 51(xxxi) of the *Constitution*[293], and s 33ZF(1) of the Federal Court Act were acquisitions of property on other than just terms.

229 It might be doubted whether s 183 of the Civil Procedure Act should be characterised in a manner that would require it either never or always to be picked up by s 79 of the *Judiciary Act*. It may be that s 183 is neither exclusively a law that is "determinative of the rights and duties of persons" nor exclusively a

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290 *Bell Lawyers Pty Ltd v Pentelow* (2019) 93 ALJR 1007 at 1028-1029 [95]-[96]; 372 ALR 555 at 579.

291 *Vella v Commissioner of Police (NSW)* [2019] HCA 38 at [68].

292 *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151. See also *Cominos v Cominos* (1972) 127 CLR 588 at 591, 593, 600, 606, 608-609.

293 *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 136 [28].

law that is concerned with "the manner of exercise of jurisdiction"[294], which involves regulating or governing the exercise of power rather than the conferral of power itself. The better view may be that whether s 183 is a section that regulates or governs the exercise of power, such that it would be required to be "picked up" by s 79 of the *Judiciary Act*, will depend upon the nature of the court orders that it empowers. It is unnecessary to decide this matter because, like a common fund order made under s 33ZF(1) of the Federal Court Act, a common fund order under s 183 of the Civil Procedure Act does not involve an acquisition of property.

230 A court order is unlikely to be characterised as an acquisition of property where a court makes an order for "compensation for a wrong done or damages for an injury inflicted, or as a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity"[295]. The expression "adjustment of the competing rights, claims or obligations" is a loose description that encapsulates a wide range of orders that are made for principled reasons independently of any purpose of acquiring property. One example is an order that requires a defendant to make restitution of a payment made to them by mistake. That order is plainly not an acquisition of property. Another example is a common fund order that provides for the reasonable remuneration of a service provider from a common fund, ensuring that remuneration is made for a non-gratuitous service and that the cost of the remuneration is spread across all group members whose common fund was obtained as a result of the service.

Conclusion

231 At times during these appeals, there was a heavy focus in submissions upon arguments of policy. For instance, on the one hand it was submitted that in open class actions a common fund order avoided inefficient and costly "book building" which would ultimately enrich only the lawyers engaged in that process and unnecessarily reduce the fund available to compensate deserving plaintiffs. On the other hand, it was submitted that it would be more "sensible and logical" for potential group members to be identified individually at an early stage and to be personally informed at that stage. These arguments, at heart, concern the extent to which, and manner in which, non-parties should intervene in another's

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294 *Masson v Parsons* (2019) 93 ALJR 848 at 858 [30], see also at 860 [39]; 368 ALR 583 at 593, 596.

295 *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 510. See also *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 161.

litigation. The answers depend for their practical application on "large questions which vary with changing attitudes to litigation"[296]. There may be doubt whether courts are the best forum for resolution of these questions of policy.

232 For the reasons given above, the answer to the central issue in these appeals can be resolved by legal principle. It is open for a court acting under s 33ZF(1) of the Federal Court Act or s 183 of the Civil Procedure Act to make a common fund order that will ensure proportionate distribution among all group members of a reasonable remuneration to a litigation funder. The court has power to make the order if it thinks that such an order is "appropriate or necessary to ensure that justice is done in the proceeding", including on an interlocutory basis. That power is supported by reference to long-standing, established approaches to legal principle.

233 The appeals should be dismissed with costs.

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296 *XYZ v Travelers Insurance Co Ltd* [2019] 1 WLR 6075 at 6106 [113].