HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S146/2024

BETWEEN: **JOHN BRUCE KAIN**
Appellant

and

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

DAVID FURNISS
Second Respondent & Ors named in the Schedule

No S143/2024

BETWEEN: **ROBERT WARNER SHAND**
Appellant

and

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

DAVID FURNISS
Second Respondent & Ors named in the Schedule

No S144/2024

BETWEEN: **ERNST & YOUNG (A FIRM) ABN 75 288 172 749**
Appellant

and

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

DAVID FURNISS
Second Respondent & Ors named in the Schedule

AMENDED SUBMISSIONS OF THE FIRST AND SECOND RESPONDENTS

PART I: CERTIFICATION

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

PART II: ISSUES

2. These appeals concern the power of the Federal Court of Australia to make orders approving the distribution of a funding commission, borne pro rata by group members from a common fund of the proceeds recovered from the litigation,[1] either to a litigation funder (**CFO**) or to a solicitor (**SCFO**). The Appellants variously contend that such orders can never be made, or alternatively can only ever be made at the end of proceedings and in favour of litigation funders (but never solicitors). The Respondents submit that this Court should hold that CFOs and SCFOs are within power.

PART III: SECTION 78B NOTICES

3. Notice is not considered to be required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: FACTS

4. The facts recited by Kain (**KS**) at [5]–[7] and [9]–[13] are not in dispute.

PART V: ARGUMENT

Part V.1: Introductory Matters

(A) Key Principles of Statutory Construction

5. ***Shin Kobe Maru.*** These appeals concern the proper construction of statutory provisions granting powers to a superior court of record. It is well-settled that such provisions are to be construed as liberally as their terms and context permit.[2] Kain (but not Shand or EY) at least acknowledges this principle (KS [14]), whilst doing nothing to apply it. The principle is informed by the special quality of a court as a repository of statutory power; namely that a court must exercise any power conferred on it judicially and in accordance with legal principle.[3] This special quality tends in favour of the most liberal construction of statutory provisions conferring powers on courts, because it "*denies the validity of considerations*

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1 See *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [178] (Edelmam J); ***Davaria*** *Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501, [19], [22]–[30] (Lee J).

2 *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, 313 (Brennan CJ, Gaudron and McHugh JJ). See also *Owners of Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404, 421 (the Court); *Deputy Commissioner of Taxation v Huang* (2021) 273 CLR 429, [24] (Gageler, Keane, Gordon and Gleeson JJ).

3 See, eg, *Oshlack v Richmond River Council* (1998) 193 CLR 72, [3] (Brennan CJ), [22], [34] (Gaudron and Gummow JJ), [65] (McHugh J), [134] (Kirby J). See also *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, [148] (Gordon J), [185], [206], [222] (Edelman J).

which might limit a grant of power to some different body including, for example, that the power might be exercised … to work oppression or abuse".[4] Attempts to confine the jurisdiction of courts by reference to arguments *in terrorem* must inevitably fail because a court exercising statutory power*:* "*will and should develop principles governing the exercise of the discretion which will ensure that the jurisdiction is not exercised in such a way as to give rise to abuse*".[5] Sophisticated principles have already been developed, the application of which will ensure that CFOs and SCFOs can never be ordered (without appealable error) unless consistent with the text, context and purpose of Pt IVA of the *Federal Court of Australia Act* : see **[24]** below.

6. ***The irrelevance of State legislation & regulations.*** A related principle is that, where jurisdiction is conferred in general terms upon federal courts, powers are generally presumed to have been intended to be "*exercised in the context of, and within the confines imposed by, the ordinary criminal law of the relevant State or Territory*".[6] However, this principle does not, and cannot by reason of s 109 of the *Constitution*, extend beyond the "*ordinary criminal law*". It does not extend to prohibitions (like the *Legal Profession Uniform Law* (NSW) (**LPUL**)) "*imposed as an integral part of a statutory scheme*", nor to situations (like the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) (**ASCR**)) involving a "*general regulatory scheme which operates within the very area which the jurisdiction validly conferred by the Commonwealth law was intended to control*".[7] This is because "*orders made in the exercise of the Commonwealth jurisdiction will prevail over the provisions of the State or Territory law*".[8] To the extent that the State law (or regulation) would "*alter, impair or detract from*"[9] the conferral of federal jurisdiction by precluding (directly or indirectly) an actual exercise of that jurisdiction, the State law (or regulation) is simply inoperative. For this reason, the Appellants' various attempts to shoe-horn State legislation and regulations, and the public policy underpinning them, into what should be an orthodox exercise in statutory

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4 ***Knight** v FP Special Assets Ltd* (1992) 174 CLR 178, 205 (Gaudron J), 185 (Mason CJ and Deane J).
5 *Knight* (1992) 174 CLR 178, 185 (Mason CJ and Deane J).
6 *P v P* (1994) 181 CLR 583, 602 (Mason CJ, Deane, Toohey and Gaudron JJ) (emphasis added).
7 *P v P* (1994) 181 CLR 583, 602 (Mason CJ, Deane, Toohey and Gaudron JJ) (emphasis added).
8 *P v P* (1994) 181 CLR 583, 603 (Mason CJ, Deane, Toohey and Gaudron JJ). That form of inconsistency has subsequently been endorsed: see, eg, *Burns v Corbett* (2018) 265 CLR 304, [86] (Gageler J); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, [211] (Gummow J), [323] (Kirby J), [486] (Callinan J).
9 *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, [32] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), [65], [70]–[73] (Gageler J), [105] (Edelman J).

construction of federal legislation, is fundamentally erroneous: eg ES [26], [46]; SS [25]; KS [20].

7. ***Section 79 of the Judiciary Act.*** EY submits the relevant statutory powers must be read "harmoniously" with State laws, which it says are "picked up" via s 79 of the *Judiciary Act 1903* (Cth): ES [24]-[25]. Suppressed within this submission is the false premise that State laws "picked up" by s 79 can be used to interpret Commonwealth laws. The premise should be rejected. ***First***, it is inconsistent with the adoption[10] of the s 109 inconsistency test for the words "*otherwise provide[d]*" in s 79. The "*starting point*"[11] for determining s 109 inconsistency is to construe the laws in question: first, the Commonwealth law, before turning to the State or Territory law. So too, the "starting point" for determining whether a federal law "*otherwise provide[s]*" must be first to construe the Commonwealth law, without reference to the surrogate federal law. ***Secondly***, it would undermine the gap-filling function of s 79[12] if powers which had been expressly conferred on federal courts could be read down by reference to those which had not. Amongst other unintended outcomes, this would mean that the construction of federal legislation (rather than the exercise of federal jurisdiction) could differ depending on where the Court was sitting (ie the Federal Court sitting in Melbourne might have a broader power to order a CFO than the Federal Court sitting in Sydney). National laws should be given uniform construction,[13] especially in circumstances where the powers of the Federal Court fall be exercised in relation to parties and group members throughout (or even outside[14]) Australia.

8. ***Construction by reference to what Parliament did <u>not</u> do.*** Kain and EY place reliance on recommendations made by the Australian Law Reform Commission (**ALRC**) in 1988 and 2018 which were <u>not</u> adopted by Parliament: eg, KS [40]–[42]; ES [41]–[45]. This is of no assistance to the Court, because the ALRC assumed that the Federal Court lacked power, which is the point in issue in these appeals.[15] Relatedly, the idea that Parliament *could*

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10 *Masson v Parsons* (2019) 266 CLR 554, [43] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

11 *Bell Group NV (in liq) v Western Australia* (2016) 260 CLR 500, [52] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

12 *Rizeq v Western Australia* (2017) 262 CLR 1, [20] (Bell, Gageler, Keane, Nettle and Gordon JJ).

13 By analogy with the construction of national uniform laws: see, eg, *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).

14 ***BHP Group*** *Ltd v Impiombato* (2022) 276 CLR 611, [64]–[71] (Gordon, Edelman and Steward JJ).

15 Section 15AB(1) of the *Acts Interpretation Act 1901* (Cth). Apart from s 15AB of the *Acts Interpretation Act 1901* (Cth), it is not legitimate to rely upon extrinsic material to determine the existing state of the law: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ, Gaudron J separately agreeing); *AQO v Minister for Finance and Services* (2016) 93 NSWLR 46, [145]–[151] (Basten JA).

have specified a CFO or SCFO as an available power does not assist in circumstances where Part IVA is "*replete with broadly expressed powers*".[16]

(B) The Experience of FEOs, CFOs and GCOs

9. The Appellants repeatedly assert that CFOs and SCFOs do not enhance access to justice or otherwise benefit group members: KS [25]; ES [5]. Shand goes so far as to submit that they "*harm*" group members: eg SS [26]. These submissions are unsupported by evidence; indeed, the consistent experience of courts, law reform bodies and empirical studies speaks to the contrary.

10. ***FEOs.*** The experience of case managers has been that FEOs, which have been recognised in Australia since 2009,[17] are not necessarily beneficial for group members. FEOs involve no necessary assessment by the court of the reasonableness of the costs incurred by funded group members.[18] In some cases, the arithmetic is such that an FEO would be more expensive for group members than a CFO.[19] It would be strange if the proper construction of Pt IVA produced the result that the Court had power to make an FEO, but lacked power to make an alternative order which produced a better financial outcome for group members. A system which encourages book-building and closed class actions has "*a number of undesirable features*", including encouraging duplicative class actions for different group members, and the more likely exclusion of "*poorly informed or less literate or educated members of a possible open class*".[20] FEOs have also been found to incentivise expensive and inefficient book building, because of the funder's incentive to maximise its contractual entitlements against the largest pool of group members:[21] ie "*the economics of a class action [are] dictated by the size of sign-up*".[22] In cases involving very large groups, the need to book-build can create long and unjustifiable delays in order that tens of thousands of group members are separately signed-up to individual funding agreements.[23] It would be strange if the adopted construction of Pt IVA had the effect of promoting such an

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16 *Brewster* (2019) 269 CLR 574, [207] (Edelman J), cf SS [5(d)], [46].
17 See *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2009] FCA 19.
18 *Brewster* (2019) 269 CLR 574, [185] (Edelman J).
19 See, eg, *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527, [167] (Murphy J); *Hodges v Sandhurst Trustees Limited* [2018] FCA 1346, [7] (2nd last bullet point); see also Murphy J, "Navigating through the principles and practicalities of Group Costs Orders, Common Fund Orders and No Win No Fee" (Keynote speech, Commercial Law Association Seminar, 18 March 2022).
20 *Elliott-Carde* (2023) 301 FCR 1, [411].
21 *Elliott-Carde* (2023) 301 FCR 1, [146] (Beach J).
22 ***Perera*** *v GetSwift Ltd* (2013) 263 FCR 1, [25] (Lee J).
23 *Stanwell Corporation Ltd v LCM Funding Pty Ltd* (2021) 157 ACSR 401, [6] (Beach J).

inefficient practice. Book building is "*conducive to closed classes*", which are themselves antithetical to the design of Pt IVA.[24]

11. ***CFOs.*** By contrast, the experience of case managers has been that CFOs are a "*simpler and more transparent mechanism than [an FEO] for fairly apportioning funding charges across the class*" and as "*easer for class members to understand*".[25] CFOs enhance access to justice by encouraging open class representative proceedings. Where litigation funders "*are permitted to charge a commercially realistic but reasonable percentage funding commission to the whole class, it is less likely that funders will seek to bring class actions limited to those persons who have signed a funding agreement*".[26] In turn, open class avoid multiplicity and attendant costs and wastage of the resources of the parties and the courts.

12. ***Commencement CFOs.*** A commencement CFO complements settlement and judgment CFOs by reducing uncertainty.[27] They can provide greater information to, and thereby empower, group members, because "*[i]f a [CFO] 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*".[28] They also avoid the possibility of "*hindsight bias that arises by assessing risk when success is known rather than at the time when the risk is incurred*".[29]

13. ***GCOs and SCFOs.*** The central reasons why it can be "just" to approve a settlement involving, or order the payment of, a contingency fee to a solicitor is that an SCFO / GCO[30] can expand access to justice, and can operate to decrease costs and increase returns for group members. The Group Costs Order (**GCO**) regime established under s 33ZDA of the *Supreme Court Act 1986* (Vic) (**VSC Act**) has been found to assist in the just resolution of

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24 *Elliott-Carde* (2023) 301 FCR 1, [150] (Beach J). The notion that book building mitigates the risk of windfalls "*at the expense of the funder*" overlooks this: SS [24].

25 See, eg, *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3)* [2018] FCA 1842, [222] (Murphy J).

26 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, [205] (Murphy, Gleeson and Beach JJ).

27 *Brewster* (2019) 269 CLR 574, [113]. See also *Simons v ANZ Bank New Zealand Limited* [2024] NZCA 330, [135] (Collins J).

28 *Brewster* (2019) 269 CLR 574, [220].

29 *Brewster* (2019) 269 CLR 574, [221].

30 A formal difference between a GCO and an SCFO is that, under s 33ZDA, the costs payable to the law practice are not broken into constituent parts comprising "legal costs" and any amount beyond that, whereas an SCFO may be expressed in those terms. However, as a matter of substance, that difference is immaterial: at the level of discretion, the Court is able to ensure in assessing the reasonableness or justness of an order that there is no "double-dipping" by the solicitors standing behind the group members, and that any reward is assessed taking into account the amount otherwise payable by way of legal costs.

disputes as inexpensively as possible from the perspective of group members: J [113]. GCOs have the potential to make class actions significantly less expensive for group members by contrast with other funding mechanisms: J [113]–[115], [120]. In *Allen v G8 Education Ltd*, the first case in which a GCO was made, Nichols J recognised that a GCO, depending on the available evidence of the commercial realities of a given case, could create a "*real prospect*" of a better outcome for group members than, in particular, third party funding.[31] GCOs in turn may have a "gravitational force" in bringing down funding commissions. Thus, Professor Morabito has also reported that, since the introduction of GCOs, group members facing funding commissions in settlement approvals have been significantly financially better off: in the period 2020–2023, there was a median funding commission of 22.25%, compared to 24.9% in the period directly prior to the introduction of s 33ZDA.[32] The financial advantage of the GCO is that it is the "*only deduction from the gross settlement sum*", whereas in funded class actions the funding commission is only one of the deductions albeit usually the largest.[33]

Part V.2: Construction of Pt IVA

14. ***Framing the issue.*** The real issue[34] in these appeals is whether the broad and generally worded provisions in Pt IVA of the FCA Act are constrained by the various matters identified by the Appellants. This Court has the benefit of careful consideration by the Full Court of the Federal Court,[35] the Victorian Court of Appeal,[36] and single judges of the Supreme Court of New South Wales under cognate State provisions,[37] all concluding that Settlement CFOs are within power. The Respondents submit that this conclusion is correct, having regard to text, context and purpose of the relevant provisions: J [38], [56]. The reasoning supporting this conclusion also confirms power to make an SCFO where to do so would enhance access to justice, and outcomes, for group members.

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31 [2022] VSC 32, [93].

32 Morabito, *Empirical perspectives on twenty-one years of funded class actions in Australia* (Apr 2023) (**Morabito 2023**), 29.

33 Morabito, *Group Costs Orders and Funding Commissions* (Jan 2024), 23.

34 There is no question of "*contort[ing] the words of the Act*" by subordinating them to *a priori* policy considerations favouring access to justice: cf SS [5(d)]. In truth, it is the Appellants who resort to *a priori* policy considerations.

35 *Elliott-Carde* (2023) 301 FCR 1, [170] (Beach J), [407]–[412] (Lee J), [504] (Colvin J); *Galactic Seven Eleven Litigation Holdings LLC v Davaria* (2024) 302 FCR 493, [32] (Murphy J).

36 *Botsman v Bolitho* (2018) 57 VR 68, [379]–[381] (Tate, Whelan and Niall JJA).

37 *Haselhurst v Toyota Motor Corporation Australia Ltd* [2022] NSWSC 1076, [51] (Rees J); *Quirk v Suncorp Portfolio Services Ltd (No 2)* [2022] NSWSC 1457, [44] (Stevenson J); *Ellis v Commonwealth* [2023] NSWSC 550, [51] (Beech-Jones CJ at CL); *Ashita Tomi Pty Ltd v RCR Tomlinson Ltd (No 2)* [2024] NSWSC 717, [52] (Nixon J).

(A) Text of s 33V and s 33Z

15. ***Section 33V.*** Section 33V(1) provides that a representative proceeding "*may not be settled or discontinued without the approval of the Court*". In terms, the provision is expressed as a constraint upon the ability of parties to settle or discontinue their dispute. The constraint is that the court must approve the settlement. By necessary implication, therefore, s 33V(1) confers the power to approve.[38] Because there is no textual constraint upon the power to approve, it is "*easy to postulate a variety of circumstances where an exercise of the jurisdiction*" would be "*extravagant and unjust*".[39] The Appellants succumb to this temptation: eg SS [22]. But the mere existence of such possibilities does not justify an implied limitation upon the power of courts, because courts must exercise their powers judicially: see **[5]** above. The correct approach is that "*such broad terms of empowerment are constrained only by limitations that are strictly required by the language and purpose of the section.*"[40] The purpose of s 33V(1) is clear: it is to ensure that settlements or discontinuances are undertaken "*in the interests of the group members as a whole, and not just in the interests of the applicant and the respondent.*"[41] Thus, a settlement would not be approved "*if its terms do not amount to a settlement which is fair, reasonable and in the interests of all group members*":[42] cf KS [15].

16. Section 33V(2) provides that, if the approval is given, the Court "*may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into Court*". The terms of s 33V(2) condition the exercise of the power in four ways: ***first***, there must be a settlement; ***secondly***, the settlement must be one by which a fund of money has been created; ***thirdly***, the proposed order must effect a distribution to a person or persons of all or part of the fund; and ***fourthly***, the proposed order must be one that is considered by the Court, on the material before it, to be "*just*".[43] As Beach J observed in *Elliott-Carde* at [97], s 33V(2) "*employs language importing a wide judicial discretion*": the criterion that orders must be "*just*" is particularly broad, permitting "*latitude as to the orders to be made*",[44] and the phrase "*with respect to*" is itself a phrase of "*wide import*".

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38 *Elliott-Carde* (2023) 301 FCR 1, [320] (Beach J), [386] (Lee J); *Botsman v Bolitho* (2018) 57 VR 68, [200] (Tate, Whelan and Niall JJA).

39 *Knight* (1992) 174 CLR 178, 185 (Mason CJ and Deane J).

40 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157, [103] (Keane, Nettle and Gordon JJ)

41 *Elliott-Carde* (2023) 301 FCR 1, [388] (Lee J).

42 *Davaria* (2020) 281 FCR 501, [23] (Lee J).

43 *Elliott-Carde* (2023) 301 FCR 1, [385] (Lee J).

44 *Elliott-Carde* (2023) 301 FCR 1, [394] (Lee J); *Augusta Pool 1 UK Ltd v Williamson* (2023) 111 NSWLR 378, [1]–[9] (Bell CJ), [77]–[78] (Ward P), [168] (Adamson JA).

Section 33V(2) is a "*settlement specific power*", with no possible suggestion that it is a "*limited gap-filling power*",[45] and invokes the Court's protective role in exercising its approval jurisdiction.[46] By contrast with s 33ZF (being the power considered in *Brewster*), s 33V(2) is not conditioned by a requirement that justice be done "*in the proceeding*". As such, the assessment of what is "*just*" is "*broader than what [is] at issue in the proceeding and can relevantly extend to orders made in favour of non-parties*".[47]

17. The language and purpose of s 33V(1)–(2) supply no basis to confine the scope of the powers so that settlements involving the payment eg of a contingency fee to a litigation funder or solicitor are excluded. There is nothing in the provisions to distinguish payment of fees to funders or solicitors from the clear power to make an order for payment of legal fees directly from the settlement proceeds to a solicitor.[48] Instead, the discretion, including to make a CFO, is hedged about by the general duty to act judicially; the conditions outlined above; and by the scope and purposes of Pt IVA and the FCA Act.[49]

18. ***The text of s 33Z.*** Section 33Z(1)(g) provides that, "*in determining a matter in a representative proceeding*", the Court may "*make such other as the Court thinks just*". The text of the provision imports only two requirements: that the orders be thought "*just*", and that they be made "*in determining a matter in a representative proceeding*": J [49]. Not only does that provision confer a broad discretion to order what is "*just*"; it is also concerned with what the Court "*thinks*" just, which 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*".[50] The terms of s 33Z(1)(g) "*ought not be given any incongruently narrower construction*" than that which is properly given to s 33V(2): J [50]. Section 33Z(1)(g) has been recognised by the Full Court as having the "*most likely practical relevance*" in making a CFO in some of the most common outcomes to a class action.[51]

19. The immediate context of s 33Z(1)(g) includes s 33Z(2), which provides that in making an order for an award of damages, "*the Court must make provision for the payment or*

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45 *Elliott-Carde* (2023) 301 FCR 1, [101] (Beach J).
46 *Elliott-Carde* (2023) 301 FCR 1, [462], [467] (Colvin J).
47 *Elliott-Carde* (2023) 301 FCR 1, [409] (Lee J); see also [470] (Colvin J) as to the breadth of the Court's approval jurisdiction.
48 *Elliott-Carde* (2023) 301 FCR 1, [99]–[100] (Beach J).
49 *Elliott-Carde* (2023) 301 FCR 1, [394] (Lee J).
50 *Brewster* (2019) 269 CLR 574, [100] (Gageler J).
51 See *Davaria* (2020) 281 FCR 501, [27]–[28] (Lee J), which the Full Court repeated at J [47]–[48].

distribution of the money to the group members entitled." Shand is wrong to submit that s 33Z(2) operates as a constraint upon s 33Z(1)(g), either based on the *Anthony Hordern* principle or a species of inconsistency: cf SS [16], [30]. This is because s 33Z(2) does not exhaust the Court's powers on the topic of the distribution of judgment monies: it "*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).*"[52] As Kirby J explained, Parliament's clear intention by s 33Z(1) was to "*arm the Federal Court with a wide and flexible armoury of powers, capable of being adapted to the particular needs and novel circumstances of representative proceedings and any matter in such proceedings*".[53]

20. ***"Just" as a criterion.*** The discretion in s 33V(2) to approve terms relating to settlement on the basis of what is "*just*", and the discretion in s 33Z(1)(g) to make an order on judgment which the Court "*thinks just*", "*facilitates the supervisory role of the Court*" enshrined in Pt IVA, including the "*onerous protective role of the Court in relation to the interests of non-party group members*".[54] As demonstrated above, Parliament saw fit to enable that purpose by the conferral of powers of the broadest possible width, and of an ambulatory nature, empowering the Court to "*make a choice between lawful, but different courses of action*".[55] In circumstances where Pt IVA enables proceedings to be brought without the consent, or even knowledge, of some group members, the concept of "*justice*" in these provisions "*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*".[56]

(B) Object and Context of Pt IVA

21. ***Object of Pt IVA.*** Sections 33V and 33Z(1)(g) fall to be construed in light of the clear purpose animating Pt IVA: facilitating access to justice. Part IVA was enacted "*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*

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52 *Brewster* (2019) 269 CLR 574, [117] (Gageler J); see also [209] (Edelman J).
53 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, [267] (Kirby J) (emphasis added).
54 *Elliott-Carde* (2023) 301 FCR 1, [394] (Lee J); see also [462], [470] (Colvin J).
55 *Davaria* (2020) 280 FCR 1, [25] (Lee J).
56 *Brewster* (2019) 269 CLR 574, [108]–[109] (Gageler J).

resources"".[57] The ALRC, in a 1988 report which prompted the development of Pt IVA, considered that the "*principal basis*" for the introduction of a class action regime was "*to enhance access to legal remedies*", both as an end in itself,[58] and to serve an instrumental good: to "*render the substantive law more enforceable and thus encourage a greater degree of compliance with laws the purpose of which is to prevent or discourage activities which cause loss or injury to others*".[59] Pt IVA was intended to "*create power in numbers that would be non-existent if claims were pursued individually*".[60] It would be strange if CFOs or SCFOs were beyond power even where experience has shown that they produce better access to justice outcomes for group members: see **[10]-[13]** above.

22. ***Litigation funding as a tool for realising the objects of Pt IVA.*** In enabling access to justice through the bringing together of multiple causes of action which would, if brought alone, be uneconomic to litigate, Pt IVA necessarily assumes that someone will bear the risk of such an action. For that reason, litigation funding has been recognised as an important tool for realising the objects of Pt IVA.[61] Time and again, litigation funding has been celebrated by law reform bodies,[62] and appellate and apex courts in the United Kingdom,[63] Canada[64] and New Zealand,[65] as a means of facilitating access to justice. Since its acceptance by this Court in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*,[66] litigation funding has become an "*established part of the way in which applicants may cover the costs and risks of conducting court proceedings*",[67] which benefits not only the impecunious, but all rational litigants.[68] For example, funded proceedings constituted 67%

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57 *Brewster* (2019) 269 CLR 574, [97] (Gageler J), quoting Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 Nov 1991, 3174.

58 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988) (**1988 Report**), [2], [13], [62]–[63], [67], [69], [238].

59 1988 Report, [67]; see also [357].

60 Murphy and Cameron, "Access to justice and the evolution of class action litigation in Australia" (2006) 30 *Melbourne University Law Review* 399, 403.

61 *Elliott-Carde* (2023) 301 FCR 1, [103] (Beach J).

62 See, eg, 1988 Report, [315]–[319]; NSW Law Reform Commission, *Barratry, Maintenance and Champerty* (Discussion Paper No 36, 1994) at [2.55]; Review of Civil Litigation Costs (UK), *Preliminary Report* (2009), Ch 15, [1.1]; Law Council of Australia, *Regulation of third party litigation funding in Australia* (Position Paper, 2011), [43].

63 See, eg, *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655; [2005] 1 WLR 3055, [49]–[53]; *R (**Paccar** Inc) v Competition Appeal Tribunal* [2023] 1 WLR 2594, [11] (Lord Sales), [105] (Lady Rose).

64 See, eg, *9354-9186 Québec inc v Callidus Capital Corp* [2020] 1 SCR 521, [96]–[97] (Wagner J and Moldaver J).

65 See, eg, *Saunders v Houghton* [2010] 3 NZLR 331, [28], [77] (Baragwanath J, for the Court); *Simons v ANZ Bank New Zealand Limited* [2024] NZCA 330, [133] (Collins J, for the Court) (there expressly approving *Brewster* (2019) 269 CLR 574, [110] (Gageler J)).

66 (2006) 229 CLR 386, [61]–[65] (Gummow, Hayne and Crennan JJ).

67 *Elliott-Carde* (2023) 301 FCR 1, [461] (Colvin J).

68 See, eg, *Bogan v Smedley* [2022] VSC 201, [93] (John Dixon J).

of all federal representative proceedings commenced in 2022, compared to 28.5% of those commenced in 2006.[69]

23. ***Context of Pt IVA.*** As Edelman J observed in *Brewster* (at [207]), Pt IVA is "*replete with broadly expressed powers*". Wilcox J, who chaired the Division of the ALRC which produced the 1988 Report, explained that in developing Pt IVA, "*it was impossible to foresee all the issues that might arise in the operation of the Part*". It was, therefore, "*obviously desirable to empower the Court to make 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'*".[70] So much was necessary for the Part to create an "*efficient and effective procedure to deal with multiple claims*",[71] and to empower the Court to "*develop new procedures in form and contour as it responded to the practical and economic circumstances in which Pt IVA was to work*", including "*the practical working out, over time, of available and appropriate procedures for individual Pt IVA cases*".[72] The Federal Court has embraced that challenge, by testing, evaluating and modifying a range of innovative procedures within the structure of Pt IVA.[73] SCFOs can be seen as the next frontier in that process.

(C) Criteria for making CFOs and SCFOs

24. ***CFOs.*** A CFO or SCFO could only be made where the Court considers that to be "*just*". The form of oversight which a court exercises in making a CFO is analogous to the role that courts have historically taken in setting remuneration rates for trustees and liquidators, rewards for salvors, and the reasonable remuneration of sheriffs.[74] This necessarily requires consideration of the amount which should be ordered, and involves a commonsense evaluative assessment by the Court.[75] It is now well-established[76] that the question of whether to make a CFO, and in what amount, is to be guided by a non-

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69 Morabito 2023, 13 (Table 3).

70 *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1, 4 (Wilcox J).

71 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 Nov 1991, 3174–3175.

72 *Lenthall FC* (2019) 265 FCR 21, [85] (Allsop CJ, Middleton and Robertson JJ).

73 *Brewster* (2019) 269 CLR 574, [102] (Gageler J), citing with approval *Perera* (2013) 263 FCR 1, [10]–[29] (Lee J); see also J [104]. Of course, State courts have also played their role, as the various authorities cited in these submissions demonstrate.

74 See, eg, *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625, [23]–[24] (Lee J) and the authorities there cited; ***Fox*** *v Westpac Banking Corporation* (2021) 69 VR 487, [150] (Nichols J).

75 *Galactic* at [76] and [77] (Murphy J); [136] (Lee J); and see [156] and [159] (Colvin J).

76 See, eg, *Smith v Australian Executor Trustees Ltd* [2018] NSWSC 1584, [24]–[25] (Ball J); *Court v Spotless Group Holdings Ltd* [2020] FCA 1730, [82] (Murphy J); *Haselhurst v Toyota Motor Corp Australia Ltd (t/as Toyota Australia)* [2022] NSWSC 1076, [51]–[52] (Rees J).

exhaustive list of factors,[77] which include: **(a)** whether class members were properly informed when agreeing to the funding commission rate; **(b)** a market-based comparison of the funding rate, compared to what has been awarded in other cases or is available or common in the market; **(c)** the amount of any settlement or judgment, specifically to ensure that the aggregate commission received is proportionate to the amount sought and recovered in the proceeding and the risks assumed by the funder;[78] and **(d)** any objections by group members to litigation funding charges.

25. ***GCOs.*** As the Full Court recognised below (J [120]), it is also likely that many of the principles applicable to s 33ZDA of the VSC Act will provide further guidance for the exercise of power under ss 33V(2) and 33Z(1)(g) to make an SCFO. Under the GCO line of authority, the Court will give regard to "*fairness and equity*", and an order "*must not unjustly affect the interests of any party to the proceeding*".[79] The analysis may be "*outcome-based*",[80] with the "*primary consideration informing [the] evaluation*" being the effect on group members of the proposed order.[81] *"Price, or the costs that group members are likely to pay*", is one of numerous considerations, which also include the risk assumed by the law practice.[82] These principles, as applied to an SCFO, will ensure that an SCFO will be consistent with the text, context and purpose of Pt IVA.

26. ***SCFOs.*** In addition to the foregoing matters, a court would consider the following matters in determining whether or not it is appropriate to make an SCFO and in what amount: **(a)** whether the solicitor would be sufficiently rewarded for any risk assumed by funding and conducting the proceeding by an award of costs calculated on ordinary principles, or whether some greater remuneration is merited in the circumstances;[83] **(b)** the adequacy of the solicitor's disclosure of their intention to seek an SCFO to the plaintiff and group members (see **[68]** below); **(c)** the solicitor's practices and procedures for managing any

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77 *Money Max* (2016) 245 FCR 191, [80] (Murphy, Gleeson and Beach JJ).

78 *Money Max* (2016) 245 FCR 191, [80(g)] (Murphy, Gleeson and Beach JJ).

79 See, eg, ***Raeken*** *Pty Ltd v James Hardie Industries PLC* [2024] VSC 173, [14] (M Osborne J); *Fox* (2021) 69 VR 487, [36] (Nichols J).

80 See, eg, *Raeken* [2024] VSC 173, [18] (M Osborne J); *Allen v G8 Education Ltd* [2022] VSC 32, [26] (Nichols J). See also *Bogan v Smedley* [2022] VSC 201, [26]–[30] (John Dixon J). See also ALRC, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, 2018), [5.16].

81 *Fox* (2021) 69 VR 487, [34] (Nichols J), citing ***Mobil Oil*** *Australia Pty Ltd v Victoria* (2012) 211 CLR 1, [21] (Gleeson CJ). See also *Elliott-Carde* (2023) 301 FCR 1, [477] (Colvin J).

82 See, eg, *Bogan v Smedley* [2022] VSC 201, [12(f)], [13(c)(iv)] (John Dixon J).

83 In the United States, courts will generally make orders remunerating class counsel by either: **(a)** determining an appropriate percentage of the amount recovered; **(b)** using the "lodestar method" of the hours worked multiplied by the average market rate; or **(c)** through a combination of the two: see *McLaughlin on Class Actions* (Westlaw, 20th ed, October 2023) § 6.24; *Attorney's Fees* (Westlaw, 3rd ed, May 2024) § 7.9.

potential conflicts, including acting on and in accordance with advice provided by the independent bar (see **[78]** below); **(d)** the extent of the solicitor's disclosure of material relating to the conduct of the proceeding to the Court, including any privileged material and any settlement offers (see **[79]–[81]** below); and **(e)** any objections made by group members to the making of the SCFO, or to the amount to be awarded to the solicitor under the SCFO. Without seeking to constrain the exercise of the discretion in any particular case, it may be that a court is unlikely to order an SCFO unless satisfied that it would result in a better outcome for group members than any alternative.

(D) "New" Legal Rights and Entitlements Can Be "Just"

27. Before grappling with the spectrum of other arguments, it is convenient to begin with Kain's submission that a CFO could never be "*just*" because Pt IVA was not intended to confer "*new legal rights*": KS [19]; see also ES [5]. A related idea is that a CFO, in creating a "*complex relationship between group members and the funder*" (KS [29]), could never be "*just*" on the basis that "*unfunded group members have no contractual or other relationship with the funder*": KS [22], [25]. Shand's variation on this theme is that the context and text of s 33V are focused "*on what is occurring inter parties*", and cannot be extended to "*the interests of the funder*": SS [22]. These arguments should be rejected.

28. ***First***, the relevant powers naturally contemplate and authorise the creation of new rights and entitlements in a fund in favour of third parties. Were it otherwise, even FEOs would be beyond power,[84] despite the majority's views in *Brewster*,[85] because FEOs create new rights in the common fund in favour of solicitors or litigation funders at the expense of unfunded group members. Further, if s 33V precluded approval of settlements and distribution of settlements in favour of third parties, this would preclude commonplace[86] matters such as: payments in favour of an administrator of a settlement scheme, a costs referee, a newspaper publishing the settlement notice, or an after-the-event insurer which had supplied security for costs to the lead plaintiff. In one sense, every settlement agreement will create "new rights" and these new rights will often benefit third parties.

29. For the same reason, there is no relevant room for the principle of legality: cf SS [15], [25]. The principle of legality "*exists to protect from inadvertent and collateral alteration*" of

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84 FEOs reduce unfunded group members awards by an amount equivalent to that paid by funded group members to the litigation funder: see SS [12].

85 See, eg, (2019) 269 CLR 574, [89] (Kiefel CJ, Bell and Keane JJ): "*A FEO is clearly available where settlement is reached*" (emphasis added).

86 See *Elliott-Carde* (2023) 301 FCR 1, [409] (Lee J).

rights, and has no force where the interference with rights is the very purpose of the provision.[87] In Pt IVA, Parliament has already effected a significant alteration to the rights of group members by enabling their choses in action to be litigated without their consent and, in some circumstances, without even their knowledge.[88] Further, a CFO or SCFO would only be ordered if it were appropriate to ensure the ends of justice in a way that equitably and fairly distributed the burden of a proper and legitimate funding cost to vindicate and realise common rights. In such circumstances, a CFO or SCFO does not detract from, but instead "*supports and fructifies, rights of persons that would otherwise be uneconomic to vindicate*".[89] As Edelman J explained, a CFO "*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*".[90] In that sense, the only "infringement" of the relevant property rights is seen to be one which is instrumental to the vindication and realisation of the monetary value of those rights.

30. ***Second***, the idea that the relevant statutory powers do not authorise creation of "*new legal rights*" or the creation of "*a complex relationship*" where there would otherwise have "*been no such relationship*" (KS [29]), is distinctly inconsistent with the long-standing equitable jurisdiction to authorise the payment of a litigant's costs out of a common fund realised through their efforts for the benefit of other persons.[91] Since the early 19th century, litigants who incurred costs for the benefit of others have been entitled to have their costs on a solicitor and client basis "*paid pro rata by all the creditors who partook of the benefit of the suit*".[92] The principle originated with creditors who filed a bill for the administration of an estate,[93] but was later extended to diverse contexts including: creditors bringing

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87 See, eg, *Northern Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [81] (Gageler J). See also *Brewster* (2019) 269 CLR 574, [212] (Edelman J).

88 See, eg, *BHP Group* (2022) 276 CLR 611, [8]–[14] (Kiefel CJ and Gageler J). See also *Money Max* (2016) 245 FCR 191, [14] (Murphy, Gleeson and Beach JJ); 1988 Report, [108], [126]–[127], [289], [293].

89 See *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 (***Lenthall FC***), [94] (Allsop CJ, Middleton and Robertson JJ); see *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [212] (Edelman J). The majority of this Court in *Brewster* did not find it necessary to deal with this issue: (2019) 269 CLR 574, [48].

90 *Brewster* (2019) 269 CLR 574, [212] (Edelman J).

91 See G O Morgan and E A Wurtzburg, *A Treatise on the Law of Costs* (Steven & Sons, 2nd ed, 1882) 201–203; S E Williams and F Guthrie-Smith, *Daniell's Chancery Practice* (Steven & Sons, 8th ed, 1914) vol 2, 1081–1083.

92 *Stanton v Hatfield* (1836) 1 Keen 358, 361; 48 ER 344, 345–346 (Lord Langdale MR). See also *Goldsmith v Russell* (1855) 5 D M & G 547, 556–557; 43 ER 982, 986 (Lord Cranworth LC).

93 *Tootal v Spicer* (1831) 4 Sim 510; 58 ER 191; *Hood v Wilson* (1831) 2 Russ & My 688; 39 ER 557; *Brodie v Bolton* (1835) 3 My & K 168; 40 ER 64; *Sutton v Doggett* (1840) 3 Beav 9; 49 ER 4; *Thompson v Cooper* (1845) 2 Coll 87; 63 ER 649.

proceedings against an executor to set aside a fraudulent conveyance out of the estate;[94] legatees who filed a bill for the administration of an estate which was insufficient to pay all legacies;[95] and actions by bond- or debenture-holders where the assets of the company were insufficient to pay all debts.[96] The authorities applying this principle were followed in Australia,[97] and an equivalent principle continues to be applied today in contexts ranging from the administration of estates,[98] to members' derivative actions for the benefit and on behalf of a company.[99] Moreover, there are cases extending a solicitors' lien over the proceeds of a settlement or judgment beyond the interest of their own client, so that it extends over the entire fund.[100] This is justified on the basis that other parties with an interest in the fund "*cannot claim to be entitled to the fruits of the action and at the same time repudiate the right of the solicitor, who caused it to fructify, to receive his costs out of the fruits*".[101] These principles demonstrate that "*new*" rights in a fund, and the superimposition of "*complex relationships*", can sometimes be the very thing that "*justice*" requires. It would be strange if Pt IVA, which was designed to facilitate and regularise group actions, excluded such orders.

(E) Other Arguments

31. Five other supposed constraints upon power are advanced by the Appellants.

32. ***The term "distribution".*** Kain submits that the use of the term "*distribution*" in s 33V(2) points against it conferring power to make a settlement CFO, because "*the word 'distribution' (or a variation of it) is used elsewhere*" in Pt IVA, and "*in each case it is directed towards payment to group members*": KS [30]-[31]. In each of the provisions using the term to which Kain refers (s 33M(b); s 33Z(2); and s 33ZA), the recipient of the distribution is expressly nominated. But the omission of any nominated object for the exercise of the powers in ss 33V(2) and 33Z(1)(g) confirms that those powers are *not* so

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94 *Stanton v Hatfield* (1836) 1 Keen 358, 361; 48 ER 344, 345–346 (Lord Langdale MR). See also *Goldsmith v Russell* (1855) 5 D M & G 547, 556–557; 43 ER 982, 986 (Lord Cranworth LC).

95 *Cross v Kennington* (1848) 11 Beav 89; 50 ER 750; *Thomas v Jones* (1860) 1 Dr & Sm 134; 62 ER 329; *Re Harvey* (1884) 26 Ch D 179.

96 *National Bolivian Navigation Co v Wilson* (1880) 5 App Cas 176; *Re New Zealand Midland Railway Co* [1901] 2 Ch 357.

97 *Permanent Trustee Co v Redman* (1917) 17 SR (NSW) 353, 360–363 (Harvey J)

98 *Chick v Grosfeld (No 4)* [2013] NSWSC 509, [13]–[19] (White J); *Wardle v Wardle (No 2)* [2021] NSWSC 1663, [9] (Slattery J); *Rydzewski v Rydzewski (No 2)* [2024] NSWSC 1074, [16]–[18] (Richmond J).

99 See, eg, *Re Woodbine Project Pty Ltd* [2021] VSC 617, [71]–[76] (Button J).

100 *Greer v Young* (1883) 24 Ch D 545, 552–553 (Brett MR), 555 (Cotton LJ), 556–557 (Bowen LJ); *Re W C Horne & Sons Ltd* [1906] 1 Ch 271, 275–276 (Farwell J).

101 *Ex parte Patience* (1940) 40 SR (NSW) 96, 107–108 (Jordan CJ). See also *Commissioner of Taxation v Government Insurance Office of New South Wales* (1993) 45 FCR 284, 299–300 (Hill J); *Akki Pty Ltd v Martin Hall Pty Ltd* (1994) 35 NSWLR 470, 475–476 (Windeyer J).

constrained. Beach J was correct to hold in *Elliott-Carde* (at [123]) that the ordinary meaning of the term "*distribution*" is silent as to recipient, and that the omission of any specified recipient in s 33V(2) supports the existence of power to make a CFO.

33. For the same reason, Shand's submission that ss 33V is limited to "*what is occurring inter partes*" (SS [22]) must also be rejected: the argument ignores that s 33V(2) (unlike other provisions of Pt IVA) is silent as to the identity of the recipient. Shand's submission would also have the result of constricting freedom of contract. It has been found to be "*commonplace*" for a settlement deed to "*address more than the settlement of the claims against the defendant*", dealing also "*with the distribution of settlement money, including to a litigation funder*".[102] If a settlement cannot be approved in the absence of approval under s 33V, and s 33V constrains the approval power to distributions *inter se,* the result must be to constrain the types of settlements that litigants can reach. As for Shand's notion that "*[a]ny number of other categories of person with relationships to unfunded group members*" might seek some kind of order (SS [33]), it exemplifies the type of *in terrorem* argumentation deprecated by this Court in *Knight*:[103] see **[15]** above.

34. ***Section 33Z(1)(a)–(f) as constraints.*** Kain submits that "*the other sections within s 33Z*" are limited to "*orders affecting*" the parties or group members, and that this context requires s 33Z(1)(g) also to be so-limited: KS [32]. This point is a type of *ejusdem generis* or *noscitur a sociis* argument, in that it seeks to constrain the residuary power in s 33Z(1)(g) by reference to a genus said to be derived from the preceding powers. But a CFO or SCFO does not depart from the genus: it is an "*order affecting*" the parties to litigation, by sharing both the burdens and benefits of the litigation through the establishment of a common fund and thus achieving justice between them: see ss 33Z(1)(f) and 33ZA. The fact that the CFO or SCFO also affects a third party (eg a litigation funder or solicitor) can hardly be an exclusionary criterion, especially since courts are able to make orders affecting third parties in the disposition of litigation (subject to procedural fairness[104]). Further, the application of the maxims can be of little assistance in circumstances where s 33Z(1)(g) was clearly intended by Parliament to deal with a range of circumstances beyond those addressed by paragraphs (a)–(f).

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102 *Botsman v Bolitho* (2018) 57 VR 68, [203] (Tate, Whelan and Niall JJA).
103 (1992) 174 CLR 178, 185 (Mason CJ and Deane J).
104 See, eg, *Ross v Lane Cove Council* (2014) 86 NSWLR 34, [61] (Leeming JA).

35. ***The term "matter".*** Shand submits that "*matter*" in s 33Z(1)(g) should be read in its constitutional sense, such that s 33Z(1)(g) only permits "*orders that are necessary to resolve the dispute between the parties*": cf SS [5(c)], [28]. But this cannot be correct, because orders under s 33Z will not necessarily resolve the claims of all group members (who may or may not be within the same constitutional "matter"[105]). The term is instead used in the chapeau to s 33Z "*in the same way as if the word used was 'issue'*".[106]

36. ***The phrase "to the group members" in s 33Z(2).*** Shand submits that s 33Z(1)(g) should be read down in light of s 33Z(2), either based on the *Anthony Hordern* principle or some species of inconsistency. Shand says this is so because, as s 33Z(2) provides expressly for the distribution of judgment monies to group members, the general power in s 33Z(1)(g) should not be construed as empowering distribution to third parties: SS [16], [30]. Those submissions should be rejected. As explained at **[19]** above, s 33Z(2) is not an "*exhaustive*" statement of the Federal Court's powers with respect to the distribution of judgment monies, and so it should not constrain the proper construction of s 33Z(1)(g). Section 33Z(2) requires the Court to make provision for distribution among group members in making an "*award of damages*" under s 33Z(1)(e) or (f), which is unlikely to attach to, for example, orders to pay a debt, awards of an account and disgorgement of profits, or orders for restitution of money.[107] Indeed, the breadth of the power to "*make such other order as the Court thinks just*" in s 33Z(1)(g) is "*apt to detract from the submission that the references in paragraphs (e) and (f) to awards of 'damages' are to be read as exhaustive of all pecuniary remedies*".[108] Reading s 33Z(1)(e) and (f) more broadly than "*damages*" in the ordinary sense is also difficult to reconcile with the Court's power to "*grant any equitable relief*" in s 33Z(1)(d).[109]

37. ***Section 33ZJ.*** Finally, Shand submits that a broad construction of s 33Z(1)(g) (sufficient to support a CFO) would render s 33ZJ(2) redundant: SS [31]. This submission encounters the same difficulty identified above (at **[19]**): Pt IVA does not provide a comprehensive and specific scheme for the distribution of judgment monies. Instead, s 33ZJ(2) is concerned with the specific situation in which the legal costs reasonably incurred by a

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105 See, eg, ***Williams*** *v Toyota Motor Corporation Australia Limited* (2021) 288 FCR 282, [56] (Lee J).

106 See, eg, *Williams* (2021) 288 FCR 282, [55] (Lee J).

107 *Brewster* (2019) 269 CLR 574, [209] (Edelman J). See also *Walsh v Permanent Trustee Australia Ltd* (1996) 21 ACSR 213, 215–216 (Brownie J).

108 *Brewster v BMW Australia Ltd* (2019) 343 FLR 176, [47] (Meagher, Ward and Leeming JJA).

109 Edelman J observed in *Brewster* that to read "*damages*" so broadly would be to "*attribute[] to Parliament a bovine ignorance of fundamental concepts in private law*": (2019) 269 CLR 574, [210].

representative party "*are likely to exceed the costs recoverable by the person from the respondent*". As Colvin J recognised in *Elliott-Carde* (at [489]), s 33ZJ(2) addresses the specific situation of a "*settlement … proposed in circumstances where the nature of the representative proceedings is such that any damages award may be confined to the claim of the representative applicant*". The provision has nothing to say about the distribution of funds beyond the reimbursement of "*legal costs*", such as funding commissions, and the power in s 33ZJ(3) to "*make any other order it thinks just*" further indicates that s 33ZJ(2) does not deal exhaustively with the distribution of judgment monies.[110] Indeed, in *Brewster*, both Gageler J and Edelman J contemplated that s 33ZJ(3) might itself empower the Court to order payment to a third party who provided funding for the proceeding: at [117], [207].[111]

Part V.3: The Decision in *Brewster* (NOC Grounds 1 and 3)

38. **Brewster *is distinguishable.*** Kain submits that the observations of this Court in *Brewster* apply with equal force to a settlement or judgment CFO as a commencement CFO: eg KS [28]. The Respondents' primary submission is that the clear differences between commencement CFOs and settlement or judgment CFOs,[112] and the clear differences between the powers in question, mean that *Brewster* is distinguishable. The central question in *Brewster* was whether the words in s 33ZF ("*any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding*") extended to making a CFO. The distinct language of s 33ZF ("*to ensure that justice is done in the proceeding*") was central to the reasoning of the majority. That language is absent from ss 33V and 33Z. Of the three members of this Court who made distinct observations in *Brewster* about the power to make a CFO at the conclusion of a proceeding, Gageler J and Edelman J each said there was power to do so (at [117] and [207]), whilst Gordon J said there was not: at [135], [141], [143], [149]. The result is that the submissions in Part V.2 above can all be made without need to reopen *Brewster*.

39. ***The majority's decision is erroneous.*** The following submissions concern what the majority in *Brewster* did decide, namely that a commencement CFO (and, by parity of reasoning, a commencement SCFO) are beyond power. The Respondents submit that *Brewster* should be reopened and overturned because it is attended by significant

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110 See also *Elliott-Carde* (2023) 301 FCR 1, [489] (Colvin J).
111 Lee J reasoned similarly in *Davaria*: see (2020) 281 FCR 501, [28].
112 See, eg, *Davaria* (2020) 281 FCR 501, [13]–[30] (Lee J).

conceptual and constructional errors. The ***first*** error concerns the role of commencement CFOs in "facilitating" proceedings. The plurality placed central emphasis on a distinction between Pt IVA being concerned with empowering "*the making of orders as to how an action should proceed in order to do justice*", rather than "*the radically different question as to whether an action can proceed at all*" (at [3]). To similar effect, Nettle and Gordon JJ each considered commencement CFOs as attempting to address "*uncertainties*" on the part of litigation funders as to the financial viability of a proceeding (at [126]–[127], [143], [148], [152], [158], [164], [166]), which fell outside the concerns of Pt IVA. This supposed distinction rests on the unrealistic notion 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*".[113]

40. The central concern of Pt IVA is to "*facilitate access to legal remedies and to promote efficiency in the determination of legal rights and in court management*":[114] see **[21]** above. The "facilitation" or "continuation" of a proceeding are both core aspects of that central concern, hedged by the duty to act judicially, and the overarching criteria that relevant orders be "*just*" or "*ensure justice*". This has been recognised by the New Zealand Court of Appeal, which has preferred Gageler J's reasons in holding that "*the commercial viability of a litigation-funding arrangement enhances access to justice by providing certainty in the way the representative proceeding is funded*".[115]

41. ***Secondly***, the majority was wrong to reduce s 33ZF to a mere "*gap filling*" provision: see, eg, [68]–[69]. Section 33ZF is one of numerous ambulatory provisions intended to afford the Court the widest possible power to ensure that justice is done in a proceeding. It enables the Court to make such orders as are appropriate or necessary to "*ensure that such arrangements for the funding of the proceeding as 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*": at [110]. But even if s 33ZF is reduced to a gap filling provision, the existence of clear power to make a settlement CFO (see Part V.2) means that there is a relevant "gap" that can usefully filled by s 33ZF: namely, in providing certainty and predictability at the outset as to what will or is likely to occur on

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113 *Brewster* (2019) 269 CLR 574, [110] (Gageler J).
114 *Brewster* (2019) 269 CLR 574, [205] (Edelman J), citing the 1988 Report, [324].
115 *Simons v ANZ Bank New Zealand Limited* [2024] NZCA 330, [133] (Collins J, for the Court).

settlement. In this regard, the failure of 4 of the 5 majority Justices to address distinctly and comprehensively the extent of power at the stage of settlement or judgment (see **[38]** above) renders their reasoning incomplete. If the submissions in Part V.2 are sound, then the purpose and effect of a commencement CFO, and its consistency with the scheme of Pt IVA, must be seen in a light which 4 of 5 majority Justices did not address.

42. ***Thirdly***, as Edelman J recognised (at [188]), at the heart of Pt IVA is the idea that "*the concept of justice in a proceeding is plainly one that can, and was expected to, evolve*". Against that, the majority's "*squeamish[ness]*" as to a funder possessing a commercial interest in the outcome of a proceeding gave controlling weight to "*conceptions of justice in 1991*" in forming the "*essential meaning*" of s 33ZF: see [171], [205].

43. ***The correct construction.*** The Respondents submit that Gageler J and Edelman J were correct to conclude that a commencement CFO was capable of being seen as "*appropriate or necessary to ensure that justice is done in the proceeding*". As Gageler J held, a construction of s 33ZF which empowers the Court to make a CFO at the early stages of a representative proceeding best reflects the reality of such proceedings, that "*[t]he representative party takes the group members in tow, and they sink or swim together*".[116] The power "*cannot be divorced from the principal object of Pt IVA of enhancing group members' access to justice*",[117] and achieves that object by providing a means of both the burdens and fruits of litigation being shared between group members. The power recognises that the "*potential value of the litigation cannot realistically be 'unlocked' without the litigation funder*", and so is at least capable of being seen as appropriate and necessary for ensuring justice is done.[118]

44. **John *criteria.*** There are "*special considerations applicable to the doctrine of stare decisis in cases of statutory construction*", because the "*fundamental responsibility of a court when it interprets a statute is to give effect to the legislative intention as it is expressed in the statute.*"[119] Those considerations have acute focus here, because there was a division of opinion among the majority justices, and persuasive dissents.[120] The *John* criteria, and related considerations, must be viewed through that prism. ***First***, *Brewster* did not rest upon a principle carefully worked out in a significant succession of cases. ***Secondly***, there

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116 *Brewster* (2019) 269 CLR 574, [108]–[109] (Gageler J).
117 *Brewster* (2019) 269 CLR 574, [110] (Gageler J).
118 *Brewster* (2019) 269 CLR 574, [190] (Edelman J).
119 ***John*** *v Federal Commissioner of Taxation* (1989) 166 CLR 416, 439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).
120 *John* (1989) 166 CLR 416, 440 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

were differences between the reasons of the majority. While Kiefel CJ, Bell and Keane JJ (with whom Nettle J agreed) primarily focused on the facilitation of the continuation of proceedings not providing a basis on which a CFO would be appropriate or necessary to ensure that justice is done in those proceedings (eg [52]-[53]), Gordon J was considerably more critical of CFOs being conducive to justice at all (eg [149]-[152], [157]), and focused on facilitating relationships involving non-parties (that is, funders) as not being appropriate or necessary to ensure that justice is done in those proceedings: eg [166].

45. ***Thirdly***, as emphasised at **[41]** above, if the submissions in Part V.2 are accepted, *Brewster* will be seen to have been overtaken by surrounding developments in the law, requiring its reconsideration.[121]

46. ***Fourthly***, *Brewster* has been productive of inconvenience rather than any useful result. It denies to group members the degree of information and certainty that commencement CFOs are capable of providing. On the assumption that settlement CFOs are within power (see Part V.2 above), it makes sense that s 33ZF(1) should be able to be used as an "*adjunct to a likely or anticipated future use*" of those powers.[122] Litigation since *Brewster*, including matters reaching this Court,[123] has confirmed that a great deal of "*doing justice in a proceeding*" involves a series of inter-related pre-trial questions: what information can and should be given to group members in the opt-out notices and when should such notices be given? How should the court deal with competing, overlapping class actions? How should the court deal with class closure and registration? Given the intense demands that many group actions make on the court's limited public resources, how far should referees be used, even in federal jurisdiction? Each of these questions looks forward to what might occur if the matter proceeds to either a settlement or contested resolution and judgment (whether favourable or unfavourable to the group). Economics is inescapably at the heart of these questions and of the "*doing of justice in the proceedings*". The court has a proper interest, within the scheme of Pt IVA, in ensuring that the proceeding is on a stable footing in which the respondent is adequately protected for its costs if it succeeds; in ensuring that the applicant's side is reasonably capable of following through on its demands on the

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121 See *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005, [35] (the Court).

122 *Elliott-Carde* (2023) 301 FCR 1, [127] (Beach J). See also *Lenthall FC* (2019) 265 FCR 21, [96] (Allsop CJ, Middleton and Robertson JJ); *Money Max* (2016) 245 FCR 191, [176]–[205] (Murphy, Gleeson and Beach JJ).

123 See, eg, *Wigmans v AMP Ltd* (2021) 270 CLR 623; *Pallas v Lendlease Corporation Ltd* (2024) 114 NSWLR 81 (in respect of which special leave has been granted: [2024] HCASL 191).

court's resources; and critically that group members have the best available information when they make decisions such as whether to opt out or register for a settlement. The commencement CFO helps achieve these objectives and conversely *Brewster* impedes the court's ability to do so.

47. ***Fifthly***, to the extent *Brewster* promotes a return to book building and closed class actions, this runs contrary to the purpose of Pt IVA: at [150]; cf SS [24].[124]

48. ***Sixthly***, *Brewster* has not been independently acted upon in a manner that militates against reconsideration. To the contrary, the Federal Court has been driven to develop case management strategies to cope with its "chilling" effect. With an air of resignation, Beach J has said: "*[O]ne can only wonder what the practical difference is*" between "*indicating informally at case management hearings that [the Court] may be favourably disposed to making a settlement CFO in due course*", on the one hand, and "*making an interlocutory CFO at that time on the other hand*".[125] The Respondents submit that there is a real difference, both legal and practical.

49. ***Summary on re-opening.*** If a commencement CFO is viewed only as the court busying itself in propping up a funder's commercial interests and the applicant's side of the record, then the decision in *Brewster* might, as Nettle J viewed it at [122]–[125], be a borderline one which this Court should, for reasons of institutional integrity, leave in place for lower courts to continue to do their best with. But every analysis of the text and purposes of Pt IVA, and the practical experience of *"doing justice in the proceeding"* over the last six years, shows that the decision jars with the challenges which the court, the parties and the funding communities face every day of the week. It is better that this Court confront the mischief that *Brewster* is causing than to require the lower courts to continue to do justice with one hand tied behind their back.

50. ***NOC Ground 3.*** Once the above submissions in Parts V.2 and V.3 are accepted, then, by parity of reasoning, a commencement SCFO is available as a matter of power as much as a commencement CFO.

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124 Chen and Legg, "An economic perspective on costs in Australian class actions" (2022) 45 *Melbourne University Law Review* 950, 955. See also Waye and Duffy, "The fate of class action common fund orders: The policy, procedural and constitutional issues of a legislative revival" (2021) 40 *University of Queensland Law Journal* 215, 225–227.

125 *Elliott-Carde* (2023) 301 FCR 1, [128] (Beach J).

Part V.4: Public Policy Against Contingency Fees for Solicitors

(A) Introductory matters

51. The Appellants each submit that SCFOs are necessarily beyond power because the asserted public policy against contingency fees for solicitors constrains the meaning of "*just*" under ss 33V(2) and 33Z(1)(g): eg KS [35]; SS [33]–[34]; EY [46]–[47]. The nature and extent of the asserted public policy are addressed below. At the outset, however, it is necessary to confront central features of the Appellants' arguments. ***First***, the arguments are insensitive to any better financial return to group members from an SCFO. Their argument must be that an SCFO cannot be "*just*" even if on the facts of the case it would result in lower costs and a higher return for group members. ***Second***, the arguments are thereby shown to assume (without justifying) a hierarchy of public policies, in which the historical antipathy towards contingency fee agreements is given normative priority over access to justice. But the hierarchy is unjustifiable even apart from the centrality of access to justice to the purpose of Pt IVA: see **[21]** above. Access to justice has been recognised as a fundamental right both in Australia[126] and overseas.[127] In Australia, the "*right of access to curial determination*" has been held to be "*deeply rooted in constitutional principle*".[128] Access to justice has far greater contemporary relevance, and far greater foothold in the statutory text.

52. The public policy against contingency fees may have work to do at the level of discretion. For example, an SCFO is unlikely to be ordered unless the evidence showed that it provided the greatest return to group members of the options available. But at the level of constructional technique, it is not permissible to constrain the interpretation of federal legislation by reference to public policy to the extent that it is enshrined in and implemented by State legislation: see **[6]** above. Further, Victoria having now rejected the public policy asserted by the Appellants, the content of the term "*just*" in s 33V(2) and s 33Z(1)(g) cannot simply be dictated by the public policy of a majority of States. Instead, the Federal Court should be left to determine what is "*just*" having regard to the circumstances of the

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126 See, eg, *Momcilovic v The Queen* (2011) 245 CLR 1, [444] (Heydon J).

127 See, eg, *Golder v United Kingdom* [1975] ECHR 1, [34]–[36]; *Airey v Ireland* [1979] 2 EHHR 305.

128 *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603, [55] (Gummow J), citing *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909, 977 (Lord Diplock). See also *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, [41], in which the plurality emphasised the importance of "*having recourse to courts of justice for the vindication of legal rights*" in considering whether curtailments of procedural fairness are consistent with Ch III of the Constitution.

particular case in light of basic principles of justice, such as those which animated the legal doctrines outlined at **[30]** above.

53. ***Section 79 of the Judiciary Act.*** EY's submission that LPUL s 183 and ASCR r 12.2 are "picked up" by s 79 of the *Judiciary Act* (ES [19]–[25]) should be rejected. Those provisions impose norms of conduct. They are laws which are "*determinative of the rights and duties of persons as opposed to the manner of exercise of jurisdiction*".[129] LPUL s 183 is a law imposing a civil penalty on a law practice for contravention of a norm of conduct (s 183(1)), or potentially making the law practice liable to a finding of unsatisfactory professional conduct or professional misconduct (s 183(3)). It is a law directed to the conduct of the law practice, not the manner in which State jurisdiction is exercised. LPUL ss 185(1) and (4) are laws which regulate the existence or non-existence of causes of action arising out of costs agreements which contravene s 183. The existence or non-existence of a cause of action is plainly a matter which relates to the rights and duties as between a law practice and its client, and not the exercise of State jurisdiction. Likewise, ASCR r 12.2 is a legislative rule which exposes a solicitor who contravenes the norm of conduct it prescribes liable to a finding of unsatisfactory professional conduct or professional misconduct under LPUL s 298(b). Again, that is a rule directed to the conduct of the solicitor, not the exercise of State jurisdiction.

54. This has two consequences. *First*, these State provisions are not capable of being picked up by s 79. *Secondly*, and in any event, if Pt IVA properly construed is inconsistent with such provisions, Pt IVA prevails: see **[7]** above.

(B) Common law public policy

55. ***The true scope.*** Kain relies upon the statement in ***Clyne*** *v New South Wales Bar Association*[130] that a solicitor "*must not in any case bargain with [their] client for an interest in the subject-matter of litigation, or … for remuneration proportionate to the amount which may be recovered by [their] client in a proceeding*" (KS [34]).[131] Kain variously describes this as a "*prohibition on contingency fees*" (KS [35], [39], [45]) or on "*percentage-based fees*" (KS [42]). By reference to the same statement in *Clyne*, EY generalises "*a common law prohibition of award-based contingency fees*" (ES [32]) and

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129 *Masson v Parsons* (2019) 266 CLR 554, [30] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
130 (1960) 104 CLR 186.
131 (1960) 104 CLR 186, 203 (Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ).

then cites a series of cases (ES [33]–[39]) which it says reflect "*an uninterrupted policy of the common law to prohibit award-based fee agreements*" (ES [40]).

56. These submissions are over-stated. The prohibition described in *Clyne* was derived from the tort of maintenance, and was limited to a solicitor entering a particular kind of "*bargain*" with a client. The Court in *Clyne* cited the first edition of Fleming's *The Law of Torts*, which said that solicitors "*must refrain from entering into agreements whereby their remuneration is proportioned to the amount recovered in the action*."[132] The tort of maintenance had nothing to say about a solicitor receiving payment of their fees out of the proceeds of a settlement or judgment, which was expressly permitted by the law through the solicitor's lien: see **[30]** above. Kain's submissions about the scope of the prohibition stated in *Clyne* must be rejected (eg KS [35]-[39], [42], [45]).

57. ***The effect of abolishing the tort of maintenance.*** The tort of maintenance, which underpinned the prohibition in *Clyne*, was later abolished in New South Wales[133] by legislation which stipulated that the prohibition only had any ongoing effect to the extent that it was either: **(a)** preserved by s 6 of the *Maintenance and Champerty Abolition Act 1993* (NSW) as a "*rule of law … as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal*";[134] or **(b)** reflected in the prohibition in LPUL s 183 on a solicitor entering "*a costs agreement under which the amount payable … is calculated by reference to the amount of any award or settlement … that may be recovered in any proceedings to which the agreement relates*".[135] As this Court held in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*,[136] "*no wider rule of law*" was preserved following the legislative abolition of maintenance.[137]

58. The submissions of Kain (KS [43]) and EY (ES [32]) that some wider "*prohibition on contingency fees*" continues to exist beyond those two legislative provisions ignores that the prohibition described in *Clyne* was only ever limited to "*bargains*". After the

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132 John G Fleming, *The Law of Torts* (Law Book Co, 1957) 638.

133 *Maintenance and Champtery Abolition Act 1993* (NSW) ss 3–4. The Act was repealed by the *Statute Law (Miscellaneous Provisions) Act 2011* (NSW) sch 4, but its substantive provisions were transferred to *Civil Liability Act 2002* (NSW) sch 2 cl 2 and *Crimes Act 1900* (NSW) sch 3 cl 5.

134 *Maintenance and Champerty Abolition Act 1993* (NSW) s 6; *Civil Liability Act 2002* (NSW) sch 2 cl 2(2).

135 The predecessor to this provision was *Legal Profession Act 1987* (NSW) s 188, itself later re-enacted as *Legal Profession Act 2004* (NSW) s 325. The provision was originally introduced by the *Legal Profession Reform Act 1993* (NSW), which was cognate to the *Maintenance and Champerty Abolition Act 1993* (NSW): J P Hannaford (Attorney-General), Second Reading Speech, Legislative Council, Thursday, 16 September 1993, page 3279.

136 (2006) 229 CLR 386.

137 *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 407 [1] (Gleeson CJ), 433 [86] (Gummow, Hayne and Crennan JJ). See also *Smits v Roach* (2004) 60 NSWLR 711, 747 [69] (Sheller JA).

legislative abolition of maintenance, the legislative provisions which continued the prohibition were likewise similarly limited to "*contracts*" or "*agreements*". But neither Kain nor EY have identified any authority for the existence of any wider rule at any point in time. The United Kingdom authorities identified at ES [28]–[31] all concerned "*agreements*" to pay contingency fees and do not support the existence of any wider rule.[138]

59. ***Changes in legal practice over time.*** Since *Clyne*, the regulation of legal practice in New South Wales has changed markedly. At the same time maintenance and champerty were abolished by legislation, legal costs were deregulated by removing most scales of fees and costs,[139] ultimately leading to the current prevalence (but not universality) of time-based billing. This development was recognised as creating the potential for conflicts between solicitors and clients, but it became accepted that these conflicts could be managed in the conventional way through disclosure between solicitor and client and supervision by the court.[140] At the same time, solicitors were permitted to charge uplift fees to compensate them for the additional risk they assumed in accepting "no win no fee" arrangements.[141] A short time later, law firms were permitted to incorporate under the *Corporations Act*.[142] Again, while the potential for conflicts was recognised, it was accepted that they could be managed with appropriate corporate governance frameworks.[143]

60. None of these reforms would have been contemplated when *Clyne* was decided, but they now form part of the legal landscape against which Pt IVA falls to be applied. The purpose of these reforms was to create a more efficient profession through greater competition leading to better outcomes for clients.[144] These reforms recognised that it may be necessary

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138 *Wallersteiner v Moir (No 2)* [1975] QB 373, 393D (Lord Denning MR) ("*an agreement by which a lawyer is remunerated on the basis of a 'contingency fee'*"), 401D (Buckley LJ) ("*an arrangement under which the legal advisers of a litigant shall be remunerated only in the event of the litigant succeeding in recovering money*"), 407E (Scarman LJ) ("*to permit Mr Moir to employ a solicitor on the basis of a contingency fee*"); *Trendtex Trading Corporation v Credit Suisse* [1980] 1 QB 629, 663E (Oliver LJ) ("*by the agreement, for instance, of so called 'contingency fees'*").

139 *Legal Profession Reform Act 1993* (NSW) sch 3 cl 1, repealing and replacing *Legal Profession Act 1987* (NSW) pt 11. For the stated rationale behind deregulation, see J P Hannaford (Attorney-General), Second Reading Speech, Legislative Council, Thursday, 16 September 1993, page 3275–6.

140 *Law Society of NSW v Foreman* (1994) 34 NSWLR 408, 437A-E (Mahoney JA); *Re Morris Fletcher and Cross' Bills of Costs* [1997] 2 Qd R 228, 243–4 (Fryberg J).

141 *Legal Profession Act 1987* (NSW) s 187, introduced by *Legal Profession Reform Act 1993* (NSW) sch 3 cl 1. The current version of the provision is LPUL s 182.

142 *Legal Profession Amendment (Incorporated Legal Practices) Act 2000* (NSW).

143 J W Shaw (Attorney-General), Second Reading Speech, Legislative Council, Friday, 23 June 2000, page 7624–5.

144 J P Hannaford (Attorney-General), Second Reading Speech, Legislative Council, Thursday, 16 September 1993, page 3275 ("*Deregulation would encourage competition and lead to a more efficient system*"); J W Shaw (Attorney-General), Second Reading Speech, Legislative Council, Friday, 23 June 2000, page 7625

to accept a degree of potential conflict between the interests of solicitors and clients, where those conflicts can be appropriately managed in the pursuit of better outcomes for clients and greater access to justice.

61. ***Extrinsic material.*** For reasons explained at **[8]** above, what Parliament did not do will not assist this Court in construing the meaning of "*just*" in s 33V(2) and s 33Z(1)(g). But something more should be said about the reliance by EY on a statement by the government (ES [44]) which rejected a recommendation made by the ALRC in 2018 to introduce a regime into Pt IVA permitting solicitors to enter into "*percentage-based fee agreements*" subject to the approval of the Federal Court (ES [41]–[45]). That statement cannot be analytically useful. Plainly, a statement made in 2021 could not be relevant to the construction of legislation enacted in 1992.[145] To the extent that it is relied upon to support the vitality of the underlying public policy, it is irrelevant to construction. Sections 33V(2) and 33Z(1)(g) require the Federal Court, not the executive government, to determine whether or not a potential conflict means that an SCFO cannot be "*just*".[146] Contrary to ES [45], this does not constitute the Court as a "*roving commission to declare public policy*". It means that the Court is not fettered by the government's statement in exercising, judicially and in accordance with basic principles of justice, a broadly-worded and open-textured discretion.

(C) Legislative Provisions & Policy

62. For reasons explained at **[6]** above, it is impermissible to constrain ss 33V(2) and s 33Z(1)(g) by reference to State legislation, or by a common law public policy partly or wholly enshrined in State legislation. But, in any event, for reasons developed below, the Appellants' reliance on those provisions is misplaced.

63. ***LPUL s 183.*** Contrary to what is asserted by Kain and Shand (KS [57]; SS [44]), there is nothing in LPUL s 183 which suggests that it was intended to have any effect wider than prohibiting a law practice entering a costs agreement of a particular kind. That provision is found in a division of the LPUL entitled "*Costs agreements*". What is prohibited is a

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("*These limitations impede the ability of the legal profession to compete with other occupational groups and affect its efficiency*").

145 *Hunter Resources Ltd v Melville* (1988) 164 CLR 234, 240–1 (Mason CJ and Gaudron J); *Dossett v TKJ Nominees Pty* Ltd (2003) 218 CLR 1, 6 [10] (McHugh J); *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1, 16 [33] (French CJ, Hayne, Kiefel and Bell JJ).

146 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135, 151–6 [39]–[51] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Obeid v The Queen* (2015) 91 NSWLR 226, 248 [118] (Bathurst CJ, Beazley P, Leeming JA).

"*costs agreement under which the amount payable is calculated by reference to the amount of any award or settlement*". On the proper construction of s 183, the term "*under*" has its ordinary meaning of "*governed, controlled, or bound by; in accordance with*",[147] such that what is prohibited is the creation of a contractual right or entitlement to payment from the client "*by reference to the amount of any award or settlement*". There is no textual or contextual basis to construe s 183 as proscribing agreements authorising a solicitor to apply to a court for an SCFO, because that would not be a "*costs agreement under which the amount payable is calculated*".

64. This interpretation is consistent with the legislative purpose in abolishing maintenance and champerty except to the extent that they affected "*contracts*".[148] That purpose reflects a rational distinction between: **(a)** a solicitor acquiring an interest in the proceeds of a settlement or judgment by a private agreement; and **(b)** a solicitor acquiring such an interest by order of a court. The former interest is acquired at a time before the amount of the proceeds is known. The client will almost always be unable to assess whether any amount proposed by the solicitor will end up being "*proportionate*" to the amount recovered in the light of the services provided and risks assumed by the solicitor. There is no independent oversight of the amount proposed by the solicitor or mechanism for review of it after the event. By contrast, the latter interest is acquired at a time when the amount of the proceeds is known and the court is able to ascertain independently an amount which is proportionate to the proceeds recovered based on an assessment of the solicitor's conduct of the proceedings.[149] Neither Kain nor Shand offers any principled reason why the latter interest should be subject to legislative prohibition or be seen as a "*circumvention*" (KS [60]) of an "*implicit legislative policy*" (KS [59]).

65. For these reasons, Kain and Shand's submissions that LPUL s 183 "*prohibits the payment or charging of an amount calculated by reference to the amount of any award or settlement*" (KS [57]), or that there is a "*clear legislative intent … for solicitors not to be paid amounts calculated by reference to an award*" (KS [57]) must be rejected. It follows that the "Addendum to Costs Agreement" (**KFM 63–5**) would not contravene LPUL s 183 or any "*implicit legislative policy*" which it embodies (KS [59]).

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147 *Rinehart v Welker* (2012) 95 NSWLR 221, 248–9 [123]–[125] (Bathurst CJ).

148 *Maintenance and Champtery Abolition Act 1993* (NSW) s 6; *Civil Liability Act 2002* (NSW) sch 2 cl 2(2).

149 This submission addresses a SCFO made on settlement or judgment. A commencement SCFO establishes a provisional framework, independently assessed by the court, with the ability to review it after the event. For this reason, it also falls well outside the asserted public policy.

66. ASCR ***r 12.2.*** This provision is inapplicable for three reasons. ***First***, prior to amendments which came into effect on 1 April 2022,[150] r 12.2 was focused exclusively on the exercise of "*undue influence*" by a solicitor. As explained by the Law Council of Australia,[151] the purpose of the amendments to r 12.2 was to "*clarify the expression of the prohibition in Rule 12.2, as a prohibition on the exercise of 'undue influence', by expressing the Rule in a more detailed and precise formulation*".[152] The language of "*calculated to dispose*" and "*induce*" in r 12.2 must be read in light of this clearly-expressed purpose.[153] So read, that language is directed against a solicitor engaging in conduct which is intended or is likely to influence a client or third party to confer a benefit on the solicitor. It is not directed to a solicitor who receives a benefit under an agreement or arrangement to which their client has given their "*fully informed consent*".[154] So much is apparent from the fact that most of the express exclusions in r 12.4 are predicated on the existence of such consent.[155] In the present case, there is no allegation that the "Addendum to Costs Agreement" (**KFM 63–5**) would be entered into other than with the "*fully informed consent*" of the Respondents.

67. ***Second***, ASCR r 12.2(i) is inapplicable because the "*benefit*" which a solicitor receives under an SCFO is part of "*the solicitor's fair and reasonable remuneration for legal services*" because, if the solicitor receives a benefit under an SCFO, a court will have necessarily found that the amount of the benefit is reasonable and proportionate in the course of determining whether to approve a proposed settlement or distribution.[156] Otherwise, the court would not have made the SCFO. ***Third***, ASCR r 12.2(ii) is inapplicable because it is "*reasonably incidental to the performance of the retainer*" for a solicitor to obtain instructions to apply for an SCFO where there is a real risk that the representative proceeding may not be able to continue otherwise. The evidence supports such a conclusion in this case (**KFM 17 [22]–[23]**).

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150 *Legal Profession Uniform Law Australian Solicitors' Conduct Amendment Rules 2022* (NSW).

151 The Law Council of Australia develops amendments to the ASCR under LPUL s 472(2).

152 Law Council of Australia, *Australian Solicitors' Conduct Rules 2022: Commentary* (March 2024) 76.

153 *Interpretation of Legislation Act 1984* (Vic) s 35. The ASCR are "Uniform Rules" made under LPUL Pt 9.2, and thus, the Victorian legislation applies by reason of LPUL s 7(1).

154 *Maguire v Makaronis* (1997) 188 CLR 449, 466–7 (Brennan CJ, Gaudron, McHugh and Gummow JJ); *Rahme v Benjamin & Khoury Pty Ltd* (2019) 100 NSWLR 550, 569 [99]–[100] (Macfarlan JA).

155 ASCR rr 12.4.1, 12.4.3, 12.4.4.

156 *Courtney v Medtel Pty Ltd (No 5)* [2004] FCA 1406, [61] (Sackville J); *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626, [32] (Gordon J); *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433, [91] (Murphy J); *Botsman v Bolitho* (2018) 57 VR 68, 115–7 [220]–[225] (Tate, Whelan and Niall JJA); *TW McConnell Pty Ltd v SurfStitch Group Ltd (No 4)* [2021] NSWSC 121, [277] (Stevenson J); *Haselhurst v Toyota Motor Corporation Australia Ltd* [2022] NSWSC 1076, [39] (Rees J).

Part V.5: Conflicts

(A) Introductory matters

68. Kain and Shand submit that the existence of a potential conflict between a solicitor's personal interests and the duties they owe to the court, their client and potentially group members arising from an SCFO means that such an order could never be "*just*" under s 33V(2) and s 33Z(1)(g) (KS [46]–[51]; SS [35]–[40]; [49]–[53]). A submission which gives such a strict and inflexible meaning to what can be "*just*" cannot be accepted. Since the purpose of imposing a duty on fiduciaries to avoid potential conflicts is to ensure the fiduciary acts in the interests of the principal,[157] it has always been the case that a potential conflict is permissible when the principal has given their consent[158] after being "*fully informed of [their] rights 'and of all the material facts and circumstances of the case'*".[159] Even assuming that an SCFO does create a potential conflict, the disclosure of the "*material facts and circumstances*" relating to that conflict occurs by informing the plaintiff and group members of the solicitors' intention to seek such an order upon a proposed settlement or distribution of the judgment amount (including via opt-out notices) and by providing all relevant information to the Court in the exercise of its "*supervisory and protective role*" on behalf of the plaintiff and group members to approve the proposed settlement or distribution.[160] Any determination by the Court about whether it would be "*just*" to make an SCFO under s 33V(2) or s 33Z(1)(g) must necessarily be made in light of the circumstances disclosed in the particular case and is a question of discretion, not power.

69. Kain and Shand appear to submit that there is something different about a potential conflict created by a solicitor's personal financial interest in the outcome of a settlement or judgment arising from an SCFO, which means that such an order could never be "*just*", either because: **(a)** such a conflict is somehow unique (KS [47]–[49]; SS [34]); or **(b)** such

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157 *Aberdeen Railway Co v Blaikie Brothers* (1854) 1 Macq 461, 471 (Lord Cranworth LC); *Birtchnell v Equity Trustees, Executors & Agency Co Ltd* (1929) 42 CLR 384, 408 (Dixon J); *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 393–4 (Gibbs J); *Queensland Mines Ltd v Hudson* (1978) 52 ALJR 399, 400–1 (Lord Scarman).

158 *Maguire v Makaronis* (1997) 188 CLR 449, 466–7 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

159 *Commowealth Bank of Australia v Smith* (1991) 42 FCR 390, 393 (Davies, Sheppard and Gummow JJ), quoting *Life Association of Scotland v Siddal* (1861) 3 De G F & J 58, 73; 45 ER 800, 806 (Turner LJ).

160 *R&B Investments Pty Ltd v Blue Sky Alternative Investments Ltd* (2024) 304 FCR 395, 409 [67] (Murphy, Beach and Lee JJ), referring to *McKenzie v Cash Converters International Ltd (No 3)* [2019] FCA 10 at [24] (Lee J).

a conflict cannot be effectively managed by the solicitor or supervised by the Court (KS [50]–[51]; SS [49]–[51]). These points are addressed below.

(B) The nature of the conflict arising from SCFOs

70. ***The nature of the conflict.*** Kain variously identifies the potential conflict as arising from a solicitor having "*a financial interest as a quasi-funder*" (KS [46(a)]) or from a solicitor's "*commercial interests and imperatives*" (KS [46(b)]). Presumably, in either case, the conflicting interest is said to be the solicitor's "*financial interest*" in the proceeds of any settlement or judgment of the proceedings by reason of the making of an SCFO (KS [36]–[37]). Shand identifies the source of the potential conflict in a similar manner, as being the solicitor's "*direct, and potentially substantial, financial interest in the outcome of any given case*" (SS [34]). The Respondents accept: **(a)** that the effect of an SCFO is to confer upon the solicitor a personal financial interest in the proceeds of a settlement or judgment; **(b)** that a solicitor who seeks or receives instructions to apply for an SCFO has at least the potential for conflict between their personal financial interest and the duties which they owe to the court, their client, and (possibly) group members (J [62]–[65]; cf SS [37]–[39]). However, it does not follow that an SCFO could never be "*just*" under s 33V(2) and s 33Z(1)(g).

71. ***The potential conflict arising from an SCFO is not unique.*** As explained at **[30]** above, through a solicitor's lien, the law already confers an interest in the proceeds of a settlement or judgment on solicitors independently of the making of SCFOs. To this extent, the law already condones the existence of a potential conflict between a solicitor's personal financial interest in the proceeds and the fiduciary duties owed to their client. In the case of solicitors' liens, the existence of the potential conflict is subordinated to the principle of "*common justice*" in recognising the solicitor's efforts in obtaining a settlement or judgment[161] and, more broadly, because it promotes "*access to justice*" by incentivising solicitors to act for impecunious clients.[162] SCFOs are no different.

72. That SCFOs are no different is also shown by the law's tolerance of the conflict created by contingency fees. Under LPUL s 182, a solicitor is permitted to acquire an interest in the proceeds of a settlement or judgment through a "no win no fee" agreement with an uplift

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161 *Groom v Cheesewright* [1895] 1 Ch 730, 732 (Kekewich J). See also *Guy v Churchill* (1887) 35 Ch D 489, 491 (Cotton LJ), 492 (Lindley LJ); *Akki Pty Ltd v Martin Hall Pty Ltd* (1994) 35 NSWLR 470, 483 (Windeyer J).

162 *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2018] UKSC 21 at [1] (Lord Briggs). See also *Ex parte Bryant* (1815) 1 Madd 49, 52; 56 ER 19, 20 (Plumer VC).

fee of up to 25%. The uplift represents a "*premium to take into account that the law practice will not become entitled to payment unless and until a successful outcome is achieved*".[163] Depending upon the circumstances of any given case, the quantum of a 25% uplift fee may end up being greater than the remuneration to which a solicitor may become entitled under an SCFO. An SCFO creates no greater or different conflict: cf SS [52].[164] If anything, an SCFO *reduces* the potential conflict by more closely aligning the interests of the solicitor and their client in maximising the proceeds of settlement or judgment, compared to a "no win no fee" agreement which gives a solicitor an incentive to settle if the defendant makes an offer sufficient to cover their costs and any uplift fee.[165]

73. These are two clear examples of potential conflicts arising in litigation which, having received the sanction of the general law and statute respectively, certainly could not be considered as being other than "*just*". The same reasons which justify the acceptance of these conflicts equally apply to the potential conflict arising from SCFOs. In these circumstances, it could hardly be said that potential conflict arising from an SCFO means that such an order could never be "*just*" under s 33V(2) and s 33Z(1)(g), or that such a conflict "*undermines public confidence in the legal profession*" or is inimical to the "*administration of justice*": cf KS [49]; SS [33]–[34].

74. ***The involvement of the Court in creating a potential conflict.*** Kain asserts that the fact that the potential conflict arising from an SCFO is created through an order of the Court means that it cannot be "*just*" (KS [48]). This inverts conventional thinking about the role of courts in monitoring conflicts. For example, it has long been accepted that a court may grant a trustee remuneration beyond what is authorised in the trust deed, despite any conflict which this may create.[166] In *Forster v Ridley*,[167] Knight Bruce and Turner LJJ exercised this power to award remuneration for past services, while in *Re Freeman's Settlement Trusts*,[168] Stirling J appointed new trustees on terms that they be paid

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163 *Carter Capner Law v Clift* (2020) 4 QR 600, 612 [23] (Fraser JA).

164 It should also be noted that, although consistent with the law stated in *Clyne*, the decision in *Thai Trading Co v Taylor* [1998] QB 781 cited at SS [52] has been held to have been decided *per incuriam* by later Courts of Appeal in the United Kingdom: *Awwad v Geraghty & Co (a firm)* [2001] QB 570, 593–4 (Schiemann LJ), 598–9 (May LJ); *Morris v Southwark London Borough Council* [2011] 2 All ER 240, 247–8 [23]–[24], 251–2 [39], 253 [45] (Lord Neuberger MR).

165 Eg *Lay v Nuix Ltd; Batchelor v Nuix Ltd; Bahtiyar v Nuix Ltd* [2022] VSC 479, [80].

166 *Marshall v Holloway* (1820) 2 Swans 432; 36 ER 681; *Brocksopp v Barnes* (1820) 5 Madd 90; 56 ER 829; *Morison v Morison* (1838) 4 My & Cr 215; 41 ER 85.

167 (1864) 4 De G J & S 452; 46 ER 993.

168 (1887) 37 Ch D 148.

commission for collecting rents forming part of the trust estate.[169] Early Australian cases applied a flexible approach to awarding remuneration to trustees,[170] and this approach was confirmed by the High Court in *Nissen v Grunden*.[171] In that case, over the opposition of some of the beneficiaries, the primary judge had granted the trustees past and future remuneration calculated at 5% of the profits of a business which they managed as part of the trust estate.[172] Following an extensive review of the authorities,[173] Griffith CJ concluded that "*it is idle to say that the Court of Chancery had no jurisdiction to make an allowance to trustees and executors for their pains and trouble*" and upheld the primary judge's decree.[174] *Nissen v Grunden* has not since been doubted and this power continues to be exercised throughout Australia.[175]

75. That courts can grant trustees additional remuneration out of a trust estate beyond their costs, even to the extent of granting trustees a percentage commission on the profits of a business they operated on behalf of the trust estate,[176] demonstrates that the services provided by the trustees may be such as to justify creating a potential conflict for the benefit of the trust estate.[177] If it can be "*just*" for a court to grant additional remuneration to a trustee (being the paradigm of a disinterested fiduciary[178]), even where this is not authorised by the trust instrument and without the consent of the beneficiaries, then it would be strange to conclude that it could never be "*just*" for a court to grant a person (including a solicitor) who had funded a proceeding additional remuneration above their legal costs in making a CFO under s 33V(2) and s 33Z(1)(g).[179] Such a person is in a similar position to a trustee in that they have expended significant time and resources in realising a benefit for the group members which they would have otherwise been unable to obtain. The Court could only make such an order after being satisfied that the proposed settlement

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169 For the current position in the United Kingdom, see *Re Duke of Norfolk's Settlement Trusts* [1982] Ch 61.

170 *Richardson v Allen* (1870) 10 SCR Eq 1; *Re Will of Cox* (1890) 11 LR (NSW) Eq 124; *Plomley v Shepherd* (1896) 17 LR (NSW) Eq 215; *Johnston v Johnston* (1903) 4 SR (NSW) 8.

171 (1912) 14 CLR 297, 304–5 (Griffith CJ), 313–17 (Isaacs J).

172 *Grunden v Nissen* [1911] VLR 97, 107 (a'Beckett J).

173 (1912) 14 CLR 297, 304–8 (Griffith CJ).

174 (1912) 14 CLR 297, 307 (Griffith CJ). See also 311–12 (Barton J), 312–17 (Isaacs J).

175 *Re Sutherland* [2004] NSWSC 798; *Toyoma Pty Ltd v Landmark Building Developments Pty Ltd* [2007] NSWSC 55; *Re Creditors' Trust of Jackgreen (International) Pty Ltd* [2011] NSWSC 748; *Re Gowing; Ex parte Preen* [2014] NSWSC 247; *Re LGSS Pty Ltd* [2021] NSWSC 1613.

176 *Re Freeman's Settlement Trusts* (1887) 37 Ch D 148; *Grunden v Nissen* [1911] VLR 9; *Nissen v Grunden* (1912) 14 CLR 297.

177 *Bainbrigge v Blair* (1845) 8 Beav 588, 596–7; 50 ER 231, 235 (Lord Langdale MR); *Plomley v Shepherd* (1896) 17 LR (NSW) Eq 215, 217 (Manning J); *Re Sutherland* [2004] NSWSC 798 at [11] (Campbell J).

178 *Broughton v Broughton* (1855) 5 De G M & G 160, 164; 43 ER 831, 833 (Lord Cranworth LC).

179 *Brewster* (2019) 269 CLR 574, 612 [88] (Kiefel CJ, Bell and Keane JJ).

or distribution of a judgment amount is "*fair and reasonable*",[180] and the quantum of any remuneration granted would always remain a matter of discretion to be determined by the court in the particular circumstances.[181]

76. The Respondents note here that, while for the reasons just expressed equity provides additional support for the concept of *"justice"* embraced in s 33V(2) and s 33Z(1)(g), NOC Ground 2 itself is not pressed. Kain is correct to observe at KS [62] that the question as finally framed before the Full Court did not raise directly the power of a court of equity to make an order analogous to an SCFO: J [4]. Such contention is not abandoned, but is not before this Court in this appeal.

(C) Management and Supervision of Conflicts

77. Kain and Shand submit that it "*undermines public confidence in the legal profession*" (KS [49]) or is inimical to the "*administration of justice*" (SS [32(a)], [33]–[34]) for a solicitor to have any potential conflict arising from their personal interests. Kain and Shand also submit that it is not possible for the potential conflict arising from an SCFO to be effectively managed by the solicitor or supervised by the Court so that such an order could never be "*just*" under s 33V(2) and s 33Z(1)(g) (KS [50]–[51]; SS [49]–[51]). These submissions should not be accepted.

78. ***Management of potential conflicts by the solicitor.*** As explained at **[72]** above, there is no reason why the potential conflict arising from an SCFO would necessarily be any greater than the potential conflict which arises under a permissible "no win no fee agreement" with an uplift fee. Nor is it apparent why it would necessarily be greater than any other potential conflict,[182] such as that arising from time-based billing[183], from the liquidity pressures which might affect any law practice,[184] or indeed, from a partner-solicitor's fiduciary duties to co-partners. These other potential conflicts are no more difficult to manage than the

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180 See, eg, *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250, 258 (Branson J); *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459, [19] (Goldberg J); *Wheelahan v City of Casey* [2011] VSC 215, [57]–[59] (Emerton J); *Richards* [2013] FCAFC 89, [40] (the Court); *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663, [34] (Osborn JA); *Fisher v Vocus Group Ltd (No 2)* [2020] FCA 579, [17(a)] (Moshinsky J); *Fowkes v Boston Scientific Corporation* [2023] FCA 230, [41(a)] (Lee J).

181 *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885, [21]–[25] (Lee J); *Augusta Pool 1 UK Ltd v Williamson* (2023) 111 NSWLR 378, 400–1 [102]–[103] (Ward P); *Galactic Seven Eleven Litigation Holdings LLC v Davaria* (2024) 302 FCR 493, 514–23 [79]–[126] (Murphy J).

182 Kain's submission that a plaintiff's solicitor must be free from *any* potential conflict (KS [51]) is divorced from reality.

183 *Law Society of NSW v Foreman* (1994) 34 NSWLR 408, 437A-E (Mahoney JA).

184 *Gill v Ethicon Sàrl (No 12)* [2023] FCA 902, [133]–[152] (Lee J).

conflict which arises from SCFOs. To the contrary, a solicitor who receives instructions to seek an SCFO will be required to show that they are appropriately managing conflicts, because the Court is required to be satisfied that the solicitor's conduct of the proceeding is of a standard which makes it "*just*" to award the solicitor remuneration out of the proceeds beyond their taxed or assessed legal costs under s 33V(2) and s 33Z(1)(g).[185] Further, the ability of a solicitor to seek advice from the independent bar is an important part of how a solicitor can manage the potential conflict arising from an SCFO (J [68]). The independent bar may not be a panacea which can "*guarantee protection against all of the potential conflicts of interest*": cf SS [51]. But it does form an important part of the context in which solicitors manage conflicts and must be given appropriate weight.

79. ***Supervision of potential conflicts by the Court.*** Kain submits that it would be difficult for the Court to review "*the day-to-day conduct of the proceedings to assess whether decisions are being or have been made free and clear from conflicts of interest*" (KS [50]). However, as the applicant for an SCFO, the solicitor has the onus of providing the Court with material which enables the Court to be satisfied that it would be "*just*" to make the order sought. If the volume of the material is such that it cannot be dealt with efficiently by the Court, an independent referee can be appointed.[186] If the Court, or the referee, has any concerns about the adequacy or sufficiency of the material, then they can require further information. Further, if impropriety is identified, it is not to the point to say that the Court may be literally unable to "*undo what has occurred*" (KS [50]). The Court has ample powers to address any such impropriety, including by refusing to make the SCFO, or by withholding approval of any proposed settlement or distribution.

80. Shand submits that the Court will lack "*visibility*" over privileged advice or negotiations or the solicitor's litigation strategy (SS [50]). That is not necessarily correct. There is no reason why any privileged material which needs to be disclosed to the Court to discharge this onus could not be provided in the same way that privileged material is provided to the Court for the purposes of settlement approval,[187] just as it is common in judicial advice

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185 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 209–210 [80(d)], [80(g)] (Murphy, Gleeson and Beach J); *Galactic Seven Eleven Litigation Holdings LLC v Davaria* (2024) 302 FCR 493, 517 [91]–[119], 523 [123] (Murphy J).

186 *Federal Court of Australia Act 1976* (Cth) s 54A. See *Courtney v Medtel Pty Ltd (No 5)* [2004] FCA 1406 at [59] (Sackville J); *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 at [119]–[124] (Murphy J); *Pearson v Queensland (No 2)* [2020] FCA 619 at [258] (Murphy J); *Wigmans v AMP Ltd* (2021) 270 CLR 623, 671 [119] (Gageler, Gordon and Edelman JJ).

187 Damian Grave, Ken Adams and Jason Betts, *Class Actions in Australia* (Thomson Reuters, 3rd ed, 2022) 967–9 [19.340].

applications for a trustee to provide the court with confidential and privileged material disclosing legal advice as to the prospects of the proceeding.[188] There is no reason why a court asked to make an SCFO could not require a summary of the advice, negotiations and litigation strategy if that were felt to be required in the circumstances. The central point is that the Court must be satisfied that it would be "*just*" to make an SCFO. If the Court is unable to be satisfied that it would be "*just*" to make an SCFO on the material which the solicitor and any contradictor has chosen to put before it or a referee, it will simply refuse to make the order.

81. The sole concrete example provided by either Kain or Shand of the Court's inability to supervise a potential conflict involves a solicitor advising a plaintiff to refuse a reasonable settlement offer "*if the solicitors consider their own share of the award is insufficient*" (SS [50]). This kind of *in terrorem* argumentation does not go to power: see **[5]** above. In any event, the example is flawed. It implicitly assumes that the group members are prejudiced by a later settlement or judgment being obtained for a lower amount than the offer; otherwise, refusing the offer would have been in the interests of group members. But in either case, the refusal of the earlier offer will necessarily need to be justified to the Court: in the case of a later lower settlement, as part of establishing that the later settlement was "*fair and reasonable*"; and in the case of a later lower judgment, in order to explain why the rejection of the earlier higher offer ought not to entitle the defendant to its costs. Unless it is assumed that the plaintiff and defendant's solicitors collude to conceal it, the idea that the rejection of the earlier higher offer would somehow be withheld from the Court is remote from reality. Notably, these *in terorrem* arguments wholly ignore the experience in Victoria since GCOs were introduced by s 33ZDA of the VSC Act. They point to no evidence to suggest that management of conflicts has not proceeded adequately under that regime, which represents a clear analogy to SCFOs.

82. ***The solicitor as an officer of the court.*** Kain and Shand also give no weight to the fact that a solicitor, as an officer of the court, always has duties to the court and is subject to supervision by the court. Every day, responsible solicitors observe those duties and balance them with their duties to their clients, to co-partners and so on. Across all areas of law, sophisticated practices and rules have developed to manage those often-conflicting duties. To take an example, a solicitor (or barrister) knows that the duty not to mislead the court

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188 *Re Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247, [80] (Palmer J); *Re NSW Trustee & Guardian* [2014] NSWSC 423, [2]–[3] (Kunc J).

must take precedence over the duty to advance the client's cause.[189] But a way is found to balance the two. A solicitor informed by the client of matters which render the case being advanced a false one is not required to sacrifice the confidentiality of the communication with the client. The solicitor may simply withdraw from acting.[190] The court will accept that withdrawal and not demand the solicitor divulge the confidential reasons.[191] These intensely ethical, yet practical, rules of reconciliation are the stuff of professional practice, developed over centuries and refined as new challenges emerge. The present issue raises no fundamentally different challenge.

(D) Miscellaneous points raised by Shand

83. Finally, Shand refers to cases which hold that a solicitor who acts in a position of potential conflict may have engaged in professional misconduct and be a reason for a court exercising its inherent power to restrain the solicitor from acting (SS [41]–[42]). Those cases concern conflicts that are very different in nature to that arising from the making of an SCFO, including dishonesty and breaches of confidentiality,[192] deliberate overcharging,[193] trust account defalcations,[194] and entering into arrangements amounting to a prohibited contingency fee agreement.[195] They do not provide any assistance in explaining why the potential conflict arising from an SCFO will inevitably be impermissible. As explained at **[68]** above, an SCFO would only be made after a Court has considered, and is satisfied by, the adequacy of the disclosure of the potential conflict to the plaintiff, the group members and the Court.

Part V.6: Section 1337P of the Corporations Act (NOC Ground 4)

84. A narrower path to success in these appeals is to hold that it is open to the Federal Court to make an order akin to an SCFO under s 33ZDA of the VSC Act, as applied by s 1337P(1) of the *Corporations Act 2001* (Cth).[196] This submission provides an independent pathway supporting the Full Court's answer to the Reserved Question. Section 33ZDA, if it is

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189 ASCR r 3.1; *Council of the Law Society of New South Wales v Croke* [2024] NSWCA 195, [16] (Bell CJ). See also *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) rr 4(a), 4(e), 23, 79; *Giannarelli v Wraith* (1988) 165 CLR 543, 556 (Mason CJ).

190 ASCR r 20.1.5.

191 Similarly, see *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) rr 27–8.

192 *Victorian Legal Services Board v Gobbo* [2020] VSC 692, [47]–[49] (Forbes J).

193 *Bechara v Legal Services Commissioner* (2010) 79 NSWLR 763, 764 [8], 773 [33] (McClellan CJ at CL).

194 *Council of the Law Society v Yoon* [2020] NSWCA 141, [4]–[5] (Bell P, Ward and White JJA).

195 *Bolith v Banksia Securities Ltd (No 4)* [2014] VSC 582, [51]–[52] (Ferguson JA); *Hegarty v Keogh (No 2)* [2023] SASCA 30, [1]–[8], [139] (Livesey P, Doyle and Bleby JJA);

196 See **ground 4** of the notice of contention.

picked up under s 1337P(1), would authorise the making of an order which would "*provide for the distribution of funds to a solicitor otherwise than as payment for costs and disbursements incurred in relation to the conduct of the proceeding*": J [1], [6]. On that basis, it provides a basis for reaching a positive answer to the Reserved Question, as a GCO would involve the distribution of funds to the Respondents' solicitors "*otherwise than as payment for costs and disbursements incurred*" in relation to these proceedings. It also in its terms, permits orders of the kind described in cl 5.1(a) of the Protocol (J [11]), would empower the Respondents' solicitors to be "*further remunerated for their risks in funding the legal costs and disbursements*", within the meaning of cl 5.1(a)(ii).

85. Section 1337P(1) provides that a court exercising "*relevant jurisdiction*"[197] in dealing with a matter for determination in a proceeding can apply "*rules of evidence and procedure*" that are "*applied in a superior court in Australia*" and which "*the court considers appropriate to be applied in the circumstances*". The Explanatory Memorandum for the progenitor to s 1337P(1) (being s 54 of the *Corporations Act 1989* (Cth)) explained that:

> This section deals with the questions of which laws, and which rules of evidence and procedure, should be applied in a case involving cross-vested jurisdiction. In effect, the section gives the court freedom to choose the rules of any superior court in Australia or an external Territory, whichever the court considers appropriate.[198]

The *Corporations Act 1989* (Cth), including s 54, was eventually replaced by the *Corporations Act 2001* (Cth), following this Court's decision in *Re Wakim; Ex parte McNally*.[199] Part 9.6A, including s 1337P, was "*intended to produce substantially the same outcomes*" as Pt 9 of the 1989 Act, including s 54.[200]

86. ***Relevant Jurisdiction.*** The "*claim*" in these proceedings is brought in part under the *Corporations Act*. Matters such as the approval of any settlement and the distribution of the settlement sum will each be "*a matter for determination in the proceeding*", and will involve the Federal Court exercising subject-matter jurisdiction conferred upon it under, relevantly, s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) and s 1337B(1) of the *Corporations Act*.

87. ***Rule of procedure:*** Section 33ZDA of the VSC Act is undoubtedly a "*rule of procedure*" which is "*applied in a superior court in Australia*", and is the kind of power to which

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197 "*Relevant jurisdiction*" is defined in s 1337P(3)(a) relevantly to mean "*jurisdiction conferred on the Federal Court of Australia … with respect to civil matters arising under the Corporations Legislation*".

198 Explanatory Memorandum, Corporations Legislation Amendment Bill 1990 (Cth), 177.

199 (1999) 198 CLR 511: see Explanatory Memorandum, Corporations Bill 2001 (Cth), [5.34].

200 Explanatory Memorandum, Corporations Bill 2001 (Cth), [5.34].

s 1337P(1) is apt to attach.[201] It is a "*rule of procedure*" because it is directed to the governing or regulating the mode or conduct of group proceedings, providing "*numerous procedural safeguards for the rights of group members*".[202] It "*only operates in relation to claims in respect of which the Supreme Court otherwise has jurisdiction*".[203] This Court's observation that Pt IVA of the FCA Act is procedural and not substantive[204] (a proposition which Kain accepts: KS [19]) has been held to apply with equal force to Pt 4A of the VSC Act.[205] It follows that s 33ZDA is capable of being applied under s 1337P(1) where a court exercising relevant jurisdiction considers it "*appropriate … in the circumstances*".

88. ***Utility of a GCO:*** Kain submits that the Class Action Applicants "*do not seek a GCO nor an order akin to a GCO*", being a payment of "*legal costs*", and instead "*seek both reimbursement for legal costs incurred and (relevantly) a separate and independent percentage-based fee*" (KS [63]). That submission implicitly assumes that the concept of "*legal costs*" within the meaning of s 33ZDA(1)(a) is limited strictly to the value of particular items of work by a law practice. That assumption is wrong. The Supreme Court of Victoria has repeatedly held that "*the calculation of an appropriate or necessary percentage*" for the purposes of s 33ZDA "*may properly take into account not only the value of the legal services performed, but the value of a reasonable return to the law practice for the financial risk assumed by it*".[206] In that way, s 33ZDA "*implicitly permits the linking of risk and reward in the calculation of fees*".[207] As Nichols J held in *Nelson v Beach Energy Ltd*:[208] "*making a Group Costs Order serves to fix the method of calculation*

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201 Section 33ZDA also falls within the description "laws relating to procedure" in s 79 of the *Judiciary Act 1903* (Cth). This was common ground in the Victorian Court of Appeal in *Bogan v The Estate of Peter John Smedley (Deceased)* [2023] VSCA 256; 72 VR 394 (as can be seen eg at [140]), and was also common ground on removal to this Court in *Bogan & Anor v The Estate of Peter John Smedley (Deceased) & Ors* (Case No. M21/2024).

202 ***Hall*** *v Australian Finance Direct Ltd* [2005] VSC 306, [85] (Hollingworth J).

203 *Mobil Oil* (2002) 211 CLR 1, [10] (Gleeson CJ).

204 See, eg, *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, [1] (the Court); *BHP Group* (2022) 276 CLR 611, [6]–[7] (Kiefel CJ and Gageler J), [54] (Gordon, Edelman and Steward JJ).

205 See, eg, *Green v Graincorp Oilseeds Pty Ltd* [2023] VSC 395, [16]–[17] (Dixon J); *Hall* [2005] VSC 306, [92] (Hollingworth J).

206 ***Gawler*** *v FleetPartners Group Ltd* [2024] VSC 365, [24] (Waller J), citing *Bogan v Estate of Peter John Smedley (Deceased)* [2022] VSC 201, [12(f)] (John Dixon J); *Allen v G8 Education Ltd* [2022] VSC 32, [28] (Nichols J); *Fox* (2021) 69 VR 487, [20] (Nichols J); *Raeken Pty Ltd v James Hardie Industries PLC* [2024] VSC 173, [20] (M Osborne J); *Norris v Insurance Australia Group Ltd* [2024] VSC 76, [18] (Nichols J); *Gehrke v* ***Noumi*** *Ltd* [2022] VSC 672, [53(a)–(f)] (Nichols J); *Mumford v EML Payments Limited* [2022] VSC 750 (Delany J); *Maglio v Hino Motors Sales Australia Pty Ltd* [2023] VSC 757, [99] (M Osborne J). See also Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings* (Report, 2018), [3.67].

207 *Gawler* [2024] VSC 365, [24] (Waller J).

208 [2022] VSC 424, [49].

of legal costs in which, among other things, consideration of the legal work that has been done will be a relevant integer."

89. More generally, the Supreme Court of Victoria has recognised that the making of a GCO under s 33ZDA(1) "*serves the purpose of permitting the proceeding to be funded in a particular way (the law firm funding the proceeding and assuming the burden of meeting any adverse costs and security for costs liability, and group members sharing liability for payment of legal costs)*".[209] As such, s 33ZDA, in its terms, permits orders of the kind described in cl 5.1(a) of the Protocol: J [11]. It follows that s 33ZDA also empowers the Court to make an order of the kind described in the Reserved Question: J [1].

PART VI: ESTIMATE OF TIME REQUIRED

90. The First and Second Respondents estimate that they will need 4.5 hours for oral argument (less any time allocated to any intervenor who may be granted leave to make submissions in support of the First and Second Respondents).

Dated: ~~30 January 2025~~ 5 February 2025

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209 *Noumi* [2022] VSC 672, [53(d)] (Nichols J).

ANNEXURE TO THE FIRST AND SECOND RESPONDENTS' AMENDED SUBMISSIONS

Pursuant to *Practice Direction No 1 of 2024*, the Respondents set out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date(s)
		Commonwealth provisions			
1.	*Constitution*	Current	s 109	Currently in force; in force as at date of Full Court hearing	N/A
2.	*Acts Interpretation Act 1901* (Cth)	Current (Compilation No 38, 11 Dec 2024)	s 15AB	Currently in force; provisions unchanged since Full Court hearing	N/A
3.	*Corporations Act 1989* (Cth)	As made	Pt 9; s 54	Referred to for extrinsic materials as at date of enactment	N/A
4.	*Corporations Act 2001* (Cth)	As at 28 May 2024 (Compilation No 130, 22 May – 11 Jun 2024)	Pt 9.6A; ss 1337P, 1337B	As at date of the Full Court hearing (however subsequent amendments to Pt 9.6A not materially relevant)	N/A
5.	*Federal Court of Australia Act 1976* (Cth)	Current (Compilation No 59, 11 Dec 2024)	Pt IVA; ss 33V, 33Z, 33ZF, 33ZJ	Currently in force; provisions unchanged since Full Court hearing	N/A
6.	*Judiciary Act 1903* (Cth)	Current (Compilation	ss 39B, 79	Currently in force; provisions	N/A

		No 51, 11 Dec 2024)		unchanged since Full Court hearing	
			State provisions		
7.	*Civil Liability Act 2002* (NSW)	Current (No 22, 16 June 2022)	Sch 2, cl 2	Currently in force; provisions unchanged since Full Court hearing	N/A
8.	*Crimes Act 1900* (NSW)	Current (No 40, 2 December 2024)	Sch 3, cl 5	Currently in force; provisions unchanged since Full Court hearing	N/A
9.	*Legal Profession Act 1987* (NSW)	Repealed (No 15 August 2005 – 30 September 2005)	Pt 11, s 188	For illustrative purposes	N/A
10.	*Legal Profession Act 2004* (NSW)	Repealed (No 112, 4 July 2014 – 30 June 2015)	s 325	For illustrative purposes	N/A
11.	*Legal Profession Amendment (Incorporated Legal Practices) Act 2000* (NSW)	Repealed (No 73, 15 July 2001 – 28 November 2001)		For illustrative purposes	N/A
12.	*Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW)*	Current (No 243, 4 March 2022	rr 4, 23, 27, 28, 79	Currently in force; provisions unchanged since Full Court hearing	N/A
13.	*Legal Profession Reform Act 1993* (NSW)	(No 87, 29 November 1993)	Sch 3, cl 1	For illustrative purposes	N/A

14.	*Interpretation of Legislation Act 1984* (Vic)	Current (No 131, 6 September 2023)	s 35	Currently in force; provisions unchanged since Full Court hearing	N/A
15.	*Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW)	Current (No 114, 9 August 2024)	rr 12.2, 12.4, 20	Currently in force; provisions unchanged since Full Court hearing	N/A
16.	*Legal Profession Uniform Law Australian Solicitors' Conduct Amendment Rules 2022* (NSW)	Current (No 34, 1 April 2022)	r 12	For illustrative purposes	N/A
17.	*Legal Profession Uniform Law* (NSW)	Current (No 16a, 1 July 2022)	Pt 9.2; ss 7, 182, 183, 185, 298, 472	Currently in force; provisions unchanged since Full Court hearing	N/A
18.	*Maintenance and Champerty Abolition Act 1993* (NSW)	Repealed (No 88, 1 April 1997 – 7 July 2011)	ss 3–4, 6	For illustrative purposes	N/A
19.	*Statute Law (Miscellaneous Provisions) Act 2011* (NSW)	Current (No 27, 2 September 2012)	Sch 4	Currently in force; provisions unchanged since Full Court hearing	N/A
20.	*Supreme Court Act 1986* (Vic)	Current (Version 110, 29 Mar 2024)	Pt 4A; 33ZDA	Currently in force; in force as at date of Full Court hearing	N/A

SCHEDULE OF PARTIES

No S146/2024

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

ROBERT WARNER SHAND
Fourth Respondent

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

CHUBB INSURANCE AUSTRALIA LIMITED ACN 001 642 020
Sixth Respondent

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

ZURICH AUSTRALIAN INSURANCE LIMITED ACN 000 296 640
Eighth Respondent

XL INSURANCE COMPANY SE ARBN 083 570 441
Ninth Respondent

No S143/2024

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

JOHN BRUCE KAIN
Fourth Respondent

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

CHUBB INSURANCE AUSTRALIA LIMITED ACN 001 642 020
Sixth Respondent

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

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Eighth Respondent

XL INSURANCE COMPANY SE ARBN 083 570 441
Ninth Respondent

No S144/2024

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