HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

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

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

FOURTH RESPONDENT'S SUBMISSIONS

Part I: CERTIFICATION

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

Part II: ISSUES ARISING

2. The issues have been identified in paragraph [2] of Mr Kain's submissions dated 12 December 2024 (**KS**).

Part III: SECTION 78B *JUDICIARY ACT 1903* (CTH)

3. The Fourth Respondent (being the Appellant in the related appeal, S143/2024) (**Mr Shand**) considers that no s78B notice is required in this proceeding.

Part IV: FACTS

4. The background facts have been summarised in KS [5] to [13].

Part V: MR SHAND'S ADDITIONAL SUBMISSIONS

First ground of appeal: CFO at settlement or judgment

5. Mr Shand has additional submissions to make to those made by Mr Kain with respect to the first ground of appeal. In summary, the propositions that Mr Shand advances as part of those additional submissions are:

   (a) Each of s 33V(2) and s 33Z(1)(g) of the *Federal Court of Australia Act 1976* (Cth) (**the Act**) ought be taken separately. The ordinary meaning of the text of each section is not to confer a power to create a legal right on the part of a funder or solicitor (or anyone else) either as against unfunded group members or as a proprietary interest in a settlement sum or damages paid by a respondent in discharge or settlement of rights of group members.

   (b) Section 33V(2) is concerned with doing what is just with respect to the distribution of a settlement amount or monies paid into Court, and that could only be concerned with the just distribution of the funds to, and as between, group members, not any other person who might assert that they would like (but do not have an antecedent legal entitlement) to receive part of the funds.

   (c) Section 33Z(1)(g) provides for the making of an additional order that is just (that is, additional to those provided for by sub-sections (a) to (f)) in determining a matter in a representative proceeding. Section 33Z(1) is concerned with resolving the justiciable controversy with respect to the rights

and interests of the parties to the litigation (including group members). Nothing in the text suggests that s33Z(1)(g) confers an additional power to create a substantive right for a third party with respect to any damages award. In addition, the Full Court's construction of s 33Z(1)(g) was inconsistent with the specific provisions of s 33Z(2) and s 33ZJ.

(d) There is no reason to contort the words of the Act on the basis of a general policy considerations about ensuring access to justice or a market for litigation funding.[1] These are matters for the legislature and, if it wished to do so, the Commonwealth legislature could make specific provision for CFOs, or any other form of order it considered appropriate, and the circumstances in which such an order could be made, as the Victorian legislature has done.

First Additional Submission: Defining Some Significant Terms

6. There are four relevant concepts used by the parties and the Court below, being a:

(a) common fund order / 'CFO';

(b) solicitors' common fund order / 'SCFO';

(c) funding equalisation order / 'FEO'; and

(d) group costs order / 'GCO'.

7. Each of these orders share common features. All four species of orders can be used to share the costs of a representative proceeding amongst all group members.

8. There are differences in the burden created by some of these orders. The critical feature of a CFO (as well as a SCFO and a GCO) that distinguishes those orders from a FEO is that they can oblige group members (as a whole) to pay to a litigation funder an amount greater than the amount that any group members (in totality) have contractually committed to paying to that funder. In contrast, a FEO is designed to distribute the contractual burdens of some group members on a pro rata basis amongst all group members. A SCFO has the added feature of imposing additional burdens on group members that would be illegal if found in a contract between those group members and their solicitor.

[1] There is no 'envisag[ing] a Court making orders with respect to the economics of a proceeding by ensuring that a litigation funder obtains a particular return on funds invested': *BMW Australia Ltd v* ***Brewster*** (2019) 269 CLR 574 at 630 [141] (Gordon J).

9. There are also timing differences: each of CFO, SCFO and FEO orders are made at a time where the group members' property rights have crystalised in the creation of a fund (at judgment or settlement). In contrast, a GCO is made at an early stage.

10. A CFO: A CFO has the following essential feature: '[b]y force of the order, the representative party and group members are required to pay to the litigation funder, out of such amount or amounts as [have been] jointly or severally obtained by them by way of settlement of, or judgment in, the proceeding, such amount or amounts by way of reimbursement for funded costs and by way of funding commission as are identified in the funding terms. The funding commission to be paid to the litigation funder includes a premium for litigation risk'.[2]

11. A SCFO: A SCFO does not involve a payment to a litigation funder, but instead involves an equivalent payment being made to the solicitors for the representative party. The effect of the order is to oblige group members (as a whole) to pay to the solicitors an amount of the settlement or judgment:

(a) reflecting the risk to those solicitors of conducting and financing the proceedings;

(b) in addition to the solicitors' contractual entitlements for the recovery of fees and disbursements; and

(c) in terms that the solicitors would be prohibited from contractually bargaining for because of statutory and ethical prohibitions placed on the solicitors.

12. A FEO: A FEO 'reduces unfunded group members' awards by an amount equivalent to that paid by funded group members to the litigation funder'.[3] As Beach J explained in *Elliot-Carde* at [155]-[158],[4] there are two common "forms" of FEOs – the first involves 'deducting from the share of the settlement attributed to unfunded group members … amounts equal to the funding costs that would otherwise have been payable by them if they had entered into a funding agreement … [and then] distribute those notional amounts across the whole class'.[5] The second involves 'redistribut[ing]

[2] *Brewster* at 617 [104], Gageler J (as his Honour then was), with the bracketed text reflecting the form of orders approved post-*Brewster*. Although addressing CFOs as that term was used prior to Brewster, the essential features in the quoted extract remain a fair summary of the effect of the order.
[3] *Brewster* at 612 [86] (Kiefel CJ, Bell and Keane JJ).
[4] ***Elliott-Carde*** *v McDonald's Australia Ltd* (2023) 301 FCR 1 (Beach, Lee and Colvin JJ).
[5] *Elliott-Carde* at [156] (Beach J). This is the form of order considered in *Brewster* at 612 [86] (Kiefel CJ, Bell and Keane JJ)

the amounts which the funded group had collectively agreed to bear across the whole group, so that the whole group shared the expense contractually incurred only by the funded group'.[6] The detail of the first method was explained by Lee J in *Davaria* at [57]-[59]; as Lee J noted, the effect of the first method is potentially to increase the return to funders by increasing the share received by funded group members. But in a broad sense, the effect of either form of FEO it is to redistribute the expenses incurred contractually by funded group members amongst all group members in a pro rata fashion.

13. A GCO: A GCO can be made in class action proceedings in the Victorian Supreme Court. It is made at an early stage and grants the solicitors for the plaintiff a statutory contingency fee in exchange for those solicitors assuming the burden of funding the proceeding and the risks of an adverse costs order.[7] This is the order that the First and Second Respondents to the appeal propose to seek if this Court finds that there is no power to make a SCFO.[8]

Second Additional Submission: Further Principles of Statutory Construction

14. KS [14] contains a summary of relevant principles of statutory construction. Mr Shand submits that the following additional principles are relevant.

15. *First*, the principle of legality. Clear words are required to reveal an intention to interfere with common law rights, particularly rights of property.[9] A construction which authorises the least interference with private property rights would be favoured.[10] A property right, or a right relating to property, is not 'merely [a right] … to take or not take a particular course of action'. Rather it is 'a fundamental right of our

[6] *Elliott-Carde* at [157] (Beach J).
[7] Section 33ZDA of the *Supreme Court Act 1986* (Vic).
[8] See KS [9]: the Protocol provides that, if the Applicants are unable to obtain orders that notice be given to claimants of the intention to seek a SCFO, the Applicants will seek to transfer the proceedings to Victoria and seek a GCO or alternatively commercial litigation funding.
[9] *American Dairy Queen v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 682-3 (Gibbs CJ agreeing at 679, Mason and Murphy JJ agreeing at 686, Aikin J agreeing at 686, Brennan J agreeing at 686).
[10] *Potter v Minahan* (1908) 7 CLR 277 at 304 (O'Connor J); *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341 (Mason ACJ, Wilson and Dawson JJ); *Coco v The Queen* (1994) 179 CLR 427 at 436-8 (Mason CJ, Brennan, Gaudron and McHugh JJ); *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at 608 [5] and 619 [42]-[43] (French CJ); *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2010) 240 CLR 409 at 420-21 [32] (French CJ, Gummow, Crennan and Bell JJ); and *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376 at 387 [68] (French CJ, Kiefel, Bell, Keane, and Gordon JJ).

legal system'.[11] The principle of legality is about ensuring that the legislature confronts what it is doing where that affects existing rights and interests. It cannot be said from either the text of the statute or the explanatory material that the legislature has confronted the prospect of courts engaging in the redistribution of property from unfunded group members to funders.

16. *Second*, the '*Anthony Hordern*' principle. A general provision will usually be interpreted so that it does not contradict a specific power that imposes 'conditions and restrictions which must be observed' in the exercise of the same power.[12]

17. *Third*, it is a mistake to begin with an idea of the desirable policy and impute that to the legislature as a purpose of the statute.[13] The conclusion that a particular consequence of proposed construction is one that Parliament is unlikely to have intended needs to be grounded in the text and structure of the statute, albeit the process may be assisted by common law and the rules of statutory construction.[14]

Third Additional Submission: Context of ss 33V and 33Z and Their Purpose

18. Kain at [14]-[20] provides a summary of the context of Part IVA and the particular provisions. At KS [25] to [29], Mr Kain contends that Part IVA was not intended for the Court to protect the prospective return on litigation funder's investment. As stated above at [21], it would be a mistake to begin with an idea of a desirable policy (that is, to ensure a competitive market for litigation funding in Australia) and impute that to the legislature as a purpose of Part IVA. An additional point of context for s33V is identified by Mr Shand.

19. The approval of settlements in representative proceedings is part of the Court's protective or supervisory jurisdiction.[15] It is analogous to the Court's supervisory role in approving settlements on behalf of infants.[16] The obligation is onerous and protective

[11] *Lehman Brothers Holdings Inc v City of Swan* (2010) 240 CLR 509 at 531 [66] (Heydon J) quoting *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 284 [36] (McHugh J).
[12] ***Anthony Hordern*** *& Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 (Gavan Duffy CJ and Dixon J).
[13] *Certain Lloyd's Underwriters Subscribing to Contract No1HooAAQS v Cross* (2012) 248 CLR 378 at [26] (French CJ and Hayne J); ***BXS20*** *v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 296 FCR 63 at 70-71 [32] (Thawley, Stewart and Kennett JJ).
[14] *BXS20* at 70-71 [32] (Thawley, Stewart and Kennett JJ).
[15] *Australian Securities and Investments Commission v* ***Richards*** [2013] FCAFC 89 at [8] (Jacobson, Middleton and Gordon JJ); *Elliot-Carde* at 62 [394] (Lee J), 76 [470] (Colvin J).
[16] *Richards* at [8] (Jacobson, Middleton and Gordon JJ).

of group members.[17] It 'contemplates the exercise of a protective role in scrutinising the terms that are proposed in the interests of the party whose interests are to be protected by the jurisdiction to approve'.[18] The Court is required to assume this protective role because group members generally play a passive role in representative proceedings, and are generally left uninformed of the day-to-day running of those proceedings.

Fourth Additional Submission: Textual Analysis – Meaning of s33V(2)

20. KS [17]-[29] addresses the meaning of 'just' and KS [30]-[31] addresses the meaning of 'distribution'. These are Mr Shand's additional submissions on the meaning of the composite expression in s33V(2) that the Court 'may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court'.

21. *First*, s33V(2) is only a power to make such orders as are just with respect to distribution of money paid under a settlement or into Court. The relevant money will be paid by one or more respondents and as settlement or in discharge of the rights of action of the representative party and group members. The text of the section read in its ordinary way permits the Court to determine a just distribution as between group members (some of whom may be funded and some of whom will not be) with respect to a lump sum paid in discharge of all of their collective rights.

22. It is a warping of the ordinary meaning of the text of the section to try to insert the interests of the funder in receiving a 'fair' or 'reasonable' return for the investment that the funder has already made into the consideration of what is the 'just … distribution of any money paid under a settlement'. Any number of other categories of persons with relationships to unfunded group members (for example, their actual creditors or their dependents) might wish to have the benefit of part of the money that would be received by a group member in discharge of the legal rights of that group member; but as with litigation funders, there is no reason to read into s33V(2) the creation of a power to distribute funds to any person who wishes to assert that it would be fair for them to receive a share of the settlement sum. The context and text of s33V both focus on what is occurring *inter partes*; that is in contrast to other statutory powers in which the nature

[17] *Richards* at [8] (Jacobson, Middleton and Gordon JJ).
[18] *Elliot-Carde* at [470] (Colvin J).

of the power to do something "just" or "in the interests of justice" might invite or necessitate consideration of matters beyond the interests of the parties.[19]

23. *Secondly*, the context in which orders are made under s33V(2) is that the proceedings have resolved, subject to court approval. What is 'just with respect to the distribution of money' is to be considered at the time of the orders being sought under that power. A funder is not obliged at that point to do anything further for group members to further the proceedings;[20] hence there could not be an access to justice consideration within the litigation at the time of the exercise of the power under s33V. And a public policy concern about ensuring a general active market for litigation so as to promote access to justice generally is beyond the scope of an order under s33V(2).

24. As to the potential concern that group members do not receive a 'windfall' at the expense of the funder[21] – this is a risk that the funder agreed to take in funding the action. It is a risk that is mitigated by book building. Unlike group members, the funder is not vulnerable to these risks, but rather assumes the risk voluntarily. There is nothing 'just' about paying group members' property to a funder who has no right to the money.[22]

25. *Thirdly*, the resolution of the proceedings will involve the payment of money to group members and therefore the distribution of the property of the group members. The significance of this is that the principle of legality is engaged for the reasons given at paragraph 17 above.[23] The effect of a CFO made under s33V(2) is to charge group members' property for the benefit of the litigation funder (or the solicitor in the event of a SCFO). The power to 'make such orders as are just with respect to the distribution of any money paid' should be read in a way that does the least harm to the property rights of group members. Absent specific statutory intention to interfere in those

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[19] See, for example, *BHP Billiton Limited v Schulz* (2004) 221 CLR 400 at 421 [15] (Gleeson CJ, McHugh and Heydon JJ in dissent) dealing with transfer of proceedings under cross-vesting legislation, *Aon Risk Services Australia v Australian National University* (2009) 239 CLR 175 at 190 [26] (French CJ) and 212 [95] (Gummow, Hayne, Crennan, Kiefel and Bell JJ) dealing with case management; *ACCC v ASIC* [2000] NSWSC 316 at [27] and [28] (Austin J) dealing with reinstatement of a company.

[20] See *Brewster* at 649 [104] (Gageler J), 640 [179] (Edelman) – the funder was required to give various undertakings to fund the action at the outset of the proceeding in exchange for the promise of reward at the conclusion of the proceeding.

[21] *Elliott-Carde* at FCR 70 [437] (Colvin J).

[22] *Brewster* at 612-613 [87]-[90] (Kiefel CJ, Bell and Keane JJ).

[23] In *Brewster*, the plurality did not consider it necessary to reason by reference to the principle of legality: 600 [48] (Kiefel CJ, Bell and Keane JJ) and 654 [212] (Edelman J).

property rights (as is found in s33ZJ(2) of the Act), the section should not be read to support orders that impose additional burdens on those property rights.

26. *Fourthly*, the Court is exercising its protective jurisdiction in making orders under s33V of the Act. This context is important when considering the vices of CFOs and SCFOs identified by Kain here – that they contemplate an additional burden being placed on the group members whose interests are to be protected and, in an opt-out class action, play a passive role in the proceedings. Orders that create additional burdens on group members do not protect those group members. They harm them. The protective purpose of the court's jurisdiction is not served by a compulsory acquisition of their property that they are not otherwise legally obliged to provide to the litigation funder.[24]

Fifth Additional Submission: Meaning of s33Z(1)(g)

27. KS [17]-[29] addresses the meaning of 'just'. These are Mr Shand's additional submissions on the meaning of s33Z(1)(g).

28. First, s33Z(1) is a source of power to do what is "just" when 'determining a matter in a representative proceeding'. The term 'matter' is not defined but is used throughout the Act.[25] Logically, its usage in s33Z(1) cannot be broader than its usage in the Constitutional sense. In its Constitutional sense, it refers to the Court quelling a justiciable issue between the parties.[26] Judicial power is the power exercised by Courts in making final and binding adjudications as to rights, duties or obligations put in issue by the parties.[27] Consistent with the Constitutional concept of "matter", the chapeau should be read as being a source of power to make orders that are necessary to resolve the dispute between the parties (including the group members). That construction is

[24] *Brewster* at 612 [87] (Kiefel CJ, Bell and Keane JJ).
[25] *Williams v Toyota Motor Corporation Limited* [2021] FCA 1425 at [58] (Lee J).
[26] *CGU Insurance v Blakeley* (2016) 259 CLR 339 at 352 [30] (French CJ, Kiefel, Bell and Keane JJ).
[27] *Truth About Motorways v Macquarie* (2000) 200 CLR 591 at 610 [43] (Gaudron J) citing *Huddart, Parker & Co Proprietary Ltd v Moorehead* (1909) 8 CLR 330 at 357 (Griffith CJ); *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 463 (Isaacs and Rich JJ); *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 211-212 (Starke J); *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 666 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Harris v Caladine* (1991) 172 CLR 84 at 147 (Gaudron J); *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 497 (Gaudron J); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 256-259 (Mason CJ, Brennan and Toohey JJ), 267-269 (Deane, Dawson, Gaudron and McHugh JJ); *Nicholas v The Queen* (1998) 193 CLR 173 at 207 (Gaudron J); *Abebe v Commonwealth* (1999) 197 CLR 510 at 555 (Gaudron J).

consistent with each of sub-sections (a) to (f) of s 33Z(1), which provide for the doing of things *inter partes*.

29. The whole of the text of s 33Z(1) does not suggest that sub-section (g) is conferring a more general power, beyond determining the rights and interests of the parties to the litigation, so as to permit the Court to determine, based on some more general norm of what is "just", that unfunded group members should pay money to a person with whom they have no contractual or other relationship in law or equity. Section 33Z(1)(g) does not support a freestanding right for non-parties to approach the court and make claims on the judgment sum.

30. *Second*, the proposition that the general words in s33Z(1)(g) create a power to cause part of any judgment sum to be distributed to a funder is inconsistent with the specific words of s 33Z(2). Section 33Z(1)(e) and s 33Z(1)(f) provide that, in determining a matter, the Court may make an award of damages. Section 33Z(2) requires that *'[i]n making an order for an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled'*. Section 33Z(2) reflects the premise that monies are paid in discharge of the liability of a respondent to group members; it provides that the award of damages is to be paid or distributed to the entitled group members; it does not provide that money paid in discharge of an award of damages may be distributed to a funder or any other person other than a group member. As such, the general power found in s33Z(1)(g) should not be construed as an exception to the specific restriction in s33Z(2) – that is, the Court's power to distribute a payment of damages only extends to payment to the relevant group member.[28] The construction of the Full Court below, to the effect that s33Z(1)(g) allows for payment of some of the award of damages to a litigation funder or solicitor, is either directly inconsistent with that provision or inconsistent with the *Anthony Hordern* principle.[29]

31. Third, s 33ZJ provides that *'(1) [w]here the Court has made an award of damages in a representative proceeding, the representative party ... may apply to the Court for an order under this section' and '(2) [i]f ... the costs reasonably incurred in relation to the representative proceeding ... are likely to exceed the costs recoverable by the*

[28] *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 589 [59] (Gummow and Hayne JJ).
[29] *Anthony Hordern* at 7 (Gavan Duffy CJ and Dixon J); ***Leon Fink*** *Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678 (Mason J).

person from the respondent, the Court may order that an amount equal to the whole or a part of the excess be paid to that person out of the damages awarded'. The effect of this provision is to deal specifically with the possibility of an adjustment to a group members' entitlement to their damages sum to account for legal costs. That specific provision, providing for when a representative party can obtain an order that they be paid with respect to the costs of the litigation, would be redundant if 33Z(1)(g) provides a general power to order costs and funding commissions to be paid out of the damages award regardless of whether the requirement of s 33ZJ is satisfied.[30]

Second Issue – Solicitors CFO

10 32. In addition to Mr Kain's submissions at KS at [33] to [60], Mr Shand further submits that:

(a) A SCFO could never be 'just' within the ordinary meaning of the word because contingency fees risk undermining the administration of justice, which is the reason that contingency fees are unlawful in equity, common law and statute.

(b) If ss33V(2) and 33Z(1)(g) permitted the ordering of a SCFO in certain circumstances, then ss33V(2) and 33Z(1)(g) would stand in conflict with statutory prohibitions on contingency fees. If the legislature intended ss33V(2) and 33Z(1)(g) to deprive the statutory prohibitions on contingency fees of effect in class actions, it would have expressed that intention clearly.

20 (c) The court and the independent bar are unable to adequately manage the conflicts of interest that are inherent in an SCFO such that an SCFO could never be 'just'.

(d) The fact that the Victorian legislature has explicitly allowed plaintiff solicitors to charge contingency fees in class actions filed in the Supreme Court of Victoria has no effect on the construction of the Act.

First Additional Submission: The Various Prohibitions against Contingency Fees are Fundamental to the Administration of Justice

33. An SCFO is not 'just' within the meaning of ss33V and 33Z of the Act because it undermines the administration of justice. An order that has that effect is not a 'just' order.

[30] *Anthony Hordern* at 7 (Gavan Duffy CJ and Dixon J); *Leon* at 678 (Mason J).

34. By allowing the solicitors to be remunerated for their risks in funding the legal costs and disbursements by payment of a percentage of the judgment or settlement sum, an SCFO, in effect, enables solicitors to charge contingency fees. Contingency fees are unlawful in equity, common law and statute. The prohibition against solicitors having a direct, and potentially substantial, financial interest in the outcome of any given case is to ensure that that the lawyer's fundamental duty to the court, the overriding duty of candour, its independence and duty to the client are not compromised.[31] These ethical duties are integral to the administration of justice.

35. **Fiduciary duties**: The solicitor-client relation is a fiduciary relationship and has been described as one of the most important fiduciary relationships known to law.[32] A consequence of the solicitor-client relationship being fiduciary is that a solicitor has a duty not to misuse their position to gain a profit without the client's fully informed consent,[33] and a solicitor must avoid any real sensible possibility of conflict between the duty to serve the interests of the client and the solicitor's personal interest.[34] These duties prevent solicitors from charging contingency fees.

36. The objective of these rules is to preclude the fiduciary from being swayed by considerations of personal interest and to preclude the fiduciary from misusing their position, opportunity or knowledge for personal advantage.[35]

37. The Full Court held at FC [62] to [65] that the applicants' solicitor only owes fiduciary duties to group members (where there is no retainer) in circumstances where the solicitor seeks to resolve their individual claim. The Full Court found that, where the solicitor is not seeking to resolve an individual claim, the duties of the solicitors to group members, absent a retainer, are not fiduciary in nature but only not to act contrary to the interests of those in respect of whom the lead applicant acts in a representative

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[31] ***Bolitho*** *v Banksia Securities Limited* [2014] VSC 582 at [19] (Ferguson JA); *Bogan v The Estate of Peter John Smedley & Ors* (2023) VR 394 at 398 [3] (Ferguson CJ, Niall and Macaulay JJA); *Frost v Miller* [2015] QSC 206 at [14] (de Jersey CJ); *Michael McGarvie v Legal Services Commissioner* [2012] VCAT 1800 at [31].
[32] ***Oceanic Life*** *Ltd v HIH Casualty & General Insurance Ltd* [1999] NSWSC 292 at [39] (Austin J) citing *Mallesons Stephen & Jaques v* ***KPMG Peat Marwick*** (1990) 4 WAR 357 at 361 (Ipp J); see also *Maguire v Makaronis* (1997) 188 CLR 449 at 463 (Brennan CJ, Gaudron, McHugh and Gummow JJ).
[33] *Oceanic Life* at [40] (Austin J) citing *Boardman v Phipps* [1967] 2 AC 46; ***Hospital Products*** *Ltd v United States Surgical Corporations, Surgeons Choice* (1984) 156 CLR 41 at 103 (Mason J); *Pilmer v The Duke Group Ltd (in liq)* (2001) 207 CLR 165 at 199 [78] (McHugh, Gummow, Hayne and Callinan JJ).
[34] *Oceanic Life* at [40] (Austin J) citing *KPMG Peat Marwick* at 362 (Ipp J).
[35] *Chan v Zacharia* (1984) 154 CLR 178 at 198-199 [24] (Deane J); *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1 at 47 [199] (Spigelman CJ, Sheller and Stein JJA).

capacity.[36] The Full Court was wrong to limit the scope of the fiduciary duties in this way.

38. A solicitor may have a fiduciary duty even absent a retainer.[37] When considering the various circumstances that may point to the existence of a fiduciary duty or obligation - in particular, an undertaking by one party to perform a task or fulfil a duty of another party,[38] the scope for one party to unilaterally exercise a discretion or power which may affect the rights or interests of another,[39] and the dependency or vulnerability one the part of one party that causes that party to rely on another[40] - it is apparent the representative party's solicitors owe fiduciary duties to the group members prior to the resolution of their individual claims. In class actions, the representative party's solicitors provide legal services which, practically speaking, affects the rights and interests of all group members. There is a power held by the solicitors to affect the rights and interests of group members in a legal or practical sense. Further, the group members are dependent and vulnerable to the solicitors' advice and forensic decisions leading up to and during the trial as the group members are bound by the Court's findings on the common questions.

39. Moreover, if it is accepted that the representative party's solicitors owe fiduciary obligations at the point of the proceedings where the group member's individual claims are resolved (see FC at [62]-[65]), those fiduciary obligations must commence beforehand when it is *anticipated* that the solicitors will seek to have the class member's rights individually determined. The indicators of a fiduciary relationship are directed to the *scope* for one party to affect the rights or interest of another and it is not a precondition to a fiduciary relationship that the rights or interest are actually affected.

40. If, contrary to Mr Shand's primary submission, the representative party's solicitors do not owe fiduciary duties, they owe fiduciary-like duties to the group members,[41] which include avoiding being in a conflict of interest where the solicitor's personal interests could conflict with the group members by charging contingency fees.

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[36] FC [62]; ***Dyczynski*** *v Gibson* (2020) 280 FCR 583 at 673 [379] (Lee J).
[37] See *Chittick v Maxwell & Ors* [1994] NSWCA 196 (unreported), 6-7 (Mahoney JA).
[38] *Hospital Products* at 96-97 (Mason J); *Reading v The King* [1949] 2 KB 232 at 236 as cited at 70 (Gibbs CJ).
[39] *Jaken Properties Australia Pty Ltd v Naaman* (2023) 12 NSWLR 318 at 323 [8] (Bell CJ) citing *Frame v Smith* [1987] 2 SCR 99; (1987) 42 DLR (4th) 81 cited in *LAC Minerals v International Corona Resources* [1989] 2 SCR 574; (1989) 61 DLR (4th) 14 at 62-63..
[40] *Johnson v Buttress* (1936) 56 CLR 113 at 134-135 (Dixon J with Evatt J agreeing).
[41] *Dyczynski* at 635 [209] (Murphy and Covin JJ).

41. **Common law of professional misconduct**: The common law has long recognised that solicitors who fail to avoid conflicts between their client's interests and their own interests may be guilty of professional misconduct.[42] Further, solicitors who charge fees that are beyond what is fair and reasonable may also be found guilty of professional misconduct.[43] A corollary of these ethical duties at common law is that solicitors are prohibited from charging contingency fees as explained in *Clyne* and *Hegarty*.[44]

42. **Common law restraining legal practitioners from acting**: Courts have also relied on their inherent jurisdiction to make orders to restrain lawyers from acting in particular matters to ensure the due administration of justice and to protect the judicial process.[45]
10 The Court has restrained lawyers (solicitors and counsel) from acting where there has been a conflict of interest, or a real risk of a conflict of interest occurring, between the client and the legal practitioner concerning the litigation in question.[46] This has included restraining a solicitor who was entitled to receive a contingency fee.[47] Courts have restrained solicitors from acting where there is a conflict, or a real risk of a conflict, to ensure that justice is not only done but is manifestly and undoubtedly seen to be done.[48]

43. **Statute**: Each state and territory in Australia has enacted legislation that contains conduct rules by which solicitors must comply. In each state and territory, the

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[42] *Victorian Legal Services Board v Gobbo* [2020] VSC 692 at [45] (Forbes J).
[43] *Bechara v Legal Services Commissioner* (2010) 79 NSWLR 763 at 796 [138]-[142] (McClellan CJ at CL with McColl and Young JJA agreeing).
[44] *Clyne v The New South Wales Bar Association* (1960) 104 CLR 186 (Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ); *Hegarty v Keogh (No 2)* [2023] SASCA 30 at [137]-[140] (Livesey P, Doyle and Bleby JJA); *Council of the Law Society v Yoon* [2020] NSWCA 141 (Bell P, Ward and White JJA) is an example of a case where a solicitor was found to be guilty of professional misconduct for charging contingency fees, in addition to misappropriating trust funds, failure to comply with a notice and other contraventions of the LPUL).
[45] ***Grimwade** v Meagher* [1995] 1 VR 446, 452 (Mandie J) and *Bolitho* at [16] (Ferguson JA).
[46] *Bolitho* in which Ferguson JA made orders restraining the solicitor and Senior Counsel from acting for the plaintiff as their potential conflicts of interest would affect the proper administration of justice, including the appearance of justice; *Pearlbran v Win Mezz No.19 Pty Ltd* [2009] QSC 292 (Douglas J) the plaintiff's solicitor was restrained from acting because *inter alia* he had a "*personal or reputational interest in the result… [and] there [was] the distinct possibility of a real or apparent conflict between his personal interest and his duty to the Court*" (at [18] and [23]); see also *Grimwade* 454 (Mandie J); *Kallinicos v Hunt* (2005) 64 NSWLR 561 at 583 [78] (Brereton J); *Miller v Martin* [2019] VSCA 86, [18] (Kyrou, Niall and Ashely JJA); *Holborrow v Macdonald Rudder* [2002] WASC 265 at [29] in which Heenan J stated " *Other similar conflicts of interest can arise if, for example, the counsel or solicitor had a substantial personal stake in the litigation such as, for example, if he or she were to be a partner in a firm which was a party to the litigation, or a substantial shareholder in a corporation which was a party*".
[47] *Bolitho* at [50]-[52] (Ferguson JA).
[48] *Bolitho* at [16] citing *Gimwade v Meagher* [1995] 1 VR 446, 452 (Mandie J).

legislation provides that solicitors' fundamental duty is to the court;[49] they have a duty of candour;[50] they are required to avoid conflicts of interest between their client's interest and their own interest;[51] they avoid any compromise to their integrity and professional independence.[52] In accordance with these overriding and fundamental ethical obligations, each state and territory has explicitly prohibition solicitors charging contingency fees.[53]

44. Although the Full Court observed that the prohibition is on entering into a costs agreement which contains a contingency fee (in e.g. s 183 of the *Legal Professional Uniform Law* 2014 (**LPUL**)), that language must be understood as part of the provisions of Division 4 of Part 4.3 as a whole. A client of a law practice has the right to require and to have a negotiated costs agreement with the law practice': s179 LPUL and no part of the amounts that may be payable under that agreement can be calculated by reference to the amount of any award or settlement. The proper construction of these provisions, as a whole, is that a solicitor must not be remunerated by a contingency fee. The interposition of the Court in the making of the order does not avoid the conclusion that the solicitor is receiving a contingency fee in breach of Division 4 of Part 4.3 LPUL.

45. As noted at KS [39] to [43], the prohibition of contingency fees has survived even though champerty and maintenance is no longer a crime. This is consistent with a legislative intention to maintain the prohibition of contingency fees to protect the administration of justice.

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[49] *Australian Solicitors' Conduct Rules* (**ASCR**) at r 3. The ASCR has been adopted by every state and territory in Australia, except for Northern Territory: *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (which applies in New South Wales, Victoria and Western Australia); *Australian Solicitors' Conduct Rules 2023* (Qld); *South Australian Legal Practitioners Conduct Rules* (SA); *Legal Profession (Solicitors' Conduct) Rules* 2020 (Tas); see also *Legal Profession (Solicitors) Conduct Rules 2015* (ACT); *Rules of Professional Conduct and Practice (May 2005)* (NT) (**NT Rules**) at p 13.
[50] ASCR at r 4.2; NT Rules at r 1.1 and r 17.6.
[51] ASCR at r 4.1, r 12.1 and r 12.2; NT Rules at r 8.1 and 8.2.
[52] ASCR at r 4.1.4.
[53] See *Legal Profession Act 2006* (ACT) s 285; *Legal Profession Uniform Law* (NSW) s 183; *Legal Profession Act 2006* (NT) s 320*; Legal Profession Act 2007* (Qld) s 325; *Legal Practitioners Act 1981* (SA) sch 3 cl 27; *Legal Profession Act 2007 (*Tas) s 309; *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 183(1); *Legal Profession Act 2008* (WA) s 285.

Second Additional Submission: Sections 33V and 33Z do not Provide a Power for a SCFO

46. If the legislature intended for ss 33V(2) and 33Z(1)(g) to avoid the statutory prohibitions against contingency fees, it would have expressed that intention clearly.[54] And if the legislature intended to modify solicitors' professional obligations or their obligations in equity, it would have expressed that intention clearly.

47. Although the principle of *generalis specialibus non derogant* is ordinarily applied where there is a conflict between a general and specific sections in the same Act, the principle is just as applicable where the conflict arises between two separate Acts.[55] The legislature has created a detailed regime regulating solicitors' duties, which includes the prohibition against contingency fees, and by that detailed regime it is plain that it intends that regime operates in accordance with its complete terms. As set out in KS at [56], the prohibition against contingency fees appears in the context where contravention of s 183 of the LPUL can give rise to the imposition of a civil penalty or may result in the solicitor being found guilty of unsatisfactory professional conduct or professional misconduct; the costs agreement being void; and the law practice being unable to recover any amount in respect of the legal services. On the other hand, the words in ss 33V(2) and 33Z(1)(g) are general. It can be assumed that the legislature is taken not to have intended to impinge upon the comprehensive regime of a specific character, namely the regulation of solicitors charging contingency fees.[56]

48. Sections 33Z(2) and 33V should not be construed in a manner that allows making orders that would contravene the specific laws prohibiting contingency fees.[57] That approach is consistent with the approach taken in *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47, where the High Court considered whether a grant of a licence to the applicant under the *Broadcasting and Television Act 1942* (Cth) (**BAT Act**) permitted it to operate a radio transmitter in New South Wales in circumstances where s 89C of the BAT Act stated that the holder of the licence 'shall commence the

[54] ***Smith*** *v R* (1994) 181 CLR 338 at 348 (Mason CJ, Dawson, Gaudron and McHugh JJ).
[55] *Smith* at 348 (Mason CJ, Dawson, Gaudron and McHugh JJ); *Fakhouri v The Secretary for the NSW Ministry of Health* [2022] NSWSC 233 at [45] (Beech-Jones CJ at CL).
[56] *Ombudsman v Laughton* (2005) 64 NSWLR 114 at 118 [19] (Spigelman CJ).
[57] Such a construction is also consonant with the common law prohibition against contingency fees: *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635-6 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) and principles of fiduciary duties which would, in effect, prohibit a solicitor from charging contingency fees: see *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687 at 700 (Kirby P) a construction consonant with the basic rules of equity should be preferred.

service in pursuance of the licence on such date as is determined by the [Commonwealth] Tribunal'. The applicant argued that the licence obtained under the Commonwealth Act, and the obligation to act in accordance with the licence under s 132, conferred an immunity from the requirement under State law to comply with further conditions.[58] Gibbs CJ and Brennan J stated at [4] that ordinarily s 132 of the BAT Act would provide a power or authority to provide the radio transmitter service as the provision imposes a duty under penalty to do a thing specified, however an alternative construction was warranted where it was 'impossible to do the thing specified in the provision without contravening another law'. Their Honours found that the provision may be construed as either (1) authorising the doing of that thing (so that it is inconsistent with the other law) or (2) imposing a qualified duty which stops short of requiring contravention of the law. Their Honours found it would be 'erroneous to construe s.132(1) – a general offence-creating provision – as conferring authority to do many and diverse things which falls within its scope if the doing of those things is prohibited by other laws. The better construction is to read s.132(1) as not applying to a failure to comply with a condition or with a requirement of [the State law] where compliance is impossible without contravening another law'.

Third Additional Submission: Conflict or potential conflict cannot be managed by the Court

49. Contrary to the Full Court's finding at FC [68], the Court and the independent bar are unable to adequately manage and adjudicate the potential conflicts of interest.

50. Although the Court can supervise some of the conflicts created by awarding a solicitor a share in the judgment – it can only supervise conflicts of which it is aware. The way in which conflicts can manifest may be subtle and insidious.[59] The Court has no visibility over the privileged advice provided by solicitors, the solicitor's litigation strategy or without prejudice negotiations with the respondents.[60] Conflicts could actuate in a number of ways. For example, the applicants' solicitors might advise their

[58] The *Environmental Planning and Assessment Act 1979* (NSW) identified the construction of the tower as a development which required consent from local counsel, but the license licence specified the location and nature of the requisite radio transmitter tower.
[59] *Hamilton v Meta Platforms, Inc* [2023] FCA 1148 at [185] (Cheeseman J).
[60] Many solicitors in modern day law practices are also company directors of an incorporated legal practice or are a partner in a partnership structure. Those solicitors have obligations as directors to the incorporated legal practice or as partners in the partnership which would extend to ensuring that, by working on the class action where they are entitled to a contingency fee, they seek to obtain a sufficient share of the award of settlement. These obligations and interests might conflict with their duties to their client and the group members.

clients to refuse reasonable terms of settlement if the solicitors consider their own share of the award is insufficient. There would be no realistic way for the court to supervise this conflict of interest because the advice would be privileged.

51. The independent bar cannot guarantee protection against all of the potential conflicts of interest. The solicitors can determine what is briefed to counsel and to terminate the retainer and brief other counsel.[61] There is no obligation on a solicitor to brief counsel with every offer of compromise received in a proceeding. The role of the independent bar considered at FC [68] also assumes that the bar would not be affected by these same conflicts. Each of the arguments accepted by the Full Court below could apply to the statutory and ethical prohibitions on barristers charging contingency fees. If an SCFO is found to be within power, there is every reason to think that the same arguments would be deployed to support barristers' CFOs in the future.[62] The bar is not immune to these conflicts.[63]

52. At FC [68], the Full Court reasoned that conflicts of interest can be managed, referring to the existence of conditional costs agreements and stated that tensions can arise where solicitors have been acting on a 'No Win No Fee' basis. It is true that conditional costs agreements also give rise to conflicts of interest or the potential for conflicts of interest. There is a significant difference, however, between the conflicts created by a conditional costs agreement and the conflict created by providing a solicitor with an interest in the subject-matter of the litigation. As Millet LJ (with Hutchinson LJ and Kennedy LJ agreeing) explained in *Thai Trading Co v Taylor* [1998] QB 781 at [33] 'there is nothing unlawful in a solicitor acting for a party to litigation to agree to forego all or part of his fee if he loses, provided that he does not seek to recover more than his ordinary profit, costs and disbursements if he wins'. Millet LJ went on to state 'there is nothing improper in a lawyer acting in a case for a meritorious client who to his knowledge cannot afford to pay his costs if the case are lost'.[64] While it is certainly in

[61] *Gangemi Pty Ltd v Luppino Pty Ltd* [2012] VSC 168 at [25]-[26] (Sifris J) where the Court considered that the solicitors had a real and substantial financial interest in the outcome of the litigation if the plaintiff lost. The Court held that such a conflict could not be managed or prevented by having independent counsel involved.
[62] Although the Bar's conduct rules provide an additional conduct rule that a barrister must return a brief if they have a material financial interest in the outcome of a case – the exception is if the interest is the prospect of a fee: NSW Bar Rule 101(g).
[63] *Bolitho v Banksia Securities Ltd (No 18)* (remitter) (2021) 69 VR 28 at 115-117 and 132-135 (Dixon J).
[64] Cited by *Wentworth v Rogers; Wentworth & Russo v Rogers* (2006) 66 NSWLR 474 at 502 [120], [121] and 504 [128] (Santow JA). Note that doubt was cast on Millet LJ's conclusions for the purposes of English law – see *Awwad v Geraghty* [2000] 1 All ER 608, 635; [2000] 3 WLR 1041, 1068 (May LJ, with whom Lord

the solicitor's interest to see their client win the case if they have a conditional costs agreement, the solicitor has no interest in the *quantum* of the award or settlement.

53. Conversely, contingency fees enable solicitors to have a direct financial interest in the outcome of the proceedings. To extend entrepreneurial litigation to the very persons formulating and arguing the case is inconsistent with professional detachment and impartial indifference to the outcome of the case.

Fourth Additional Submission: the availability of GCOs in certain Victorian proceedings does not effect the construction of the Federal Court Act

54. At FC [109] the Full Court reasoned that it is relevant to the consideration of the scope of power as provided for in ss33V(2) and 33Z(1)(g) that a different policy applies in Victoria, such that there would be the prospect of a different outcome in terms of the Court's power to make an SCFO in Victoria as compared with New South Wales if it was accepted that "a common law public policy rule precludes the making of a Solicitors' CFO as a matter of *power*".

55. The Victorian legislature has allowed for solicitors to charge contingency in class actions in the Supreme Court of Victoria.[65] Section 33ZDA of the *Supreme Court Act 1986* (Vic) does not alter the common law prohibition against contingency fees,[66] and does not have any bearing on the construction of ss 33V(2) and 33Z(1)(g) of the Act. On the contrary, the decision made by the Victorian legislature to provide a specific power for the Court to order an SCFO stands in stark contrast to the Federal scheme.

Part VI: ORDERS SOUGHT

56. The orders that should be made are set out in **KS** [64].

Part VII: ESTIMATED HOURS

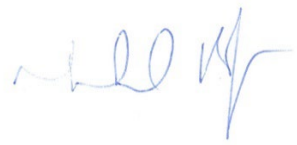
57. Mr Shand estimates that he will need 1.5 hours to present his argument, assuming a division of time and arguments with the other appellants.

Bingham of Conhill CJ agreed) stated that all contingency and conditional costs agreements were regarded as contrary to public policy in England.

[65] By reason of s 33ZDA of the *Supreme Court Act 1986* (Vic) allowing for Group Costs Orders.

[66] There being one common law of Australia: see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 514 [2]-[3] and 517 [15] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

Dated: 9 January 2025



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ANNEXURE TO THE FOURTH RESPONDENT'S SUBMISSIONS

No	Description	*Version*	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	*Broadcasting and Television Act 1942* (Cth)	19 Feb 1986 - 30 Jun 1987	Sections 89C and 132	For illustrative purposes only (Act in force at time of judgment)	1 August 1986
2.	*Federal Court of Australia Act 1976* (Cth)	Current	Sections 33V, 33Z, 33ZJ		Not applicable
3.	*Legal Professional Uniform Law* 2014 (NSW)	Current	Part 4.3, Division 4		Not applicable
4.	*Legal Profession Uniform Law Application Act 2014* (Vic)	Current	Schedule 1, clause 183(1)		Not applicable
5.	*Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW, Vic, WA)	Current	Rules 3, 4.1, 4.2, 12.1 and 12.2		Not applicable
6.	*Legal Practitioners Act 1981* (SA)	Current	Schedule 3, clause 27		Not applicable
7.	*Legal Profession Act 2006* (ACT)	Current	Section 285		Not applicable
8.	*Legal Profession Act 2006* (NT)	Current	Section 320		Not applicable
9.	*Legal Profession Act 2007* (Qld)	Current	Section 325		Not applicable
10.	*Legal Profession Act 2007* (Tas)	Current	Section 309		Not applicable
11.	*Legal Profession Act 2008* (WA)	Current	Section 285		Not applicable
12.	*Legal Profession (Solicitors) Conduct Rules 2015* (ACT)	Current	Rules 3, 4.1, 4.2, 12.1 and 12.2		Not applicable
13.	*Legal Profession (Solicitors' Conduct) Rules 2020* (Tas)	Current	Rules 3, 4.1, 4.2, 12.1 and 12.2		Not applicable
14.	*Rules of Professional Conduct and Practice (May 2005)* (NT)	Current	Rules 1.1, 8.1, 8.2, 17.6 and page 13		Not applicable
15.	*South Australian Legal Practitioners Conduct Rules* (SA)	Current	Rules 3, 4.1, 4.2, 12.1 and 12.2		Not applicable
16.	*Supreme Court Act 1986* (Vic)		Section 33ZDA		Not applicable