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

FIFTH RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES

2. The issues are:

   a. *First*, whether the Federal Court has power under Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), upon the settlement of or judgment in a representative proceeding, to make a common fund order[1] (**CFO**)?

   b. *Second*, if the Federal Court does have that power, whether it also has power to make such a CFO in favour of a solicitor who had conduct of the proceeding, and which would go beyond the costs and disbursements incurred in relation to the conduct of the proceeding (**Solicitors' CFO**)?

PART III: NOTICE OF CONSTITUTIONAL MATTER

3. The appellant does not consider any notice is required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: FACTS

4. The Fifth Respondent (**EY**) relies upon the facts set out in Part V of the submissions of Appellant (**Kain**) filed on 12 December 2024.

PART V: ARGUMENT

First issue: CFO upon settlement or judgment under ss 33V or 33Z

5. EY adopts Kain's Submissions in Chief at [14]–[32] and does not wish to make any further written submissions in respect of the first issue.

Second issue: Solicitors' CFO

6. EY adds the following submissions in respect of the second issue.

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[1] As that term is defined in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501, [19], [22]–[30] (Lee J, Middleton and Moshinsky JJ agreeing).

7. Part IVA does not confer a power to make a Solicitors' CFO upon settlement or judgment. The discretions conferred by ss 33V, 33Z and 33ZJ of the FCA Act are constrained by s 183 of the *Legal Profession Uniform Law* (NSW) (**LPUL**) and r 12.2 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) (**Solicitors' Conduct Rules**), and by the uninterrupted policy of the common law to prohibit award-based fee agreements between solicitors and clients. That constraint occurs in the following ways.

8. First, because s 183 and r 12.2 are laws that affect the manner of the exercise of the Federal Court's power, they are picked up by s 79 of the ***Judiciary Act*** *1903* (Cth). Part IVA must be read harmoniously with s 183 and r 12.2. A harmonious construction would preclude a Solicitors' CFO being ordered in any circumstances.

9. Secondly, and in any event, properly construed with regard to its text, context and purpose, the provisions of Part IVA do not confer a power to make a Solicitors' CFO because:

    a. even if s 183 and r 12.2 are not picked up by s 79 and instead apply of their own force in proceedings in the Federal Court conducted in New South Wales, their existence and history, and the public policy that underpins those provisions, is material context to be considered in construing the scope of the discretion conferred by ss 33V(2), 33Z(1)(g) and 33ZJ(3). It would never be a proper exercise of that discretion to make an order that was contrary to public policy;

    b. the word "just" in ss 33V(2), 33Z(1)(g) and 33ZJ(3) requires an assessment of the competing legal and equitable rights, duties and liabilities of those concerned, rather than the application of some free-standing conception of fairness. Solicitors who would benefit from a Solicitors' CFO could have no legal or equitable right to a proportion of the fund in circumstances where this would be contrary to s 183, r 12.2 and the public policy underlying those provisions, and so it would never be "just" to order that they have the benefit of a portion of it.

10. These arguments are developed below.

Section 183 of the LUPL and rule 12.2 of the Solicitors' Conduct Rules

11. If an opt-out notice is approved informing group members of the Applicants' intention to seek a Solicitors' CFO, the Applicants' solicitors intend to amend their respective

costs agreements to include clause 3A (*R&B Investments Pty Ltd v Blue Sky Alternative Investments Ltd (in liq) (Reserved Question)* (2024) 304 FCR 395 (Murphy, Beach and Lee JJ) (**J**) **[14]**; Amended Core Appeal Book (**CAB**) **24**; Kain's Book of Further Materials (**KFM**) **63–64**). Clause 3A.3(c) of the amended costs agreement provides that in the event a Resolution Sum (as defined in clause 3A.3(d)) is obtained, the Applicants' solicitors will seek a Solicitors' CFO (**KFM 64**).

12. In determining whether an agreement in those terms is unlawful under s 183 of the LPUL, that provision must be construed by reference to its text, context and purpose.

13. Section 183(1) appears in Division 4 of Part 4.3 of the LPUL dealing with "Legal Costs". Part 4.3 commences with s 169, which states that the objectives of the Part are: (a) to ensure that clients of law practices are able to make informed choices about their legal options and the costs associated with pursuing those options; (b) to provide that law practices must not charge more than fair and reasonable amounts for legal costs; and (c) to provide a framework for assessment of legal costs.

14. Other sections of the LPUL that are pertinent to the construction of s 183(1) are the following:

    a. section 179 provides that a client of a law practice has the right to require and to have a negotiated costs agreement with a law practice;

    b. section 180(2) provides that a costs agreement must be in writing;

    c. section 181 imposes onerous requirements for conditional costs agreements and conditional costs agreements involving uplift fees;

    d. section 185(1) provides that a costs agreement that contravenes, or is entered into in contravention of, any provision in Division 4 is void;

    e. section 185(4) provides that a law practice that has entered into a costs agreement in contravention of s 183 is "*not entitled to recover any amount in respect of the provision of legal services in the matter to which the costs agreement related and must repay any amount received in respect of those services to the person from whom it was received*"; and

    f. section 185(5) provides that if a law practice does not repay an amount required by s 185(4) to be repaid, the person entitled to be repaid may recover the amount from the law practice as a debt in a court of competent jurisdiction.

15. Construed in that context, s 183(1) prohibits any agreement between a client and a law practice that involves the payment of contingency fees, whether or not that agreement is conditional. No material distinction can be drawn between the words in s 183(1) prohibiting *"a costs agreement under which the amount payable to the law practice or any part of that amount is calculated by reference to the amount of any award or settlement …"* and a costs agreement that provides *for the making of an application* for payment of the solicitors on that basis: cf. J[85]. Such a scheme incentivises solicitors by the prospect of an award-based contingency fee in precisely the way that s 183 seeks to avoid.

16. Rule 12.2 of the Solicitors' Conduct Rules provides that a solicitor must not do anything:

    a. calculated to dispose the client or third party to confer on the solicitor, either directly or indirectly, any benefit in excess of the solicitor's fair and reasonable remuneration for legal services provided to the client; or

    b. that the solicitor knows, or ought reasonably to anticipate, is likely to induce the client or third party to confer such a benefit and is not reasonably incidental to the performance of the retainer.

17. The Solicitors' Conduct Rules is an instrument authorised under Part 9.2 of the LPUL.

18. If the applicants' solicitors enter into the proposed addendum to the costs agreement or make an application for a Solicitors' CFO, they will have contravened r 12.2(a), because they will have procured agreement from the applicants to seek an order the effect of which is, explicitly, to confer a benefit over and above the appropriate remuneration for legal services by rewarding the solicitors for the provision of other services.

Section 183 and r 12.2 are picked up by s 79 of the Judiciary Act

19. Each of s 183 and r 12 are *"applicable"* in the present case for the purposes of s 79(1) of the *Judiciary Act*, and govern the manner of the exercise of the Court's power within the conception outlined in ***Rizeq*** *v The State of Western Australia* (2017) 262 CLR 1 and ***Masson*** *v Parsons* (2019) 266 CLR 554.

20. Section 183 must be read in the context of s 185, and in particular s 185(4), of the LPUL, which provides that if a law practice enters into a costs agreement in

contravention of s 183, the law practice "*is not entitled to recover"* any amount in respect of the legal services in the matter to which the costs agreement relates. That phrase does more than negate the solicitor's contractual rights and rights to restitution. Properly construed, it must also constrain any power of the Supreme Court of New South Wales to make an order for the payment of that solicitor, including by means of a CFO under the State equivalents of ss 33V and 33Z and 33ZJ.

21. In that way, s 185(4) is a law that is directed toward the courts. It governs the manner in which judicial power is exercised. Section 185(4) is inseparable from the right in s 179 to a negotiated costs agreement and the obligations in s 183(1), just as the right to recover contribution in s 6 of the L*aw Reform Act 1995* (Qld) and the power to order it in s 7 of that Act are inseparable and picked up by s 79: *Rizeq*, [100] (Bell, Gageler, Keane, Nettle and Gordon JJ). As the majority said in *Rizeq* at [83], although s 79(1) is directed to courts, and not to laws concerned with the determination of rights and obligations of individuals:

> It would … be wrong to seek to delimit the section's operation by conceiving of a statute that is binding on a court as a statute which cannot also be binding on a person whose rights or obligations are to be determined by that court.[2]

22. That s 183 and r 12.2 confer obligations does not preclude those provisions from being a law apt to be picked up by operation of s 79(1) along with s 185.

23. There is no Commonwealth law that "otherwise provides" for the matters addressed in those sections of the LPUL referred to above or r 12.2 of the Solicitors' Conduct Rules. This is so regardless of whether the test is one of direct inconsistency or indirect inconsistency. There is nothing in Part IVA that evinces an intention by Parliament to address the matters the subject of ss 179 to 185 of the LPUL either completely, exhaustively or exclusively[3] or indeed at all, although those matters would be within federal legislative competence (for example, as matters incidental to the exercise of power by the federal judicature under s 51(xxxix) of the Constitution). As Merkel J said in *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167 at [23]-[24]:

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2 See also *Masson v Parsons* (2019) 266 CLR 554, [71]–[72] (Edelman J).

3 *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, [33] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

> Part IVA of the Act does not purport or intend to deal with, let alone cover the field in relation to, fee arrangements that might be entered into by solicitors acting for representative parties or group members in representative proceedings. … [T]he provisions of Pt IVA do not expressly or impliedly deal with those matters. Rather, Pt IVA (ss 33V and 33ZJ) and s 43(1A) deal, inter alia, with the powers of the Court to make particular orders concerning costs in the specified circumstances in representative proceedings.
>
> The legislative intention that can be discerned from Pt IVA is that fee arrangements in relation to representative proceedings were not to be regulated by the Act but rather, were left by the legislature to be dealt with by private contractual arrangements, subject to the requirements of any applicable laws or judicial power that might touch upon or regulate such arrangements. Whether such arrangements, in a particular case, should be subject to supervision or approval of the Court is a matter left to be determined by the Court.

24. It follows that at least ss 183 and 185 of the LPUL are picked up by s 79(1) and apply as federal laws.

25. Reading those provisions harmoniously, it could never be "just" within the meaning of ss 33V(2), 33Z(1)(g) or 33ZJ(3) to make an order that entailed, facilitated or encouraged (either in the immediate case or any future representative proceeding) the payment of costs on a basis that undermined the legislative purpose of ss 183 and 185 and r 12.2.

Solicitors' CFO contrary to public policy

26. Even if s 183 and r 12.2 are not picked up by s 79 and instead apply of their own force their existence and history, and the public policy that underpins those provisions, is material context to be considered in construing the scope of ss 33V(2), 33Z(1)(g) and 33ZJ(3) and would lead to the same conclusion.

27. Section 183, and the rest of the LPUL, was drafted by the federal government under the auspices of the Council of Australian Governments between 2009 and 2011.[4]

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[4] New South Wales, *Parliamentary Debates*, Legislative Council, 13 May 2014, (David Clarke, Parliamentary Secretary).

However, the prohibition of award-based contingency fee agreements has a long history in the common law. At the time Part IVA of the FCA Act was enacted, maintenance and champerty was still a crime and a tort in States other than Victoria[5] and award-based fee agreements were champertous.[6] The States and Territories, but for Queensland and the Northern Territory, came to abolish the crime and the tort (or in some jurisdictions, one but not the other),[7] but preserved the law as to the circumstances in which a contract was to be treated as contrary to public policy or as otherwise illegal.[8] In most Australian States and Territories, the abolition of the crime and the tort of champerty was accompanied by the enactment of statutory prohibitions on award-based fee agreements for solicitors.[9]

28. That history is not dissimilar to developments in England, where the Solicitors' Practice Rules 1936-1972 prohibited agreements and arrangements to receive a contingency fee (being either fixed or calculated as a percentage of the proceeds of the litigation).[10] In ***Wallersteiner*** *v Moir (No 2)* [1975] 2 WLR 389, the Court of Appeal rejected the submission that the abolition of criminal and civil liability for maintenance and champerty meant that contingency fees (including award-based fees) were lawful. In doing so, Lord Denning MR said that the reason why contingency fees were generally unlawful was not because they were criminalised, but because they were contrary to public policy. His Lordship cited (at 398H–399A) the judgment of Lord Esher MR in *Pittman v Prudential Deposit Bank Ltd* (1896) 13 TLR 110 (at 111):

> In order to preserve the honour and honesty of the profession it was a rule of law which the court had laid down and would always insist upon that a solicitor could not make an arrangement of any kind with his client during the litigation he was conducting so as to give him any advantage in respect of the result of that litigation.

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5 *Campbells Cash and Carry*, [66]–[82] (Gummow, Hayne and Crennan JJ).

6 *Smits v Roach* (2004) 60 NSWLR 711 (Sheller JA, Ipp and Bryson JJA agreeing).

7 See Kain's Submissions in Chief, [20] fn 29.

8 See, for example, *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) (repealed), s 6. This saving provision survives in s 2, Sch 2 of the *Civil Liability Act 2002* (NSW).

9 See Explanatory Memorandum, Legal Profession Reform Bill 1993 (NSW) 1, 5; Explanatory Memorandum, Maintenance and Champerty Abolition Bill 1993 (NSW) 1; *Abolition of Obsolete Offences Act 1969* (Vic), ss 2–4; *Criminal Law Consolidation Act 1935* (SA), Sch 11, cl. 3(2); *Law Reform (Miscellaneous Provisions) Amendment Act 2002* (ACT), s 71.

10 *Wallersteiner v Moir (No 2)* [1975] 2 WLR 389, 398B–399D (CA) (Lord Denning MR).

29. In the same case, Buckley LJ (at 405G–407C) considered the public policy arguments for and against the availability of contingency fees in minority shareholder litigation and concluded that before such a system was introduced in England, it ought to be the subject of comprehensive consideration by a body such as the Law Commission and any change would have to be affected by an alteration in the relevant professional rules or by legislation (at 407A–C).[11]

30. In ***Trendtex*** *Trading Corporation v Credit Suisse* [1980] 1 QB 629, Oliver LJ said, in doubting the utility of certain distinctions in the law of maintenance, that nevertheless (at 663E–F), *"[t]here is, I think, a clear requirement of public policy that officers of the court should be inhibited from putting themselves in a position where their own interests may conflict with their duties to the court by the agreement, for instance, of so called "contingency fees"".*

31. The distinction drawn in *Wallersteiner* and *Trendtex* between agreements for award-based contingency fees and the general law of maintenance and champerty is important to the interpretation of the High Court's decision in ***Campbells Cash & Carry*** *Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

32. There, the plurality found the general law of maintenance and champerty to follow more from "*the existence of common law criminal offences … than it did upon any close analysis or clear exposition of the policy to which the rules were intended to give effect.*"[12] It followed from this that the abolition of the crimes meant that any wider rule of public policy (wider, that is, than the particular rule or rules of law preserved by the abolishing acts) lost its footing.[13] However, that case concerned a third party litigation funder and so their Honours had no need to consider the long history of the common law prohibition of award-based contingency fees nor the policies that underpin the prohibition. Their Honours cited (at [85]) *Clyne v NSW Bar Association* (1960) 104 CLR 186, where a majority of the High Court said (at 203):

> …And it seems to be established that a solicitor may with perfect propriety act for a client who has no means, and expend his own money in payment of

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11 *Wallersteiner v Moir (No 2)* [1975] 2 WLR 389, 411E–412H (CA) (Scarman LJ).

12 *Campbells Cash & Carry*, [77] (Gummow, Hayne and Crennan JJ).

13 *Campbells Cash & Carry*, [86] (Gummow, Hayne and Crennan JJ).

> counsel's fees and other outgoings, although he has no prospect of being paid either fees or outgoings except by virtue of a judgment or order against the other party to the proceedings. This, however, is subject to two conditions. One is that he has considered the case and believes that his client has a reasonable cause of action or defence as the case may be. And the other is that he must not in any case bargain with his client for an interest in the subject-matter of litigation, or (what is in substance the same thing) for remuneration proportionate to the amount which may be recovered by his client in a proceeding …
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> (Emphasis added)

33. In *Smits v Roach* (2002) 55 NSWLR 166, the Court considered the predecessor legislation to ss 183 and 185 of the LPUL, namely ss 188 and 189 of the *Legal Profession Act 1987* (NSW). Under section 188, a costs agreement, *"may not provide that costs are to be determined as a proportion of, or are to vary according to, the amount recovered in any proceedings to which the agreement relates"*: see [233]. Section 189 relevantly provided that any provision of a costs agreement inconsistent with the division (including s 188) was void to the extent of the inconsistency: see [234]. There was no equivalent to s 185(4) of the LPUL.

34. Justice McClellan (at [248]–[252]) held that it was not possible to sever a champertous provision in a costs agreement from the rest of the agreement. His Honour perceived that there had been no relaxation in the rejection of arrangements which provide for legal practitioners to share generally, and in a manner unrelated to the costs actually incurred, in the financial outcome of the proceedings. His Honour said that when a legal practitioner has a significant financial interest in the outcome of the litigation, there will inevitably be a temptation for that practitioner to depart from that duty, and that his Honour's view was it would be wrong for the law to allow that to occur. He said that when Parliament had provided for limited contingency fees, it presumably balanced those concerns with the benefits to impecunious litigants, but the common law position should not otherwise change and to do so would seriously erode the confidence which the court must have in the professional integrity of those who appear before it. The ultimate consequence would be to erode the confidence which the public has in the judicial system to resolve disputes.

35. The Court of Appeal considered that on the correct construction of s 189, the costs agreement was void only insofar as it was inconsistent with s 188.[14] A few short years later, however, the LPUL, including s 185(4), was incorporated into New South Wales law, effectively reinstating the position which commended itself to McClellan J.

36. In *Hogarth v Gye* [2002] NSWSC 32, Bryson J said (at [8]) that the "*lack of effect of an agreement to assign a proportion of damages to a solicitor as remuneration [was] not open to any doubt.*"

37. In *Clairs Keeley (a firm) v Treacy* (2003) 28 WAR 139, a five-member bench of the Full Court of the Western Australian Supreme Court upheld a decision to stay proceedings on the basis that the solicitors for the plaintiffs were to be paid an uplift fee out of the commission of the litigation funder. Templeman J (Parker J, Wheeler J, and Pullin J agreeing) said that the conflict of interest inherent in this arrangement, although different to a situation where remuneration is calculated as a proportion of the recovery, was (at [170]–[174] and particularly [172]) *"inimical to the public interest."*

38. In *Hamilton v Meta Platforms, Inc.* [2023] FCA 1148, the Court considered an application to stay a proceeding because it had the potential to bring the administration of justice into disrepute. The proceeding was conducted by the applicant in person (an admitted solicitor) on behalf of himself and group members. It was funded by a JPB Liberty Pty Ltd. One of the means by which JPB Liberty was funding the action was by issuing "Sue Facebook Tokens" in exchange for financial and non-financial contributions to the litigation. The holders of the Tokens had a right to participate in any proceeds of the proceedings. It was alleged that the applicant was being paid in Tokens for his non-financial services in conducting the proceeding. Cheeseman J stayed the proceeding on a different ground, but found (at [173]) that, if it were established, the conduct of the applicant would be contrary to the legislative prohibition on contingency fees as well as the common law rule set out in *Clyne*.

39. In *Hegarty v Keogh (No 2)* [2023] SASCA 30 the South Australian Court of Appeal reviewed the law relating to maintenance and champerty in that jurisdiction, and (at

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[14] *Smits v Roach* (2004) 60 NSWLR 711, [70] (Sheller JA, Ipp and Bryson JJA agreeing)

[123]) concluded that contingency cost agreements were not unlawful and contrary to public policy where the two requirements recognised in *Clyne* were satisfied.

40. That history reflects an uninterrupted policy of the common law to prohibit award-based fee agreements between solicitors and their clients. This is supported by the absence of any legislative change in circumstances where such change in the context of representative proceedings has been expressly considered.[15]

41. On 21 December 2018, the Australian Law Reform Commission (**ALRC**) presented its final report upon its *Inquiry into Class Action Proceedings and Third Party Litigation Funders*.[16] In that report, the ALRC recommended (Recommendation 17) that solicitors acting for the representative plaintiff in representative proceedings should be permitted to enter "percentage-based fee agreements" subject to the following limitations:

    a. an action that is funded through a percentage-based fee agreement cannot also be directly funded by another funder who is also charging on a contingent basis;

    b. a percentage-based fee cannot be recovered in addition to professional fees for legal services charged on a time-cost basis; and

    c. solicitors who enter into a percentage-based fee agreement must advance the costs of disbursements, and account for such costs within the percentage-based fee.

42. The ALRC recommended that Part IVA of the FCA Act be amended to provide that percentage-based fee agreements be permitted in representative proceedings with leave of the Court, and to include an express statutory power by which the Court could reject, vary or amend the terms of such percentage-based fee arrangements (Recommendation 19).

43. The Commonwealth Government subsequently referred an inquiry to the Parliamentary Joint Committee on Corporations and Financial Services. The

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15 Cf *Supreme Court Act 1986* (Vic), s 33ZDA, as noted in *Hamilton v Meta Platforms, Inc.* [2023] FCA 1148, [173] (Cheesman J).

16 Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third Party Litigation Funders* (ALRC Report 134).

Committee's report was tabled in December 2020.[17] The Committee disagreed with the ALRC on the desirability for reform to permit contingency fees and concluded that (at [14.173]):

> …[o]n balance, the committee considers that the public interest outcomes potentially achieved with the availability of contingency fee billing in class actions have not been outweighed by the potential for their exploitation for the benefit of lawyers' profits, even with the existence of safeguards. The committee is not persuaded that the ability of lawyers to bill representative plaintiffs and class members on a contingency fee basis would lead to reasonable, proportionate and fair outcomes.

44. On 20 October 2021, the Government published a response to both ALRC Report 134 and the Report of the Parliamentary Joint Committee.[18] The Government rejected the ALRC's Recommendations 17 and 19. The response states (at p 37):

> The Government will not pursue legislative change to permit the use of contingency fee arrangements because of the potential unmanageable conflicts of interest that such arrangements can create. Lawyers owe a fundamental duty to the courts, as well as to their clients. Introducing a direct financial interest in the outcome creates a conflict of interest and such conflicts may, or be perceived to, influence recommendations made by solicitors or their manner in which they conduct matters.

45. In light of the clear policy statements in the Government's response to the ALRC's Recommendations 17 and 19, there is no occasion for the court to reconsider the public policy for solicitors conducting litigation to be promised an interest in the proceeds of litigation: cf. **J[105]**. The Court "*has not a roving commission* [to declare public

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17 Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry,* (December 2020).

18 *Australian Government response to the Parliamentary Joint Committee on Corporations and financial services report: Litigation Funding and the Regulation of the Class Action Industry and the Australian Law Reform Commission report: Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third Party Litigation Funders,* (October 2021).

policy] *according to its own conception of what is expedient for or would be beneficial or conducive to the welfare of the State.*"[19]

46. Sections 33V(2), 33Z(1)(g) and 33ZJ(3) are to be construed having regard to their wider context, including s 183 and r 12.2 and the history and public policy that underpins those provisions. So construed, it would never be a licit exercise of power under those provisions to make a Solicitors' CFO, which would be contrary to longstanding public policy and legislation.

47. Further, the word "just" in ss 33V(2), 33Z(1)(g) and 33ZJ(3) requires an assessment of the competing legal and equitable rights, duties and liabilities of those concerned, rather than the application of some free-standing conception of fairness. Solicitors who would benefit from a Solicitors' CFO could have no legal or equitable right to a proportion of the fund in circumstances where this would be contrary to s 183, r 12.2 and the public policy underlying those provisions, and so it would never be "just" to order that they have the benefit of a proportion of it.

PART VI: ORDERS SOUGHT

48. (1) Appeal allowed; (2) Set aside orders 2 and 3 of the orders of the Full Court made on 5 July 2024; (3) The Reserved Question be answered: "No."; (4) The first and second respondents pay the appellant, fourth respondent's and fifth respondent's costs of and incidental to the hearing of the Reserved Question; (5) The first and second respondents pay the fifth respondent's costs of and incidental to this appeal (and the related appeal S144/2024).

PART VII: ESTIMATED TIME

49. EY estimates that 45 minutes will be required for the presentation of its oral argument.

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19 *Wilkinson v Osborne* (1915) 21 CLR 89, 96 (Isaacs J), citing *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484, 490 (Lord Halsbury LC).

Dated: 9 January 2025

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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

ANNEXURE TO THE FIFTH 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.	*Abolition of Obsolete Offences Act 1969* (Vic)	2 December 1969 – 5 January 1983	ss 2–4	For illustrative purposes only	-
2.	*Civil Liability Act 2002* (NSW)	16 June 2022 – current	Sch 2, s 2	In force at the date of the Full Court hearing	-
3.	*Commonwealth of Australia Constitution Act 1900* (Imp)	29 July 1977 – current	s 51(xxxix)	In force at the date of the Full Court hearing	-
4.	*Criminal Law Consolidation Act 1935* (SA)	16 December 2024 – current	Sch 11, cl. 3	Currently in force (note: the relevant provisions in the version in force at the date of the Full Court hearing were the same)	-
5.	*Federal Court of Australia Act 1976* (Cth)	11 December 2024 – current	ss 25(6), 33V, 33Z, 33ZJ Part IVA	Currently in force (note: the relevant provisions in the version in force at the date of the Full Court hearing were the same)	-

6.	*Judiciary Act 1903* (Cth)	11 December 2024 – current	ss 78B, 79	Currently in force (note: the relevant provisions in the version in force at the date of the Full Court hearing were the same)	-
7.	*Law Reform (Miscellaneous Provisions) Amendment Act 2002* (ACT)	9 October 2002 – 10 October 2002	s 71	For illustrative purposes only	-
8.	*Law Reform Act 1995* (Qld)	1 September 2012 – 30 November 2018	ss 6, 7	In force at the date of the hearing in *Rizeq v The State of Western Australia* (2017) 262 CLR 1, in which it these provisions were considered (note: the relevant provisions remain the same in the current version)	-
9.	*Legal Profession Act 1987* (NSW), amended by the *Legal Profession Reform Act 1993* (NSW)	15 August 2005 – 30 September 2005 (repeal with effect from 1 October 2005)	ss 188 and 189	The latest version before repeal, for illustrative purposes only (note: the relevant provisions remained the same since 29 November	-

				1993, when introduced)	
10.	*Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW)	9 August 2024 – current	r 12.2	Currently in force (note: the relevant provisions in the version in force at the date of the Full Court hearing were the same)	-
11.	*Legal Profession Uniform Law* (NSW)	1 July 2022 – current	ss 169, 179, 180, 181, 182, 183, 184, 185 Part 9.2	In force at the date of the Full Court hearing	-
12.	*Maintenance, Champerty and Barratry Abolition Act 1993* (NSW)	1 April 1997 – 7 July 2011	s 6	For illustrative purposes only	-
13.	*Supreme Court Act 1986* (Vic)	29 March 2024 – current	s 33ZDA	In force at the date of the Full Court hearing	-