IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

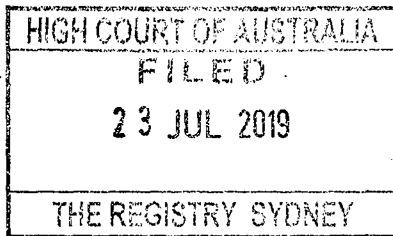
No. S154 of 2019

BETWEEN:

WESTPAC BANKING CORPORATION
First Appellant & Anor named in Annexure A

and

GREGORY JOHN LENTHALL
First Respondent & Ors named in Annexure A



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SUBMISSIONS OF THE FIRST TO FOURTH RESPONDENTS

Part I: Form of submissions

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

Part II: Brief statement of issues

2. The 1st-4th Respondents agree with the Appellants' statement of issues.

Part III: Section 78B notice

3. The Appellants have given adequate notice under s. 78B of the *Judiciary Act 1903.*

Part IV: Material facts

20 4. The 1st-4th Respondents agree with the Appellants' outline of facts, except their characterisation of the effect of the CFO: as to which see [14]-[19] below.

Part V: Argument

5. Most of the Appellants' arguments depend upon a characterisation of the common fund order (**CFO**) made by the primary judge on 28 September 2018 as a "diminishment" of the value of group members' choses in action to the benefit of the litigation funder (**JKL**). That characterisation was comprehensively and correctly rejected by the Court below having regard to the broader context of Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**Act**); the lawfulness of litigation funding; and the full terms of the CFO. Those matters will be addressed first, before turning to each of the Appellants' grounds of appeal. The 1st-4th
30 Respondents submit, in summary, that:

a. Part IVA, in enabling the bringing together of multiple causes of action which would otherwise be uneconomic to litigate, necessarily assumes that someone – be it representative, solicitor or funder – will bear the risk of that action. Justice requires that such person be reimbursed for costs incurred, and rewarded for the risk they have taken;

Filed on behalf of the First to Fourth Respondents by:
Shine Lawyers, Level 13
160 Ann Street
Brisbane QLD 4000

Telephone: 07 3006 6061
Fax: 07 3229 1999
Email: jsaddler@shine.com.au
Ref: Jan Saddler 2888235

b. The effect of the CFO is to share the benefits and burdens of the litigation across group members, including the funder's, solicitors' and any administrator's fees. It also requires the funder to commit to the funding of the proceedings. By providing a stable base of funding, the CFO's substantive effect is not to *diminish* the value of group members' choses in action but to enable their value to be *realised*.

c. The principle of legality is not engaged, for this, among other, reasons. Section 33ZF, properly construed, is broad enough to permit the making of a CFO, which is appropriate to ensuring justice is done in the proceedings in a number of identifiable ways.

d. The making of a CFO is an exercise in judicial power or is incidental thereto. The power is given to a Court; to be exercised in accordance with judicial process; tethered by familiar notions of "justice in the proceeding"; and informed by a body of equitable and restitutionary principle.

e. Because the effect of the CFO is to enable the value of group members' claims to be realised, it effects no "acquisition of property" for s. 51(xxxi) purposes. Alternatively, s. 33ZF is not properly characterised as a law with respect to the acquisition of property; the requisite element of "compulsion" is lacking; or s. 33ZF provides for "just terms".

The broader context of s. 33ZF

6. Part IVA has its origins in representative proceedings as developed in equity,[1] but refines the traditional representative action in certain important respects. Section 33C(1) authorises one or more persons out of a group of seven or more to commence proceedings as representing some or all of the group. Under s. 33E(1), the consent of a person to be a group member is not required. This is counterbalanced by s. 33J, which requires the Court to fix a date before which a group member may opt out of the proceeding. Under s. 33X, notice must be given to group members of some matters, and may be given in respect of others. Notice will ordinarily be given in generalised, public forms that will not necessarily come to the personal attention of all group members: s. 33Y(4), (5).

7. Part IVA thus authorises a self-appointed group representative to define and constitute the class, within the statutory parameters, thereby bringing group members together in a common enterprise. A person can become a group member *without consent* (and even without receiving actual notice of the proceedings) and the representative plaintiff can make decisions about the conduct of litigation *without specific instructions* from all group members.

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[1] FCAFC [13] CAB 79; *Femcare Ltd v Bright* (2000) 100 FCR 331 (***Femcare***), [54]-[62]; *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 261-263; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 29-30.

8. Once that common enterprise is formed, Part IVA makes provision for the pooling of benefits and the sharing of burdens between group members. Part IVA allows for damages to be awarded in an "aggregate" amount (s. 33Z(1)(f)); for the Court to make orders for the constitution and administration of a "fund", with administration costs to be borne by the fund (s. 33ZA(1)(a), (2)); and for the representative to seek reimbursement from the fund for costs reasonably incurred (s. 33ZJ). The primary way that a group member exercises choice in relation to the proceeding is in deciding whether to opt out and, if they do not opt out, they will be bound by the Court's decision on the common issues (s. 33ZB(b)). This relaxation of the rules regarding consent was intended to promote "open class" (as opposed to "closed
10 class") proceedings, which enhance access to justice for group members who may be ignorant of their rights; and reduce the prospect of overlapping or competing class actions.[2]

9. The Appellants' characterisation of the CFO as "interfering" with the group members' choses in action fails to grapple with the fact that Parliament has *already*, irrespective of whether a CFO is permitted, relaxed the usual requirements of consent and instructions in respect of the vindication of those choses in action and required the sharing of benefits and burdens. In *Femcare*, the Full Federal Court recognised that the "representative procedure was designed to vindicate rights that otherwise could not be pursued, or could be pursued only with great inconvenience and expense" and that Part IVA's departure from ordinary procedures is the "price of providing a mechanism for the vindication of rights held in
20 common with others".[3] Where, as here, claimants are numerous (there being some 80,000 group members) but each individual claim is small (no greater than $15,000), it is uneconomic for individual group members to litigate those claims.[4]

10. Once it is accepted that Part IVA facilitates the bringing together in a single action what would otherwise be large numbers of separate actions, the question immediately arises: who is to take the *risks* on that action – in the form of a liability to pay the legal costs of bringing the action and potentially the defendants' costs, and any order for security for costs – and how will that person be rewarded for the taking of such risk, and indemnified against costs actually incurred by them by reason of their role? The following possibilities arise:

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[2] *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 (***Money Max***) at [14]; ALRC, *Grouped Proceedings in the Federal Court* (Report No. 46) (**ALRC Report 1988**) [108], [126]-[127]; ALRC, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (2019) (Report No. 134) (**ALRC Report 2019**) at [1.54]-[1.55], [4.5].
[3] *Femcare* at [65]; see also ALRC Report 1988 at [126]-[127].
[4] FCAFC [19] CAB 80-81. See also Australia, House of Representatives, *Debates*, 14 November 1991 at 3174 (Second Reading Speech, Federal Court of Australia Amendment Bill 1991); ALRC Report 1988 at [61].

a. An option is for each group member to agree directly to bear a proportionate part of the risk (in the sense described above). This is obviously unworkable for cases where the class is large and would undermine the efficiencies Part IVA is designed to promote. It would mean that only "closed class" proceedings could be brought.

b. Another option is for the representative plaintiff, or a subset of group members, to take on the entirety of the risk.[5] In such a case, it would be inequitable and unjust for the representative or subset not to receive appropriate reward, and indemnification in respect of costs actually incurred by them, if the action is successful in producing judgment or settlement sum. Express recognition of this is partly to be found in s. 33ZJ, which enables
10 a representative party (but only <u>after</u> an award of damages) to apply for an order that costs reasonably incurred by them be paid out of the damages awarded. Part IVA contains no requirement that each group member consent to such an arrangement and it would defeat the purposes of Part IVA to read in any such requirement.

c. A further option, which developed in the early years of Part IVA litigation, and in some cases is still utilised,[6] is that a solicitor's firm could take on the risk on a "no win/no fee" basis, sometimes combined with an uplift fee.[7] That uplift fee, like JKL's commission here, functionally represents a reward for the risk taken by the solicitors,[8] over and above legal costs which would usually be permitted on taxation. Such uplift fee agreements do not address the problem that, if successful, the defendant would only be liable to pay
20 party-party costs, leaving the representative plaintiff liable to pay any outstanding solicitor-client costs. This led the ALRC, in its 1988 Report, to conclude that it would be appropriate for all group members, *even where* they had not contracted with the representatives' solicitor, to contribute to solicitor-client costs where monetary relief is rewarded including any uplift fee.[9] This also has been partially implemented by s. 33ZJ.

11. A further option, and the one selected in these proceedings, is that an *external* funder should bear the risks, at the representative's request.[10] While the concept of third party

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[5] See *Lifeplan Australia Friendly Society Limited v S&P Global Inc* [2018] FCA 379 at [23], [56]-[57].
[6] *Wigmans v AMP Ltd* [2019] NSWSC 603, [24], [26]; *Impiombato v BHP Billiton Ltd (No 2)* [2018] FCA 2045, [62]-[63]; *Klemweb Nominees Pty Ltd v BHP Group Ltd* [2019] FCAFC 107, [24]-[32], [42], [97]-[112].
[7] Now permitted in all jurisdictions: see eg *Legal Profession Uniform Law (NSW)* s 182.
[8] This was recognised in the Second Reading Speech for the Legal Professional Reform Bill 1993 (No 2), which permitted the charging of an uplift fee in New South Wales: New South Wales, Legislative Assembly, *Parliamentary Debates*, 28 October 1993, 4629. See also ALRC Report 2019, [7.11].
[9] ALRC Report 1988 at [289], [293]. This still left the problem of managing the risk of any adverse costs order.
[10] Although not necessarily exclusively: the 1st-4th Respondents' solicitors agreed to bear the risk in respect of 20% of the legal fees: see cl 5.2 and 5.4 of the Retainer: Appellants' Book of Further Materials (**ABFM**) p 8, 12.

funding was known at the time Part IVA was introduced,[11] maintenance and champerty were still prohibited and the litigation funding market was limited. In that context, the ALRC made no recommendations about group members sharing litigation funders' fees. However, the ALRC did recognise the importance of third party funding, particularly to meet adverse costs orders.[12] Moreover, as noted, the ALRC recognised that group members should share solicitors' fees, including any uplift fee, even where they have not contractually agreed to do so. The ALRC recommended that the Court should have the power, at any stage of the proceedings, to approve an agreement concerning solicitors' fees; that the rules against maintenance and champerty should not make the agreement void if approved by the Court; that group members should be given notice of the agreement; and that, in deciding whether to approve the agreement, the Court should have regard to "the financial risks to the lawyers".[13]

12. In a post-*Fostif* landscape, where it is accepted that litigation funding plays a legitimate role in facilitating access to justice,[14] it is not a great leap from that recommendation to recognising that group members should share the costs actually incurred by a litigation funder (in the form of, eg, payments to the representative plaintiff's solicitors), as well as a reward for taking on the risks of the litigation. The basic issues of principle are the same, whether it is the representative, solicitors or funder who takes on the risks. In its 2019 report, the ALRC recognised that the presence of a litigation funder provides a means of realising the value of claims which would otherwise be uneconomic to litigate.[15] It stated that the "essential rationale" for the funder's commission was that they "assume the risk of adverse costs" and recommended an express power to make CFOs for funders' fees.[16]

13. *Femcare* and *Fostif* stand unchallenged by the Appellants. The result of the above analysis is that when s. 33ZF authorises the Court to make orders "appropriate or necessary to ensure that justice is done in the proceeding", it permits consideration of:

a. the need for there to be a person who takes the risks of the action;

b. the possibility of different forms of funding, internal or external;

c. the need for the funder (whether it be the representative, a subset of group members, solicitors or external funder) to receive a reward for taking the risk, which is essential to the viability of the action, in addition to indemnification for costs actually incurred; and

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[11] FCAFC [17] CAB 80, citing ALRC Report 1988 at [315]-[319].
[12] ALRC Report 1988 at [315]-[319], referring to funding by trade unions and special interest groups.
[13] ALRC Report 1988 at [293].
[14] *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386,[61]-[65]; also FCAFC [17] CAB 80.
[15] ALRC Report 2019 at [1.29], [2.6].
[16] ALRC Report 2019 at [6.73] and [4.35] respectively.

d. it being inimical to the purposes of Part IVA to require each group member's consent before they can either receive the benefits or incur the burdens of the regime; and

e. the extent to which group members have objected (or not) to the proposed order if notification has been issued under s. 33X of the Act.

The effect of the CFO

14. A CFO is but one of a variety of ways in which the benefits and burdens of the common enterprise reflected in an open class action can be shared across the members of it. The Full Court correctly characterised the effect of the CFO made here, at [20]-[27].

15. The *first* effect of the CFO was to constitute a common fund – to create an obligation on group members to pay the proceeds of their claims into a common fund available for distribution.[17] The *second* effect was to create a priority of payments out of the fund – first to JKL; then to the 1st-4th Respondents' solicitors for any unpaid legal costs (including any "uplift fee"); then for the payment of Administration Expenses; and then to group members.[18] Within that priority, the *third* effect was to specify the nature and extent of the costs and fees of JKL as "one of the burdens to be borne by the common pool".[19] Specifically, group members were required to pay to JKL from any "Resolution Sum" (defined as the settlement or judgment sum) the amounts referred to in cl 6 of the Funding Terms, being (CAB 46):

a. an amount equal to the total moneys paid by JKL to the 1st-4th Respondents' lawyers for costs and disbursements; pursuant to any costs orders; and the reasonable fees of the Costs Referee (collectively, **Legal Costs**);

b. an amount, "as consideration for the funding of the Proceeding", being the *lesser* of: i) three times the amount of Legal Costs; *or* ii) 25% of the net Resolution Sum (being the Resolution Sum minus the Legal Costs), *as approved by the Court* (the **Commission**); and

c. if JKL funds an appeal or defence of an appeal (or any further appeal/defence), an amount being the *lesser* of a multiple of legal costs or a percentage of the net Resolution Sum at a rate *approved by the Court*, for each appeal funded (**Appeal Commission**);

but "not exceeding any such amounts as the Court determines to be fair and reasonable in all the circumstances".

16. Fourthly, the CFO improved the terms for group members over those under the

[17] Order 1; Funding Terms, cl 3-4 (CAB 36 and 45).
[18] Funding Terms, cl 5 (CAB 45-46).
[19] FCAFC [23] CAB 82.

existing funding agreements between JKL and the 1st-4th Respondents (the **Funding Agreements**). Under the Funding Agreements, the 1st-4th Respondents agreed that JKL would be paid, from the Settlement or Outcome Sum, the total costs of the proceedings paid by JKL as well as 30% of the *gross* Settlement or Outcome Sum.[20] In that sense, JKL's commission was already an "existing expense" of the litigation: cf AS [12]. The commission under the CFO was set as the lesser of 25% of the *net* return *or* a multiple of legal costs. Specifying these alternatives avoids a "windfall" recovery if the Resolution Sum is very high, and avoids "disproportionate" recovery if the multiple of Legal Costs far exceeds the Resolution Sum.[21]

17. Fifthly, the CFO was subject to an undertaking by JKL that it would comply with its obligations under the Funding Terms: Order 2. JKL duly gave such an undertaking. By that undertaking, it also acknowledged that the Funding Terms would prevail over the Funding Agreements: Funding Terms, cl 23. This means that while, under the Funding Agreements, JKL had the right to terminate funding at its discretion (see cl 21.1), JKL can now only terminate funding with the Court's approval: Funding Terms, cl 20.

18. Viewed overall, and made on an early, interlocutory basis, the CFO provides a "stable base of funding":[22] giving group members the comfort that JKL must pay for the litigation of the common questions which will be determinative of their claims, and has surrendered its ability to terminate unilaterally. Absent the CFO, it would have been uneconomic for JKL to proceed on the basis of funding agreements with four group members only. A funding equalisation order[23] **(FEO)** was an alternative option open as a matter of power, but was clearly inappropriate because, unlike in some class actions where a small proportion of group members are entitled to a high proportion of the ultimate Resolution Sum (and thus able to promise an attractive commission to a funder from their own entitlements) here the value of each group member's chose in action is small. The alternative would be for JKL to engage in "book building" – seeking to enter funding agreements with as many as possible of the 80,000 group members – but that would lead to "wasted costs" which may be deducted from the Resolution Sum and reduce any return to group members.[24] By providing that "stable base of

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[20] Cl 13.1 and 15.1: ABFM p 50-51. Those Sums were respectively defined to mean any amount due to the Respondent, <u>or any Group Member,</u> by way of settlement or judgment.
[21] PJ [60] CAB 30-31.
[22] FCAFC [27] CAB 83.
[23] As explained at AS [11]: where any costs/commission agreed to be paid by funded group members is shared proportionately with those who have not signed such agreements. However, FEOs have sometimes been made so as to *increase* the funder's commission over the agreed amount: see *Blairgowrie Trading Ltd v Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330 (***Allco No 3***) at [41], [45], [99(d].
[24] PJ [34] CAB 24; *Perera v Getswift* (2018) 263 FCR 92 at [295]; ALRC Report 2019 at [4.34].

funding", the CFO enables the litigation of choses in action that would otherwise be uneconomic to litigate and practically valueless. Thus, far from *diminishing* the value of group members' choses in action, the effect of the CFO is to enable their value to be *realised.*

19. Although the final Resolution Sum and Legal Costs were not known at the time the CFO was made, that does not render the order advisory, hypothetical or premature. It was made on the basis of the evidence then before the Court, including a table prepared by the parties setting out a range of possible outcomes by reference to possible Resolution Sums and Legal Costs.[25] If, in light of the actual Resolution Sum or Legal Costs, some injustice were to arise, the CFO had an inbuilt mechanism for varying the amounts to be paid (being subject to

10 Court "approval"). The Court also retained its powers under s. 33V to approve, and under s. 33Z to make orders regarding, the payment of such amounts at settlement or judgment.

20. The Appellants focus on the fact that the CFO requires the payment of a commission to JKL, and assert that this was not an "existing expense" of the litigation: AS [9]-[12]. But their challenge is far broader. They challenge not just the commission payable to JKL; they challenge the CFO in its entirety – including the reimbursement of JKL for amounts paid to the Respondents' lawyers; the payment to the Respondents' lawyers of any remaining unpaid legal costs; and payment of Administration Expenses. Their complaint – or at least that under s. 51(xxxi) – is not just that these are not "existing expenses" of any group member; they complain that these payments have not been consented to by *each and every* group member.

20 The Appellants therefore challenge the Court's power to make *any* orders allocating part of the judgment or settlement sum to the funder, solicitors or representatives themselves without every group members' consent. Such a challenge, if upheld, would destroy the existence of the "open class" actions which Part IVA was intended to promote.

Grounds 3(a)-(c): the proper construction of s. 33ZF

21. Section 33ZF(1) is the "widest possible power";[26] its language denoting "width, amplitude and flexibility".[27] Several features illustrate its breadth: the power can be exercised on the Court's own motion; the Court can make "any" order, at any stage of the proceedings; and the power is conditioned only upon the Court "thinking" that the order is "appropriate <u>or</u> necessary to ensure that justice is done in the proceeding".[28] Because Part IVA was a "new

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[25] PJ [50] CAB 28 and Annexure A CAB 34.
[26] FCAFC [85]-[86] CAB 99; see also *Brewster v BMW Australia Ltd* [2019] NSWCA 35 (***Brewster***) at [56].
[27] FCAFC [87] CAB 99-100.
[28] See FCAFC [87] CAB 99; note the meaning of "appropriate or necessary" set out in *Money Max,* [161]-[165].

representative action procedure",[29] Parliament must have intended that the Court would "over time, in individual cases, develop new procedures in form and contour as it responded to the practical and economic circumstances in which Pt IVA was to work".[30] In order to "avoid the necessity for frequent resort to Parliament for amendments to the legislation, it was obviously desirable to empower the Court to make the orders necessary to resolve unforeseen difficulties"[31] in the form of s. 33ZF. Such a provision, conferring power on a superior court of record, should not be read down, absent clear indication in the terms or context.[32] Each of the Appellants' attempts to read down s. 33ZF should be rejected for the following reasons.

22. The principle of legality (AS [16]-[22]): The essential premise of the Appellants' argument is that the effect of the CFO was to "diminish" or "interfere" with group members' property rights. However, at AS [17] the Appellants adopt a blinkered view of the CFO's effect. The impact of the CFO on the value of group members' choses in action is assessed usefully by comparing the value of the chose in action *before* the CFO was made, and its value *after* the CFO was made. In the "before" scenario, the Appellants focus on the fact that each group member was notionally entitled to $X amount, while ignoring that their choses in action were uneconomic to litigate and practically valueless: see [18] above. In the "after" scenario, the Appellants focus on the fact that each group member is notionally entitled to $X-$Y, while ignoring that the effect of the CFO is to enable the value of group members' choses in action to be realised. While *one effect* of the CFO, should the action be successful, is to require a portion of the proceeds of each chose in action to be paid to JKL (as well as to the solicitors and administrators), that must be viewed in the light of the effect of the CFO overall which is to *realise*, not *diminish*, the value of the rights.

23. A further reason for rejecting this argument is that given by the Court of Appeal in *Brewster* at [58]-[63]. As noted, Part IVA already effects a significant alteration to the rights of group members by enabling their choses in action to be litigated without their consent or even knowledge. In that sense, the legislature has "directed its attention to the question of the abrogation or curtailment" of group members' property rights and concluded that those rights should be limited, by curtailing the requirement for consent, in order to enable those claims to

[29] Commonwealth of Australia, House of Representatives, *Parliamentary Debates*, 14 November 1991 at p 3174.
[30] FCAFC [88] CAB 100.
[31] *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1 at 4; see also *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168 at [48].
[32] FCAFC [85]-[87] CAB 99 and *Brewster* [42], [57], citing eg *Owners of Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404, 421. See also *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270, where the Court applied the principle in respect of the power under s. 447A of the *Corporations Act 2001* (Cth).

be litigated in an efficient manner. It is therefore unhelpful, and contrary to the purposes of Part IVA, to *presume* that the legislature intended no interference to group members' property rights without their consent. At AS [18], the Appellants erect a false dichotomy between the "particular rights" that Part IVA limits, and the "quite different rights" that the CFO interferes with. But, in both cases, the interference is with the vindication of group members' chose in action. It would be unreal to presume that, in establishing a regime for the vindication of group members' choses in action without consent, the legislature intended that members should bear no risks or costs of the litigation unless their consent was in fact obtained.

24. Justice "in the proceeding" (AS [23]-[24]): The Appellants submit that an order
10 "granting a funder a share of any fruits of the litigation", in advance of determining the proceedings, is not capable of being seen as "appropriate or necessary to ensure that justice is done in the proceeding". Since the availability of the power is conditioned only upon the Court "thinking" this test is satisfied, the Appellants must demonstrate that it was not open to the primary judge to form that view. In making this submission, the Appellants adopt an unduly narrow view of what constitutes "justice...in the proceeding" and of the CFO's effect.

25. The doing of "justice" in a Part IVA proceeding is not limited to deciding the issues in dispute between the parties: cf AS [23]. It encompasses both procedural and substantive justice.[33] Given the Court's supervisory role in protecting the interests of group members, it was open to the primary judge to consider it does "justice" to make a CFO designed (in part)
20 to remove a risk to the prosecution and vindication of group members' rights. The Appellants' narrow construction finds no support in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 (AS [24]), which was concerned with a different provision (s. 23 of the Act), in a different statutory context (not Part IVA) and entirely different factual circumstances.[34]

26. The Appellants also adopt a narrow view of the effect of the CFO. As noted above, *one way* the CFO promotes justice in the proceeding is by providing a "stable base of funding". But the CFO promotes "justice in the proceeding" in other ways too.

27. *First,* the CFO achieves justice *between group members.* The CFO is a method for sharing the *benefits* of the litigation (by establishing the common fund: see ss. 33Z(1)(f), 33ZA) and the *burdens* (the funder's and solicitor's fees) across group members.[35] The
30 Appellants submit that the payments to JKL are not appropriately seen as an "expense" of the

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[33] FCAFC [90]; CAB 100-101.
[34] The case concerned an order requiring the defendant to pay into Court $3m as security for the satisfaction of judgment which, it was held, would have converted the plaintiff from an unsecured to a secured creditor.
[35] *Money Max* at [8].

proceedings, because JKL's commission has not *in fact* been incurred by any group member: AS [9]-[12]. The submission overlooks two points. The first is that, as noted above, the 1st-4th Respondents *have agreed* to pay JKL 30% of the Settlement or Outcome Sum under the Funding Agreements. Should it be necessary to characterise the commission as an "existing expense" of the litigation, that can be done here. The request made by the representative to the funder has generated the expense, subject always to court supervision and approval.

28. Further, while equitable principles justify sharing the "existing expenses" of litigation between group members (see AS [10]-[11]), what is "just" in the context of Part IVA need not be constrained to reimbursement of expenses strictly so called. The dictum of Bowen LJ in

10 *Falcke v Scottish Imperial Insurance Co*[36] has been refined: the law of restitution recognises the right of some persons who intervene to assist another, without legal compulsion, with or without request, to recover moneys reasonably outlaid and (in some cases) to earn reasonable remuneration.[37] This has included the provisions of services necessary to preserve life, health or property, including the law of salvage. This recognition is driven in part by the need, in the public interest, to encourage certain types of intervention.[38] In salvage context, the law accepts that the salvor should be entitled to reimbursement of expenses, as well as a reward recognising the risk undertaken:[39] see below at [44]. Equity is not so constrained against rewarding persons who by their trouble benefit others; there is inherent (albeit infrequently exercised) equitable jurisdiction in Courts to approve and set remuneration to trustees and

20 other fiduciaries who are under their supervision.[40] And the categories are not closed. The law is able to recognise new categories where a party provides services of public utility, with or without request. That is apt in the context of Part IVA, where the involvement of third party funders promotes access to justice and the premise of the regime is that group members' rights can be litigated without their consent (although, unlike many cases of "necessitous intervention", here some form of request is involved from the representative to the funder and

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[36] (1886) 34 Ch D 234 at 248: "The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor...create any obligation to repay the expenditure."

[37] K Mason et al, *Mason and Carter's Restitution Law in Australia* (3rd ed, 2016) (**Mason and Carter**) at [811]; Goff and Jones, *The Law of Unjust Enrichment* (9th ed, 2016) (**Goff and Jones**) at [18-03]; Edelman and Bant, *Unjust Enrichment* (2nd ed, 2016) (**Edelman and Bant**) at 316-319.

[38] Mason and Carter at [812]; see also [805]; Goff and Jones at [18-03]; Edelman and Bant at 316-319.

[39] Mason and Carter at [820]: "remuneration" (as opposed to reimbursement) should be "permitted where it can be shown that, without such reward, others might be deterred from assisting in like cases in the future".

[40] *Re Masters* [1953] 1 WLR 81, citing *Re Freemans Settlement* (1887) 37 Ch D 148, *Marshall v Holloway* (1820) 2 Sw 432; 36 ER 681; *Bainbrigge v Blair* (1845) 8 Beav 588; 50 ER 231 (Lord Langdale MR); Lewin on Trusts (16th ed, 1964) at 205. This jurisdiction, which is by way of exception to the general rule, in English law, developed into the norm in the USA: see *Story's Equity Jurisprudence as administered in England and America* (13th ed, 1886) at §§322, 1268; *Restatement of the Law Trusts (3d)* at §38(1).

group members are notified of the proposed CFO and can opt out of the proceedings). This also illustrates that the inquiry under s. 33ZF is not untethered; what is "just" is informed by a body of equitable and restitutionary principles.

29. *Secondly*, the CFO ensures court supervision of the amount of Legal Costs (as defined above) and the commission payable to JKL; just as it is appropriate for the Court to supervise the costs of representative proceedings generally in the interests of group members.[41]

30. *Thirdly*, while a CFO can be made at the point of settlement or judgment under s. 33V(2) or s. 33Z(1)(g), a benefit of making it earlier is that group members can make a more informed decision on whether to opt out of the proceedings as they will have a better
10 understanding of the likely financial consequences of choosing to remain in it.[42]

31. Anthony Hordern (AS [26]-[31]): The Appellants seek to read down s. 33ZF by pointing to other provisions which, they say, expressly provide powers to make orders regarding the distribution of the settlement or judgment sum. In so submitting, the Appellants invoke the principle that "affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise";[43] such that the "same matter is not to be done according to some other course"[44]. But the provisions on which the Appellants rely are not directed to the "same matter" as s. 33ZF, nor would they be undermined if s. 33ZF permitted the making of a CFO prior to settlement or judgment.

32. Section 33V(2) empowers the Court, when approving settlement, to "make such
20 orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court". The Appellants implicitly accept that, despite its general terms (and subject to constitutional considerations), s. 33V(2) would empower the Court to make a CFO at the point of settlement. The 1st-4th Respondents embrace that position; consistently with its generality, s. 33V(2) has been relied upon to approve a range of fees and disbursements at the time of settlement,[45] including the payment of a commission to a funder.[46] Nevertheless,

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[41] *Money Max* at [72], [171].
[42] FCAFC [19] CAB 80-81; PJ [29] CAB 22; *Money Max* at [109]-[111].
[43] *Minister for Immigration v Nystrom* (2006) 228 CLR 566 (***Nystrom***) at [54].
[44] *Nystrom* at 588 [56], citing *R v Wallis (Wool Stores Case)* (1949) 78 CLR 529 at 550.
[45] Including legal costs and disbursements, payments to representatives for time and expenses, costs of preparing and administering settlement schemes, costs of financial counselling for group members, and distribution of residual amounts to charitable foundations: see eg *Wotton v Queensland (No 10)* [2018] FCA 915, Order 3, and Sched 1 cl 48; *Allco No 3*, Order 1, [178]; *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 (***Caason***), Order 10(a), 12(b) and [107]-[146]; *Hodges v Sandhurst Trustees Limited* [2018] FCA 1346 (***Hodges***), Order 1(b) and 6(b) in the Smith proceedings and [12]-[24]; *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433, [89]-[99]; *Matthews v AusNet Electricity Services Pty Ltd & Ors* [2014] VSC 663, [346]-[386].
[46] *Caason*, Order 12 and [165]; *Hodges*, Order 6 in the *Smith* proceedings; *Allco No 3*, Order 1 and [91]-[160].

s. 33V is not addressed to the "same matter" as s. 33ZF. It is not addressed to the amount or allocation of the costs of proceedings, let alone at an early stage of the proceedings. And even if viewed as addressed to the distribution of settlement monies generally, its general language counts against it being an "exhaustive"[47] statement of the Court's powers on that topic.

33. Moreover, to the extent any conditions attach to the exercise of power under s. 33V(2), they would not be undermined by the making of a CFO of the kind made here. The Appellants rely on two alleged "conditions". The first is that the power is exercisable at the time of settlement approval. But those words merely identify the circumstance in which the power is enlivened; they do not implicitly require that any orders regarding the distribution of settlement monies *only* be made at the point of settlement. The second alleged constraint is s. 33X(4), which requires that group members be given notice of the settlement approval application. But where, as here, the CFO provides that payments to JKL are subject to the Court's later approval, the CFO *preserves*, rather than circumvents, the power to approve those amounts under s. 33V(2) with the associated notice requirements under s. 33X(4).

34. A CFO could likewise be made at the time of judgment, pursuant to s. 33Z(1)(g) ("such other order as the Court thinks just"). The Appellants, however, submit that ss. 33Z(2) and (4), 33ZA and 33ZJ are intended to be an exhaustive statement of the circumstances in which an award of damages may be distributed. Those provisions are not exhaustive of the orders that can be made at the point of judgment, let alone prior to judgment. Section 33Z(2) and (4) refer to an "award of damages", which is unlikely to include, for example, equitable compensation.[48] Moreover, as in the case of s. 33V, any constraints imposed by s. 33Z(1) are not undermined by a CFO of the kind made here, because the payments are subject to approval at the time of judgment. Section 33ZJ likewise only arises where there has been an "award of damages", and only applies to costs "incurred" by the representative party. If s. 33ZJ warrants the reading down of s. 33ZF, it would also warrant the reading down of s. 33V, meaning that the reimbursement of the representative party would also be impermissible at the time of settlement. That cannot have been intended.

35. The logical consequence of the Appellants' submission is that the Court could not, prior to settlement or judgment, make *any* orders for payments out of a future judgment or settlement sum to representatives, solicitors or funders (including FEOs) even where, as here, the order makes the amounts subject to the Court's approval in light of the final judgment or

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[47] Compare *Nystrom* at 589 [59].
[48] *Walsh v Permanent Trustee Australia* (1996) 21 ACSR 213 at 215-216.

settlement sum. That would undermine the beneficial purpose of Part IVA and the Court's role in supervising costs in the interests of group members at an early stage of proceedings.

36. Absence of practical criteria (AS [25]): Section 33ZF does provide criteria, albeit broadly expressed. It is commonplace for Courts to be vested with broad powers, even powers capable of having significant impacts on property rights, with no objective criteria other than that the order be "just" or "appropriate". That is so that the provision can be construed and adapted to account for unforeseen, developing or variegated circumstances as they arise.[49] Section 23 of the Act is such a provision which, with the passage of time, was recognised as including a power to make asset preservation orders.[50] Section 23, like s. 33ZF, is given content by the "experience of the Court accumulated from individual cases applying the law to new facts as they arise".[51] Contrary to AS [32], "justice" is the very sort of statutory concept that is "always speaking".[52] Its meaning must adapt to new ways of hearing and determining disputes, as well as changing public policy including in relation to litigation funding. For that reason, it is wrong to constrain the scope of s. 33ZF by reference to the particular legal landscape at the time Part IVA was enacted: cf AS [32]-[34].

Ground 3(d): separation of powers

37. The power to make a CFO is at least *incidental* to the exercise of judicial power. If that be accepted, it matters not whether the making of the CFO is itself an exercise of judicial power.[53] The form of s. 33ZF supports that view, as it is no different in kind to one of the statutory provisions which was at issue in *Cominos v Cominos*,[54] which empowered the Court to "make any other order ... which it thinks it is necessary to make to do justice". All members of the Court concluded that that provision was incidental to the exercise of judicial power, with McTiernan and Menzies JJ observing that the law conferred power ancillary to, and taking its colour from, the grant of jurisdiction to determine matrimonial causes for which the statute there provided.[55] Here, absent any general challenge to the validity of Part IVA as validly conferring jurisdiction to determine rights according to new procedures which do not require group members' consent (which would require a challenge to *Femcare* which is not here made), s. 33ZF should be seen in the same way.

[49] See FCAFC [88]-[89] CAB 100 and the authorities there cited.
[50] *Jackson v Sterling Industries* (1987) 162 CLR 612, especially at 622 (Deane J).
[51] FCAFC [88] CAB 100. See also *Cominos v Cominos* (1972) 127 CLR 588 (***Cominos***) at 599, 603.
[52] See *Brewster* at [75]-[76].
[53] *Femcare* at [44].
[54] (1972) 127 CLR 588, considering, inter alia, s 87(1) of the *Matrimonial Causes Act* 1959-1966.
[55] *Cominos* at 591. See also at 593 (Walsh J), 600 (Gibbs J), 606 (Stephen J), and 608-609 (Mason J).

38. The effect of a CFO, and the way in which it facilitates justice and equality in representative proceedings, has been explained above. In making a CFO the Court is acting:[56]

> *...incidentally to the resolution of legal rights of the parties and the group to ensure, as far as it can be, that those rights can be vindicated, at a reasonable cost, in an efficient manner, giving proper reasonable recompense in legal costs to professional lawyers, and commercial reward for funding appropriately commensurable with the risk undertaken and benefit conferred on group members.*

39. In that sense, the CFO "enables", "supports" or "facilitates"[57] the Court's exercise of its function of hearing and determining the representative proceedings. The examples given by the Appellants at AS [44] – injunctions, Mareva orders and preliminary discovery – provide no principled basis for limiting the scope of incidental power to processes that are directly aimed at preserving the subject matter of the litigation or obtaining information necessary for prosecuting proceedings. The categories of incidental power are not closed and new ones can be recognised, particularly in a context as novel as Part IVA.

40. In any event, the making of a CFO *is an exercise* of judicial power. The Appellants proceed on the basis that a power which creates rights can only be judicial if the power has historic judicial roots or arises from a "double function" provision: AS [38]-[41]. No authority has adopted such a cramped conception of judicial power. Rather, the authorities emphasise that the proper characterisation of a power depends upon a range of factors. Where a power is not exclusively legislative, executive or judicial, its character is informed by the nature of the body in which it is vested.[58] Also relevant are the considerations to which the body is to have regard and the processes it adopts.[59] In *Precision Data,* the fact that the relevant power operated to create rights was not, on its own, determinative; it was also important that the power was "reposed in a tribunal which [was] not a court"; that the panel members were required to have business, but not necessarily legal, knowledge; and that they were expressly required to consider "commercial policy".[60]

41. Here, it is obvious, but important, that the power is conferred on a Court. And, because it is conferred on a Court, it is presumed that it will be exercised in accordance with judicial process.[61] And here, the CFO was made in accordance with judicial process: it was made based on the facts as found, in light of the evidence before the Court. It was made

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[56] FCAFC [105] CAB 106.
[57] *Momcilovic v The Queen* (2011) 245 CLR 1 at [90]-[91].
[58] FCAFC [99] CAB 103; *Brandy v HREOC* (1995) 183 CLR 245 at 267; *R v Quinn; Ex Parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 18; *R v Davison* (1954) 90 CLR 353 at 368.
[59] See eg *Precision Data Holdings Limited v Wills* (1991) 173 CLR 167 (***Precision Data***) at 189-191.
[60] *Precision Data* at 190-191.
[61] *Palmer v Ayres* (2017) 259 CLR 478 at [48] (Gageler J). See also *Cominos* at 604-605 (Stephen).

following written and oral submissions, including from JKL. Group members were notified of the CFO application and given an opportunity to be heard, but no reasoned objections were received. Moreover, s. 33ZF is grounded in what is "appropriate or necessary to ensure that justice is done in the proceeding"; it is "difficult to conceive of a function or standard more appropriate to the judicial branch of government than considering and deciding (upon application and evidence) what is appropriate or necessary to do justice in a proceeding".[62]

42. The absence of any detailed criteria in s. 33ZF does not point towards non-judicial power: cf AS [42]. As submitted at [36] above, the text of s. 33ZF itself sets the standard, and the Court's role is to develop its content and meaning on a case by case basis.[63]

10 43. The making of a CFO is a far cry from what is done by a remuneration tribunal: cf AS [14], [42]. A remuneration tribunal may set rates and charges for services across the *whole* of an industry, which services may be *entirely unconnected* with any legal proceedings, or any person over whom the Court exercises supervisory jurisdiction.[64] By contrast, the setting of a commission rate is "largely a forensic question depending upon the material available to the judge" and is not dissimilar to the task of setting legal costs by scales, rates, and total/capped amounts, or fixing remuneration of external insolvency practitioners or trustees administering trusts.[65] The Court has set commission rates not by close analysis of the "market" (such as it is);[66] but by assessing (consistently with the terms of s. 33ZF) whether the rate falls within the range of options calculated to do justice in the proceedings.

20 44. If historical analogies be required, the law of salvage provides one. As noted at [28] above, the law of salvage, informed by restitutionary principles, recognises the right of the salvor to reimbursement for costs incurred as well as a reward for the services provided. The example illustrates that a power can be judicial despite the fact that it involves the fixing of a fee for services by reference to broad considerations. The Court fixes the reward by reference to the nature and extent of the risks undertaken by the salvor, the extent of the benefit conferred including by reference to the value of the property salved, and associated notions of proportionality.[67] Another historical analogy lies in the inherent equitable jurisdiction to remunerate persons who accept trusts, where, as Lord Langdale MR said, "*it is competent for*

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[62] FCAFC [100] CAB 104.
[63] *Thomas v Mowbray* (2007) 233 CLR 307 at [91] (Gummow and Crennan JJ).
[64] Compare *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 298.
[65] *Allco No 3* at [120]; see also ALRC Report 2019 at [4.35].
[66] The primary judge eschewed such an approach: PJ [46] CAB 27; see also ALRC Report 2019 at [5.12].
[67] FCAFC [102] CAB 105; *Brewster* at [99]. See also *United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC* (2007) 163 FCR 183 at [32]-[34]; and at [56] citing *Compaigne Generale Transatlantique v Owners of TF Barry and Auburn (Amerique)* (1874) LR 6 PC 468 at 475.

the Court considering what is beneficial to the cestuis que trust, and is calculated to promote their interest, to take the matter into consideration, and to give proper remuneration to that person who alone, by his own exertion, can produce that benefit."[68]

45. Courts have also recognised that a party (such as a liquidator) who has brought into Court a fund in which they and others are interested may make a first claim upon the fund for their costs and expenses incurred in preservation and realisation of that fund (the *Universal Distributing* principle).[69] The task of assessing the "reasonableness" of such expenses is not dissimilar to the task of setting a commission under a CFO, and can involve an assessment of the "risk" involved in the undertaking.[70] Courts have recognised other forms of indemnity out

10 of a common funds, including for a trustee's expenses (and, in some circumstances, trustee's remuneration: see [28] above); a co-owner's claim for contribution against the other to recoup expenditure benefitting their joint property; and for receiver's remuneration.[71]

46. Courts also "create" rights in the making of other types of costs orders. In addition to the usual costs orders against the unsuccessful party, costs may be awarded against non-parties, including litigation funders.[72] Courts may also make orders redistributing liability for costs between parties on one side of the record (such as "Bullock" and "Sanderson" orders).[73]

Grounds 3(e) and (f): acquisition of property otherwise than on just terms

47. As noted, while the Appellants focus on the fact that JKL's commission is not an "existing expense" which *any* group member has agreed to pay, in substance they challenge

20 any orders that redistribute the judgment or settlement sum – to a representative, solicitor, or funder – without the consent of *each and every* group member. The primary, and simplest, answer to the Appellants' argument is that the exercise of s. 33ZF here has effected no acquisition of property. For the reasons given above, the effect of the CFO is not properly characterised as *taking away* a portion of the fruits of the group members' choses in action; rather, its effect was to put in place a provisional, revisable, regime to facilitate the *realisation* of those choses in action, while preserving group members' ability to opt out and pursue them by other means. But there are other answers to the s. 51(xxxi) argument, as follows.

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[68] See [28] above. *Bainbrigge v Blair* (1845) 8 Beav 588; 50 ER 231 per Lord Langdale MR at 234-235.
[69] *Re Universal Distributing Company Limited (in Liquidation)* (1933) 48 CLR 171, 174-175; see also *Stewart v Atco Controls Pty Ltd (in liq)* (2014) 252 CLR 318 at [17]-[23].
[70] *IMF (Australia) Limited v Meadow Springs Fairway Resort Limited (in Liq)* (2009) 253 ALR 240 at [79], concerning approval of the liquidator's payment of a litigation funder's commission. Compare also the approval of liquidators' entry into funding agreements under s. 477(2B) of the *Corporations Act 2001*: *Stewart, in the matter of Newtronics Pty Ltd* [2007] FCA 1375 at [26(5)] (referring to the "risk" to the funder).
[71] *Shirlaw v Taylor* (1992) 31 FCR 222 at 228-231; *Monks v Poynice* (1987) 8 NSWLR 662 at 663-664.
[72] *Knight v FP Special Assets Ltd* (1992) 174 CLR 178; *Gore v Justice Corp Pty Ltd* (2002) 119 FCR 429.
[73] *Gould v Vaggelas* (1985) 157 CLR 215 at 229-231.

48. *First*, s. 33ZF is not properly characterised as a law with respect to the acquisition of property. The conferral of the legislative power of compulsory acquisition in s. 51(xxxi) means that, absent contrary indication, other legislative powers must be construed so that they do not authorise the making of a law which can properly be characterised as a law with respect to the acquisition of property otherwise than on just terms.[74] That is not to say that a law will be outside s. 51(xxxi) unless that is its "sole or dominant" character; for the purposes of s. 51, a law can have a number of characters; however, "unless a law can be fairly characterised, for the purposes of par (xxxi), as a law with respect to the acquisition of property, that paragraph cannot indirectly operate to exclude its enactment from the prima
10 facie scope of another grant of legislative power".[75]

49. Section 33ZF is a law supported by s. 51(xxxix),[76] which applies to "matters incidental to the *execution* of the judicial power vested in a court by s 71 or as a consequence of s 75 or of a law enacted under s 76 or s 77".[77] It may also be supported by the implied incidental power attaching to s. 77 (laws defining the jurisdiction of federal courts), which includes the power to legislate in relation to matters which are "appropriate to effectuate the exercise of the power".[78] Laws made pursuant to ss. 51(xxxix) and 77, insofar as they vest courts with powers to make orders regarding the conduct of legal proceedings, will necessarily involve some interference with a plaintiff's chose in action or the defendant's correlative rights. There is a strong analogy here with *Nintendo Co Ltd v Centronics Systems*
20 *Pty Ltd* (1994) 181 CLR 134, where the plurality observed that the "essence" of the grant of the copyright power under s. 51(xviii) was that it "authorizes the making of laws which create, confer, and provide for the enforcement of, intellectual property rights" and it was "of the nature of such laws that they confer such rights on authors, inventors and designers, other originators and assignees and that they conversely limit and detract from the proprietary rights which would otherwise be enjoyed by the owners of affected property" (at 160). That is not to say that *any* power given to a court pursuant to a law made under s. 51(xxxix) or s. 77 necessarily stands outside s. 51(xxxi). A power to award part of the settlement or judgment proceeds to a person with *no connection* to the litigation would clearly fall within s. 51(xxxi). But where, as here, the power is limited by what the Court thinks is "appropriate or necessary

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[74] *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 (***Mutual Pools***), 169, 177, 185-186, 188; see also *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 (***Nintendo***) at 160.
[75] *Mutual Pools* at 188 (Deane and Gaudron JJ).
[76] *Rizeq v Western Australia* (2017) 262 CLR 1 at [59].
[77] *Burns v Corbett* (2018) 92 ALJR 423 at [93] (Gageler J) (emphasis in original); see also at [127] (Nettle J).
[78] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 26-27 (Mason CJ).

to ensure that justice is done the proceeding", the exercise of that power will necessarily interfere to some extent with the plaintiff's chose in action and/or the fruits thereof. In that sense, it is "incongruous"[79] to speak of a law such as s. 33ZF providing for "just terms".

50. It is also important to appreciate the nature of group members' choses in action in the context of Part IVA. As explained above, even leaving aside the power to make CFOs, Part IVA already "interferes" with those rights by enabling them to be litigated without group members' consent.[80] In *Femcare* at [108]-[109], the Court rejected the submission that that amounted to an acquisition of property within the meaning of s. 51(xxxi). And, as explained above, Part IVA necessarily contemplates that there will be group members, a representative
10 of them, and a person (whether it be the representative, solicitors, or an external funder) who is taking on the risk of the action. What s. 33ZF does, by permitting the making of a CFO, is regulate or adjust the relationship between the group members, representative, solicitors and funder, and between group members themselves, in the common interest of all concerned. In that way it is a "means of resolving or adjusting competing claims, obligations or property rights of individuals as an incident of the regulation of their relationship".[81]

51. To illustrate the absurdity of the Appellants' submission, one need only ask: "How would s. 33ZF provide for just terms?". To the extent the CFO effects an "acquisition" of part of the proceeds of the litigation in favour of JKL, the very purpose of the "acquisition" is to reimburse JKL for costs incurred as well as to provide a reward for the services it provides.
20 The unstated premise of the Appellants' case is that, for s. 33ZF to validly authorise the making of a CFO, it must not only provide for recompense to the funder for the services provided, but must also require the funder to *pay back* to group members the whole of the amount received by it, or else their property is being acquired otherwise than on just terms.

52. This Court has previously recognised that the levying of a fee for a service provided – even a service provided without the express consent of the property owner – may fall outside s. 51(xxxi). In *Airservices Australia v Canadian International Airlines Ltd* (2000) 202 CLR 133, the Commonwealth law empowered the Civil Aviation Authority to impose fees for services provided and created a system of statutory liens in respect of aircraft for which the fees were unpaid. Those liens were enforceable against anyone with an interest in the aircraft,

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[79] *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 436 [77]; *Theophanous v Commonwealth* (2006) 225 CLR 101 at [56]-[60]; *Mutual Pools* at 187 (Deane and Gaudron JJ), 221-222 (McHugh J); *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285.
[80] Compare *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210 at 233-234.
[81] *Nintendo*, 161; *Georgiadis v Australia and Overseas Telecommunications Corp* (1994) 179 CLR 297, 306, 307; *Mutual Pools*, 171, 189; *Australian Tape Manufacturers Association Ltd v Cth* (1993) 176 CLR 480, 510.

such as an owner or lessee, even if those persons had not incurred the relevant debt. The majority concluded that the law was not a law with respect to the acquisition of property, in essence because the liens were a quid pro quo for the services which anyone with an interest in the aircraft had taken the benefit of, albeit not expressly consented to.[82] If the Authority had to provide "fair compensation", the "entire purpose of the lien would be frustrated as the Authority would be no better off, and indeed may be worse off, in terms of net recovery of the charges levied as a quid pro quo for the provision of the services": at [345] per McHugh J.

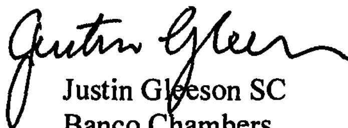
53. *Secondly*, s. 51(xxxi) contemplates acquisition by compulsion.[83] The required element of compulsion is lacking here in circumstances where group members were notified of the
10 CFO application under the procedures authorised by ss. 33X and 33Y of the Act (no reasoned objections were received); retain the ability to opt out of the proceedings, including if the CFO is not to their liking; and will have the opportunity to object to the final amounts to be paid to JKL as part of any settlement approval under s. 33V.

54. *Finally*, even if s. 33ZF is properly characterised as a law with respect to the acquisition of property, the requirement for "just terms" was satisfied. That is inherent in the requirement that the Court be satisfied the CFO is "appropriate or necessary to ensure that justice is done in the proceeding".[84] While "justice...in the proceeding" may require consideration of more than the interests of the acquiree (see AS [49]), that is consistent with the s. 51(xxxi) authorities. Section 51(xxxi) does not provide for "just compensation"; the
20 requirement for "just terms" was included to "prevent arbitrary exercises of the power at the expense of a State or the subject"[85] and encompasses not only what is "just" between acquiror/acquiree, but also "what is fair and just between the community and the owner".[86]

Part VI: Estimated time for oral argument

55. It is estimated that 2 hours is required to present the 1st-4th Respondents' argument.

23 July 2019



Justin Gleeson SC	William Edwards	Zelie Heger
Banco Chambers	Level 22 Chambers	Eleven Wentworth
T: 02 8239 0200	T: 02 9151 2216	T: 02 9101 2307
justin.gleeson@banco.net.au	edwards@level22.com.au	heger@elevenwentworth.com

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[82] See [95]-[101] (Gleeson CJ and Kirby J); [345] (McHugh J); [492]-[503] (Gummow J); [517]-[519] (Hayne J).
[83] *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 235, 249-250 and the cases there cited.
[84] See *Allco No 3* at [117].
[85] *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 290 (Dixon J).
[86] *Nelungaloo Pty Ltd v Commonwealth (No 1)* (1948) 75 CLR 495 at 569 (Dixon J); also 541-2 (Latham CJ).

Annexure A

WESTPAC LIFE INSURANCE SERVICES LIMITED (ABN 31003149157)

Second Appellant

AND

SHARMILA LENTHALL

Second Respondent

10 **SHANE THOMAS LYE**

Third Respondent

KYLIE LEE LYE

Fourth Respondent

JUSTKAPITAL LITIGATION PTY LIMITED

Fifth Respondent