FEDERAL COURT OF AUSTRALIA

Elliott-Carde v McDonald’s Australia Limited [2023] FCAFC 162

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| File numbers: | VID 726 of 2021SAD 127 of 2022 |
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| Judgment of: | **BEACH, LEE AND COLVIN JJ** |
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| Date of judgment: | 12 October 2023 |
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| Catchwords: | **REPRESENTATIVE PROCEEDINGS** – question reserved under s 25(6) of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) – whether Court has power pursuant to s 33V of FCA Act to make a “common fund order” upon settlement of proceeding – where no such order has yet been sought – anterior questions of statutory construction and jurisdiction dismissed – challenge to terms of reserved question dismissed – statutory foundation for making settlement common fund order is s 33V(2) – reserved question answered “yes”**REPRESENTATIVE PROCEEDINGS** – whether representative applicant can seek order in relation to a contravention of a civil remedy provision pursuant to ss 539 and 540 of *Fair Work Act 2009* (Cth) (**FW Act**) – whether ss 539 and 540 impliedly repeal s 33D of the FCA Act to extent of inconsistency – observations on “representative” capacity of industrial associations – consideration of matters in reach of Pt IVA scheme – no inconsistency**HIGH COURT AND FEDERAL COURT** – federal jurisdiction – whether reserved question merely advisory and beyond judicial power – question whether common fund order can be made at settlement not hypothetical and ought be answered**HIGH COURT AND FEDERAL COURT** – federal jurisdiction – whether making of common fund order upon settlement within judicial power of Commonwealth – creation of rights and liabilities an exercise of judicial power – consideration of funder’s returns not an impermissible foray into policy – making of settlement common fund order within judicial power |
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| Legislation: | *Constitution* Ch III, ss 73, 76, 77*Fair Work Act 2009* (Cth) Pt 4-1, ss 3, 12, 45, 50, 539, 540, 544, 545, 546, 550, 558B, 562, 564, 570*Fair Work (Registered Organisations) Act 2009* (Cth) ss 19, 20*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) Sch 17*Federal Court of Australia Act 1976* (Cth) Pt IVA, ss 21, 22, 23, 25, 33C, 33D, 33E, 33J, 33M, 33Q, 33R, 33S, 33V, 33X, 33Y, 33Z, 33ZA, 33ZB, 33ZE, 33ZF, 33ZG, 33ZJ*Industrial Relations Act 1988* (Cth) s 178*Judiciary Act* *1903* (Cth) ss 39B, 78B*Workplace Relations Act 1996* (Cth) ss 178, 718*Commonwealth Conciliation and Arbitration Act 1904* (Cth)ss 44, 119 (repealed)Explanatory Memorandum, Fair Work Bill 2008 (Cth)Explanatory Memorandum, Federal Court of Australia Amendment Bill 1991 (Cth)Second Reading Speech, Federal Court of Australia Amendment Bill 1991 (Cth)Australian Law Reform Commission, Report 134 *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (2018)Australian Law Reform Commission, Report 46 *Grouped Proceedings in the Federal Court* (1988)Australian Law Reform Commission, Report 46 *Summary of Report and Draft Legislation* (1988)  |
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| Cases cited: | *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564*Alqudsi v The Queen* (2016) 258 CLR 203*Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625*Attorney-General for the Commonwealth v Alinta Ltd* (2008) 233 CLR 542*Augusta Pool 1 UK Ltd v Williamson* [2023] NSWCA 93*Australian Federation of Air Pilots v Regional Express Holdings Limited* (2021) 290 FCR 239*Australian Securities and Investments Commission v Richards* [2013] FCAFC 89*AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 26*BHP Group Limited v Impiombato* (2022) 96 ALJR 956*Blairgowrie Trading Ltd v Allco Finance Group Ltd (in liq) (No 3)* (2017) 343 ALR 476*BMW Australia Ltd v Brewster* (2019) 269 CLR 574*Botsman v Bolitho* (2018) 57 VR 68*Bradshaw v BSA Limited (No 2)* [2022] FCA 1440*Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 637*Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380*Clime Capital Ltd v UGL Pty Ltd* [2020] FCA 66*Clubb v Edwards* (2019) 267 CLR 171*Cominos v Cominos* (1972) 127 CLR 588*Commonwealth of Australia v SCI Operations Pty Ltd* (1998) 192 CLR 285*Court v Spotless Group Holdings Limited* [2020] FCA 1730*Davaria Pty Limited v 7-Eleven Stores Pty Ltd (No 13)* [2023] FCA 84*Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501*Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19*Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433*Edwards v Santos Limited* (2011) 242 CLR 421*Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309*ENT19 v Minister for Home Affairs* [2023] HCA 18*Evans v Davantage Group Pty Ltd (No 2)* [2020] FCA 473*Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70*Fakhouri v Secretary, NSW Ministry of Health* (2022) 316 IR 221*Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575*Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130*Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31*Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Limited (No 2)* [2020] FCA 579*Fowkes v Boston Scientific Corporation* [2023] FCA 230*Gill v Ethicon Sàrl (No 10)* [2023] FCA 228*Hall v Arnold Bloch Leibler (a firm) (No 2)* [2022] FCA 163*Hall v Pitcher Partners (a firm)* [2022] FCA 1524*Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia; Whisson v Subaru (Aust) Pty Ltd; Kularathne v Honda Australia Pty Ltd; Brewster v BMW Australia Ltd; Bond v Nissan Motor Co (Australia) Pty Ltd; Coates v Mazda Australia Pty Ltd* [2022] NSWSC 1076*In re the Judiciary Act 1903 and the Navigation Act 1912* (1921) 29 CLR 257*IW v The City of Perth* (1997) 191 CLR 1*Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51*Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited* (2019) 369 ALR 583*Knight v FP Special Assets Ltd* (1992) 174 CLR 178*Lenthall v Westpac Banking Corporation (No 2)* (2020) 144 ACSR 573*Liverpool City Council v McGraw‑Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289*McKay Super Solutions Pty Ltd (Trustee) v Bellamy’s Australia Ltd (No 3)* [2020] FCA 461*Mellifont v Attorney-General for the State of Queensland* (1991) 173 CLR 289*Miliangos v George Frank (Textiles)* *Ltd* [1976] AC 443*Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219*Momcilovic v The Queen* (2011) 245 CLR 1*Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* (2016) 245 FCR 191*National Australia Bank Ltd v Nautilus Insurance Pte Ltd (No 2)* (2019) 377 ALR 627*Nixon v Philip Morris (Australia) Ltd* (1999) 95 FCR 453*Norbis v Norbis* (1986) 161 CLR 513 *Owners of the Ship, Shin Kobe Maru v Empire Shipping Company Inc* (1994) 181 CLR 404*Palmer v Ayres* (2017) 259 CLR 478*Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842*Poe v. Ullman* 367 US 497 (1961)*Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167*Quirk v Suncorp Portfolio Services Ltd in its capacity as trustee for the Suncorp Master Trust (No 2)* [2022] NSWSC 1457*R v Davison* (1954) 90 CLR 353*R v Dunlop Rubber Australia Limited; Ex parte Federated Miscellaneous Workers’ Union of Australia* (1957) 97 CLR 71*R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254*R&B Investments Pty Ltd (Trustee) v Blue Sky Alternative Investments Limited (Administrators Appointed) (in liq) (Carriage Application No 2)* [2023] FCA 142*Re Wakim; Ex parte McNally* (1999) 198 CLR 511*Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2016) 244 FCR 344*Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (Settlement Approval)* [2023] FCA 143*Saraswati v The Queen* (1991) 172 CLR 1*Stanwell Corporation Ltd v LCM Funding Pty Ltd* (2021) 157 ACSR 401*SZGME v Minister for Immigration and Citizenship* (2002) 168 FCR 487*The Queen v Davison* (1954) 90 CLR 353*The Queen v Joske; Ex parte Shop Distributive and Allied Employees’ Association* (1976) 135 CLR 194*Thomas v Mowbray* (2007) 233 CLR 307*Tomlinson v Ramsey Food Processing Pty Limited* (2015) 256 CLR 507*Transport Workers’ Union of Australia v Qantas Airways Limited (No 4)* (2021) 312 IR 13*Union Shipping New Zealand Ltd v Morgan* (2002) 54 NSWLR 690*Uren v RMBL Investments Ltd* *(No 2)* [2020] FCA 647*Webster (Trustee) v Murray Goulburn Co-Operative Co Limited (No 4)* [2020] FCA 1053*Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21*Wetdal Pty Ltd as Trustee for the BlueCo Two Superannuation Fund v Estia Health Limited* [2021] FCA 475*Williams v Toyota Motor Corporation Australia Limited* (2021) 288 FCR 282*Wills v Woolworths Group Ltd* [2022] FCA 1545*Wong v Silkfield Pty Ltd* (1999) 199 CLR 255*Zantran Pty Limited v Crown Resorts Limited (No 4)* [2022] FCA 500 |
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|  | *Class Actions Practice Note* (GPN-CA)Meagher, L, *Employment Class Actions: Past Use and Present Utility*, [2022] No 4 *UNSW Law Journal Forum*Morabito, V, *Empirical perspectives on twenty-one years of funded class actions in Australia*, April 2023 |
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| Division: | Fair Work Division |
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| Registry: | Victoria |
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| National Practice Area: | Employment and Industrial Relations |
|  |  |
| Number of paragraphs: | 509 |
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| Date of last submissions: | 19 May 2023 |
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| Date of hearing: | 6 March 2023  |
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ORDERS

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|  | VID 726 of 2021 |
|   |
| BETWEEN: | JADE ELLIOTT-CARDEFirst ApplicantDARCY DUNLOPSecond Applicant |
| AND: | MCDONALD’S AUSTRALIA LIMITED (ACN 008 496 928)Respondent |

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|  | SAD 127 of 2022 |
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| BETWEEN: | SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES’ ASSOCIATIONApplicant |
| AND: | BANDEC PTY LTDFirst RespondentMCDONALD’S AUSTRALIA LTDSecond RespondentAK GAZ PTY LTD (and others named in the Schedule)Third Respondent |

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| order made by: | BEACH, LEE AND COLVIN JJ |
| DATE OF ORDER: | 12 OCTOBER 2023 |

THE COURT ORDERS THAT:

1. The question reserved under s 25(6) of the *Federal Court of Australia Act 1976* (Cth) for hearing and determination by the Full Court being:

If it was just to do so, does the Court have the statutory power, pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth), to make an order distributing money paid under a settlement in the form of a “Settlement CFO”, as that term is defined in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183; (2020) 281 FCR 501 (at 506–507 [19], [22]–[25])?

should be answered as follows:

*Yes.*

2. There be no order as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BEACH J:

1 Before the Full Court are various issues that have been raised concerning the existence and exercise of statutory power to make a settlement common fund order (CFO) under s 33V(2) of the *Federal Court of Australia Act 1976* (Cth).

2 The occasion for the Full Court to consider these issues has arisen because of a question reserved for our determination under s 25(6) of the FCA Act by the docket judge, Lee J in the following terms:

If it was just to do so, does the Court have the statutory power, pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth), to make an order distributing money paid under a settlement in the form of a “Settlement CFO”, as that term is defined in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183; (2020) 281 FCR 501 (at 506-507 [19], [22]-[25])?

3 His Honour has been case managing two related and in one sense competing proceedings from which the question reserved has been conceived.

4 The first proceeding is a representative proceeding under Part IVA of the FCA Act brought by two applicants against McDonald’s Australia Limited (the Elliott-Carde proceeding) asserting various contraventions of the *Fair Work Act 2009* (Cth) and claims concerning workplace entitlements.

5 The first applicant was a McDonald’s employee. The second applicant was an employee of a McDonald’s franchisee. They represent group members who were McDonald’s employees or employees of McDonald’s franchisees. They have brought claims in a representative capacity for declarations, compensation and pecuniary penalties for contraventions of ss 45, 50, 550 and 558B of the FW Act; some of their claims assert a failure to comply with a 2013 enterprise agreement and a 2010 award. Orders for compensation are sought under s 545. A declaration is sought under s 550. And an order for a pecuniary penalty is sought under s 546.

6 The second proceeding has been brought by the Shop, Distributive and Allied Employees Association (the SDA) against McDonald’s Australia Ltd and its franchisees involving analogous claims (the SDA proceeding).

7 The SDA, being a registered organisation under the FW Act, has brought its proceeding asserting that it is “entitled to represent the industrial interests” of in essence the same employees the subject of the Elliott-Carde proceeding under the relevant 2013 enterprise agreement and the 2010 award. The SDA asserts similar contraventions of the FW Act and a failure to comply with the said agreement and award as asserted in the Elliott-Carde proceeding. As a registered organisation, it also seeks declarations, orders for compensation and pecuniary penalties under ss 545, 546, 547 and 547A.

8 In the context of both the SDA proceeding and the Elliott-Carde proceeding, there are to my mind five issues that require our determination. How such issues have arisen as between the respective sets of parties, how they have been set up for our resolution and why they require our determination now has been cogently explained in the reasons of Lee J, a draft of which I have had the advantage of considering. Let me identify these five issues, although I accept that the fourth and fifth issues could be seen as one issue with two dimensions.

9 The first issue concerns the operation of ss 539 and 540 of the FW Act. In unabashedly pushing the envelope, it is said by the SDA that these provisions, which permit proceedings to be brought on behalf of employees concerning workplace entitlements, exclude utilising the procedures of Part IVA of the FCA Act to pursue such claims in a representative proceeding under Part IVA. In essence it is said that s 33D of the FCA Act has been partially impliedly repealed by ss 539 and 540 of the FW Act, such that the applicants in the Elliott-Carde proceeding do not have standing to pursue a Part IVA proceeding concerning the FW Act contraventions. I would reject this argument.

10 The second issue, which only arises in the present context if I have rejected the SDA’s position on the first issue, is whether as a matter of statutory construction s 33V(2) of the FCA Act empowers the making of settlement CFOs. In my view, it does, and so the reserved question should be answered in the affirmative.

11 The third issue is whether, in a constitutional sense (ss 76 and 77 of the Constitution), there is currently a matter before the Court. There clearly is, if only because there has been a live controversy before us concerning the first and second issues. Alternatively it may be said that these issues are part of a broader matter. I have put this third issue in this part of the sequence because it is convenient to how I propose to discuss these issues. But this is not to deny its primacy above all else, including whether it is even appropriate to embark on the second issue.

12 The fourth issue, on the assumption of an affirmative answer to both the second and third issues, is whether the exercise of power under s 33V(2) to make a settlement CFO is in a constitutional sense the exercise of judicial power given that such an order is said to create new rights and obligations. Now even if such a characterisation of such an order is correct, that does not entail that the exercise of judicial power is not involved.

13 The fifth issue, on the assumption of the correctness of my views on the second to fourth issues, is whether an exercise of judicial power is involved in making a settlement CFO given that it is said that there is no objective standard to set a rate, the Court would be the market setter and policy issues would be involved. There is no substance to this point.

14 Let me turn to the first question concerning s 33D of the FCA Act.

## Standing – the implied partial repeal of s 33D

15 Let me begin by setting out the SDA’s position, which was opposed by the Elliott-Carde applicants and also by the Minister for Employment and Workplace Relations who was given leave to intervene, and for that purpose identify the relevant statutory provisions.

16 Sections 539 and 540 of the FW Act provide:

**539 Applications for orders in relation to contraventions of civil remedy provisions**

(1) A provision referred to in column 1 of an item in the table in subsection (2) is a ***civil remedy provision***.

(2) For each civil remedy provision, the persons referred to in column 2 of the item may, subject to sections 540 and 544 and Subdivision B, apply to the courts referred to in column 3 of the item for orders in relation to a contravention or proposed contravention of the provision, including the maximum penalty referred to in column 4 of the item.

(table omitted)

(3) The regulations may provide that a provision set out in the regulations is a ***civil remedy provision***.

(4) …

**540 Limitations on who may apply for orders etc**

*Employees, employers, outworkers and outworker entities*

(1) The following persons may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision, only if the person is affected by the contravention, or will be affected by the proposed contravention:

(a) an employee;

(aa) a prospective employee;

(b) an employer;

(c) an outworker;

(d) an outworker entity.

*Employee organisations and registered employee associations*

(2) An employee organisation or a registered employee association may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision in relation to an employee, only if:

(a) the employee is affected by the contravention, or will be affected by the proposed contravention; and

(b) the organisation or association is entitled to represent the industrial interests of the employee.

(3) However, subsection (2) does not apply in relation to:

(a) items 4, 7 and 14 in the table in subsection 539(2); or

(b) a contravention or proposed contravention of:

(i) an outworker term in a modern award; or

(ii) a term in an enterprise agreement that would be an outworker term if it were included in a modern award.

(4) …

*Employer organisations*

(5) An employer organisation may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision, only if the organisation has a member who is affected by the contravention, or who will be affected by the proposed contravention.

*Industrial associations*

(6) An industrial association may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision, only if:

(a) the industrial association is affected by the contravention, or will be affected by the proposed contravention; or

(b) if the contravention is in relation to a person:

(i) the person is affected by the contravention, or will be affected by the proposed contravention; and

(ii) the industrial association is entitled to represent the industrial interests of the person.

(7) If an item in column 2 of the table in subsection 539(2) refers to an industrial association then, to avoid doubt, an employee organisation, a registered employee association or an employer organisation may apply for an order, in relation to a contravention or proposed contravention of a civil remedy provision, only if the organisation or association is entitled to apply for the order under subsection (6).

(8) …

17 It is convenient here to set out items 1, 2, 4, 11 and 12 of the table in s 539(2):

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| **Standing, jurisdiction and maximum penalties** |
| **Item** | **Column 1Civil remedy provision** | **Column 2Persons** | **Column 3Courts** | **Column 4Maximum penalty** |
| **Part 2-1—Core provisions** |
| 1 | 44 | (a) an employee;(b) an employee organisation;(c) an inspector | (a) the Federal Court;(b) the Federal Circuit and Family Court of Australia (Division 2);(c) an eligible State or Territory court | for a serious contravention—600 penalty units; orotherwise—60 penalty units |
| 2 | 45 (other than in relation to a contravention or proposed contravention of an outworker term) | (a) an employee;(b) an employer;(c) an employee organisation;(d) an employer organisation;(e) an inspector | (a) the Federal Court;(b) the Federal Circuit and Family Court of Australia (Division 2);(c) an eligible State or Territory court | for a serious contravention—600 penalty units; orotherwise—60 penalty units |
| … |
| 4 | 50 (other than in relation to a contravention or proposed contravention of a term that would be an outworker term if it were included in a modern award) | (a) an employee;(b) an employer;(c) an employee organisation to which the enterprise agreement concerned applies;(d) an inspector | (a) the Federal Court;(b) the Federal Circuit and Family Court of Australia (Division 2);(c) an eligible State or Territory court | for a serious contravention—600 penalty units; orotherwise—60 penalty units |
| …  |
| **Part 3‑1—General protections** |
| 11 | 340(1)340(2)343(1)344345(1)346348349(1)350(1)350(2)351(1)352353(1)354(1)355357(1)358359369(3) | (a) a person affected by the contravention;(b) an industrial association;(c) an inspector | (a) the Federal Court;(b) the Federal Circuit and Family Court of Australia (Division 2) | 60 penalty units |
| 12 | 378 | (a) a person to whom the costs are payable;(b) an industrial association;(c) an inspector | (a) the Federal Court;(b) the Federal Circuit and Family Court of Australia (Division 2) | 60 penalty units |
| … |

18 The SDA contends that ss 539 and 540 of the FW Act impliedly repeal s 33D of the FCA Act to the extent that s 33D confers standing on current or former employees in a representative capacity to apply for an order in relation to a contravention of a civil remedy provision of the FW Act on behalf of other employees.

19 Now it is convenient to note at this point that ss 33C and 33D of the FCA Act provide:

**33C Commencement of proceeding**

(1) Subject to this Part, where:

(a) 7 or more persons have claims against the same person; and

(b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and

(c) the claims of all those persons give rise to a substantial common issue of law or fact;

a proceeding may be commenced by one or more of those persons as representing some of all of them.

(2) A representative proceeding may be commenced:

(a) whether or not the relief sought:

(i) is, or includes, equitable relief;

(ii) consists of, or includes, damages; or

(iii) includes claims for damages that would require individual assessment; or

(iv) is the same for each person represented; and

(b) whether or not the proceeding:

(i) is concerned with separate contracts or transactions between the respondent in the proceeding and individual group members; or

(ii) involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members.

**33D Standing**

(1) A person referred to in paragraph 33C(1)(a) who has a sufficient interest to commence a proceeding on his or her own behalf against another person has a sufficient interest to commence a representative proceeding against that other person on behalf of other persons referred to in that paragraph.

(2) …

20 Save for the SDA’s contention, it is not in issue for present purposes that the applicants in the Elliott-Carde proceeding have satisfied ss 33C and 33D.

21 Now the orders sought in the Elliott-Carde proceeding for group members are orders under Part 4-1 Division 1 and in relation to contraventions of the civil penalty provisions (s 539(2)).

22 Now SDA says that ss 539 and 540 of the FW Act were enacted to confer rights on employees, groups of employees acting for others, and organisations to apply for orders in relation to a contravention of a civil remedy provision only if certain conditions were met.

23 But it is said that in this case the conditions have not been met by the applicants in the Elliott-Carde proceeding, other than in relation to the Part 4.1 Division 1 orders sought concerning the contraventions that affect Ms Elliott-Carde and Mr Dunlop personally.

24 Now by way of background the SDA has said that in 2009 the FW Act expanded the types of representative actions that could be brought under the FW Act. It is said that it created a new scheme in s 539 and s 540 that elaborately and exhaustively defines who can make applications for orders in relation to contraventions, the conditions those applicants must meet to do so, and limits the types of contraventions that can be the subject of those applications.

25 It is said that the text, context, purpose and history of ss 539 and 540 evince a legislative intention to restrict the standing of applicants identified in s 540 to apply for such orders to those who are not excluded by the newly created limitations.

26 It is said that this scheme impliedly repeals and is inconsistent with s 33D of the FCA Act to the extent that s 33D confers standing on employees and groups of employees to apply for an order in a representative capacity in relation to a contravention of a civil remedy provision. It is said that the implied repeal arises as the result of necessary implication.

27 It is said that the limits in ss 540(1), (2), (5) and (6) that allow applications “only if” certain conditions are met are inconsistent with the s 33D scheme allowing applications regardless of those limits.

28 Now the SDA accepts that prior to 2009, s 33D conferred standing to make representative claims in relation to contraventions of the *Workplace Relations Act 1996* (Cth) and its predecessors. But it is said that in 2009 “the legislature introduced a standing provision which departed substantially from its predecessor” (*Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2016) 244 FCR 344 at [59] per Jessup J, North and White JJ concurring).

29 It is said that the explanatory memorandum to the relevant Fair Work Bill identified (pp i to iii) that a major reform was that the new Act “enhances compliance with the new workplace relations system by providing a single, accessible compliance system”. It declared (at [2120]) that “Part 4-1 establishes a single compliance framework for the new workplace relations system”.

30 Generally, it is said that in 2009 the FW Act introduced a specific and comprehensive standing scheme that defined the types of representative actions that could be brought and provided that those actions could be brought “only if” certain conditions were met.

31 It is said that the text and context support the conclusion that s 540 was intended to limit the standing of employees, groups of employees and organisations to apply for Division 1 orders in relation to contraventions of civil remedy provisions to those who satisfy the limitations in s 540. It is said that the substantive right to apply for relief is conferred by s 539, subject to s 540. It does not contemplate an alternative means of enforcing awards and enterprise agreements. Section 540 is titled “limitations on who may apply for orders etc.”

32 It is said that s 539(2) confers a right of standing on 13 types of person to apply for orders “in relation to contraventions” of civil remedy provisions: cf s 718(1) of the WR Act. Subsections 540(1), (2), (5) and (6) impose limitations on the right of standing on 9 of those 13, including limits on the right of standing of employees and, through s 540(6), groups of employees.

33 It is said that the rights of standing granted to employees by ss 539(2) and items 2 and 4, read with the limits in s 540(1), confer on an employee the right to apply for a Division 1 order in relation to a contravention of an award or enterprise agreement “only if the person is affected by the contravention”. It is said that the words “only if” in this context mean “if and not otherwise”. The intent is to limit the standing of an employee to apply for an order in relation to the particular contravention that affected that particular employee, and not confer standing on an employee in relation to contraventions that only affect other employees.

34 It is said that the limits imposed by s 540(1) are incompatible with a concurrent s 33D right of standing.

35 Section 33D permits an application by an employee in relation to contraventions that do not affect the applicant employee. But it is said that an employee who has a right under ss 539 and 540 to seek orders against an employer would not have a right to seek orders against the employer for or on behalf of employees who were not employed by that employer. But it is said that if s 33D operates concurrently, the employee would be able to seek orders for those employees. In that circumstance it is said that the limit in the FW Act would thereby be circumvented by allowing that concurrent operation.

36 Further, it is said that a concurrent s 33D right of standing is not consistent with the words “only if” in s 540(1). And it is said that those words or similar words of limitation were not contained in the predecessor of s 540; see s 718 of the WR Act. It is said that the words “only if” in s 540(1) should not be read as “if”. And it is said that such words reflected the legislative intention to create a single compliance framework.

37 Now actions by employee organisations, registered employee associations, and industrial associations are all types of representative actions. The applicants in those actions are each entitled to represent the interests of a class (s 540(6)(b)(ii)).

38 It is said that ss 539 and 540 delineate the contraventions that can be the subject of each type of representative action; see for example the limited rights of industrial associations in s 539(2) items 11 and 12.

39 It is said that the creation of that scheme in 2009 was not intended to operate concurrently with s 33D and the Part IVA scheme that creates a form of representative proceeding free of those restrictions.

40 Now the SDA accepts that prior to the enactment of the FW Act the persons who had standing to apply for relief on “the employee side” were employees, types of registered or recognised organisations and, through s 33D, certain employees on behalf of other employees (see s 718 of the WR Act). But it is said that in 2009 the FW Act replaced the former scheme and conferred standing for the first time on an informal association consisting of a group of employees to apply for relief for some contraventions: s 539 and s 540(6). It is said that this reform was significant in two respects.

41 First, it created a representative action scheme available to members and non-union members unique to the FW Act.

42 Second, it altered how s 540 was to be construed. Now it is said that the text construed includes the defined terms in it. The words of the definition of “industrial association” from s 12 are substituted for that defined term in s 540(6) and then the substantive enactment is construed in its context. As a consequence, s 540(6) may be read as:

An association of employees … (whether formed formally or informally), a purpose of which is the protection and promotion of their interests in matters concerning their employment … may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision, only if …

43 The association need not have corporate status. And it can simply be a group of employees who come together informally for the identified purpose. The intention is to confer a right of standing on groups of employees in a manner similar to the standing conferred in s 33D. However, the new right is subject to conditions, and for limited purposes.

44 It is said that the creation of the new scheme is inconsistent with the s 33D scheme operating concurrently without those limits and for different purposes.

45 The right of employee organisations to bring enforcement proceedings attracts a strict regulatory environment. Registration as an employee organisation is only available to genuine associations, formed for protective purposes which are free from control by, or improper influence from, an employer; see s 19(1)(a) and (b) and s 20(1)(a) and (b) of the *Fair Work (Registered Organisations) Act 2009* (Cth). These restrictions articulate a legislative concern, reflected in the definition in s 12 of industrial associations, that those who take representative enforcement actions should be limited to groups of employees formed for protective purposes. It ensures that the core function of those taking the actions is to protect employees.

46 It is said that permitting s 33D to have a concurrent operation allows for the prosecution of representative actions without that protection.

47 Now I would reject the SDA’s position.

48 Part IVA of the FCA Act can apply to the types of claims under the FW Act advanced in the Elliott-Carde proceeding.

49 Now as to the doctrine of implied repeal by later statute, it was said in *Saraswati v The Queen* (1991) 172 CLR 1 at 17 by Gaudron J that:

It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended both provisions should operate and that, to the extent they would otherwise overlap, one should be read as subject to the other.

50 And in *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31 at [87], French CJ and Kiefel J said:

For a court to conclude that a later statute impliedly repeals an earlier statute the court must be satisfied that the two statutes are so inconsistent that they cannot stand or live together. This will be so only if the provisions of the two statutes cannot be reconciled.

(footnote omitted)

51 Further, we have had our attention drawn to the decision of Beech-Jones CJ at Common Law in *Fakhouri v Secretary, NSW Ministry of Health* (2022) 316 IR 221 at [39] to [51]. Of course, he was dealing with different statutory provisions and so it is unproductive to draw too much from his detailed analysis. But I would endorse his statement that the notion or principle (call it what you will) of implied repeal is “a rule of last resort to be deployed if one cannot determine that one set of provisions is subject to the other”.

52 In the present case the text of the relevant provisions discloses no inconsistency, because the provisions are directed at different ends. Sections 539 and 540 regulate the standing of a party principal. They control standing by limiting the persons permitted to apply, and the contraventions to which their applications can relate.

53 But s 33D does not derogate from these controls. It does not purport to expand the classes of permitted person or contraventions beyond the limits contemplated by ss 539 and 540. Rather, its work is different and authorises a person to commence a proceeding on others’ behalf provided that the terms of s 33D(1) are met.

54 Moreover, Part IVA including ss 33C and 33D establish a limited form of statutory agency between the lead applicant and the group members. In one sense therefore, a class action under Part IVA involves each group member through the representative applicant applying for orders pertaining to the contraventions that the group members are “affected by”. Accordingly, there is no inconsistency with s 540, particularly s 540(1)(a). An employee has standing to pursue the relevant rights under s 540(1)(a). But s 540(1) says nothing whatsoever to deny that the employee may act in a representative capacity.

55 Now the SDA conceives of the relevant provisions as equivalents dealing with like subject matter. The SDA deals with the standing afforded by s 540(6) to industrial associations, and contends that the intention is to confer a right of standing on groups of employees in a manner similar to the standing conferred under s 33D.

56 But putting to one side for the moment that industrial associations have no standing to commence proceedings for contraventions of the National Employment Standards, enterprise agreements or awards (see s 539, items 1, 2 and 4), ss 539 and 540 do not give rise to any relationship of privity between an industrial association and the employee affected and do not found any relationship of agency. Section 540(6)(b) does not involve derivative standing. And the association does not stand in the shoes of the employees, as Lee J has explained. Employees are able to pursue for themselves the relevant statutory rights and to do so using representative mechanisms such as Part IVA as they see fit.

57 Accordingly, the SDA’s submissions about the limitations on standing in the relevant provisions of the FW Act go nowhere. Those provisions may be elaborate and specific, but apart from dictating who has a sufficient interest they do not otherwise interfere with representative proceedings of the kind authorised by Part IVA of the FCA Act.

58 Moreover, this construction is supported by the relevant purposes of each statute. Both the FW Act and Part IVA are intended to enhance access to justice. Now nothing further need be said concerning the obvious purpose of Part IVA. But let me refer to s 3 of the FW Act.

59 Section 3 of the FW Act provides that an object of the Act is to ensure a “guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards*…*” and speaks of “effective compliance mechanisms”.

60 Clearly, the relevant aspects of both statutory regimes concerning the standing question have a remedial purpose and should be construed broadly, not narrowly. A liberal rather than literal construction should be taken to remedial legislation.

61 In *IW v The City of Perth* (1997) 191 CLR 1, Brennan CJ and McHugh J said (at 12):

The injunction contained in s 18 of the Interpretation Act is reinforced by the rule of construction that beneficial and remedial legislation, like the Act, is to be given a liberal construction. It is to be given “a fair, large and liberal” interpretation rather than one which is “literal or technical”. Nevertheless, the task remains one of statutory construction. Although a provision of the Act must be given a liberal and beneficial construction, a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural.

(footnotes omitted)

62 Gummow J said (at 39):

There is ample authority that remedial legislation, such as that found here, is to be accorded “a fair, large and liberal” interpretation rather than one which is “literal or technical”. These were the phrases used by Thorp J in *Coburn v Human Rights Commission*. They are of importance in this case, particularly in construing the term “services” as it appears in the statutory phrases “a person who … provides goods or services” and “by refusing to provide the other person with those goods or services” in s 66K of the Act. Nevertheless, as will appear, the legislation must be read as a whole and such a term must be construed in the context in which it appears.

(footnotes omitted)

63 Now if the SDA’s contentions were to be accepted, groups of employees subject to a breach of an enterprise agreement or award and who could not afford prohibitive litigation costs could do nothing except hope that the Fair Work Ombudsman or a registered organisation might take up their claims. Even then, in respect of enterprise agreement contraventions the registered organisation would need to be covered by the relevant enterprise agreement in order to do so (see s 539, item 4, column 2).

64 Let me now say something about matters of history which the SDA prayed in aid. A key premise of its stance was that the enactment of the FW Act comprised a major reform to the standing provisions. But this premise was exaggerated.

65 Of course ss 539 and 540 depart from the antecedent standing provisions. But whilst *Regional Express* at [59] said that “the legislature introduced a standing provision which departed substantially from its predecessor”, the Full Court was addressing two specific changes, namely, the consolidation of what was previously a miscellany of standing provisions into ss 539 and 540, and the removal of the express requirement that a person affected by a contravention be a member of an organisation for that organisation to have standing in respect of the contravention.

66 So, the Full Court was concerned with the construction of the phrase “entitled to represent the industrial interests” in ss 540(2) and (6). That phrase controlled the standing of organisations and industrial associations. But the Full Court did not consider the standing of employees under s 540(1)(a).

67 And when one correctly focuses on the present context where the SDA’s argument is that it is the FW Act’s conferral of standing on employees that brings it into conflict with Part IVA and creates the implied repeal, when that specific issue of employees’ standing is compared with its antecedents, little changed. Section 540(1)(a) controls standing for employees by limiting it to employees who are “affected by” the contravention. But this controlling device has been employed in each iteration of the predecessor legislation since 1904.

68 The *Commonwealth Conciliation and Arbitration Act 1904* (as originally enacted) at s 44(2) provided that a breach of an order or award could be the subject of a proceeding commenced by “any member of any organisation who is affected by the breach or non-observance”. This provision was later re-ordered to s 119(2) but remained until that Act was repealed.

69 The *Industrial Relations Act 1988* (Cth) (in force at 18 December 1996) at s 178(5)(ca) provided that a penalty for a breach of a term of an award or order may be sued for and recovered by:

(ca) a person:

(i) whose employment is, or at the time of the breach was, subject to the award; and

(ii) who is affected by the breach;

70 The WR Act before WorkChoices(in force at 10 June 2003) at s 178(5)(ca) similarly provided.

71 The WR Act (in force immediately prior to the enactment of the Fair Work reforms) at ss 718(1) and (2) relevantly provided standing for employees whose employment was subject to the Australian Fair Pay and Conditions Standard, awards and collective agreements (items 2, 3 and 4) and who were “affected by the breach of the applicable provision”. Self-evidently this continuity is not consistent with the SDA’s inconsistency thesis. The FW Act did not involve any major reform to standing for employees. The introduction of the words “only if” in ss 539 and 540 did no more than make explicit an already extant reality.

72 Further, the broader statutory context discloses no inconsistency. Of course, it may be accepted that the FW Act provides a comprehensive scheme of enforcement, with specific mechanisms for obtaining orders in relation to contraventions of the FW Act. But nothing in the text of the FW Act evinces an intention that the scheme is to operate to the exclusion of other mechanisms available to an applicant to enforce their rights, or for a group of applicants to collectively enforce their rights, under federal law.

73 First, nothing in the FW Act expressly excludes the operation of Part IVA. The lack of a provision in the FW Act expressly excluding the powers conferred on the Federal Court by Part IVA is not determinative, but this hardly assists the SDA.

74 Second, the FW Act as a whole demonstrates an intention to work alongside the general statutory powers conferred on the Federal Court. So, for example, s 545(1) is cast in the broadest terms and allows the Federal Court to “make any order the court considers appropriate”. Further, s 562 confers broad jurisdiction on the Federal Court in relation to any matter arising under the FW Act. Further, s 564 expressly provides that nothing in the FW Act limits the Federal Court’s powers under ss 21, 22 or 23 of the FCA Act. The explanatory memorandum (at [2213]) stated that the cognate clause was “intended to address authorities which have held that federal industrial laws exhaustively contain the remedies available to enforce those laws”.

75 Further, the enactment of the FW Act in 2009 was accompanied by the enactment of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth). Schedule 17 to that Act made various amendments to the FCA Act. This shows that Parliament turned its mind to the way in which the FW Act would interact with the FCA Act and made changes to the FCA Act to reflect its intention. However, Parliament did not indicate any intention to exclude representative proceedings under Part IVA from claims arising from contraventions of the FW Act.

76 Further, Division 3 of Part 6-1 of the FW Act prohibits certain applications under the FW Act where an application has been made in relation to the same conduct under other legislation. So, the legislature was aware of the coextensive relationship between the FW Act and other remedial legislation and the potential for conflict.

77 The legislature sought to impose controls where necessary but omitted any express exclusion of Part IVA. So, there was no manifestation of intention that the FW Act would not work in parallel with Part IVA. Admittedly the nature of the overlap dealt with in Division 3 of Part 6-1 is qualitatively distinct from what I am addressing. But nevertheless such provisions indirectly confirm the thesis that Part IVA was not intended not to work in parallel.

78 Generally, the legislature turned its mind to the Court’s powers under the FCA Act and the way in which the FW Act would interact with them. And having turned its mind to how the FW Act would work together with the powers of the Federal Court, the legislature could have but did not express in s 564 or provide in any other provision an intention to exclude the powers of the Federal Court under Part IVA.

79 Third, the FW Act does not provide for representative proceedings within the meaning of or akin to those in Part IVA. The standing in ss 539 and 540 of the FW Act provided to employee organisations and to a limited extent industrial associations is provided to both as party principals. Claims brought by either of them under the FW Act are notbrought in a representative capacity and are to be distinguished from proceedings brought under Part IVA. Relevantly, there is no equivalent or analogue to Part IVA in the FW Act.

80 Fourth, a number of representative proceedings under Part IVA were brought to enforce contraventions of predecessor workplace laws in the period between the enactment of Part IVA and the commencement of the FW Act. In the many years between the commencement of Part IVA and the commencement of the FW Act, more than 30 class actions concerning subject matter arising under the WR Act were commenced (Meagher L, *Employment Class Actions: Past Use and Present Utility*, [2022] No 4 *UNSW Law Journal Forum* p 6). Some were the subject of published decisions.

81 The legislature may be taken to have been aware of these decisions. In that context, its decision to omit any express exclusion of Part IVA proceedings in the FW Act is significant.

82 In *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, McHugh J at [81] said:

Nothing in the Act suggests that this approach is no longer applicable. The Act still defines “industrial dispute” in s 4(1) as a dispute “about matters pertaining to the relationship between employers and employees”. Division 3 agreements operate in respect of “industrial disputes” (see, eg, s 170LN). These provisions give rise to the inference that Div 2 and Div 3 agreements have a common element, namely, that for such an agreement to be certifiable, it must be about matters pertaining to the requisite relationship or to “the relationship between employers and employees” *in their capacity as such*. Because the Federal Parliament enacted the Act two years after the *Re Alcan* decision, the drafters of the Act almost certainly knew of the decision and the interpretation applied by this Court to the expression “about matters pertaining to the relationship between employers and employees”. The principle that the re-enactment of a rule after judicial consideration is to be regarded as an *endorsement* of its judicial interpretation has been criticised, and the principle may not apply to provisions re-enacted in “replacement” legislation. However, industrial relations is a specialised and politically sensitive field with a designated Minister and Department of State. It is no fiction to attribute to the Minister and his or her Department and, through them, the Parliament, knowledge of court decisions — or at all events decisions of this Court — dealing with that portfolio. Indeed, it would be astonishing if the Department, its officers and those advising on the drafting of the Act would have been unaware of *Re Alcan*.

(emphasis in original, footnote omitted).

83 Nothing in the text of the FW Act or in relevant extrinsic material suggests that the legislature sought to change that existing practice.

84 Fifth, although the explanatory memorandum stated (at [2120]) that “Part 4-1 establishes a single compliance framework for the new workplace relations system”, the explanatory memorandum is here referring to the consolidation of the miscellany of standing provisions into one place. So, although the standing and compliance provisions had been scattered throughout the predecessor legislation, the FW Act integrated them into ss 539 and 540. So, the explanatory memorandum (at [2121]) said:

having a single compliance framework ensures consistency across the Bill in terms of when particular persons can apply for orders and the types of orders that the courts can make.

85 The reference to a single compliance scheme is not a reference to an exclusive compliance scheme, in the sense that it indicates any intention to exclude another enactment such as Part IVA.

86 In my view, there is no inconsistency between Part IVA and ss 539 and 540 of the FW Act and they may operate in parallel. Sections 539 and 540 of the FW Act work harmoniously with s 33D(1) of the FCA Act, so that where a person satisfies the standing requirements of those FW Act provisions, they have a sufficient interest to commence a Part IVA proceeding on behalf of 7 or more persons who have claims against the same person.

87 Properly construed, ss 539 and 540 of the FW Act do not by themselves evince an intention to impliedly exclude Part IVA. Sections 539 and 540 are concerned with an applicant’s standing to enforce civil remedy provisions of the FW Act. The phrase “affected by the contravention, or will be affected by the proposed contravention”in s 540(1) is a statutory expression of ordinary common law standing principles. The phrase does not of itself evince an intention to exclude the operation of Part IVA.

88 So, there is no inconsistency in the text of the respective provisions when read in context, let alone an inconsistency such as to engage the rarely successfully applied doctrine of implied repeal.

89 In summary, I would reject the SDA’s argument that the applicants in the Elliott-Carde proceeding lack standing under s 33D of the FCA Act.

## Does s 33V(2) empower the making of a settlement CFO?

90 The question of the existence of the relevant power to make a settlement CFO under s 33V(2) has arisen in two respects.

91 First, it goes to the SDA’s stay application concerning the Elliott-Carde proceeding and the relevant comparison between the competing proceedings and the different funding models proposed. Moreover, if the stay application fails, group members in the Elliott-Carde proceeding may have to choose between that proceeding and the SDA proceeding. In that regard, a consideration is the likely ultimate cost to group members depending upon the particular proceeding that they choose to participate in. Clearly the potential making of a settlement CFO in the Elliott-Carde proceeding will feed into that calculus.

92 Second, the question of the existence of the relevant power goes to the question of whether the proposed ss 33X and 33Y notices may or may not be misleading. The proposed notices to group members in the Elliott-Carde proceeding have foreshadowed a potential settlement CFO in the event of a successful outcome. But such a notice would be misleading if there was no statutory power to make a settlement CFO.

93 Now in my view such controversies as to carriage, the possible choice for group members as to which proceeding to stay in, and the content of such notices provide an appropriate vehicle for determining the question whether s 33V(2) empowers the making of a settlement CFO.

94 I will return to the “matter” question later. But for the moment let me concentrate on the question of whether there is statutory power under s 33V(2) to make a settlement CFO.

#### The relevant statutory power

95 Section 33V provides:

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

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

96 Its proper construction and ambit is to be determined by its text, context, and purpose.

97 Section 33V(2) employs language importing a wide judicial discretion. As it stipulates, the Court “may make such orders as are just”. And the only requirement beyond justness is that the orders be “with respect to the distribution of any money paid under a settlement or paid into the Court”. Moreover, the phrase “with respect to” is itself of wide import.

98 Now the broad discretion conferred by s 33V(2) is not to be read down by reference to implications or limitations not found in its express words, construed according to their natural meaning and in their proper context.

99 In my view, none of the terms used in s 33V(2) would, as a matter of natural meaning, be read as precluding a settlement CFO. “Distribution” refers to the function and exercise of allocation. It says or implies nothing about the identity of the recipient. Even more clearly, “paid” describes the action of the respondent. And again, it implies nothing about the ultimate recipient. Moreover, “paid” could not merely imply only payment to the applicant or group members. Such a narrow reading would preclude the Court from invoking s 33V(2) to require that settlement funds be used to pay the legal costs incurred by the class applicant; s 33ZJ would not be available on such occasions as it only addresses an award of damages and not a settlement.

100 It would appear uncontroversial, for example, that s 33V(2) could be used to make an order for the payment of legal fees to lawyers directly from the settlement proceeds. If that is accepted, there is no reason in principle why s 33V(2) could not similarly be used to make an order for the payment of fees to a litigation funder for their services, albeit that the fee is expressed by way of a percentage funding commission, because of the nature of the financial services provided. So what that the litigation funder may have been self-interested in providing the funding?

101 And as to context, s 33V(2) is a settlement specific power, which is qualitatively different from the ambulatory but limited gap-filling power in s 33ZF.

102 Further, as to the question of purpose, no specific guidance is obtained from the relevant extrinsic materials. The 1991 Second Reading Speech was silent as to class action financing (Hansard, House of Representatives, 14 November 1991 at 3174 to 3176). The explanatory memorandum adds nothing to the language of Part IVA as enacted. The 1988 ARLC Report 46 “*Grouped Proceedings in the Federal Court*” acknowledged the possibility of private third-party finance for class actions, including making reference to financing from trade unions and special interest groups (at [315]). It recommended a limited abolition of the prohibition on maintenance, but not of champerty (at [318]). The suggested draft legislation was to like effect: see ALRC Report 46 *Summary of Report and Draft Legislation* at [25] and draft ss 28(4) and 33. So, the relevant extrinsic materials do not assist in construing s 33V(2).

103 But it is not in doubt that the purpose of Part IVA is to enhance access to justice by making some small claims economically viable to litigate, and to enhance efficiency in the administration of justice by enabling the Court to deal with common questions once and for all related claims. And it is not in doubt that commercial litigation funding has been firmly established as being conducive to the achievement of the legislative objectives of Part IVA. And in that regard CFOs and funding equalisation orders (FEOs) are also conducive to such objectives.

104 There is a further aspect to context and purpose. If context is broadened beyond the confines of Part IVA, there is analogical guidance to be obtained from dealing with a context where a stranger by his exertions creates for the benefit of other persons a fund that would not otherwise have been available to them. It would be orthodox to construe the broad discretionary power in s 33V(2) as accommodating by adaption and adoption mechanisms developed in analogous situations arising in other areas of law.

105 The situations in which the question of a settlement CFO will arise are analogous to situations of maritime salvage, notwithstanding that Nettle J in *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 at [125] sought to spike such a discussion when dealing with s 33ZF(1). Of course, we are here not concerned with s 33ZF(1) but rather s 33V(2). As with salvage, the exertions of a stranger, which here is the funder who has assumed the financial burden of the litigation commenced by the applicant, result in the obtaining of a fund or retrieval of property, which can be levied as the source of remuneration for the stranger. And like salvage, the rate of remuneration ought equitably to reflect not merely the out of pockets incurred by the stranger but also the opportunity cost of forgoing other uses for the funds expended (*Brewster* at [199] per Edelman J).

106 Further, one can conjure up an analogy from the alchemy of equity. As Lee J observed in *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625 at [39], no group member has an ascertained interest in the settlement fund created by a class action, and each requires the aid of the Court to claim their share. Each claim is at the least closely analogous to that of a beneficiary. And because he who seeks equity must do equity, it is inequitable for the person who has created or realised a valuable asset not to have their costs, expenses and feesincurred in producing the asset paid out of the very fund or property that that person’s efforts have created. This is not to say that the funder has any legal or equitable right to a share of the unfunded group members’ awards under these principles.

107 For present purposes I do not need to linger further on such questions, let alone approach the event horizon of restitutionary theory.

108 Let me now turn to *Brewster* as this is said, surprisingly, to be authority against the existence of statutory power to make a settlement CFO under s 33V(2).

#### What did Brewster actually decide?

109 What is clear from *Brewster* is that it concerned neither s 33V(2) nor settlement CFOs. The case dealt with the now described gap filling s 33ZF(1) and early CFOs to be made, so it was said, for the purpose of facilitating the interests of funders and to maintain the financial viability of proceedings.

110 Let me begin by re-iterating aspects of what I said in *Evans v Davantage Group Pty Ltd (No 2)* [2020] FCA 473 at [49] to [57], referred to in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501 (*Davaria FC*) at [33] per Lee J, and see more generally his views at [34] to [42] with which I agree.

111 The plurality in *Brewster*, Kiefel CJ, Bell and Keane JJ, emphasised that whilst the power provided by s 33ZF(1) is wide, it is essentially a supplementary or gap-filling power. And as a supplementary source of power for Part IVA, it is not to be supposed that s 33ZF(1) was intended to meet the exigencies of litigation not adverted to at all by the provisions of Part IVA. So, s 33ZF(1) may not be “relied upon as a source of power to do work beyond that done by the specific provisions which the text and structure of the legislation show it was intended to supplement” (at [70]). Section 33ZF(1) “cannot be given a more expansive construction and a wider scope of operation than the other provisions of the scheme”. And to do so would be to use s 33ZF “as a vehicle to rewrite the scheme of the legislation” (at [70]). Rather, s 33ZF(1) has the effect of “support[ing] any interlocutory procedural order necessary to ensure that the pleaded issues are resolved justly between the parties” (at [21]). Of course, a just resolution could include a judgment (s 33Z) or an approved settlement (s 33V).

112 Let me say something about Nettle J’s analysis, which resonates harmoniously with that of the plurality, so that I can then synthesise the common themes of the majority. I will discuss the reasons of Gordon J later to the extent that they travel beyond the views of the plurality and Nettle J.

113 As I have said, the issue before the Court concerned the exercise of power under s 33ZF(1) to make a CFO at an early stage of the proceedings. The issue did not concern any settlement approval under s 33V(1) or the exercise of any power under s 33V(2).

114 Understandably then, Nettle J carefully expressed himself by reference to s 33ZF(1) and referred to “a common fund order (“CFO”) of the kind in issue in these matters” (at [122]) and “the kind of CFOs sought in these matters” (at [125]). His context and kind was an early CFO which he held was not empowered by s 33ZF(1) and was outside the legislative purpose; such a purpose “did not extend to addressing uncertainties on the part of litigation funders as to the financial viability of funding such proceedings” (at [126]). But contrastingly, s 33V speaks to the other end of the time spectrum where the action is for all practical purposes over and no such *in futuro* uncertainties or financial viability of funding questions are in play.

115 So, he was clearly contrasting “the broad generality of s 33ZF(1)” with “the detail and specificity of other provisions such as… s 33V…” (at [124]). But he accepted that s 33ZF(1) could be used as asupplementary power to do what was necessary or incidental to achieving the objectives of, inter alia, s 33V itself including facilitating a just outcome and finality. Of course, necessarily anterior to that is a settlement in principle that may have been achieved through mediation. In other words, exercising a power to facilitate a mediation is consonant with achieving such an objective, and within the power or purpose of s 33ZF(1).

116 It would seem that Nettle J considered that his analysis was consistent with the plurality’s views on the matters that I have just described. And if you take the plurality’s view together with Nettle J’s view, then you can synthesise the following themes from the combination.

117 First, s 33ZF(1) is a power only to be exercised in the context of *how* an action should proceed in order to do justice.

118 Second, s 33ZF(1) can be used “to support any interlocutory procedural order necessary to ensure that the pleaded issues are resolved justly between the parties” (at [21]) or “to bring the matter to a fair hearing on a just basis” (at [45] citing the words of Tamberlin J). But s 33ZF(1) is essentially supplementary or “gap-filling” notwithstanding that it is broad (at [46], [60], [69] and [70]). So, and importantly, it was in the context of those observations that it was said that s 33ZF(1) could be used to “ensure that the proceeding is brought fairly and effectively to a just outcome” (at [47], [50], [51] and [54]). And the concept of just outcome was not to be decontextualised and read up to be looked at from the perspective only of the applicant and group members.

119 But clearly, none of this says anything about the proper construction and ambit of s 33V(2) let alone the power to make settlement CFOs under s 33V(2).

120 Now Gordon J in *Brewster* did not see s 33V(2) as “envisag[ing] a Court making orders with respect to the economics of a proceeding by ensuring that a litigation funder obtains a particular return on funds invested” (at [141]). But that observation does not deny that the Court could find that it is just to make a settlement CFO under s 33V(2). A settlement CFO is made only after such funding has been provided and drawn down. It is not concerned with the economics of a proceeding as such. And the words that follow “by ensuring …” are subordinate to the preceding phrase. The lens is what is “just”, but the after the event output of course has economic consequences. Further, Gordon J’s view is obiter dicta and expressed without the benefit of argument on the ambit and operation of s 33V. And reasons for judgment must be read *secundum subjectam materiam*.

121 I should say for completeness that there is another way of reading what her Honour said (at [141]) which may bring her within the tent so to speak, that is, in conformity with the plurality and Nettle J where s 33V(2) was irrelevant to the controversy being adjudicated upon. If you read [141] in context, structurally it appears in a broader section which is just describing the legislative scheme ([136] to [145]). In other words, in this part of her Honour’s reasons there is no attempt to chart the metes and bounds of s 33V; and she does not undertake that task later, unsurprisingly, because it was not in play. Further, in the immediately preceding [140], her Honour discusses a viability threshold and the like, which is all concerned with the context of an early CFO. Now all of this may suggest that the last sentence of [141] is not addressing s 33V(2) and settlement CFOs, but merely pointing out that s 33V(2) has nothing to do with early CFOs and viability thresholds concerning “the economics of a proceeding…”. And if that be so, then there is no member of that Court who has poured cold water on the idea that s 33V(2) empowers the making of a settlement CFO. Of course though, the plurality and Gordon J have telegraphed their preference for FEOs over CFOs, although to do so does not deny the *existence* of power to make a settlement CFO under s 33V(2). Rather, such a preference could only at most go to the *exercise* of power under s 33V(2). Let me return to s 33V(2).

122 Section 33V(2) is not a “gap-filling” power. Rather, it is precisely the kind of specific power to make orders as to the distribution of claim proceeds which the plurality and Nettle J in *Brewster* held that s 33ZF(1) did not provide. Indeed, the plurality referred to the making of orders distributing the proceeds as the “appropriate occasion for orders for meeting and sharing the cost burden of the litigation because the value of the litigation and the extent of the burden will have been rendered certain” (at [68]).

123 Further, there is no incongruity with the rest of Part IVA in reading s 33V(2) as I have indicated. So, whilst s 33Z(2) and (4) and s 33ZA, which confer powers on the Court to make orders with respect to damages, specifically refer to the distribution of money to group members, s 33V(2) is not limited in that way. That is a contextual reason in favour of reading s 33V(2) as including a power to make orders that allow for money to be distributed to other persons, relevantly including the funder but also to legal representatives. The omission of the words “to group members” in s 33V(2) is not insignificant.

124 Before moving on I should make six other points.

125 First, one should not confuse the question of the ambit of the power with the question of purpose. On any view, s 33ZF(1) is broad. Now to use s 33ZF(1) to make a CFO for the dominant purpose of preferencing the interests of a funder to ensure the financial viability of a proceeding is, as *Brewster* explains, impermissible. But less obvious is why it would be impermissible to make an early CFO where you have two competing open class proceedings, where both are financially viable absent a CFO in any event, say where there are a substantial number of signed up group members in both, but where the CFO is being used to select at necessarily an early stage between the two competing proceedings with the winning action having pitched for the lowest CFO, with all else being equal. It is difficult to see how that would not be “appropriate or necessary to ensure that justice is done” (s 33ZF(1)) in both of the proceedings, with the exercise of power having a permissible purpose. In such a scenario an early CFO would not be being made to ensure the financial viability of either or both proceedings or to advance the interests of the funders.

126 The CFO made in one proceeding could be seen as the price extracted as the quid pro quo to enable that proceeding to go forward as the one open class proceeding. Control of the commission rate would be ceded to the Court as the price of success. Utilising that mechanism, one could in essence drive down the commission rates of the funder in that proceeding, to the advantage of the group members and to the disadvantage of the funder. In that context then, the CFO would be principally of advantage to the group members in that proceeding.

127 Second, it is not explained why, on the assumption that s 33ZF(1) is a gap-filler as the plurality characterised it, it could not also be used as an adjunct to a likely or anticipated future use of s 33V(2).

128 In other words, if the parties shortly after completing discovery wanted to mediate their dispute and the applicant and group members wanted some clarity as to what might be available in terms of the net potential settlement proceeds after deduction for all expenses including funding expenses, could a CFO be made at that time utilising s 33ZF(1) to facilitate a later exercise of power under s 33V(2)? It is common for claimants to want to have an idea of what they will ultimately pocket net of expenses before they reach an agreement with a respondent on the gross settlement sum figure. Such a CFO could facilitate both the anticipated mediation and the settlement and anticipate the likely exercise of power under s 33V(2). None of this would, of course, have anything to do with threshold questions as to the financial viability of the proceeding or the empty shibboleth of somehow preferencing the interests of funders. Anyway, judges for the moment have treated the use of s 33ZF(1) in this way as being chilled by *Brewster* and accordingly have dealt with the matter in other practical ways by indicating informally at case management hearings that they may be favourably disposed to making a settlement CFO in due course if the occasion arises. And so doing, one can only wonder what the practical difference is between so indicating on the one hand or making an interlocutory CFO at that time on the other hand, which can be later varied in the known world of an exercise of power under s 33V(2). Anyway, because of *Brewster*, the latter option is out.

129 Third, s 23 of the FCA Act can also be invoked as a source of power for settlement CFOs, and perhaps even early CFOs, although judges of our Court post-*Brewster* have refrained from using it for early CFOs.

130 Section 23 is broader than s 33ZF(1). Moreover, s 33ZG(b) confirms that s 33ZF(1) does not affect the amplitude of s 23; Part IVA is neither an exclusive nor an exhaustive code concerning representative proceedings. In *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, it was said at [168] per Murphy, Gleeson and Beach JJ that s 23 was also an available head of power. As best as I can tell, there is no other authority which grapples with or would deny that reality.

131 Moreover, the “gap-filler” reading down by the plurality in *Brewster* of the language of s 33ZF(1) does not entail any reading down of the plenary power of s 23. Indeed, the more s 33ZF is read narrowly, the greater the amplitude for s 23 to operate. It is counter-intuitive to suggest that a narrower reading of one general power can carry with it by necessary implication a consonant reading down of an even broader power, particularly in the face of s 33ZG(b).

132 Further, and by parity of reasoning, s 23 can also be used to make a settlement CFO, particularly if it be suggested that s 33V(2) cannot be used.

133 Fourth, as to purpose, s 33V reflects the court’s important supervisory role in respect of settlements of representative proceedings for the protection of group members. That role extends to the supervision of legal costs and funding charges. It is consistent with that supervisory role for the Court, in considering what orders are just, to assess the remuneration that should be provided to a litigation funder, without which compensation may not have been payable to group members at all, having regard to the interests of the group members and the amount of compensation that they would ultimately receive.

134 Fifth, it has been said that a settlement CFO creates a relationship between a funder and an unfunded group member. But I am not convinced.

135 The first way to look at it is that a settlement CFO is an order made by the Court under s 33V(2) requiring the deduction from a settlement fund from an otherwise entitlement of an unfunded group member which is then ordered to be paid to the funder. There is no consensual or other relationship between the funder and the unfunded group member. Rather, a third party, namely, the Court is imposing its own order which affects both the funder and the unfunded group member in a complementary way. A is directing B and C. But for A to do so does not entail any relationship between B and C. But even this construct is inaccurate as there is no prior “otherwise entitlement” of the group member; such an entitlement only arises *after* all deductions including costs are made as allocated in accordance with any s 33V(2) order.

136 The second way to look at the settlement CFO is that it is making an order against the fund (in rem), rather than the parties or group members.

137 But in any event if this relationship point were good, you could say something analogous about an FEO. That could be seen as creating a relationship between a funded group member and an unfunded group member where none existed; they are both strangers to each other.

138 Generally I do not see this relationship point taking the matter far. And in any event it distracts from the real question, which is the ambit of the statutory power under s 33V(2).

139 Sixth, the fact that other possible mechanisms may be available to address the problem of “free-riding” does not entail that a settlement CFO could never be considered just in a particular case.

140 Let me turn now more directly to the question of FEOs as it was suggested that the so-called spirit of *Brewster* requires the Court to prefer FEOs over CFOs and that somehow if an FEO can be made then the Court ought not make a CFO. But what if the Court cannot make an FEO because group members have not been signed up? What then? Can the Court make a settlement CFO? *Brewster* does not negate such a possibility. But in any event, the Court under s 33V(2) is required to do what is “just” and to act upon the basis of evidence before it, rather than to simply resonate with any vibe emanating from preferences expressed for particular funding expense allocation models.

#### Funding equalisation orders

141 *Brewster* does not contain majority considered obita dicta justifying the proposition that FEOs are to be preferred as an exercise of power on settlement under s 33V(2), and that no settlement CFO could be made.

142 Further, to the extent that *Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 637, which is an outlier as Lee J has demonstrated, suggested otherwise it may be put to one side. In any event Foster J’s expression of views were obiter as he himself recognised (at [429]). And as for O’Callaghan J’s decision in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd (No 13)* [2023] FCA 84, which relied upon *Cantor*, it is under appeal concerning the orders ultimately made. It rises or falls with *Cantor* and I do not propose to say anything further.

143 Let me turn more directly to the discussion in *Brewster* concerning FEOs.

144 First, it would seem that these are said to have the additional advantage that they do not impose, as CFOs are said to, an additional cost on the unfunded group members (*Brewster* at [88] per the plurality). But what does any of that really mean?

145 An FEO includes some deduction from the moneys otherwise paid to unfunded group members. So there is a cost. But what then does it mean to say “additional cost”? In some scenarios, the arithmetic is such that an FEO will impose more of a cost on an unfunded group member than a CFO, as was discussed in *Money Max.* I will return to this in a moment.

146 Second, it is said that it is of advantage that FEOs take as their starting point the actual costs incurred in funding the litigation (*Brewster* at [88] per the plurality). But if FEOs, in contrast to CFOs, involve unnecessary, expensive and inefficient book-building as they do, then the “actual costs” incurred have been unnecessarily increased; of course there are also hidden and indirect costs from any delay resulting from book-building. Book-building is necessarily incentivised by FEOs because, predictably, a funder has an incentive to maximise its contractual entitlements against the largest pool of group members that it can sign up.

147 I noted the fiasco associated with incentivising book-building, as the distortion of preferencing FEOs appears to do, in *Stanwell Corporation Ltd v LCM Funding Pty Ltd* (2021) 157 ACSR 401 at [6] where the class included more than a million electricity consumers in Queensland and where I said:

[T]he proceeding dispels the myth of the so called advantages of book building in a case of this type. The book building here has resulted in an unnecessary, costly and inefficient delay of seven months in order that over 50,000 retail customers be separately signed up to individual funding agreements. There is little justification for such a barrier to entry so to speak or justice.

148 So, you have the perceived virtue of taking as the starting point the “actual costs”, but the real vice of using FEOs which has resulted in an unnecessary inflation of the “actual costs”. The so-called advantage of the starting point being “actual costs” is illusory, where the base has been unnecessarily inflated to the disadvantage and expense of all group members under an FEO.

149 Third, *Brewster* did not consider let alone analyse how an FEO could work where only the representative applicant had signed a funding agreement or where only a small number could do so because the majority of the class were unascertainable within a reasonable time frame as to their identity or where the nature of the characteristics of most members of the class due to their education or other socio-economic factors was such that it was not feasible to expect them to understand let alone sign up to relatively complex funding agreements.

150 Fourth, if FEOs only are available, it is also conducive to closed classes. But the very philosophy underpinning Part IVA and the opt-out model is open classes, not closed classes. In other words, those who are promoters of FEOs, which they assert is in keeping with the Part IVA regime, are counter-intuitively pushing the antithesis of what Part IVA was intended to operate on, namely, open classes.

151 Now one can appreciate the evolution of the equalisation technique and FEOs. But it ought not to be forgotten that a funding equalisation method was first introduced as an ad hoc innovation posited by solicitors seeking to expediently resolve a practical problem that had arisen in *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19. It did not arise through extensive judicial evolution and exposition. And it is fanciful to suggest that there is only one form of the mechanism that is somehow to be timelessly preserved and suitable for all occasions.

152 Initially, most securities class actions were commenced on a closed class basis where membership of the group was limited only to persons who had signed a funding agreement with the litigation funder. If the class was closed in this sense, the common form litigation funding agreement usually entered into by all class members made contractual provision for each group member to bear their proportionate share of almost every kind of conceivable cost incurred by the funder, the solicitors or the representative applicant, but importantly only out of their proportionate share of the recovery from the litigation. In this sense, in a truly closed class the settlement sum was properly to be described as a common fund out of which all deductions were contractually to be regarded as common and deducted accordingly.

153 The next “innovation” was the technique of the opening up of a closed class by amending the group definition to include persons who had not entered into funding agreements. This was done for the purpose of ensuring that litigation finality could be achieved for respondents, rather than being plagued with an interminable succession of further closed class actions each time they settled one such action, until the expiration of any limitation period barred the commencement of a new closed class action; any s 33ZE suspension only applied endogenously within a *particular* closed class action. But such an opening up of the class posed a problem in terms of class members’ relationships inter se. Why should persons newly admitted to the class who had not agreed to pay the costs of the action get a free ride at the expense of those who had agreed to pay those costs, including the litigation funding commission?

154 So in these circumstances and whilst legal costs continued to be deducted on a common fund basis, as had occurred in closed class actions, so far as litigation funding commission was concerned what was developed in a succession of settlements approved by this Court under s 33V was the device of an FEO to redistribute the *additional* amounts received in hand by *unfunded* class members pro rata across the class as a whole; of course they were otherwise receiving more because they had no contractual obligation to pay the commission.

155 Now it does not seem to have been appreciated that two different formulae for equalisation enshrined in FEOs have been employed so far as litigation funding costs are concerned.

156 The first method, which was used traditionally in the first equalisation cases, worked by notionally deducting from the share of the settlement attributed to unfunded group members, that is, those people who had not entered into funding agreements but had identified themselves prior to the settlement, amounts equal to the funding costs that would otherwise have been payable by them if they had entered into a funding agreement. What was then done was to distribute those notional amounts across the whole class. The relevant formula distributed the notional amounts calculated such that the net outcome to both the cohort of funded group members and the cohort of unfunded group members was the same. The formula allocated more money to the funded group, so that after the funders’ contractual entitlements were satisfied the funded group was in the same position as the unfunded group. This can be called FEO method 1. It is what was described in *Davaria FC* by Lee J at [57] to [59]. Further, I said in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (in liq) (No 3)* (2017) 343 ALR 476 at [99]:

…When a percentage amount is deducted from unfunded group members and added back pro rata across all group members, that incrementally increases the recoveries for the funded group members…

157 Contrastingly, the second method operated differently. It redistributed the amounts which the funded group had collectively agreed to bear across the whole group, so that the whole group shared the expense contractually incurred only by the funded group. This can be called FEO method 2. Now this was not the way in which the formula had traditionally operated, but this approach has been referred to in some authorities, including *Brewster*. The description of funding equalisation by the plurality at [88] (“the making of a FEO, which takes, as its starting point, the actual cost incurred in funding the litigation”) is a description of FEO method 2. Contrastingly, Gordon J at [134] cited the Full Court’s description of funding equalisation in *Money Max*, which was a description of FEO method 1. She then indicated that although she accepted that a funding equalisation order distributed notional amounts, it was also “limited to redistributing actual costs incurred”. Edelman J at [183] to [185] referred to FEOs developed by the Court of Chancery to ensure costs incurred were borne pro rata by all who benefited, which is consistent with FEO method 2.

158 Now both FEO method 1 and FEO method 2 are predicated upon the basis that benefiting group members should obtain equal returns, rather than litigation funding commission only being borne by the funded group members. But the difference between them was that FEO method 1 was premised upon the notional deduction from the unfunded group members and then grossing up the allocations of the settlement sum to funded group members such that after application of the obligations under the funding agreements to those grossed-up allocations, net returns were equal, whereas FEO method 2 was predicated upon allocating the settlement sum pro rata and then applying the funding agreements to determine the aggregate contractual expense to be then spread across the group as a whole.

159 In terms of strict formalism, FEO method 1 results in only the funded group members paying commission out of the share allocated to them, whereas FEO method 2 results more directly in commission being paid by both groups. Both methods have continued to be used.

160 Let me address some other matters about funding equalisation mechanisms and restate some of the points I made in *Blairgowrie (No 3)* at [97] to [102].

161 If one has the scenario of an open class proceeding with few (if any) group members signed up to funding agreements, the context for discussing and applying a funding equalisation mechanism simply may not exist. And as I have already indicated, that scenario may exist because the nature of the matter is such that book-building is not feasible, for example, a mass tort where the ambit of the class may not be known or where the characteristics of group members, say a vulnerable class that have been preyed on, do not make this feasible.

162 But assume another scenario where a substantial number of group members have signed funding agreements and the issue at the time of settlement approval under s 33V(1) is whether a funding equalisation mechanism ought to be applied in preference to a settlement CFO. There will be a number of variables to consider including the following.

163 First, one will need to consider the percentage of group members who have signed funding agreements as compared with the percentage of group members who have not.

164 Second, one will need to consider the percentage commission rate posited for the expense sharing order (the rate being the cost paid for the third party finance reflecting risk) as compared with the percentage commission rate(s) stipulated in the funding agreements, and whether the rate in each case is on the net settlement sum or gross settlement sum.

165 Third, one may have to assume, in relation to the funding agreements, that a judge on a s 33V application could not modify the rate set or its payment as part of *approving* the settlement as distinct from not approving the settlement if the commission rate is unacceptable. Judges who have applied funding equalisation mechanisms appear to have assumed that they lack the power to modify.

166 Fourth, one would have to consider whether, if a funding equalisation mechanism was used, the funder would receive a greater share in any event. When a percentage amount is deducted from the unfunded group members and added back pro rata across all group members, that incrementally increases the recoveries for the funded group members. Litigation funders may then assert that they are contractually entitled to an additional amount, that is, a percentage on the incremental amount. *Money Max* considered the prospect that under contract, the funder could say to a funded group member that if the group member received an additional increment arising from a funding equalisation mechanism (a pro rata part of the deduction from the unfunded group members added over all funded and unfunded group members), the increment itself would be part of the "recoveries" of the funded group member on which the percentage commission rate would be payable. Now the Full Court in *Money Max* was told that in all cases where a funding equalisation mechanism had been applied, the funder had also obtained a percentage of the increment added back to the recoveries of funded group members. It is not clear to me whether other judges who applied such mechanisms pre-*Money Max* were ever aware of this. Their reasons do not expressly say so. Moreover, from the arithmetic applied in those cases, it seems implicit that they may not have been so aware.

167 Now the plurality in *Brewster* considered that a CFO is not an obvious solution to the problem of “free-riding” and that an FEO might be preferable on the basis that a CFO is apt to impose an additional cost. But whether a CFO produces a greater return to funders than an FEO will depend on the case and the various variables that I have just mentioned.

168 Finally, as Mr Lachlan Armstrong KC explained before us, the opponents of settlement CFOs usually put arguments that suffer from numerous enthymematic infelicities. For example, an unstated premise of those who argue against settlement CFOs is that the appropriate valuation methodology of the group members’ rights is a top-down methodology. In other words, their implicit foundation is that the group members start with a right with a particular gross value, and a CFO subtracts from that right. But this mischaracterises the right and the nature of a CFO. The group members’ rights should properly be understood from the bottom-up. The net value of the right is properly understood to be subject to the costs of realising the right. And a cost of realising any value from the right in such proceedings will almost always include the expense of a risk premium to secure litigation funding.

169 But whatever one’s personal preferences between an FEO or a CFO, the question for any settlement judge under s 33V(2) is to do what is just. And that provision does not deny the use of either mechanism as an appropriate choice from the menu.

#### Conclusion

170 In my view s 33V(2) empowers the making of a settlement CFO.

171 Let me note one other matter.

172 Professor Vince Morabito pointed out recently in his latest valuable empirical report that “the 15 years or so preceding *Money Max* involved an almost unanimous judicial refusal to scrutinise the funding commissions (and recoupment on costs) provided for in proposed settlement agreements” (Morabito, V, *Empirical perspectives on twenty-one years of funded class actions in Australia*, April 2023 at p 28, and see also at p 7).

173 Fortunately that position has now changed. The availability of tailored settlement CFOs has been an important part of the solution.

174 Having disposed of the statutory power points, let me turn to the constitutional issues raised by the contradictor. I should note that necessary s 78B notices were given and that the Court had the benefit of submissions not only from the contradictor and the parties, but also received submissions on behalf of the Attorney-General of the Commonwealth on these questions.

## The constitutional issues

175 There are three constitutional issues before us, although two relate to the characterisation of judicial power. Let me address each in turn and begin with the question of whether there is a matter before us.

#### Is there a “matter”?

176 The matter question is:

whether the determination of the reserved question presently gives rise to, or forms part of, a ‘matter’ within the meaning of Ch III of the Constitution that is appropriate for resolution by a court exercising federal jurisdiction.

177 The contradictor says that there is no matter. It is said that the s 33V(2) power is only enlivened at the time of settlement approval, but that stage has not yet been reached in the Elliott-Carde proceeding. Moreover, it is said that such an application might never be made. In these circumstances, it is said that there is no “immediate right, duty or liability to be established by the determination of the Court” (see *In re the Judiciary Act 1903 and the Navigation Act 1912* (1921) 29 CLR 257 at 265 per Knox CJ et al).

178 Now the contradictor accepts that the answer to the reserved question may have some bearing on the SDA’s stay application, the choice that group members might make between the Elliott-Carde proceeding and the SDA proceeding, and the form of the notice to group members. But it is said that this is insufficient to amount to a matter.

179 Now the contradictor says that the matter question has two elements, namely, subject matter and justiciability. The contradictor says that the first element is satisfied here, but the second is not.

180 It is said that the justiciability question involves an evaluative exercise to determine whether the dispute involves an immediate right, duty or liability to be established by the determination of the Court. Whether this is so will often involve questions of degree without bright line distinctions. It is said that a determination of the reserved question will, from a practical perspective, have little to no bearing on the outcome of the interlocutory contests.

181 The contradictor says that it is not sufficient that the reserved question forms part of a broader matter for it to give rise to a presently justiciable dispute. It is said that whilst the underlying proceedings each give rise to a “matter”, it does not follow that every interlocutory dispute that arises in those proceedings also constitutes a matter or forms part of the broader matter.

182 Further, the contradictor says that the reserved question concerns the Court’s *future* power. In other words, the question remains abstract and hypothetical. It is said that the Court may never be asked to decide on the reserved question in the context of the Elliott-Carde proceeding.

183 Further, the contradictor disputes that the answer to the reserved question will be significant, central and of real, immediate and unavoidable consequence to a determination of the pending interlocutory disputes.

184 Further, the contradictor says that even if it were accepted that any comparison between the funding models in the Elliott-Carde proceeding and the SDA proceeding could only be made on the basis of the applicants’ putative CFO in the Elliott-Carde proceeding, the difference between the competing funding models is neither central nor significant to the controversy.

185 Further, the contradictor says that in relation to the approval of the opt-out notice in the Elliott-Carde proceeding, it is difficult to imagine any group member having even a passing interest as to the form of order by which the substantial class action costs would be extracted from their recoveries given the existence of a no-cost alternative.

186 Further, the contradictor says that the Court could approve a notice in which any uncertainty arising from the reserved question could be conveyed to group members in plain terms and without misleading anyone. It is said that such a notice could encompass with clarity the realistic range of possible funding outcomes. And it is said that any future clarification could be addressed by a subsequent notice.

187 In any event, the contradictor says that a resolution of the reserved question could not eliminate the inherent uncertainty as to the form of any distribution order under s 33V(2) which might ultimately be made. It is said that even if the reserved question is resolved in the affirmative, the Court may decline to exercise that power if it forms the view that an FEO or some other order would be a just outcome.

188 It is said that when one has regard to the ease with which a notice could be drawn which takes account of the unavoidable uncertainties as to how the burden of the costs of the class action would be distributed, and without misleading or confusing group members, the inutile nature of an advance determination as to power becomes plain.

189 More generally, it is said that determining the reserved question now would involve the Court impermissibly considering a hypothetical question and engaging in the provision of an advisory opinion with no real utility to the pending interlocutory disputes.

190 Further, it is said that the Court should decline to answer the reserved question even if it were satisfied that the matter requirement were met on other grounds. It is said that the performance of the Court’s adjudicative function “proceeds best when it proceeds if, and no further than is, warranted to determine a legal right or legal liability in controversy” (*Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at [58] per the plurality, citing *Clubb v Edwards* (2019) 267 CLR 171 at [137] per Gageler J), and that “the adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity” (*Mineralogy* at [58], citing *Poe v. Ullman* 367 US 497 (1961) at 503).

191 I would reject the contradictor’s arguments concerning whether there is a matter.

192 Now of course the question whether or not there is a matter in the constitutional sense is itself a constitutional question. But let me proceed beyond that nicety for a moment.

193 Now I accept that whether there is a matter has two elements, being subject matter and justiciability.

194 The subject matter element is satisfied by establishing that the subject matter of all claims made within the scope of the controversy satisfies relevantly at least one of the descriptions in s 39B(1A) of the *Judiciary Act* *1903* (Cth). That is not in doubt in the present circumstances.

195 The justiciability element requires that there be an immediate right, duty or liability to be established by the determination of the Court, that is, a justiciable controversy. This element is not co-extensive with a legal proceeding. It is identifiable independently of proceedings brought for its determination, and it encompasses all claims made within the scope of the controversy. And only a claim is necessary, since a matter can exist even though the asserted right, duty or liability has not yet been and may never be established.

196 The requirement for a justiciable controversy reinforces that the court is concerned to resolve genuine controversies, not give advisory opinions. Where the relief sought is declaratory, relief will not be granted if the question is purely hypothetical, claimed in relation to circumstances that have not occurred and might never happen, or if the Court’s declaration will produce no foreseeable consequences for the parties.

197 Further, the existence of a matter is to be determined by reference to the foundational controversy between the parties. If there is such a matter, the Court then has authority to adjudicate all the questions raised by the various claims and under that umbrella.

198 Now before proceeding further I should say that I have reviewed the recent decision of the High Court in *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 26.

199 The ratio is straight-forward. An intermediate appellate court exercising federal jurisdiction must satisfy itself that there is a matter before it, which matter may be different from that before the trial judge, but nevertheless must involve a live controversy over some immediate right, duty or liability. The live controversy in the appellate context is almost always whether the orders of the trial judge the subject of appeal should have continuing effect. But if they do not have continuing effect there can be no correlative controversy. Of course, in most cases costs orders made below, which have continuing effect, are live issues on appeal. Another related type of live controversy on appeal arises from the scenario where it is said that the trial judge should have made orders that he refused or neglected to make. But all of this does not touch and concern us as we are exercising original jurisdiction rather than appellate jurisdiction.

200 Further, rather than seeking to execute the judicial equivalent of a reverse somersault with triple-pike maneuver to reconcile or rationalise it, *Mellifont v Attorney-General for the State of Queensland* (1991) 173 CLR 289 should be seen only for what it is, being the exercise of appellate jurisdiction by the High Court under s 73 of the Constitution where there is no “matter” requirement (as explained at [43] by Kiefel CJ and Gordon and Steward JJ, and at [93] by Edelman J).

201 Let me return to the context before us.

202 In this Court, jurisdiction is express, first, as to subject matter, and second, as to the intermediate issues and interlocutory disputesthat arise in the course of the controversy. There is also an implied jurisdiction. For present purposes I do not need to say anything about the Court’s associated jurisdiction or accrued jurisdiction.

203 Once jurisdiction is established, then subordinate questions arise as to whether or how it is exercised, that is, power, and finally discretion. But the constitutional question of matter is not to be revisited for every intermediate question of fact or law that arises, and nor for the myriad interlocutory issues including case management steps that might be necessary or appropriate to address on the way to trial or final orders. Once there is a matter in this Court, the Court can deal with all issues that arise in the course of its resolution, including all case management issues.

204 Now there is no dispute that the underlying claims in the proceeding give rise to an immediate controversy in which this Court has subject-matter jurisdiction and which otherwise satisfies the test for a matter. Rather, the question raised is whether the controversy over the choice between the two proceedings and over the content of the notices to group members, and within those controversies the specific issue of the power under s 33V(2) to make a settlement CFO, are within the scope of the underlying constitutional matter.

205 The underlying constitutional matter encompassing the claims made in the Elliott Carde proceeding, has given rise to two subordinate but immediate controversies, being first as to the valid comparison between the competing proceedings involving a consideration of the different funding models, and second as to the appropriate content of a notice to class members. Those controversies arise in the course of readying the underlying matter for final determination. The conduct of the proceeding in a manner consistent with Part IVA, and in particular reflecting the Court’s responsibility to safeguard the interests of the class members, requires that the controversies be resolved now. And inherent in both controversies is the question whether the assumption that the Court even has power to make the CFO order contemplated by the funding model and the proposed notices is correct. That question has real, immediate and unavoidable consequences for both of the controversies presently before the docket judge.

206 Now in the SDA proceeding, the Court has before it an application for a stay of the Elliott-Carde proceeding. In determining the stay application, one of the relevant factors that may be considered is the comparative position of group members as between the two proceedings in the context of a stay of one of the proceedings. The difference in litigation funding models as between the two proceedings is squarely raised as a factor by the Minister for Employment and Workplace Relations intervening on the stay question. The question whether a court has power to make a settlement CFO in the Elliott-Carde proceeding, which may in turn affect the damages group members receive in hand, is therefore significant as part of that assessment.

207 Central to that argument are the different funding arrangements in the various proceedings. The SDA has undertaken that it will not seek to deduct in the SDA proceeding its costs from any amounts recovered on behalf of the affected workers. Contrastingly, the applicants in the Elliott-Carde proceeding, which is externally funded, intend to apply for a CFO if a settlement is reached or they succeed at final hearing. If a CFO is ultimately made, a portion of any amounts recovered on behalf of the affected workers will be applied toward payment of remuneration to the funder.

208 In these circumstances, the question of whether the funding model contemplated by the applicants in the Elliott-Carde proceeding is even possible is central to the comparison the Court is required to undertake. If there is no power everto make a CFO then the calculus is necessarily and materially different.

209 Further, the suggestion that the question of a CFO power is neither significant nor essential to the disposition of the stay application is untenable.

210 First, the touchstone for determining the stay application is the interests of justice. That calls for a consideration of the relative positions of the affected workers under the competing proposals. In terms of the financialcomparison, the proposal in the Elliott-Carde proceeding isthe CFO.

211 Second, the relevant present question of the power to make a CFO is distinct from the question whether or how the Court might in future exercise its discretion to deploy the power.

212 Third, the Court cannot sensibly determine the controversy as to carriage on other bases. The funding question is fundamental. It cannot be assumed away. Even deferringresolution of the CFO question would be of obvious practical significance, because it changes the comparison from one between two clear funding models, to one that compares the SDA’s relatively uncontroversial model against an alternative over which there is some uncertainty.

213 Further, the present case is dissimilar to *Davaria FC* where at an interlocutory and pre-settlement stage the question was proposed as to whether, in the possible event of settlement, the Court would have power to make a CFO under s 33V(2). There the question stood alone, as one seeking advice or guidance. But in the present context the question arises because the challenge as to whether one of two competing funding models is available is central to an extant case-management controversy as to which proceedings ought go forward. Moreover, even if the stay application failed and both proceedings went forward, the question is still relevant to a group member’s choice in the Elliott-Carde proceeding as to whether to opt out.

214 Now in *Edwards v Santos Ltd* (2011) 242 CLR 421 it was argued that the declaration there sought had no foreseeable consequences and was hypothetical. But Heydon J held (at [37]):

The jurisdiction to grant a declaration “includes the power to declare that conduct which has not yet taken place will not be in breach of … a law”. The jurisdiction also includes the power to declare that conduct which has not yet taken place will be a nullity in law. The plaintiffs are claiming that the petroleum defendants had no right to apply to the Minister under s 40 of the *Petroleum Act* because the ATP had ceased to be valid. The plaintiffs are claiming that there is no power in the Minister to grant a “production licence”, ie lease, under s 40, and that any attempt to grant it can be restrained by injunction. These claims are not outside the Federal Court’s jurisdiction to grant declaratory and injunctive relief. The plaintiffs have a sufficient interest to make those claims, because success in those claims would advance their interests in the negotiations which the parties were contractually obliged to conduct. The plaintiffs have standing because they have an interest in the question whether the ATP is valid which is greater than that of other members of the public. The questions which the plaintiffs wished to agitate were not hypothetical. The first defendant’s letter of 4 November 2005 had sufficiently indicated the intention of the petroleum defendants to make an application to the Minister under s 40 of the Petroleum Act and it had predicted that success would be “automatic”. If so, the plaintiffs would be seriously disadvantaged because their negotiating position would be gravely weakened; if not, the plaintiffs would be correspondingly better off. If the plaintiffs obtained the first declaration sought, it would produce foreseeable consequences for the plaintiffs and the petroleum defendants by allowing them to continue the process of negotiating the new [indigenous land use agreement] armed with knowledge of the correct legal position in relation to the ATP.

(footnotes omitted)

215 The declaration there was directed to resolving a legal uncertainty affecting the bargaining positions of the parties. Similar considerations attend the resolution of the carriage motion here.

216 Let me move to the next dimension of the question of an extant controversy concerning the giving of notices in the Elliott-Carde proceeding under ss 33X and 33Y.

217 In the Elliott-Carde proceeding, the Court has before it an application to approve opt-out notices under s 33Y(2). The purpose of opt-out notices is to ensure that group members can make an informed decision concerning their rights. Decisions about opting out should not be based on a notice that is apt to mislead them.

218 The proposed opt-out notice relevantly states that if the class action results in a settlement, then “the Court will be asked to make an order that some of the money be deducted and used to pay a share of … remuneration (commission) to the litigation funder for having taken the financial risk of the Class Action”. It also goes on to state that the Court will decide what funding commission is reasonable, but that group members should assume that it will be in the range of 20 to 30%. The notice therefore contemplates an application for a settlement CFO. Now this information would be misleading if the Court in fact had no power to make a settlement CFO. So, a question has arisen as to whether the content of the notice might be misleading. That is a present issue or a real and immediate controversy about which the Court must be satisfied in order properly to exercise its role under s 33X.

219 Further, the question cannot be satisfactorily avoided by softening the terms of the notices by telling group members that there remains a real question whether the CFO power is even available. The Court has a present obligation under Part IVA to protect class members’ interests, at least to the extent of ensuring that they are not misled as to the ramifications of the group proceeding. Group members ought be required to make their opt-out decisions based on their assessment whether the proposal in all its respects is one they approve, but they ought not be left uncertain as to what that proposal is, and certainly not as to a fundamental consideration like the funding arrangement.

220 Further, it is no answer to say that the notices could be amended to remove any misleading aspect. The fact that a settlement CFO may be made is relevant to a group member’s informed assessment of whether to opt out. Any omission of that topic would itself be misleading. And even if the opt-out notice were drafted in a more general way, for example, that might contemplate the making of an FEO, that may also be misleading insofar as it fails to give sufficient information about the nature of the order that is intended to be sought and the potential impact on what group members will receive. Ultimately, the question whether any aspect of the notice is misleading can only be answered having regard to whether the Court has power to make a settlement CFO.

221 So, the proposed notice must in fairness inform the class members about the funding proposal, and do so in a way that is not misleading. It follows that to ensure a fair notice to class members, the Court must resolve now the question whether the CFO that the notice foreshadows is even available.

222 Let me deal with some other broader points.

223 First, notwithstanding that there is no present application for a settlement CFO under s 33V(2) does not entail that the reserved question about the power to make such an order does not give rise to or is part of a matter. There is a genuine question whether the Court is capable of making a settlement CFO under s 33V(2) that now arises in the course of determining the rights and obligations of the parties in the applications before the Court in each proceeding. And it would not be premature to answer the reserved question.

224 Second, it is unnecessary for the answer to the reserved question to be significant or essential to the outcome of those applications. Indeed, it is not necessary that the answer ultimately affects the outcome at all. It is sufficient that the answer to the reserved question may have some bearing. In any event, the answer to the reserved questions is significant.

225 Third, the power question that has been raised is part of the broader matter raised by the two proceedings in any event. Each issue or sub-issue does not have to separately constitute a constitutional matter.

226 Fourth, not only is there a matter before the Court, but answering the reserved question has, as both Lee J and I have indicated, real and immediate utility. And it is not premature for this Court to determine the reserved question, in circumstances where the question arises directly in the applications before the docket judge, with the controversy live before him and as alive before us given the reservation for our consideration.

227 Let me turn to the second question raised by the contradictor.

#### Judicial power – the creation of new rights and obligations

228 The contradictor submits that the making of a settlement CFO pursuant to s 33V(2) does not fall within the judicial power of the Commonwealth for two reasons. First, it is said that it would involve the creation of new rights and obligations for which the FCA Act does not provide. Second, it is said that it would involve the application of non-judicial, policy considerations in quantifying the amount of commission to be paid.

229 Let me begin by addressing the first point.

230 The contradictor says that the creation of new rights and obligation is prima facie outside the realm of judicial power where the object of the adjudication is not to resolve a dispute about determining existing rights and obligations, but instead about determining what rights and obligations should be created*.*

231 The contradictor says that a CFO would create new rights and obligations as between the unfunded group members and the funder where no such rights otherwise exist. Additionally, it is said that a CFO invites the Court to order the establishment of a relationship between unfunded group members and the funder.

232 It is said that no other part of the FCA Act could be seen to allow for the creation of rights and obligations in the context of a settlement of a Part IVA proceeding. Moreover, it is said that the failed constitutional challenge over 20 years ago to the s 33J opt out mechanism does not preclude the conclusion that s 33V would impermissibly create new rights and obligations as between the unfunded group members and the funder if invoked to make settlement CFOs. It is said that unlike s 33V, s 33J is clearly intended to create rights and obligations.

233 The contradictor says that it is a point of distinction that a settlement CFO involves the creation of new rights and obligations involving third parties. It is said that those new rights and obligations are not merely rights and obligations between the parties and group members *inter se*. It is said that they also relate to the creation of new rights and obligations as between the unfunded group members and a third party with whom they otherwise have no legal relationship.

234 Further, the contradictor says that it is not correct to say that a settlement CFO merely affects the representative party, the funder and the person holding the fund, or that it is directed only at the trustee or administrator of the fund.

235 It is said that this is so because the unfunded group members, being bound by any such settlement, will also have an equity in the fund, or at the least a claim on the fund, which crystallises upon proving their status as a group member. It is said that any order under s 33V(2) with respect to the distribution of the fund is therefore bound to affect them, and create rights and obligations as between them and the funder. It is said that the position is even stronger where the fund is ascertained. Conversely, it is said that a funder has no antecedent interest in the fund, or not one that is superior to that of a group member.

236 Now the contradictor accepts that the creation of rights or obligations is not always inimical to judicial power, especially where such rights and obligations are created pursuant to interlocutory orders. Nonetheless, the contradictor says that it is clear that a purported exercise of a largely unfettered statutory power which creates new rights or obligations will, in the absence of certain conditions, generally not be a proper exercise of judicial power.

237 Now in *Cominos v Cominos* (1972) 127 CLR 588 it was held to be within judicial power to make property settlement orders in the context of a matrimonial dispute. In that case the applicable statutory power allowed the court to make such orders that it considered to be “just and equitable” and as “necessary … to do justice”. But the contradictor says that there are two important distinctions between the sources of statutory power in *Cominos* and s 33V(2) of the FCA Act.

238 First, it was said that the statute in question in *Cominos* expressly empowered the court to create or modify rights and obligations only as between the nuptial parties. It was said that whilst the statute in question enabled the court to make orders including for the benefit of any children of the marriage and therefore allowed the court to take into account the children’s interests, the power to effect a property settlement, that is, to create and vary rights and obligations, was not stated to extend beyond the nuptial parties themselves; see ss 86(1) and (2) of the *Matrimonial Causes Act 1959-1966* (Cth). In any event, it was said that no party in *Cominos* sought to argue that the statute enabled the court to create rights in favour of, or obligations on the part of, any non-party children.

239 Second, it was said that the context and historical basis of the matrimonial jurisdiction in *Cominos* was a significant consideration justifying the characterisation of the statutory power in that case.

240 The contradictor says that both these factors enabled the Court to determine that the exercise of statutory power in question had been judicial.

241 Conversely, the contradictor says that in the present context, the use of s 33V(2) to make a settlement CFO would sanction the distribution of group member funds to a non-party, thereby preferring the interests of a funder over unfunded group members. It is said that this is a different proposition to the outcome sanctioned in *Cominos* and finds no support in the scheme of Part IVA.

242 Further, the contradictor says that there is no authority where a Court has held that it is consistent with judicial power to make orders creating rights and obligations in favour of non-parties where such a power is not referred to and conferred through the express terms of the statute. In this case the third party in question is a funder.

243 Generally, the contradictor says that the rights and obligations that would be created by a settlement CFO would be entirely new. It is said that a settlement CFO does not simply recognise and give effect to rights that differed from a previously settled understanding. No rights previously existed as between the unfunded group members and the funder, and there is no pre-existing right or obligation between them for the Court to adjudicate on.

244 I would reject the contradictor’s arguments concerning this first dimension to his judicial power argument. Let me begin with some general concepts before specifically addressing the contradictor’s points concerning the creation of new rights and obligations.

245 The concepts of judicial and non-judicial power are not mutually exclusive. The legislature may commit some functions to courts falling within Chapter III although much the same function might be performed administratively.

246 Where a power is conferred on a court, the focus of inquiry is not whether the power falls within the core or heart of judicial power. Instead, the determinative question is whether the power is inherently non-judicial because it is directed to an ultimate end which is peculiarly legislative or executive, or is otherwise incapable of being exercised judicially.

247 In contrast, where a power is conferred on a non-court, the determinative question is different. In those cases, the determinative question is whether the power is essentially and exclusively judicial. As Gummow and Crennan JJ explained in *Thomas v Mowbray* (2007) 233 CLR 307 at [88], “[c]are is needed in considering the authorities in this field. The vantage point from which the issues were presented is significant.”

248 Further, there is “no single combination of necessary or sufficient factors [which] identifies what is judicial power” (*Attorney-General for the Commonwealth v Alinta Ltd* (2008) 233 CLR 542 at [93] per Hayne J). Some decades earlier, a related way of putting the open-endedness was expressed in terms that “[it] has never been found possible to frame a definition that is at once exclusive and exhaustive” (*The Queen v Davison* (1954) 90 CLR 353 at 366 per Dixon CJ and McTiernan J). Moreover, it is well accepted that judicial power is not to be defined or limited in any narrow or pedantic manner.

249 Now the power to make a settlement CFO is neither inherently non-judicial nor otherwise incapable of being exercised judicially. Moreover, it is at least incidental to the exercise of a judicial power given the very language of s 33V(2) being that the Court “may make such orders as are just”.

250 Now it may be accepted that the making of a common fund order creates rights and liabilities, by fixing (until further order) an amount to which a litigation funder will be entitled from the proceeds of any judgment or settlement. But the fact that the order creates rights does not require the conclusion that the power is inherently non-judicial.

251 There are undoubtedly circumstances in which a power to create rights may be appropriate for exercise by a court in federal jurisdiction. Examples include where the power has some historical analogue, or in which the provision conferring the power performs a “double function” of creating rights and conferring jurisdiction. Those two classes do not exhaust the circumstances in which a power to create rights may be exercised in federal jurisdiction: they are merely examples of when such a power is *not* directed to an ultimate end which is peculiarly legislative or executive. Moreover, consideration of those examples suggests that the impugned power here is similarly directed to an end which is appropriately achieved through a judicial process.

252 As to “double function” provisions, the High Court has long-accepted that a law performing a “double function” may confer judicial power on a court, notwithstanding that the power is discretionary and to be exercised by reference to broad criteria.

253 So, for example, in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 Gummow J described (at 130) the power to detain under the *Community Protection Act 1994* (NSW) as performing a double function “proleptically, by presenting criteria which require the Supreme Court to decide whether it is more likely than not that the appellant is likely to act in a particular fashion.” McHugh J said in *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at [34] that “[t]he exercise of judicial power often involves the making of orders upon determining that a particular fact or status exists”. In this case, the status determined by the Court to exist is that the making of a settlement CFO is “just with respect to the distribution of any money paid under a settlement”. That is a standard sufficiently precise to engage federal judicial power.

254 Now the power under s 33V(2) is analogous to the similar provision upheld in *Cominos*.

255 In *Cominos* it was held that a power conferred on a court to order parties to a marriage to make such settlement of property as the court considered “just and equitable” was “a recognized part of judicial power” (at 591 per McTiernan and Menzies JJ).

256 The relevant provisions conferred “powers in aid of the exercise of the jurisdiction to hear and determine proceedings for divorce” (at 593 per Walsh J) that are ancillary to and “take their colour from, the valid grant of jurisdiction to hear and determine matrimonial causes” (at 591 per McTiernan and Menzies JJ).

257 Similarly here, the power under s 33V(2) is enlivened as part of the hearing and determination of a representative proceeding under Part IVA, and so would fall within those powers in aid of the exercise of that jurisdiction. It follows that, if s 33V(2), on its proper construction, is capable of authorising the making of a settlement CFO, then the making of a settlement CFO also involves an exercise of judicial power.

258 Moreover, the argument that the making of a CFO under s 33ZF did not involve judicial power has previously been rightly rejected. By analogy, the same reasoning applies concerning s 33V(2).

259 In *Money Max*, in a decision that has not been challenged or questioned on this aspect, it was observed that the exercise of judicial power was analogous to the power considered in *Cominos*. It was said by Murphy, Gleeson and Beach JJ (at [171]):

… [QBE] contends that the proposed orders do not involve an exercise of judicial power. This is a surprising argument. We accept that ss 33ZF and 23 are to be construed as not permitting the making of orders that do not involve the exercise of judicial power or are not incidental thereto. But the proposed orders do involve an exercise of judicial power. Under Pt IVA, the Court has a supervisory function to protect the interests of class members. This is not unlike other protective jurisdictions that a Court may have, such as with persons under a disability. *Moreover, the exercise of judicial power is analogous to that described in Cominos v Cominos (1972) 127 CLR 588 at 608 per Mason J (as he then was)*; see also *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 190 and 191. *More generally, there is little doubt that a Court can make orders creating rights or liabilities as an exercise of discretionary power, provided the power is exercised according to legal principle and by reference to an objective standard.* That is the present case, with s 33ZF(1) setting out that objective standard, albeit a broad one.

(my emphasis)

260 Further, both Gageler and Edelman JJ who also considered the question in *Brewster* rejected the argument that s 33ZF did not confer judicial power. After noting that the constitutional arguments “[did] not warrant elaborate responses”, admittedly a temptation that I have singularly failed to resist, Gageler J said at [119]:

… As to the suggested want of judicial power, it is sufficient to bring s 33ZF(1) within the judicial power of the Commonwealth that it confers power on the Federal Court as an incident of a strictly judicial proceeding to be exercised by reference to the Court’s assessment of the interests of justice in that proceeding. I agree with the observation of the Full Court that “it is difficult to conceive of a function or standard more appropriate to the judicial branch of government than considering and deciding (upon application and evidence) what is appropriate or necessary to do justice in a proceeding”.

261 The same reasoning is applicable to the making of a settlement CFO under s 33V(2), which is based on what is “just”. No authority need be cited to observe that the paramount purpose of the exercise of federal judicial power is to do justice, although there is one for every occasion (*Alqudsi v The Queen* (2016) 258 CLR 203 at [1] per French CJ).

262 Now a power does not cease to be judicial merely because it authorises the creation of rights. As was said by French CJ in *Momcilovic v The Queen* (2011) 245 CLR 1 at [81]:

… courts have long exercised powers to make orders, declaratory in form, which do not merely declare legal rights and obligations but create new legal relationships.

263 It has long been recognised that the exercise of judicial power may include making orders altering the pre-existing legal rights of the parties. In *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 191 it was said:

… The Parliament can, if it chooses, legislate with respect to rights and obligations by vesting jurisdiction in courts to make orders creating those rights or imposing those liabilities. It is an expedient which is sometimes adopted when Parliament decides to confer upon a court or tribunal a discretionary authority to make orders which create rights or impose liabilities. This legislative technique and its consequences in terms of federal jurisdiction were discussed by Dixon J. in *R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*. Leaving aside problems that might arise because of the subject-matter involved or because of some prescribed procedure not in keeping with the judicial process, where a discretionary authority is conferred upon a court and the discretionary authority is to be exercised according to legal principle or by reference to an objective standard or test prescribed by the legislature and not by reference to policy considerations or other matters not specified by the legislature, it will be possible to conclude that the determination by the court gives effect to rights and obligations for which the statute provides and that the determination constitutes an exercise of judicial power.

(footnotes omitted)

264 Moreover, in *Brewster*, Edelman J specifically rejected a similar and equally meritless argument, stating (at [225]) that:

The first submission misunderstands the distinction between the “adjudication of existing rights and obligations” and “the creation of rights and obligations”. The latter is concerned with an attempted judicial creation of new rights whilst simultaneously concluding that those rights should never have previously existed. By contrast, it is entirely within judicial power for courts to create new rights, in the sense of recognising and giving effect to rights that differ from a previously settled understanding. That is often how the common law develops.

(footnotes omitted)

265 *Money Max* (at [171]) is to the same effect, as I have already set out. These themes were also reinforced in *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 at [97] and [98] per Allsop CJ, Middleton and Robertson JJ.

266 Moreover, there are numerous examples of powers that have been held to be judicial when conferred on a court though they involve the creation of new rights and liabilities, including powers to make orders relating to the maintenance and guardianship of infants, orders for the winding up of companies and the grant of letters of administration, and to vary the terms of a contract that had become inequitable or unduly onerous.

267 Generally, the creation of rights or obligations is not inimical to judicial power. Indeed, the contradictor offers no positive authority in support of the proposition that judicial power does not extend to the creation of rights and obligations involving third parties.

268 Now the contradictor says that those cases in which the court has held that judicial power had not been validly conferred involved third parties, whereas those in which the court held that judicial power had been validly conferred concerned orders in circumstances not involving third parties.

269 But the contradictor’s characterisation of the relevant cases is inaccurate or fails to pay sufficient regard to the court’s underlying reasoning. And in my view the contradictor’s attempted distinction fails.

270 The contradictor characterises three cases cited as holding that judicial power had not been validly conferred to make orders affecting third parties. But two of those cases, *Precision Data* and *Alinta* involved powers conferred on non-judicial bodies, being the Corporations and Securities Panel and the successor Takeovers Panel respectively, and the relevant powers were found not to be judicial powers having regard to the nature of the body on which they were conferred. Further, *Davison* held that the power to make a sequestration order was judicial, and therefore had not been validly conferred on a Registrar. *Precision Data* and *Alinta* do not support the contradictor’s distinction, and the reasoning in *Davison* is contrary to it; a sequestration order affects not just the bankrupt but third party creditors as well and where new rights and restraints are created.

271 Further, the contradictor characterises various cases as holding that judicial power had been validly conferred but only in circumstances not involving third parties.

272 But in *Cominos*, one of the statutory provisions considered provided that the court may by order require the parties to the marriage “to make, for the benefit of all or any of the parties to, and the children of, the marriage, … a settlement of property”. The children clearly were third parties.

273 Further, in *Mowbray* at [15] and [16], the examples discussed with approval included orders in relation to matrimonial causes, bankruptcy, probate and the winding up of companies, all of which are also apt to involve third parties.

274 Further, it is not in doubt that a court can create rights or obligations in respect of a non-party. In *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, it was held that a court can make a costs order against a non-party. Mason CJ and Deane J said (at 192) that:

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

275 This passage was quoted with approval by Edelman J in *Brewster* at [214], who also noted that such reasoning concerning orders for payment of a party’s costs by a non-party was “equally applicable to payment by a party of a non-party’s costs and remuneration”.

276 In any event, the power to make a settlement CFO is at least incidental to the admittedly judicial function of quelling the dispute in the representative proceeding. Incidental powers are a third example of a power to create rights, which is directed to an ultimate end which is notpeculiarly legislative or administrative, and which may therefore be exercised by a court in federal jurisdiction. The power to make a settlement CFO is, at least, such a power. The assertion to the contrary is undermined by a necessary premise of this branch of the argument, which is that a settlement CFO may be just under s 33V(2). That provision must be construed and applied as a provision conferring powers in aid of the exercise of the jurisdiction to hear and determine the representative proceeding. Further, there is a sufficient relation between the making of a settlement CFO and the judicial function of quelling the controversy in the matter between the parties.

277 Now it is said by the contradictor that the exercise of the power in s 33V(2) to make a settlement CFO is not ancillary or incidental to the representative proceeding. It is said that the making of the order lacks the requisite connection to the Court’s core judicial task because it has no connection to the substantive proceeding except that in a general way it facilitates the exercise of judicial power in the proceeding. But an order under s 33V(2) must be made in a proceeding that involves the exercise of judicial power. It may only be made if the Court is satisfied that it is appropriate or necessary to do justice in the proceeding. Thus the order must, by definition, have a sufficient relation to the judicial function to which it may be thought to be accessory. Otherwise it could not be made. Further, that connection is more than insubstantial or remote.

278 Let me make one final point. It is accepted that FEOs are an exercise of judicial power, because they seek to allocate rights and liabilities between a class of people whose rights have been vindicated. And whether this is premised on a need to avoid unjust enrichment or upon equitable doctrines is beside the point. But if an FEO, which is also not provided for explicitly in Part IVA, can be made having regard to the justice of the case, so too must a settlement CFO be capable of being characterised as an exercise of judicial power. After all, at least one type of FEO also creates new rights and obligations as between funded group members and unfunded group members.

279 Let me turn to the next topic.

#### Judicial power—impermissible policy making and market-setting?

280 The contradictor says that an exercise of statutory power involving the balancing of unstated considerations of policy may violate the bounds of judicial power if the policy considerations applied do not clearly emerge from the statutory context and/or the express words of the statute.

281 The contradictor says that s 33V(2) does not state any criteria, other than that the Court considers a proposed distribution of settlement money to be “just”.

282 The contradictor says that the difficulties inherent in making a CFO at any stage of a proceeding without the Court straying beyond the range of considerations supported by the statutory scheme are clear.

283 It is said that it is impossible to sensibly make such an order without compromising the immediate interests of group members for the benefit of funders, or without recourse to justifications based on the viability of the third party funding model; it is said, somehow, that the plurality in *Brewster* has precluded taking into consideration such matters.

284 It is said that it is difficult to see how the fact of a relatively modest pool for recovery could justify a disproportionate commission reflecting the risk taken on by the funder at the commencement of the proceeding unless the interests of group members are suborned to those of third party funders.

285 Further, it is said that if market rates are applied as the appropriate yardstick, other unstated policy considerations intrude. The following questions are posed by the contradictor. How are such market rates to be determined, and should the Court delve into whether such rates sufficiently reflect the true value of the funding risk? Are the idiosyncratic features of a particular case, the funder and/or the group members to be accounted for, and if so how? And how (if at all) is the Court to account for the role it might play in guiding or reinforcing, by an accumulation of decisions, market prices?

286 Further, the contradictor says that if the solution to inscrutable market complexities of this type may be put to one side in a given case, the question remains: in the absence of statutory criteria or guidance gleaned from the statutory context, what rate should be set?

287 It is said that unlike the remuneration of insolvency practitioners, trustees or lawyers, which are usually set based on hourly rates in light of the amount of work done, the funder’s contribution is untethered to any easily quantifiable metric. Its primary contribution is capital, in respect of which it requires a return. It is said that without clear legislative guidance, the value of that provision of capital and the reasonable rate of return for a given funder is very difficult, if not impossible, for the Court to assess without straying into the realm of impermissible and non-judicial policy-making.

288 It is said that a court acting within the bounds of Chapter III judicial power should not make such assessments in the absence of express legislative guidance or guidance which is otherwise discernible from the statutory scheme. And it is said that *Brewster* made clear that such assessments form no part of the scheme of Part IVA.

289 It is said that the use of s 33V(2) would in this context involve the Court acting as a market regulator, effectively driving the setting of market rates for funding commission. This would involve policy considerations beyond its proper purview.

290 Further, it is said that the plurality’s observation in *Brewster* (at [68]) that at the conclusion of a proceeding the value of a funder’s support to group members will be capable of assessment and recognition “because the value of the litigation and the extent of the burden will have been rendered certain” is not an answer to the policy problem.

291 It is said that the value that a funder brings which would fall to be assessed is not limited to the value of the litigation and the extent of the burden rendered through funding the litigation. Other questions that may arise include whether and to what extent the Court should take into account an appropriate return on investment for funders, bearing in mind factors including, for example, the nature and extent of the risk borne at the time of investment, the particular risk appetite of the funder in question and whether and to what extent that appetite should be rewarded, the duration of the investment, the nature of the domestic and international funding market, and the nature of that market compared to other asset classes into which investors may otherwise have invested their capital.

292 But it is said that these do not involve objective criteria or legal principle assessed through any judicial process. It is said that they involve the weighing of policy considerations between funder and group member, assessed in light of value judgments involving how the broader litigation funding market should be rewarded.

293 Now I would also reject this second dimension to the contradictor’s judicial power arguments. At the least I am wary of the contradictor’s position concerning s 33V(2) in this respect, which is calculated to maximise the prospect of constitutional infirmity concerning the making of a settlement CFO.

294 The making of a settlement CFO is not non-judicial because it involves the weighing of policy considerations, which may include assessment of an appropriate commercial return on investment for funders.

295 Further, in my view the contradictor’s position is meritless. Let me repeat what I said in *Blairgowrie* *(No 3)* at [120] to [122] shortly after *Money Max*, and inject a dose of realism into this question of setting a commission rate based upon my own practice and no doubt the practice of Lee J and others which is still the current position.

296 Whether a Court should set a commission rate and the rate to be used is largely a forensic question depending upon the material available to the judge at the time the order is sought. It is not to be determined by some value laden proposition clothed in the language that it is not a suitable issue for the exercise of judicial power. After all, judges set legal costs by scales, rates, individual amounts and total or capped amounts, whether ex ante or ex post; a commission or funding rate may be seen as a relevant analogue. Further, some judges in fixing the remuneration of external insolvency practitioners also readily engage in such exercises, including ex ante or ex post rates of remuneration. In other contexts, judges have set rates of remuneration for trustees administering trust assets. In yet other contexts, judges set discount rates on some aspects of common law damages. They may also set interest rates less than or more than statutory interest rate entitlements.

297 In general, the question is not whether the rate setting for a common fund order is a suitable subject matter for the exercise of judicial power. Rather, the question is whether, in a particular case, a judge is in a position to or should set a rate by the application of the appropriate judicial method tailored to the circumstances of the individual case.

298 And once one appreciates that perspective, the answer to the question of whether a judge should set a commission rate depends upon the forensic context and the adequacy of the information provided. And as with other contexts, such as damages assessments including the value of lost economic opportunities, the judge has to do the best he can on the evidence available, albeit incomplete or imperfect. Moreover, the fact that the question may in part be evaluative and one upon which reasonable minds might differ is no bar to engaging in the task.

299 Yet another argument suggests that the judge ought not be the market setter. But the judge is not setting a market rate, but rather a rate referable to the individual circumstances of the particular case before him or her. But the rate set may be contextually informed by an actual or putative market rate, including reference to rates in foreign jurisdictions, particularly where demand side or supply side substitutability is not necessarily confined by geographic limitations. The rate set may also be informed by the risks faced by litigation funders in investing in litigation generally, not just the case in question, which may also be affected by whether a funder has a diversified spread of litigation investments and not a small pool of such investments thereby producing overall higher risk for the undiversified funder. In other words, what is the equity beta for funders locally or globally? And consequently, what is the rate of return on equity that a funder locally or globally might reasonably expect given the level of risk for such a business, ie funding litigation? And is the funder earning disproportionate returns? If so, that may indicate that there is no true “price” competition in the litigation funding market and that the commission rates are higher than what a workably competitive market might be expected to deliver. Now these are all interesting questions. And no doubt a judge is not in a position to investigate such questions in any detail. But a review of the financial accounts of the funder and other funders might quickly allay concerns that standard commission rates are somehow producing rates of return on equity so outside a reasonable range such as to cast doubt on whether standard commission rates should be used as a benchmark or at least for a contextual check. But if the judge’s concerns are not allayed, all that means is that the judge might put to one side standard or putative market rates as a benchmark and set a rate based only on evidence concerning the case before him. In other words, it is no argument for not setting a rate at all, but rather it may justify putting to one side putative market rates or comparable data.

300 At the end of the day the application is made by the representative party. The Court is being asked to approve of a rate sought by the applicant. The application includes evidence which goes to why the funding has been given on the terms that it has. The Court has a discretion to make or not make the order based on the available evidence. If the Court proceeds to exercise its discretion to make a settlement CFO, it makes an evaluative judgment based upon the evidence before it. This is plain vanilla judging.

301 Further, a similar argument to that put by the contradictor before us was rejected in *Brewster* by both Gageler J and Edelman J. As Gageler J put it (at [115]):

To the extent that making a CFO involves the Court in an evaluation of the appropriateness of the payments to be made to the litigation funder in the event of success in the proceeding, I reject the suggestion that making a CFO requires the Court to embark on an inquiry which is beyond its institutional competence, which involves the Court in inappropriate speculation, or which is inadequately guided by the broad statutory standard of what the Court thinks appropriate or necessary to ensure that justice is done in the representative proceeding…

302 His Honour cited an example well known to any commercial judge who is frequently called upon to approve contracts entered into by liquidators for funding future litigation on behalf of the liquidated entity and has to assess and approve of rates of remuneration or commission for the funding.

303 And as Edelman J said (at [226]):

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

(footnote omitted)

304 The same arguments apply in relation to the making of a settlement CFO under s 33V(2), which in one sense is also open-textured. This is a power which is exercised in accordance with the judicial process and which is bounded by the “quintessentially judicial” requirement of what is just; see also *Lenthall* at [100] and [102] to [106], albeit discussing s 33ZF(1) principally although there is some reference to s 33V.

305 Further, the contradictor’s characterisation of the Court as a market regulator, effectively driving the setting of market rates for funding commission, is inapt. The question for the Court will be whether a settlement CFO, including any funding commission rate, is just having regard to the individual circumstances of the case before it. That is a judicial question that is capable of being answered judicially.

306 Now the contradictor also relies on the observation of the plurality in *Brewster*, which identified the key problem with the court’s fixing of the funder’s remuneration as being the absence of criteria to guide the exercise of discretion by the court (at [59]). But that observation does not assist.

307 First, that observation was not made in the context of a discussion about whether s 33ZF validly conferred judicial power on a court. It was made in the context of a discussion of whether s 33ZF empowered a court to make a commencement CFO as a matter of statutory construction.

308 Second, and as the second sentence of [59] makes clear, their Honours were concerned with “the problems that attend the fixing of the rate of the funder’s remuneration at the beginning of the proceeding”. Clearly, those concerns do not attend the fixing of the rate at the end of the proceeding pursuant to a settlement CFO. And the plurality in *Brewster* were not at all concerned with the text, context and purpose of s 33V(2) which are all different.

309 Now the contradictor says that there is no standard for a settlement CFO. But the criterion of “just” in s 33V(2) assumes or embodies an objective standard, although it is vague. Moreover, there is no reason why, in this context, it is impermissible to rely upon the well-recognised technique of giving a broad standard content and more detailed meaning on a case by case basis. Indeed, the words “make such orders as are just” in s 33V(2) “point to the requirement to develop principles governing the exercise of the power”, albeit such as to avoid abuse (*Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [26] per the plurality).

310 Further, in *The Queen v Joske; Ex parte Shop Distributive and Allied Employees’ Association* (1976) 135 CLR 194*,* Mason and Murphy JJ said (at 215 and 216):

The prosecutors argue that ss. 171C and 171D confer on the Industrial Court non-judicial power. The attack upon s. 171C was supported largely by reference to the provisions of pars (a) and (b) of sub-s. (2) of that section. They follow sub-s. (1) which empowers the Court, on the application of an organization, a member or a person having a sufficient interest in respect of it, to hear and determine the question whether an invalidity has occurred in the affairs of the organization and to make such declaration as it thinks proper. The sub-section provides:

“171C. (2) Where, in proceedings under sub-section (1), the Court finds that an invalidity of the kind referred to in that sub-section has occurred, the Court –

(a) may make such order as it thinks fit to rectify or cause to be rectified the invalidity, or to negative, modify or cause to be modified the consequences in law of the invalidity, or to validate any act, matter or thing rendered invalid by or as a result of the invalidity;

(b) shall, before making such order, satisfy itself that such an order would not do substantial injustice to the organization or to any member or creditor of the organization or to any person having dealings with the organization."

It involves, so the argument runs, the conferment on the Court of functions which differ markedly from the ascertainment and declaration of existing rights, involving as they do, the making of determinations by reference to criteria not enunciated and the making of orders creating new rights. In addition, it is urged that the concept of "substantial injustice" is so vague as not to lend itself to an exercise of judicial power. These considerations, it seems to us, are not enough to bring us within reach of the conclusion which the prosecutors seek to attain. Many examples are to be found in the exercise of judicial power of orders which alter the rights of the parties or are the source of new rights. Likewise, there are countless instances of judicial discretions with no specification of the criteria by reference to which they are to be exercised - nevertheless they have been accepted as involving the exercise of judicial power (see *Cominos v. Cominos*). It is no objection that the function entrusted to the Court is novel and that the Court cannot in exercising its discretion call in aid standards elaborated and refined in past decisions; it is for the Court to develop and elaborate criteria regulating the discretion, having regard to the benefits which may be expected to flow from the making of an order under sub-s. (2)(a) and the impact which such an order will have on the interests of persons who may be affected.

(footnote omitted)

311 As one can see, the contradictor’s arguments before us have not found favour at appellate level in any analogous setting concerning the conferral of statutory power on a court, where the standard to be applied is very broad.

#### A coda - the two conceptions approach

312 Let me conclude my observations on the question of judicial power by saying something concerning Gageler J’s two conceptions approach to judicial power.

313 In *Palmer v Ayres* (2017) 259 CLR 478, Gageler J said (at [47]):

… The first is of the existence of an area of judicial power within which a particular act or thing done is directed to an ultimate end that can be achieved only through the exercise of judicial power. At the centre of that exclusive area is what has subsequently been described as the “unique and essential function” of the judicial power of “the quelling of … controversies [as to legal rights] by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion”. Also within that exclusive area of judicial power and more difficult to catalogue are some, but by no means all, other functions that have in the past been exercised only by courts. The second conception is of an area of judicial power, within “[t]he borderland in which judicial and administrative functions overlap”, and within which a particular act or thing done by a court through the application of a judicial process is directed to an ultimate end that might equally be achieved through the application of a non-judicial process. Beyond those two conceptions lies the area of non-judicial power.

(footnotes omitted)

314 The exercise of power under s 33V(2) to make a settlement CFO in my view falls under the first part of the first conception. And if not, it would fall under a modified form of the second conception where “administrative” is replaced with “non-judicial”.

315 Further, Gageler J went on to say (at [48]):

Where the Commonwealth Parliament confers a power to do a particular act or thing on a court, it must be assumed in the absence of some indication to the contrary that the Parliament intends and requires that power to be exercised by that court through the application of a judicial process. If the act or thing is capable of being done through the application of a judicial process, the question whether the power to do it is within the judicial power of the Commonwealth turns on the end to which the act or thing is directed.

(footnote omitted)

316 Let me dwell on this formulation for a moment. Now as I have said, the power in s 33V(2) is to be exercised through the application of the judicial process and a settlement CFO is capable of being determined through the application of the judicial process. The judge receives submissions, receives evidence and makes a ruling, possibly with the assistance of a contradictor. What then is left to consider in order to determine whether the power to do it is within judicial power? The question then “turns on the end to which the act or thing is directed”. But here the matter is put beyond doubt. Section 33V(2) requires that the end to which a settlement CFO is directed is to do what is “just”. It is difficult to see how the making of a settlement CFO under s 33V(2) could be anything other than the exercise of judicial power if the judicial method and process is followed and the order is “just”.

317 Finally, if it be right to say that courts exercise supervisory jurisdiction in many and varied areas, such as applications by trustees, receivers, provisional liquidators, other administrators, infants, persons under a disability and so on, and that to do so is considered to be an exercise of judicial power, perhaps the second part of Gageler J’s first conception, by analogy, is the Court’s protective or supervisory jurisdiction under Part IVA including s 33V so different? And to make a settlement CFO does not involve the Court travelling outside that protective or supervisory jurisdiction.

## Other matters

318 I have had the advantage of reading a draft of Colvin J’s reasons. Let me briefly make three points.

319 First, his Honour has made observations concerning the scope of a representative applicant’s authority to conduct and settle proceedings on behalf of group members with which I am not in complete agreement, and in any event are issues that are not relevant to my perspective on or resolution of the issues that I have addressed.

320 Second, it is said variously by his Honour that s 33V(1) does not confer power to approve. In my view, s 33V(1) creates both the necessary condition requiring approval and by necessary implication the power to approve.

321 Third, the process under s 33V may or may not involve a two step process. In cases where I have approved settlements, sometimes I have not given approval under s 33V(1) until I have worked out the allocation protocol to be the subject of an order(s) under s 33V(2), as my views concerning the latter aspect have informed my views as to whether I should approve under s 33V(1). On other occasions I have been able to give my approval under s 33V(1) without needing to decide some s 33V(2) questions and postponing for later consideration my decision concerning aspects of the distribution protocol to be the subject of a later specific s 33V(2) order.

322 But these are subtle differences between us that do not in any way detract from the fact that we are in agreement that s 33V(2) empowers the making of a settlement CFO.

323 Finally, for the reasons given by Lee J, I also joined in the order refusing the amendment to the reserved question.

## Conclusion

324 For the foregoing reasons, the reserved question is to be answered “yes”.

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| I certify that the preceding three hundred and twenty-four (324) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Beach. |

Associate:

Dated: 12 October 2023

REASONS FOR JUDGMENT

LEE J:

# A INTRODUCTION AND BACKGROUND

325 Before the Court in its original jurisdiction are no less than 17 related matters, each connected in one way or another to allegations that McDonald’s Australia Limited (**MAL**) and its franchisees contravened the *Fair Work Act 2009* (Cth) (**FW Act**) in failing to provide employees with ten-minute rest breaks as required by the *Fast Food Industry Award 2010* (Cth) and the *McDonald’s Australia Enterprise Agreement 2013* (Cth).

326 If contravening conduct is established, the applicants in two of the 17 proceedings seek compensatory orders on behalf of 300,000 to 350,000 current and former workers. The *first* is a representative proceeding under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), being *Jade Elliott-Carde & Anor v McDonald’s Australia Limited (ACN 008 496 928)* (VID 726 of 2021) (**Class Action**); and the *second* is a proceeding in which claims are brought by an industrial association, being *Shop, Distributive and Allied Employees Association v Bandec Pty Ltd & Anor* (SAD 127 of 2022) (**SDA Proceeding**).

327 This duplication of claims for statutory compensation prompted competing stay applications heard initially in December 2022. A proposal emerging at the hearing seemed to have resolved the perceived difficulty: orders were made dismissing each of the stay applications on the basis that both the SDA Proceeding and the Class Action would proceed, with the entitlement of group members to statutory compensation being determined within the Class Action, unless the group member opted out (in which case the compensatory claim would be determined in the SDA Proceeding along with the other claims advanced by the Shop, Distributive and Allied Employees Association (**SDA**), such as pecuniary penalties).

328 Accordingly, orders were made, among other things, for the provision of draft opt out notices to be approved and then sent to registered and unregistered group members in the Class Action. After draft opt out notices were provided, and for reasons unnecessary to detail for present purposes, it became clear in February 2023 that the apparent consensus reached prior to Christmas 2022 had disappeared. With leave, the SDA renewed its application for a stay of the Class Action, which was listed, together with an application for approval of opt out notices, on 9 March 2023.

329 Submissions were then filed by the SDA in support of its stay application. The SDA submitted that following the recent decision of O’Callaghan J in *Davaria Pty Limited v 7-Eleven Stores Pty Ltd (No 13)* [2023] FCA 84, a division had re-emerged in this Court as to whether the Court has power to make a common fund order at any stage of a proceeding, including an order upon the settlement of a class action under s 33V(2) of the FCA Act for the distribution of amounts considered by the Court to be just to a third-party funder from an approved settlement fund, known commonly as a “Settlement CFO”.

330 When the applicants in the Class Action (**applicants**) joined issue with this contention, I indicated to the parties, through my Associate, that the question of power to make such an order appeared material to the disposition of the stay application, as the basis upon which the Class Action was being conducted was premised upon the existence of such a power. Further, the proposed terms of the opt out notices referred to a proposed Settlement CFO. For obvious reasons, any notification to group members would be materially affected depending upon whether the power to make such an order existed. Submissions were invited as to whether a question should be referred to a Full Court pursuant to s 25(6) of the FCA Act for the Full Court to consider the disputed question of power.

331 The response of the SDA was to “withdraw” its submission as to power and raise a series of issues relating to the proposed reservation of a question, which are presently irrelevant. I considered, however, that it was at least arguable the issue remained live, because forming a view as to power was relevant to determining the extant interlocutory applications.

332 Accordingly, I made an order which in its final form reserved the following question for determination by the Full Court (**Reserved Question**):

If it was just to do so, does the Court have the statutory power, pursuant to s 33V of the [FCA Act], to make an order distributing money paid under a settlement in the form of a “Settlement CFO”, as that term is defined in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183; (2020) 281 FCR 501 (at 506–507 [19], [22]–[25])?

333 As the SDA initially indicated it wished to play no part in any hearing before the Full Court, orders were made appointing an *amicus curiae* to conduct the role of contradictor on the Reserved Question. In written submissions, the contradictor identified, among other things, constitutional arguments.

334 In summary, the contradictor asserted the making of a Settlement CFO could not be a proper exercise of the judicial power of the Commonwealth because: *first*, it involves the creation of new rights and obligations for which the FCA Act does not provide; *secondly*, it necessitates quantifying the amount of commission to be paid which involves non-judicial, policy considerations; and *thirdly*, there is presently no matter in the constitutional sense that has arisen because the relevant power can only be enlivened at the time of settlement approval.

335 In the light of these contentions, at the time of oral argument in the Full Court, orders were made for the service of notices pursuant to s 78B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**). Subsequently, the Full Court received confirmation that the Commonwealth Attorney-General (**Attorney-General**) wished to intervene and provide written submissions.

336 However, there were two developments after oral argument concluded in the Full Court: *first*, the Minister for Employment and Workplace Relations (**Minister**) exercised his statutory right under the FW Act to intervene in the interlocutory applications; and *secondly*, the SDA belatedly raised an issue as to whether ss 539 and 540 of the FW Act exhaustively prescribe the manner in which proceedings may be brought on behalf of employees in relation to their workplace entitlements, such that by implication, those specific provisions exclude the operation of the general provisions in Pt IVA of the FCA Act. Obviously enough, if Pt IVA has been improperly invoked, the Court is bereft of power to make a Settlement CFO in the Class Action (and irrespective of whether the Court has power to make Settlement CFOs in other, licitly commenced class actions). Additionally, the Minister and the SDA requested to be heard on the Reserved Question, and the Full Court granted leave for written submissions to be filed.

337 By this somewhat tortuous path, the Court is now presented with two issues, which are logically anterior to the issue of statutory construction raised by the Reserved Question and can be summarised as follows:

(1) Does the FW Act operate so as to repeal impliedly s 33D of the FCA Act to the extent that s 33D confers standing on current or former employees to apply for an order in relation to a contravention of a civil remedy provision of the FW Act?

(2) Does the Reserved Question give rise to an immediate right, duty, or liability to be established by the determination of the Full Court, such that it would be a proper exercise of judicial power to answer the Reserved Question?

338 If these two preliminary questions are decided in favour of the applicants then, in answering the Reserved Question, the further constitutional argument as to whether the making of a Settlement CFO is within judicial power arises, as does the final argument as to statutory power, based upon the proper construction of s 33V. Finally, a question of discretion arises as to relief. Hence I propose to structure the balance of my reasons under the following headings:

B CAN A CLASS ACTION SEEK PT 4-1 DIV 2 ORDERS?

C IS THE POWER ISSUE MERELY ADVISORY?

D JUDICIAL POWER AND THE SETTLEMENT CFO

E THE SETTLEMENT CFO AND SECTION 33V

F ISSUES AS TO THE TERMS OF THE RESERVED QUESTION AND RELIEF

G ORDERS

339 The constitutional arguments have no substance, and the Reserved Question can, and should, be answered. Further, for the reasons explained below, the answer to the Reserved Question is that there is statutory power to make a Settlement CFO in the Class Action (provided the Court is satisfied, at the time of settlement, that the order would be “just”).

340 Before going on, it is appropriate to make a preliminary point: there are not only differences between orders commonly described as CFOs and those commonly described as funding equalisation orders (**FEOs**); and there are also differences between types of orders that can be described as CFOs. The differing terminology used to describe different types of orders can be obscure: see *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183; (2020) 281 FCR 501 (at 503–504 [8] per Lee J, with whom Middleton and Moshinsky JJ agreed); *Augusta Pool 1 UK Ltd v Williamson* [2023] NSWCA 93 (at [120] per Ward P, with whom Bell CJ and Adamson JA agreed). But here specificity is provided by the terms of the Reserved Question; what is relevant is a “Settlement CFO” as defined.

# B CAN A CLASS ACTION SEEK PT 4-1 DIV 2 ORDERS?

341 The argument of the SDA did not lack ambition. If correct, it would displace a well-entrenched understanding of the compatibility of the FW Act with Pt IVA of the FCA Act. The submission was developed as follows.

342 Sections 539 and 540 of the FW Act were enacted in 2009 as part of major reforms to standing and conferred rights on employees, groups of employees acting for others, and organisations to apply for orders in relation to a contravention of a civil remedy provision – but “only if” certain conditions are met.

343 The orders sought in the Class Action for group members against MAL are orders under Pt 4-1 Div 2 of the FW Act and are, in the words of s 539(2), “in relation to a contravention” of the civil remedy provisions in Pt 4-1. The post-2009 scheme in ss 539 and 540 “elaborately and exhaustively” defines who can make applications for orders in relation to contraventions, and the evident statutory intention is that s 540 circumscribes the standing of persons (being employees, groups of employees, and organisations) who can apply for Pt 4-1 Div 2 orders. This is reflected in the fact that the substantive right to apply for relief is conferred by s 539, but is subject to s 540 which is entitled “Limitations on who may apply for orders etc.”

344 To further this intention, employee A could only apply for an order in relation to the particular contravention that affected employee A and not in relation to contraventions that only affected other employees. Further, an employee who has a right under ss 539 and 540 to seek orders against an employer would not have a right to seek orders against the employer for or on behalf of employees who were not employed by that employer.

345 The 2009 reforms created a new form of representative action and conferred standing, for the first time, on an informal association consisting of a group of employees who may apply for relief for some contraventions: ss 539 and 540(6). This reform was significant in creating a representative scheme available to union members and non-union members unique to the FW Act. The reform evinces a concern to control the identity of applicants, including that those who take representative enforcement action should be limited to groups of employees formed for protective purposes.

346 The SDA submitted that if the broad standing provision contained in s 33D of the FCA Act is not regarded as having been impliedly repealed in part upon enactment of the 2009 scheme, the consequence would be to permit any employee and others to apply for an order under Pt 4-1 Div 2, notwithstanding the express limits imposed by s 540 of the FW Act. If Pt 4-1 Div 2 and s 33D operate concurrently, the employee would be able to seek orders for other employees and the “limit in the FW Act would thereby be circumvented”.

347 The argument of the SDA is misconceived for at least four interrelated reasons.

348 *First*, the argument is premised upon a repeal, absent express words being used to bring about that legal consequence. For a conclusion to be reached that a later statute impliedly repeals a provision of an earlier statute, it must be established that the two provisions are so inconsistent that “they cannot stand or live together” because the “provisions of the two statutes cannot be reconciled”: *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43; (2015) 258 CLR 31 (at 61 [87] per French CJ and Kiefel J). This reflects a presumed legislative intention that statutory provisions should operate harmoniously. As Gummow and Hayne JJ reasoned in *Ferdinands v Commissioner for Public Employment* [2006] HCA 5; (2006) 225 CLR 130 (at 146 [49]), the question is not whether one law prevails, but whether that presumption is displaced.

349 The initial difficulty for the SDA is that there is no clash between the relevant provisions.

350 To focus initially upon the standing of an employee, s 540(1)(a) allows an employee to “apply for an order” under Pt 4-1 Div 2 (subject to being affected by the contravention and the employee complying with the time limitation provided for in s 544). This gives the employee a right of action, which has an existence anterior to, and separately from, any proceeding brought for its vindication. The FW Act says nothing about how the employee is required to advance that claim, save that orders, including orders awarding compensation for loss suffered because of a contravention, can only be made by particular courts (see s 545(2) and, more generally, Pt 4-1 Div 2, Subdiv B). It also says nothing at all about whether an employee is able to seek additional orders in a representative capacity as to common (but not individual) aspects of other employees’ claims (and the right of action of an employee under s 540(1) is clearly a “claim” as that expression is used in s 33C of the FCA Act).

351 Additionally, there is no clash because to the extent the 2009 reforms allowed for a form of “representative” proceeding to be commenced, such a proceeding is quite different to a class action provided for in Pt IVA of the FCA Act.

352 In *Transport Workers’ Union of Australia v Qantas Airways Limited (No 4)* [2021] FCA 1602; (2021) 312 IR 133 (at 138–139 [11]–[23]), I made a number of observations about s 539(2) of the FW Act providing standing to an industrial association. But, as I explained (at 138–139 [15]), the question of eligibility to bring an application is not the same thing as identifying the capacity in which an application is brought.

353 The SDA Proceeding is superficially a “representative” one as the relief sought (if made or refused) would directly affect the interests of strangers to the proceeding, that is, the approximately 300,000 to 350,000 current and former workers. In this respect, the SDA would be performing a form of “representative” function, not dissimilar to other representative functions known to the law, being those described by the High Court in [*Tomlinson v Ramsey Food Processing Pty Limited*](https://jade.io/article/404137)[2015] HCA 28; (2015) 256 CLR 507 (at [524](https://jade.io/article/404137/section/140890) [[40]](https://jade.io/article/404137/section/140890) per French CJ, Bell, Gageler and Keane JJ). But any such comparison needs to be carefully examined and not decontextualised. The SDA is registered under the [*Fair Work (Registered Organisations) Act 2009* (Cth)](https://jade.io/article/218300) (**FWRO Act**). It is a body corporate, separate and distinct from its members and acts in an independent capacity:[*R v Dunlop Rubber Australia Limited; Ex parte Federated Miscellaneous Workers’ Union of Australia*](https://jade.io/article/65206)(1957) 97 CLR 71 (at [81](https://jade.io/article/65206/section/139986) per Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ). It is given standing in order to allow it to pursue its legitimate industrial objectives.

354 Notwithstanding an industrial association such as the SDA is conducting litigation in a way that could result in relief being obtained on behalf of strangers to the litigation, it is conducting the litigation as a “party principal” (see *Australian Federation of Air Pilots v Regional Express Holdings Limited* [2021] FCAFC 226; (2021) 290 FCR 239 (at 293 [178] per Bromberg, Kerr and Wheelahan JJ)) and is entitled to act on its own account and in its own interests (subject to the requirements of the FWRO Act). All current and former workers are not privies of the SDA in any relevant respect and, notwithstanding they are all affected third-parties, as non-parties to the litigation, it is far from clear that any are bound at law or in equity by orders made in the proceeding (such as would be the case by a s 33ZB “statutory estoppel” in a class action under Pt IVA of the FCA Act or in equity in a Chancery representative proceeding). On any view, there are important distinctions between the position of a stranger to FW Act litigation (but on whose behalf relief is sought), and the role, rights and protections of a group member in Pt IVA proceedings.

355 Depending upon the circumstances, representative roles in litigation can be performed by agents, trustees, tutors, guardians and also pursuant to centuries of equitable practice, now reflected in rules of court, allowing representation of numerous persons who have a common interest. Section 33ZG of the FCA Act provides that except as otherwise provided by Pt IVA, nothing in Pt IVA affects the commencement or continuance of any action of a representative character commenced otherwise than under Pt IVA. All these differing types of representative roles exist concurrently, and Pt IVA is not a code prescribing the commencement or maintenance of proceedings having some form of representative character. The role of an industrial association (or other person given standing under the FW Act to make applications for orders in relation to contraventions) is a bespoke one, different to other forms of representative litigation, including the role of an applicant in a class action, who is given a statutory agency to deal with common issues in accordance with Pt IVA.

356 This reality is at odds with a contention that the provisions, addressing different purposes and dealing with quite different types of proceedings, are irreconcilable.

357 The *second* reason, as Kiefel CJ and Gageler J reinforced in *BHP Group Limited v Impiombato* [2022] HCA 33; (2022) 96 ALJR 956 (at 960 [6]), is that Pt IVA “assumes the investment by another law of the Parliament of [the Federal Court] with jurisdiction to entertain the subject matter of the representative proceeding” and “creates new procedures and gives the court new powers, in relation to the particular exercise of that jurisdiction”. As their Honours went on to explain, the distinction between the jurisdiction of the Federal Court, assumed by Pt IVA, and procedures and powers of the Court relating to the particular exercise of that jurisdiction, created by Pt IVA, is important. It is similarly important to maintain a distinction between the *entitlement* to seek relief, and the procedures and powers of the Federal Court in dealing with an application for relief made by an eligible applicant.

358 Here, s 562 of the FW Act and s 39B(1A)(c) of the Judiciary Act each confer jurisdiction on the Court in relation to any matter arising under the FW Act. Sections 539 and 540 govern entitlement to seek relief. I explained above how s 540(1)(a) allows an employee to “apply for an order”, and ss 539 and 540(6) allow an industrial association to “apply for an order” (subject to a member being affected by the contravention and complying with the s 544 time limitation). But properly construed, none of these sections say anything about how the Court, invested with jurisdiction and then dealing with an eligible application, can use such of its powers and procedures as are invoked (including those created by Pt IVA) to quell the justiciable controversy.

359 The *third* reason is that the FW Act demonstrates a legislative intention to operate in tandem with the general powers conferred on this Court by Parliament. Section 564 is entitled “No limitation on Federal Court’s powers” and provides:

To avoid doubt, nothing in this Act limits the [Federal Court](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fwa2009114/s12.html#federal_court)’s powers under [section 21](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fcoaa1976249/s21.html), [22](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fcoaa1976249/s22.html) or [23](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fcoaa1976249/s23.html) of the [FCA Act].

360 The Explanatory Memorandum to the Fair Work Bill 2008 (Cth) explains (at [2213]) that s 564 was “intended to address authorities which have held that federal industrial laws exhaustively contain the remedies available to enforce those laws”.

361 Although this section is directed at remedies themselves rather than the procedure by which any entitlement to a remedial response is ascertained and then recorded, its enactment demonstrates that Parliament evidently had regard to the intersection between the FW Act and the Court’s powers under the FCA Act and, far from there being any intention to affect those powers, there is every indication that no provision of the FW Act was directed to ousting existing powers and procedures of the Federal Court in relation to any type of matter arising under the FW Act.

362 It is not as if by 2009 the use of Pt IVA class actions in the context of employment and industrial disputes was in any way uncommon: see L Meagher, ‘Employment Class Actions: Past Use and Present Utility’ (2022) 4 *UNSW Law Journal Forum* 1 (at 6). If a substantive change to the law was to occur in 2009 by preventing the use of this beneficial mode of seeking relief for contraventions of the FW Act, one would expect such a change to be not only remarked upon in the extrinsic materials, but also effected by express terms.

363 The *fourth* reason is that Pt IVA grants the Court broad and flexible powers to deal with matters within jurisdiction: Pt IVA is not to be read by making implications or imposing limitations not found in the words used: [*Wong v Silkfield Pty Ltd*](https://jade.io/article/68149) [1999] HCA 48; (1999) 199 CLR 255 (at [260–261](https://jade.io/article/68149/section/140185) [[11]](https://jade.io/article/68149/section/140185) per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ). The same applies for limiting the reach of the class action regime because of the subsequent enactment of different types of procedures absent express words.

# C IS THE POWER ISSUE MERELY ADVISORY?

364 With respect to the contradictor, the submissions made as to whether the Reserved Question gave rise to an immediate right, duty or liability tended to elide distinct but logically connected issues. This is understandable as questions of jurisdiction, judicial power and the power and discretion to answer a reserved question (which is essentially in the nature of a declaration), can be seen to be intertwined: [*National Australia Bank Ltd v Nautilus Insurance Pte Ltd (No 2)*](https://jade.io/article/667562) [2019] FCA 1543; (2019) 377 ALR 627 (at [629](https://jade.io/article/667562/section/140705) [[7]](https://jade.io/article/667562/section/140705) per Allsop CJ).

365 This section of the reasons will deal with what is described as the jurisdictional argument that there is presently no “matter” (as that word is used in its constitutional sense). Save for the submissions of the applicants, each submission on this topic implicitly assumed that the issue as to the power to make a Settlement CFO needed to be conceptualised as a discrete controversy and any alleged justiciable issue as to power was distinct from the substantive matter or matters (arising from the underlying substratum of facts and claims as between and among the applicants, the SDA, group members, MAL and the franchisees).

366 In *Williams v Toyota Motor Corporation Australia Limited* [2021] FCA 1425; (2021) 288 FCR 282 (at 293–294 [56]–[57]), I had cause to consider, and doubt the correctness of, the observation of Wilcox J in *Nixon v Philip Morris (Australia) Ltd* [1999] FCA 1107; (1999) 95 FCR 453 (at [484](https://jade.io/article/117285/section/630) [[52]](https://jade.io/article/117285/section/630)) that Pt IVA provides a mechanism for determining, in the one proceeding, individual claims, each of which *must* be a “matter” within the meaning of ss 76 and 77 of the *Constitution*. For my part, to assert in an *a priori* way that each claim in a class action must be an individual “matter”, or that all of the claims as grouped in the class action must be part of the one “matter”, is difficult to reconcile with the breadth of the concept of what can constitute a “matter” (see *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 (at 585–586 per Gummow and Hayne JJ)) but also gives insufficient recognition to the different extents of commonality that can exist in (and within) claims grouped in a Pt IVA proceeding. All that is necessary is that the claims be in a “matter” or “matters” within the subject matter jurisdiction of the Court.

367 But this debate is beside the point for present purposes, as is the correctness of the assumption made in submissions that the issue as to power raised by the Reserved Question has to be conceived of as a “matter” in its own right. The question of the proper characterisation of a “matter” is not revisited for every intermediate question of fact or law that arises. Once there is a matter in this Court, the Court can deal with all issues that arise subject to the issue being justiciable.

368 The relevant issue is better framed as being one as to the proper bounds of judicial power and, more particularly, whether answering the Reserved Question would be hypothetical and advisory and hence beyond the licit exercise of judicial power in Ch III of the *Constitution*.

369 When framed in this way, the answer emerges clearly.

370 A court can refer or reserve a question of law arising in proceedings before it to an appellate court pursuant to a statutory power to do so; the answers to which are “not given in circumstances divorced from an attempt to administer the law as stated by the answers … [but] given as an integral part of the process of determining the rights and obligations of the parties which are at stake in the proceedings in which the questions are reserved”: *Mellifont v Attorney-General for the State of Queensland* (1991) 173 CLR 289 (at 303 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ, 322 per Toohey J). As the Attorney-General correctly submits, it is unnecessary for the answer to the Reserved Question to be “significant” or “essential” to the outcome of the interlocutory applications; it is sufficient that the answer “may have some bearing” on resolving the issues the Court is called upon to resolve by the interlocutory applications. Although questions of the extent of judicial power and discretion to grant relief are logically separate, as will become evident when dealing below with the question as to discretion to answer the Reserved Question, the answer does not only have some bearing on resolving the disputed issues on the interlocutory applications but is significant. There is no question as to jurisdiction or power to deal with the Reserved Question.

# D JUDICIAL POWER AND THE SETTLEMENT CFO

371 The argument that making a Settlement CFO does not involve an exercise of judicial power has an unpromising start given that in *BMW Australia Ltd v Brewster* [2019] HCA 45;(2019) 269 CLR 574, when Gageler J was dealing with an argument as to a supposed want of power to make a CFO under a different section of the FCA Act, his Honour explained (at 622–623 [119]) that:

it is sufficient to bring s 33ZF(1) within the judicial power of the Commonwealth that it confers power on the Federal Court as an incident of a strictly judicial proceeding to be exercised by reference to the Court’s assessment of the interests of justice in that proceeding. I agree with the observation of the Full Court that “it is difficult to conceive of a function or standard more appropriate to the judicial branch of government than considering and deciding (upon application and evidence) what is appropriate or necessary to do justice in a proceeding”.

372 The same can be said of an order under s 33V(2), which provides for a discretion to make an order upon application and evidence, and conditioned upon an evaluation that a settlement should be approved and that the proposed order for distribution of a sum of money is “just”.

373 There is no single combination of necessary or sufficient factors to distil or define judicial power because “it has never been found possible to frame a definition that is at once exclusive and exhaustive”: *R v Davison* (1954) 90 CLR 353 (at 366 per Dixon CJ and McTiernan J). But an order made for the express purpose of being part of the orders by which the Court resolves a dispute about existing rights (and quells the controversy resolved by the settlement) is not at the margins of judicial power.

374 In any event, even if this was not correct, and the only proper exercise of judicial power was approving the settlement itself, a federal law may validly confer a non-judicial function on a federal court, where that function is incidental or ancillary to the performance of a judicial function, that is, where it enables, supports or facilitates the exercise of judicial functions by a court: *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 (at 269–272 per Dixon CJ, McTiernan, Fullagar and Kitto JJ).

375 The argument of the contradictor that the making of a Settlement CFO would not constitute an exercise of judicial power involves two propositions: *first*, it would involve the creation of new rights and obligations for which the FCA Act does not provide; and *secondly*, in considering what is “just”, the Court would consider non-judicial, policy considerations in quantifying the amount of commission to be paid.

376 Neither proposition withstands scrutiny.

377 As to the *first* proposition, the conferral of a power on a court to create or alter rights, and not merely declare and give effect to pre-existing rights, does not place those powers outside of the scope of judicial power. The making of an adoption order or the granting of a decree of divorce are obvious examples. As Edelman J explained in *Brewster* (at 658–659 [225]), “it is entirely within judicial power for courts to create new rights, in the sense of recognising and giving effect to rights that differ from a previously settled understanding”. Similarly, the Full Court (comprising Murphy, Gleeson and Beach JJ) explained in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148; (2016) 245 FCR 191 (at 225 [171]) (in an observation not the subject of criticism in *Brewster*) that “there is little doubt that a Court can make orders creating rights or liabilities as an exercise of discretionary power, provided the power is exercised according to legal principle and by reference to an objective standard”. That is the case here.

378 As to the *second* proposition, the characterisation of the power as judicial is not affected by the breadth of the discrimen informing the exercise of the statutory discretion. Value judgments in respect of which there is room for reasonable differences of opinion, with no particular opinion being uniquely right, are common and judicial powers are commonly conditioned upon evaluations of what is “just” or in the “interests of justice”: *Cominos v Cominos* (1972) 127 CLR 588 (at 608 per Mason J); *Norbis v Norbis* (1986) 161 CLR 513 (at 518 per Mason and Deane JJ).

379 The nub of the complaint appears to be that the making of a Settlement CFO would necessarily involve the weighing of “policy considerations”, which may include assessment of an appropriate commercial return on investment for funders.

380 The obvious response to this submission, directed, as it is, to questions of power and not of discretion, is that it is premised on the assumption that a Settlement CFO would necessarily be made in favour of a funder and would involve assessment of “commercial returns” on such enterprises. For reasons explained below, the distribution of monies paid under a settlement to a third-party to a class action who has acted in such a way to facilitate the realisation of the fund, and to whom a payment is “just” by reference to all the circumstances, need not necessarily be a commercial funder. As I noted in *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited* [2019] FCAFC 107; (2019) 369 ALR 583 (at 610–611 [121]–[130]), a Settlement CFO might be thought to be consistent with general equitable principles that a person who benefits from another’s efforts in producing a fund is obliged to provide appropriate value in return, as is reflected in the underlying principle that it would be inequitable for the person who has created or realised a valuable asset, in which others claim an interest, not to have the costs, expenses and fees incurred in producing the asset paid out of the fund or property created. Although these observations were made in the context of s 33ZF, one can readily conceive of circumstances where it could be a “just” order to pay to a solicitor (who has taken the necessary risks to get in the settlement fund) a sum in addition to legal costs payable pursuant to a retainer. Moreover, on any view, it could be one of the group members who may have put up the necessary funds to advance the class action to a successful conclusion. This premise of this argument is wrong.

381 But even accepting the premise of the proposition, the making of a Settlement CFO is not non-judicial because it involves the weighing of “policy considerations”, which may include assessment of an appropriate commercial return on investment for funders.

382 It may be accepted that consideration of whether an order is just will often require a judge to assess an appropriate level of return for the funder, but this does not mean the judge is doing other than exercising judicial power. As the Full Court (comprising Allsop CJ, Middleton and Robertson JJ) said in *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34; (2019) 265 FCR 21 (at 48–49 [102]):

courts assess imprecise, and to a degree indeterminate, considerations such as risk, reward, danger and related benefits conferred in the proper exercise of judicial power. It could never be suggested that this task was non-judicial because of the indeterminacy of the commercial, physical and legal considerations.

383 Courts very commonly set rates of return of interest, calculate economic loss, and fix the remuneration of executors, trustees, liquidators and salvors, which tasks can involve commercial assessments and considerations of risk. More broadly, matters of policy “may enter permissibly (and necessarily) into the exercise of judicial power in various ways”: *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2; (2008) 233 CLR 542 (at 553–554 [14] per Gummow J). The notion that the making of a Settlement CFO would not be an exercise of judicial power, or at least incidental to the exercise of judicial power, is unsustainable.

# E THE SETTLEMENT CFO AND SECTION 33V

## E.1 *The Nature of the s 33V Discretion*

384 The Reserved Question is directed to the nature of the statutory power or powers given to the Court pursuant to s 33V of the FCA Act. The starting point for considering the nature of the Court’s powers under s 33V is the text, which is as follows:

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

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

385 In considering the power to make a Settlement CFO, we are dealing with the power to distribute money from a fund. As can be seen from the above, the discretion to make any order with respect to the distribution of any money from an identified settlement fund in existence (or to be brought into existence) is expressly dealt with in s 33V(2). Properly analysed, the exercise of a discretion to make any distribution order under s 33V(2) is conditioned upon: *first,* there being a settlement; *secondly,* the settlement being one by which a fund of money has been or is to be created or which provides for payment out of a fund of money paid into court; *thirdly,* the proposed order effecting a distribution to a person or persons of all or part of the fund; and *fourthly*, the proposed order for distribution being one that is considered by the Court, on the material before it, to be just.

386 Subsections 33V(1) and (2) confer  two distinct powers: *first*, to approve the settlement; and, *secondly*, if the approval is given, to approve the distribution of payments made under the settlement: see *Botsman v Bolitho* [2018] VSCA 278; (2018) 57 VR 68 (at 111 [200] per Tate, Whelan and Niall JJA).

387 These powers are related, and to understand the nature of the discretion with which we are concerned, this relationship requires some elaboration.

388 The text of s 33V(1) provides no test for determining whether approval should be granted but its purpose is obvious: it is necessary for the Court to be satisfied that any settlement (or irrelevantly for present purposes, discontinuance) of a class action has been undertaken in the interests of the group members as a whole, and not just in the interests of the applicant and the respondent. There can only be a settlement if the Court reaches this level of satisfaction, and as a way of providing assurance to the Court that this level of satisfaction should be reached, most provisional settlements the subject of approval applications record, in a contract, promises as to a scheme providing for an amount to be distributed out of the fund in satisfaction of the claims of group members.

389 Historically, this has meant that in a number of cases, as I noted in *Davaria* (at 506–507 [23]), it was evidently thought recourse to the ancillary power in s 33V(2) was unnecessary because the specific power under s 33V(1) allowed for approval to be given to a proposed settlement, including the contractual provisions by which payments are to be paid out of that settlement. I went on to say (at 506–507 [23]) that this “no doubt reflects the way the s 33V application was framed by the applicant seeking approval”.

390 Although pragmatic, the better view is that the approach of eliding the two distinct steps under s 33V does not reflect its proper construction as a whole.

391 In the Australian Law Reform Commission’s (**ALRC**) report *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report 134, December 2018), the ALRC noted (at [5.16]) a number of aspects of a settlement scheme will typically require consideration as part of the approval process under s 33V(1), including likely distributions to group members and, in complex cases, proposed claims assessment methodologies – that is, the Court gives consideration to whether a proposed settlement subjects all claims to the same principles and procedures for assessment in the course of considering the fairness of a proposed settlement. These are aspects of a proposed settlement governing the fairness of treatment of group members *inter se*, which the Court scrutinises to ensure fairness for group members in the course of determining whether to grant approval pursuant to s 33V(1) of the FCA Act.

392 But this does not mean the Court’s hands are then tied “with respect to the distribution of any money paid under a settlement or paid into the court” if the Court is satisfied it is just to make orders effecting distribution of monies from the settlement fund. This is why, in *Botsman* (at 111 [203]), Tate, Whelan and Niall JJA explained that it:

is an essential starting point to identify the settlement and its terms. It is commonplace that a deed of settlement may address more than the settlement of the claims against the defendant and will also deal with the distribution of settlement money, including to a litigation funder. The structure of subss 33V(1) and (2) suggests that such payments may be distributions of money that has been paid under a settlement to which the Court has given approval under s 33V(1). Those distributions are the subject of separate Court approval under s 33V(2).

393 Reasoning in that way, the Court of Appeal reached the conclusion (at 139 [353]) that it could uphold the settlement that Mr Bolitho had struck but decline to approve distributions in respect of legal costs and funder’s commission and remit those two matters for later determination.

394 It can be seen that any *inter partes* provisions in a settlement deed the subject of an approval application, which are promises “with respect to the distribution of any money paid under a settlement or paid into the Court”, will be material to assessing the fairness and reasonableness of the settlement, but are nevertheless subject to the exercise of discretion under s 33V(2) to make orders the Court considers just as to distribution of monies from any approved settlement fund. The existence of this discretion facilitates the supervisory role of the Court enshrined in s 33V. It is evident the discretion conferred on the Court at the s 33V(2) stage is broad, but it is not at large. It is confined by the necessity that any order made is just, the general duty to act judicially, and the scope and purposes of Pt IVA of the FCA Act, including the onerous protective role of the Court in relation to the interests of non-party group members. As the New South Wales Court of Appeal has recently reinforced, the power vested in the court in a provision such as s 33V permits some latitude as to the orders to be made: *Augusta v Williamson* (at [1]–[9] per Bell CJ, [77]–[78] per Ward P and [168] per Adamson JA).

395 Usually, of course, the s 33V(1) approval and the approval of distributions under s 33V(2) will occur in the same set of orders made following a single approval hearing, however, in some cases, it may be necessary or expedient to bifurcate the process: see, for example, *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (Settlement Approval)* [2023] FCA 143 and *Gill v Ethicon Sàrl (No 10)* [2023] FCA 228. What is important for present purposes is that the statutory foundation for making a Settlement CFO is s 33V(2) and any order is conditioned upon the existence of the four matters referred to at [385]. The only exception is a proposed Settlement CFO in the unusual case where the form of approved settlement does not, or will not, create a fund, a matter to which I will return (at [416]) below.

396 Out of an abundance of caution, I should make clear I adhere to the view I have previously expressed that notwithstanding its broad scope, s 33V(2) is not a charter for generally rewriting bargains contained in contracts between group members and third-party funders. The fact that the Court makes an order “with respect to the distribution” of money from a specific fund does not alter personal covenants to pay a price for the provision of services absent some established legal or equitable basis for interfering with those personal covenants: see *Liverpool City Council v McGraw‑Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289 (at [47] per Lee J). This is why when a Settlement CFO is proposed in circumstances where personal covenants could be enforced to obtain further remuneration, the Settlement CFO is only made following receipt of an undertaking, from the person who will obtain the benefit of the Settlement CFO, that those personal covenants will not be enforced.

## E.2 *The Logic of the Submission as to a Want of Power and the Contradictor’s Argument*

397 Having explained the nature and breadth of the discretion under s 33V(2), it is well to note that whatever discretionary arguments could be mounted against a specific Settlement CFO, the logic of the contradictor’s argument goes further. To be more precise than I was in *Davaria* (at 507 [25]), given the exercise of a judicial discretion allows a judge to make a choice between lawful, but different, courses of action, if there is no power to make a Settlement CFO, that is because, irrespective of its proposed terms or any other circumstance obtaining upon a settlement, a Settlement CFO is not within the conception of a “just” order that could be made “with respect to the distribution of any money”.

398 The contradictor developed his argument as to why this was the case as follows.

399 The contradictor accepted that there was no majority in *Brewster* that indicated, in terms, that s 33V did not empower the Court to make a Settlement CFO, but stressed that the reasoning in that decision is not “properly confined to s 33ZF” and “contains valuable observations on the context and purpose of Pt IVA in the context of the power to make CFOs”.

400 As to text, while the words “such orders as are just” in s 33V(2) are wide, they are qualified by reference to the aim of “distribution” of settlement monies. Consistently with the reasons of the plurality in *Brewster* (at 600 [50] per Kiefel CJ, Bell and Keane JJ), the focus should be on ensuring that justice is done in the proceeding “as between the parties to it”; “whether or not a potential funder of the claimants may be given sufficient financial inducement to support the proceeding” is extraneous. There is no relevant difference between the aim of ensuring that justice is done in the proceeding and the power to make such orders as are just. The funder’s position – as a non-party – is outside the concern of the text of s 33V.

401 Further, as to context and purpose, as was explained in *Brewster*, while Pt IVA provides for the costs of proceedings between group members, there is nothing in Pt IVA that invites the Court to order the establishment of a complex relationship between group members and a funder with whom the group members would otherwise have no relationship at all, nor any criteria for setting the rate of remuneration for the funder (at 604–605 [66]–[67] per Kiefel CJ, Bell and Keane JJ). It is the identification of all group members under s 33J that facilitates the “distribution” of any proceeds from a settlement under s 33V (at 606–607 [72]–[73]) and the occasion for making orders distributing any proceeds is at the conclusion of proceedings, at which point the value of the funder’s support will have been rendered certain (at 605 [68]). At that point, an FEO is available to equalise rights as between group members (at 613 [89] per Kiefel CJ, Bell and Keane JJ, 637–638 [169] per Gordon J).

402 As to any concern to prevent free-riding, this is not addressed in Pt IVA by permitting a distribution to a non-party, even one with a significant commercial interest in the litigation. After discussing the policy concern to prevent free-riding and noting that it is “just that the costs of the proceeding be spread amongst that group” (that is, all group members) (at 612 [86]), the plurality reasoned (at 612 [87]):

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

403 The words “much less” indicate that this passage was intended to have application beyond s 33ZJ. They indicate the plurality’s view as to CFOs generally.

## E.3 *Consideration*

404 To the extent the submissions of the contradictor support (albeit tentatively) the notion there is considered *dicta* of the majority in *Brewster* preventing the making of an order under s 33V for payment of a percentage of a settlement to a litigation funder, those submissions are inconsistent with an abundance of judgments of this Court and the Supreme Court of New South Wales: see, for example, *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885; (2020) 385 ALR 625 (at 634 [33] per Lee J); *McKay Super Solutions Pty Ltd (Trustee) v Bellamy’s Australia Ltd (No 3)* [2020] FCA 461 (at [31] per Beach J); *Lenthall v Westpac Banking Corporation (No 2)* [2020] FCA 423;(2020) 144 ACSR 573 (at 579 [16] per Lee J); *Webster (Trustee) v Murray Goulburn Co-Operative Co Limited (No 4)* [2020] FCA 1053 (at [110] per Murphy J); *Clime Capital Ltd v UGL Pty Ltd* [2020] FCA 66 (at [8]–[9] per Anastassiou J); *Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Ltd (No 2)* [2020] FCA 579 (at [72] per Moshinsky J); *Uren v RMBL Investments Ltd* *(No 2)* [2020] FCA 647 (at [50]–[53] per Murphy J); *Court v Spotless Group Holdings Limited* [2020] FCA 1730 (at [101] per Murphy J); *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70 (at [51] per Beach J); *Hall v Arnold Bloch Leibler (a firm) (No 2)* [2022] FCA 163 (at [23], [29], [38] per Beach J); *Hall v Pitcher Partners (a firm)* [2022] FCA 1524 (at [5] per Beach J); *Bradshaw v BSA Limited (No 2)* [2022] FCA 1440 (at [103] per Bromberg J); *R&B Investments Pty Ltd (Trustee) v Blue Sky Alternative Investments Limited (Administrators Appointed) (in liq) (Carriage Application No 2)* [2023] FCA 142 (at [18] per Lee J); *Wetdal Pty Ltd as Trustee for the BlueCo Two Superannuation Fund v Estia Health Limited* [2021] FCA 475 (at [60]–[65] per Beach J); *Wills v Woolworths Group Ltd* [2022] FCA 1545 (at [5] per Beach J); *Zantran Pty Limited v Crown Resorts Limited (No 4)* [2022] FCA 500 (at [84]–[86] per Beach J); *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia; Whisson v Subaru (Aust) Pty Ltd; Kularathne v Honda Australia Pty Ltd; Brewster v BMW Australia Ltd; Bond v Nissan Motor Co (Australia) Pty Ltd; Coates v Mazda Australia Pty Ltd* [2022] NSWSC 1076 (at [50]–[51] per Rees J); and *Quirk v Suncorp Portfolio Services Ltd in its capacity as trustee for the Suncorp Master Trust (No 2)* [2022] NSWSC 1457 (at [44] per Stevenson J).

405 The submissions of the contradictor also exhibit tension with the considered reasoning of two intermediate courts of appeal (being the New South Wales Court of Appeal in *Brewster v BMW Australia Ltd* [2020] NSWCA 272 (at [19(ii)], [37], [41]–[42], [46] per Bell P, with whom Bathurst CJ and Payne JA agreed) and the Full Court in *Davaria* (at 509–510 [32]–[34], 511–512 [41]–[42] per Lee J, with whom Moshinsky and Middleton JJ agreed)), which not only confirmed the *ratio* of *Brewster* was limited to the Court’s power under the state cognate of s 33ZF of the FCA Actto make a CFO at an early stage of proceedings, but also that it was far from obvious that the majority judgments were addressing, still less deciding, any question of power under the state cognate of s 33V.

406 They do, however, find apparent support in the recent judgment of O’Callaghan J in *Davaria v 7-Eleven Stores (No 13)*, where his Honour adopted the reasoning of Foster J in *Cantor v Audi Australia Pty Limited (No 5)* [2020] FCA 637. Justice Foster observed (without finally deciding) that the true import of *Brewster* was there was no power to make a CFO. Notwithstanding O’Callaghan J’s decision was in the same class action where, in October 2020, on the respondent’s application, Justice Middleton reserved a question for determination by the Full Court (which led to a Full Court setting out the principled approach to identifying the *ratio* and relevant considered *dicta* of *Brewster*), it appears from the judgment that neither the Full Court’s decision in *Davaria*, nor the New South Wales Court of Appeal’s decision in *Brewster v BMW*, were cited. Although the reason does not matter, one presumes this was because his Honour did not receive the benefit of detailed submissions from those appearing as to how two intermediate courts of appeal had, post-*Cantor*, subsequently distinguished (and otherwise interpreted) “the decision of the immediately higher court” in their reasoning: see *SZGME v Minister for Immigration and Citizenship* [2008] FCAFC 91; (2002) 168 FCR 487 (at 500–501 [42] per Black CJ and Allsop J), citing *Miliangos v George Frank (Textiles)* *Ltd* [1976] AC 443 (at 478 per Lord Simon of Glaisdale).

407 Subject to the following four matters, I have nothing to add to my reasoning in *Davaria* (at 504–512 [13]–[42]) as to why the contradictor’s submission as to power must be rejected.

408 *First*, as explained above, the proper of construction of s 33V as a whole leads to the conclusion the statutory power to make a Settlement CFO is the discretion provided for in s 33V(2).

409 *Secondly*, contrary to the contradictor’s submission in this case, there is a “relevant difference” between s 33ZF, which is conditioned by a requirement that justice “be done in the proceeding”, and s 33V, which contains no such condition: cf *Brewster* (at 652 [207] per Edelman J). That points to the reality that an assessment of the “justness” of a proposed order as to the distribution of the fund in question is broader than what was at issue in the proceeding and can relevantly extend to orders made in favour of non-parties. If the contradictor’s argument was correct, there would be no power under s 33V(2) to distribute the proceeds of an approved settlement fund to pay an administrator of settlement scheme, or a costs referee, or a newspaper publishing the settlement notice, or the solicitors – this would be absurd. A broad discretion is not to be read down by reference to implications or limitations not found in its express words, construed according to their natural meaning and in their proper context: *Owners of “Shin Kobe Maru” v Empire Shipping Co Inc* (1994) 181 CLR 404 (at 421 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Wong v Silkfield* (at 260–261 [11] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).

410 *Thirdly*, some submissions made in opposition to Settlement CFOs seem to be based upon: an apparent disdain for the payment of a just amount to a litigation funder for its services; or upon a misunderstanding as to how s 33V operates to authorise common forms of FEOs by supplementing contractual rights; or the misapprehension that FEOs necessarily lead to a greater sum to be distributed to group members than Settlement CFOs. This scepticism of Settlement CFOs is reflected in the submission of the contradictor that the litigation funder may have been “self-interested” in providing the funding. What commercial enterprise, one asks rhetorically, is not self-interested? There is no reason to be “squeamish” in providing the litigation funder with just and hence reasonable remuneration: *Brewster* (at 621 [115] per Gageler J).

411 More significantly, these submissions are properly directed to *discretion*, not power. The apparent notion that a Settlement CFO could never be just, even if it augmented the return to group members as compared to contractual entitlements, is difficult to understand. Notwithstanding the term “access to justice” has often been used as a slogan inappositely by the self-interested, it should be recognised that any discretion under s 33V(2) is required to be exercised in the context that litigation funding has become a means by which claims which would not otherwise have been able to have been brought are litigated, thus facilitating the achievement of the legislative objectives for Part IVA. While it is true that in some cases class characteristics make book build and an FEO practicable, this is not always the case, and the book build process is often cumbrous and slow. Moreover, it has the effect of encouraging closed classes. This has a number of undesirable features including encouraging duplicative class actions for different group members who have signed up and, as those well experienced in class actions would be aware, class composition is usually more sophisticated in closed class actions than open class actions (thus tending to exclude poorly informed or less literate or educated members of a possible open class seeking relief for the same alleged wrong).

412 *Fourthly*, it may be accepted that Gordon J in *Brewster* did not see s 33V as “envisag[ing] a Court making orders with respect to the economics of a proceeding by ensuring that a litigation funder obtains a particular return on funds invested” (at 630 [141]). But as the Attorney-General correctly submits, Gordon J’s view is *obiter dicta*, expressed in the context of a discussion about a quite different form of order and without the benefit of argument on the point, and the weight to be given to it should be assessed in that light: *Union Shipping New Zealand Ltd v Morgan* [2002] NSWCA 124; (2002) 54 NSWLR 690 (at 733–734 [114] per Heydon JA, Hodgson and Santow JJA agreeing).

# F ISSUES AS TO THE TERMS OF THE RESERVED QUESTION AND RELIEF

## F.1 *Terms of the Reserved Question*

413 Shortly after making the order identifying the Reserved Question, the solicitors for the applicants contacted my Associate. They foreshadowed an application to amend the Reserved Question such that it would not only encompass the question of whether the Court has power under s 33V to make a Settlement CFO, but also whether the Court has an equitable power to make such an order. The application to amend the Reserved Question was refused by the Full Court.

414 My reason for joining in the order refusing the amendment was because it was unnecessary.

415 I explained in *Asirifi-Otchere v Swann Insurance* (at 634–636 [34]–[40]) that a Settlement CFO is consistent with general equitable principles. These general principles, developed over centuries of Chancery practice, have a continuing vitality and resonance in informing consideration of what is consistent with good conscience. Identifying an equity asserted and then enforcing it by an appropriate remedy in equity’s exclusive jurisdiction is not, of course, the same as determining whether the exercise of a proposed statutory discretion is “just”; however, learning drawn from the development of equitable doctrines and remedies can assist in identifying what should be considered just. As I said in *Davaria* (at 517 [71]), hypothetical postulation as to the absence of equities, in the absence of knowledge of the facts, is dangerous. But having said this, and without being definitive, given the breadth of the statutory discretion in s 33V(2), it is difficult to conceive of a realistic circumstance where an order could not be made under the statute and yet equity would provide a remedy.

416 The only qualification to this (and where equity seems to me to have a role) is where there is a settlement which produces an asset of value but the asset is not a fund of money (as is required to engage the discretionary power under s 33V). But there is no suggestion that this has any relevance to the present case. The availability of equitable remedies can be put to one side.

## F.2 *Discretion to Grant Relief*

417 I made reference above to the interrelationship between jurisdiction, power and discretion. Just because answering the Reserved Question would be a proper exercise of judicial power does not mean it should be answered. Similarly to declaratory relief, which also has a statutory foundation, even if the Reserved Question cannot be stigmatised as being purely abstract or hypothetical, relief should not be granted in relation to circumstances that are unlikely: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 (at 582 per Mason CJ, Dawson, Toohey and Gaudron JJ).

418 However, in a number of respects, the answer to the Reserved Question has real and immediate utility.

419 As noted above, in the Class Action, an application is before the Court to approve opt out notices under s 33Y(2) of the FCA Act. The purpose of opt out notices is to ensure that group members can make an informed decision concerning their rights. The importance of group members being apprised of information of this type promptly, and prior to opt out, is reflected in the fact that the *Class Actions Practice Note* (GPN-CA) (at [15.4], [16.1]) requires group members to be alerted to the likelihood of deductions from any settlement fund as soon as practicable. The proposed opt out notices relevantly state that, if the Class Action settles, then “the Court will be asked to make an order that some of the money be deducted and used to pay a share of … remuneration (commission) to the litigation funder for having taken the financial risk of the Class Action” and goes on to advise that the Court will “decide what funding commission is reasonable” (but that group members should assume that it will be in the range of 20–30%). The notice therefore contemplates an application for a Settlement CFO of a particular type. This information would necessarily be removed from any approved notices if there was a want of power to make a Settlement CFO.

420 Moreover, in the present case, the fact that a Settlement CFO may be made is not only relevant to a group member’s informed assessment of whether to opt out, but an absence of power goes to the whole basis upon which the Class Action is being funded. There is no significant book build and no other suggestion the Class Action can be funded without the ability of the funder to obtain the order it has made plain it is seeking upon any settlement or judgment. If there was a want of power and funding was, as a consequence, imperilled, close attention would need to be given to what must be said about this development to group members, who are necessarily concerned with the viability of the Class Action in making a decision as to whether they wish to continue to have the common questions relevant to their claims resolved in that proceeding.

421 Relatedly, as noted above, a stay of the Class Action is sought by the SDA. A central issue on that application is the relative viability of each proceeding and whether one, or the other, or both, present a suitable vehicle for determining the claims of affected workers. Although the SDA was reticent in pursuing its initial submissions as to statutory construction, the difference in litigation funding models as between the two proceedings is squarely raised as a factor by the Minister who intervened in support of the stay of the Class Action.

422 It is not premature to answer the Reserved Question. In both *Davaria* and *Brewster v BMW*, there was no immediate or compelling reason for the resolution of the questions there reserved. Here, practical and real consequences flow from resolving the issue, being those identified above. Further, an answer will identify the correct legal foundation for negotiation of any settlement, given any settlement would need to be considered fair by those seeking approval: see *Edwards v Santos* [2011] HCA 8; (2011) 242 CLR 421 (at 435–436 [37] per Heydon J). Some understanding of what net amounts would likely be paid to group members in satisfaction of their claims is required as part of this assessment.

# G ORDERS

423 The Reserved Question is premised on the basis that the proposed order under s 33(V)(2) can be characterised as being “just”. If a just Settlement CFO is proposed, the statutory discretion is enlivened. There is no want of statutory power and the Reserved Question should be answered “yes”.

424 No party advanced any argument as to why an order for costs should be made, and given the terms of s 570 of the FW Act, no such order should be made.

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| I certify that the preceding one hundred (100) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Lee. |

Associate:

Dated: 12 October 2023

REASONS FOR JUDGMENT

COLVIN J:

425 A question has arisen as to whether the Court has authority to make an order distributing to a third-party litigation funder a specified proportionate share of money paid under a settlement of representative proceedings if the Court is satisfied at the time of approving the settlement that it is just to do so. Such an order was described as a settlement common fund order or Settlement CFO by Lee J in *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183; (2020) 281 FCR 501 at [19], [22]‑[25]. The terminology was adopted (with due explanation and qualification) in order to distinguish such orders from orders of a similar kind made at an early stage of representative proceedings which have been determined to exceed the authority conferred by the general statutory power as to orders that the Court may make in any representative proceeding: *BMW Australia Ltd v Brewster* [2019] HCA 45; (2019) 269 CLR 574.

426 The precise question reserved for determination concerns whether this Court has statutory power pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) to make a Settlement CFO of the kind described by Lee J in *Davaria*.

427 Section 33V provides:

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

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

428 The decision in *BMW Australia Ltd v Brewster* was concerned with the general power of the Court to make orders in representative proceedings that is conferred by s 33ZF in the following terms:

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

The reference in s 33ZF to 'this Part' is to Part IVA of the Act which concerns representative proceedings.

429 It may be observed that s 33ZF is expressed in broad terms. However, it is confined to that which the Court thinks appropriate or necessary to ensure justice is done 'in the proceeding'. Its focus is upon the conduct of the proceeding. Unlike s 33V, it is not specifically directed to the orders that may be made on settlement of a representative proceeding. Further, whereas s 33ZF concerns orders to be made to ensure justice is done *in* any representative proceeding, s 33V concerns settlement or discontinuance of the representative proceeding and orders to be made about distribution of money paid under an approved settlement or paid into Court.

430 Section 33V(1) does not confer power to approve. Rather, it requires the authority which the Court has as a superior court of record to insist upon approval of settlements or discontinuances in appropriate instances in respect of claims within its jurisdiction to be exercised in the case of any settlement or discontinuance of a representative proceeding. For that reason, the matters to which the Court may have regard and the procedures to be adopted for the approval are to be determined by reference to the law and practice concerning court approvals when applied to the particular characteristics of a representative proceeding.

431 Further, s 33V(2) does not govern the approval process. Rather, it confers a specific jurisdiction to make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court. It is a jurisdiction that exists if the Court gives its approval to the settlement or discontinuance of representative proceedings. It presupposes the approval.

432 For reasons developed below, in the context of Part IVA and the nature of the representative proceedings for which it provides, the jurisdiction conferred by s 33V(2) is necessary in order for the Court to be able to make orders that allow for distributions to be made to group members who are not parties to the proceedings. It is more than a procedural jurisdiction of the kind conferred by s 33ZF. It is a substantive conferral of authority to decide what will happen to money paid under an approved settlement or that has been paid into Court if approval is given of a settlement or discontinuance.

433 Therefore, the issue raised by the reserved question is whether the authority conferred by s 33V(2) extends to making orders which would provide for money paid under a settlement (or into Court) to be paid to a third-party litigation funder in circumstances where the Court has approved the terms of a settlement or discontinuance.

## Some assumptions implicit in the reserved question

434 The reserved question assumes that financial support has been provided for the conduct of the representative proceedings by a third-party funder and that a settlement has been reached which, if approved by the Court, will provide for money to be paid for the benefit of group members.

435 Further, it assumes an understanding of the nature of the financial support that is usually provided by a third-party funder of representative proceedings. For present purposes it is sufficient to observe that the support provided by a funder will usually involve meeting the legal costs and disbursements incurred to advance the representative proceedings and providing an indemnity in respect of any order for costs imposed upon the representative applicant. In addition, the involvement of a commercial funder is likely to require security to be provided for the respondent's costs. Therefore, it is usual for the funder's support to extend to meeting that liability also.

436 In addition to an agreement with the representative applicant, the funder may secure an agreement with some or all of the group members. Although it is possible for a funder to 'bookbuild' by entering into individual agreements with prospective group members before the commencement of representative proceedings and then proceed on a closed class basis confined to group members with whom the funder has reached an agreement, the opt out structure of Part IVA allows for the commencement of proceedings on an open class basis. In consequence, it is also possible that the funder may enter into agreements with some group members concerning the funding arrangements for the proceedings (funded members) and then commence proceedings on an open class basis. If that course is followed then some of the group members will not have agreed to the funding terms (unfunded members). In those instances, the funded members effectively finance the representative proceedings 'by pooling their promises to pay' the funder according to the agreed terms: *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433 at [83] (Murphy J). It is also possible for the funder to only enter into an agreement with the representative applicant with the consequence that, when the representative action is commenced, all the other group members will be unfunded.

437 In any instance where there are unfunded members there is the prospect that they will be able to 'free ride' on the commitments made by others to the funder and thereby obtain 'windfall gains' if the proceedings are successful or a settlement is proposed. An outcome of that kind may be seen to be unfair and unjust: *Botsman v Bolitho* [2018] VSCA 278; (2018) 57 VR 68 at [214]‑[215] (Tate, Whelan and Niall JJA).

438 Further, if the representative applicant (and any other funded group members) are unable to recover a just contribution from unfunded members then it may be expected that funders will not agree to provide financial support for representative proceedings unless all group members are funded. Consequently, the extent of the access to justice that the open class structure of Part IVA affords will be curtailed.

439 It is now well established that upon settlement, a form of equalisation order (which has been described as a funding equalisation order or FEO) may be made which does not impose upon unfunded members the burden of equivalent funding terms to those which have been assumed by the funder members. The order provides for deductions from the amounts to be paid to unfunded group members of an amount equivalent to the payment for funding costs to be made by each of the funded members. The deducted amounts are then distributed pro rata to all group members. In practical terms, an FEO is likely to result in differential burdens of the costs of funding as between funded and unfunded members. It is an equalisation of the net amount received by each group member.

440 The burden of the reserved question is whether, at the time of approving a settlement or discontinuance (and as a condition of such approval), the Court can make an order that it considers to be just which allows a reasonable percentage amount of any moneys to be made available as part of a proposed settlement to be paid out of those moneys for the benefit of the funder, the burden of which will fall proportionally upon all group members (irrespective of whether they are funded members) according to the amount they will receive from those monies of the settlement as approved.

## The present circumstances

441 The reserved question arises in the present instance because the Court must approve the terms of proposed opt out notices to be sent to group members. In order to be able to provide group members with accurate information as to what participation in the representative proceedings may afford a group member who does not opt out, it is necessary to provide information as to what is likely to occur if the proceedings are resolved by way of settlement. In particular, it may be expected that the opt out notice will provide information about the possibility of a Settlement CFO, assuming that the Court has authority to make such an order under s 33V(2). If the Court has such authority, it may also be appropriate to include some information about the process by which the Court determines the appropriate amount that may be allowed to be paid to a funder pursuant to a Settlement CFO.

442 The point assumes further significance in the present case because the representative proceedings allege contraventions of the *Fair Work Act 2009* (Cth). Provisions within Part 4‑1 of the *Fair Work Act* confer rights upon individuals to seek relief where there have been contraventions of certain provisions of the legislation. In addition, the *Fair Work Act* provides that an industrial association may apply for an order in relation to certain contraventions if the person affected is a person that the industrial association is entitled to represent: see s 540(6). Separate proceedings have been brought by an industrial association pursuant to that procedure in respect of contraventions that are also the subject of representative proceedings. In consequence it may be important for those who are considering whether to opt out to be able to make comparisons between the different types of proceedings and the outcomes they may deliver.

443 The existence of the proceedings that have been brought by the industrial association gives rise to contentions to the effect that there can be no Settlement CFO in this particular case because it is the *Fair Work Act* form of proceeding that is the only 'representative' procedure that can be used in the case of claims to which that procedure applies.

## The issues and outcome

444 I am relieved of the burden of explaining the full extent of the alternative arguments because I have the considerable advantage of being provided with a draft of the reasons to be published by Lee J. Respectfully, I agree with Lee J that the reserved question should be answered in the affirmative. I do so substantially for the reasons given by his Honour. However, in one respect, with considerable caution given his Honour's extensive experience in the field, I have reached a different view. It concerns the nature of the approval process to be undertaken on a proper construction of s 33V. Otherwise, I wish also to add some further brief observations and indicate some points as to which I prefer to express no concluded view.

445 For reasons which will emerge, in my view the reserved question should be answered in the following terms: 'If the Court has approved the terms of settlement or discontinuance in the exercise of its approval jurisdiction, yes'.

446 I will address the issues in the order in which they have been addressed by Lee J.

## Part IVA of the *Federal Court of Australia Act* and Part 4-1 of the *Fair Work Act*

447 I agree, substantially for the reasons given by Lee J, that an applicant for the statutory remedies conferred by the *Fair Work Act* is unconstrained by the terms of that Act as to the procedure that may be invoked to pursue those remedies. Employees have individual rights to seek the statutory remedies: see s 539. As Lee J explains, those rights may be pursued by representative proceedings under Part IVA. The inclusion of a provision pursuant to which an industrial association that is entitled to represent the interests of a person who is or will be affected by a contravention of the *Fair Work Act* may apply for an order under Division 2 of Part 4‑1 of that Act does not manifest an intention that an employee is unable to pursue those rights themselves. In that respect, it is significant that s 540(6) does not confer authority upon an industrial association to bring proceedings as a representative of a person. If it brings proceedings then it does so in circumstances that are much closer to those considered in *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28; (2015) 256 CLR 507 at [41] (French CJ, Bell, Gageler and Keane JJ) where their Honours differentiated between a claim brought as a representative and a claim where the applicant 'acts for statutorily … permitted reasons within a statutorily defined area of responsibility in making such a claim'.

448 I prefer to express no view as to the way in which the concept of what can constitute a 'matter' bears upon the character of representative proceedings under Part IVA. I agree that once there is a matter in the Court's jurisdiction, the Court can deal with all justiciable issues that arise. I also agree that in consequence no question arises as to the Court's jurisdiction or power to deal with the reserved question. A Full Court may always decline to answer a reserved question if, after hearing argument, it forms the view that it is not appropriate to answer the question.

449 I express no view as to whether there could be said to be any abuse of process in a person being both a group member in a representative action and a person in respect of whom an industrial association has applied for an order pursuant to the authority conferred by s 540(6) where both proceedings concern the same statutory rights.

## Judicial power and a Settlement CFO

450 I agree with Lee J for the reasons given by his Honour that the making of a Settlement CFO would not involve the Court undertaking a task that was non-judicial.

## Proper construction of s 33V

### General principles of statutory construction

451 There was no issue as to the principles of statutory construction to be applied in construing s 33V. The fundamental principles were recently summarised in *ENT19 v Minister for Home Affairs* [2023] HCA 18 at [86]‑[87] (Gordon, Edelman, Steward and Gleeson JJ). They require a focus upon the text whilst at the same time having regard to its context and purpose. In the present case, this requires regard to the whole of the scheme and its purpose that is evident from the terms of Part IVA.

### The Part IVA statutory scheme

452 The statutory scheme for representative proceedings authorises a representative applicant to commence proceedings for the purpose of determining questions that are common to group members: s 33C. It entrusts the conduct of those proceedings to the representative applicant even though no authority has been conferred upon that representative by any act of the group members. In *Tomlinson*, French CJ, Bell, Gageler and Keane JJ placed the role of the representative applicant within a class of forms of representation that give rise to fiduciary duties. As their Honours said at [40]:

Traditional forms of representation which bind those represented to estoppels include representation by an agent, representation by a trustee, representation by a tutor or a guardian, and representation by another person under rules of court which permit representation of numerous persons who have the same interest in a proceeding. To those traditional forms of representation can be added representation by a representative party in a modern class action. Each of those forms of representation is typically the subject of fiduciary duties imposed on the representing party or of procedures overseen by the court (of which opt-in or opt-out procedures and approval of settlements in representative or class actions are examples), or of both, which guard against collateral risks of representation, including the risk to a represented person of the detriment of an estoppel operating in a subsequent proceeding outweighing the benefit to that person of participating in the current proceeding.

(footnotes omitted)

453 However, a representative applicant does not have complete authority to conduct proceedings on behalf of all group members. Rather, the authority of a representative applicant is confined to conducting proceedings that will resolve questions that are common to the claims of group members who do not opt out of the representative proceedings. Save for certain governmental parties, there is no consent required from a person to be a group member in a representative proceeding: s 33E. It is by the terms of Part IVA that the determination of the common questions by the representative proceedings will bind all group members who do not opt out: s 33ZB. In addition, the representative proceedings may result in a final hearing at which the personal claims of the representative applicant are finally determined in their entirety.

454 It is possible for the common questions that are determined by representative proceedings to include the entirety of the claim of each group member where all aspects are common. Accordingly, Part IVA contemplates that representative proceedings may result in judgment being given that will result in a need to identify group members and provide for distribution to them of amounts ordered to be paid: s 33M.

455 However, it is quite likely that some aspect of the claim of each group member will require some form of individual assessment of circumstances that are unique to each group member - such as instances where the nature and extent of damages will depend upon individual circumstances. In the latter instance, even if the common questions the subject of the representative proceedings are resolved favourably to the group members, individual claims will need to be pursued to resolve the non-common aspects of each claim or some procedure will need to be agreed by which to resolve those aspects which cannot be determined on a representative basis.

456 The Court has a limited authority under Party IVA to give directions in relation to the determination of the remaining issues if it appears that determination of the common issues will not finally determine the claims of all group members: s 33Q. It also has authority to permit a group member to appear in the representative proceedings to determine an issue relating to that group member: s 33R. It may also give directions as to the commencement and conduct of a separate proceeding by a group member where an issue cannot properly or conveniently be dealt with as part of the representative proceedings: s 33S. Therefore, the representative applicant may have a limited role, to the extent of the exercise of the power to make such directions, that goes beyond determination of the common questions.

457 Further, as the reasoning in *Tomlinson* recognises,a representative applicant will also have authority to bring forth settlements for approval. The fact that the representative applicant has carriage of proceedings which could only result in a determination of the common issues and in the making of directions as to the determination of remaining issues does not mean that any settlement terms proposed by a representative applicant must be confined to the resolution of those common issues and the terms of those directions.

458 The terms of settlement of representative proceedings need not be confined to the claims expressly made against the respondents to the representative proceedings. They may contemplate a broader resolution that brings to an end the whole of the underlying controversy as it concerns all group members. They may require general releases to be given by group members. They may reserve rights for individual group members to pursue aspects of their claims in separate proceedings. They may establish an arbitral procedure or some other mechanism for the quantification of remaining aspects of individual claims. They may propose the terms of an offer to be made to each group member which may or may not be accepted on an individual basis. They may require group members to register in some way in order to receive payments under proposed settlement terms.

459 Further, as was noted by Lee J in *Davaria* at [63] they may propose orders which provide for a lesser return to a funder than would have been the case if the funder was able to recover according to the terms of a relevant funding agreement.

460 In short, the settlement terms may be as varied as the circumstances may require in order for agreement to be reached as to proposed settlement terms resolving the representative proceedings to be submitted to the Court for approval. Further, any settlement to be approved which provides for money to be available for group members is highly likely to include terms relating to the way in which the representative applicant may recover legal costs and disbursements reasonably incurred in order to advance those proceedings and negotiate the proposed settlement terms.

461 Commercial litigation funding is now an established part of the way in which applicants may cover the costs and risks of conducting court proceedings. Many issues arise from the intersection between the attributes of representative proceedings as an appropriate procedure for just resolution of claims and the attributes of the commercial enterprises that provide funding to enable that procedure to be resorted to in the interests of group members: Report 134 of the Australian Law Reform Commission, *Integrity, Fairness and Efficiency - An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Chapter 6. The Part IVA scheme should be construed on the basis that its provisions will apply in circumstances where all, some or none of the group members are funded.

### Text of s 33V

462 As has been noted, s 33V(1) requires any settlement of representative proceedings to be supervised by the Court. It invokes the Court's protective role: *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [8] (Jacobson, Middleton and Gordon JJ). In effect, the Court supervises the conduct of the representative applicant who proposes terms of settlement. The Court does so by itself making an assessment as to whether the settlement is fair and reasonable: see the summary of the principles by Moshinsky J in *Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Limited (No 2)* [2020] FCA 579 at [17] and, more recently, by Lee J in *Fowkes v Boston Scientific Corporation* [2023] FCA 230 at [32]‑[45].

463 However, the analogy with other instances in which the Court exercises a jurisdiction to approve the settlement or discontinuance of proceedings is not complete. In the case of a representative applicant, their authority is confined in the manner I have described. There is an express authority to bring the representative proceedings and to do all those things necessary for the reasonable conduct of those proceedings. It is also necessarily implicit in the terms of s 33V(1) that the representative applicant may conduct negotiations for the purpose of proposing terms of settlement of the representative proceedings. As I have explained, the terms of settlement may include terms by which there may be a mechanism for settlement of group member claims (not just the determination of common questions). This is because the terms of settlement may address any matter which is a bona fide term that has been included in order to reach agreement with the respondents to dispose of the underlying controversy that has given rise to the representative proceedings. Settlement need not be confined to the resolution of common questions and any directions as to the resolution of individual claims.

464 However, the representative applicant has no authority conferred by Part IVA, whether fiduciary in character or otherwise, to agree to terms of settlement of the claims of individual group members. Therefore, if those claims are to be settled, the terms of settlement for which approval is sought must propose some mechanism by which the settlement may be carried into effect despite the limits on the authority of the representative applicant. This is an important contextual aspect when it comes to interpreting s 33V(2).

465 For reasons which follow, in my view, s 33V(2) is a mechanism by which a settlement may be carried into effect despite the limits on the authority of the representative applicant. It confers jurisdiction on the Court, in a case where a settlement has been approved, to make such orders as are just with respect to the distribution of money paid under the settlement or paid into Court.

466 It is possible to conceive of mechanisms which may facilitate agreement by individual group members to an approved settlement as a condition of the settlement taking effect. However, in many claims such mechanisms are likely to be cumbersome and may tend to discourage settlement by respondents on a whole group basis. In the context of Part IVA as a whole and the limited nature of the authority of a representative applicant, s 33V(2) presents as a mechanism that is intended to confer authority upon the Court to make orders which enable an approved settlement to be carried into effect.

### Proper construction of s 33V

467 For reasons that have been given, s 33V(1) does not confer jurisdiction. Rather it requires the exercise of the Court's existing jurisdiction to require the Court's approval before certain types of proceedings can be settled or discontinued to be invoked in the case of representative proceedings. The nature and extent of that jurisdiction is determined by general law principles that are long-standing. It is a jurisdiction that is exercised where the Court considers there is a need to protect the interests of particular parties when it comes to the resolution of proceedings by some means other than adjudication of the merits after a final hearing.

468 The Court's approval jurisdiction is sufficiently broad to allow for the Court to consider whether, in an appropriate case, a settlement which contemplates the payment to a third-party funder of particular amounts should be approved. Indeed, the Court will often consider the extent of any liability to pay costs and disbursements to lawyers and experts or receivers or other administrators in insolvency in deciding whether to approve a settlement (or in the exercise of the Court's related jurisdiction to provide judicial advice to a particular party acting in the interests of others as to whether that party is justified in settling court proceedings on particular terms).

469 In any case where terms are proposed as part of the resolution of representative proceedings, it is likely that similar issues will arise. There is no indication in the terms of s 33V that the kind of approval jurisdiction the exercise of which is contemplated by its terms is limited in any way.

470 Importantly, in the present context, the Court's approval jurisdiction does not confine the types of terms that may be advanced as part of the settlement. Rather, it contemplates the exercise of a protective role in scrutinising the terms that are proposed in the interests of the party whose interests are to be protected by the jurisdiction to approve. The Court may require particular information to be provided as part of the approval process. In an appropriate case, the Court may make orders by which legal representatives are appointed to make submissions as to the interests of those persons who are to be protected. It is the exercise of that aspect of the jurisdiction that has caused this Court, on occasion, to require the appointment of legal representatives to present submissions as to the effect upon the interests of group members when considering whether to approve a proposed settlement of representative proceedings (with the costs of such representation to be borne by the parties to the representative proceedings in a manner determined by the Court). Again, the making of such orders is an exercise of the Court's approval jurisdiction and does not require authority to be found in the terms of Part IVA.

471 As the language of s 33V(2) exposes, it contemplates an approval process before the making of any orders in the exercise of the power conferred under that provision. Therefore, in my view, it does not bifurcate the approval process such that those aspects of the settlement that are concerned with distribution of money (including any distribution to third-party funders) are considered under s 33V(2). The authority conferred by s 33V(2) does not concern approval. Rather, s 33V(2) confers an authority to make orders as to the distribution of money even though the representative applicant has no authority to agree or consent to such orders on behalf of group members. It is a jurisdiction that authorises the Court, consequent upon approval, to make orders as to distribution of settlement monies (or monies paid into Court) even though the group members are not parties to the representative proceedings and may only be bound by the determination of common questions (or the exercise of the limited powers to make directions that I have identified).

472 Of course, the existence of the power conferred by s 33V(2) means that the settlement terms proposed for approval may contemplate the exercise of the power. If that is the case, then the Court will include that aspect of the settlement in the matters to be considered when undertaking its deliberation as to whether to approve the proposed settlement.

473 However, on the proper construction of s 33V, the approval of the settlement does not involve two steps. Rather, it requires a consideration of all of the settlement terms having regard to the existence of the jurisdiction to make an order under s 33V(2) and whether it is contemplated by the proposed settlement that there will be an order of a particular kind made in the exercise of that jurisdiction.

474 Conceivably, the Court may conclude that the total amount proposed to be paid by the respondents is reasonable (having regard to the evidence presented as to the merits of the competing positions of the parties and the confidential terms of any advice received by the representative applicant as to risks and contingencies) but conclude that the settlement is unreasonable because of the extent of the fees, disbursements and other amounts proposed to be paid from the monies to be paid by the respondents as part of the settlement (or the basis upon which those amounts are sought to be justified): see, for example, the reasoning of Murphy J in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842. However, that is not to undertake a two‑step evaluation. Rather, it is to identify the aspect of the settlement that has led the Court to conclude that it should not be approved.

475 It is also possible that there is a term of the proposed settlement that is submitted for approval that contemplates payment out of the settlement monies of such fees, disbursements and other amounts that the Court is prepared to accept as reasonable and in such manner as the Court considers just for the purposes of approving the settlement. However, a settlement proposal that is presented for approval in those terms still requires the whole of the settlement terms to be approved.

476 In consequence, properly understood, no issue arises as to whether the Court has power to remake the terms of any agreement reached between a third-party funder and a representative applicant (or with a representative applicant and funded members). Rather, any settlement requires the approval of the Court. The fact that particular terms have been agreed with a third-party funder is one matter to be considered by the Court in deciding whether to grant the required approval. However, the Court may refuse to approve a settlement even though its terms contemplate payment to the third-party funder of an amount determined in accordance with its agreement. This is a well known characteristic of the Court's approval jurisdiction. In such cases the Court does not modify the agreement. Rather, it simply declines to approve a settlement proposed on the basis of performance of the terms agreed, in the present context terms agreed between a funder and funded group members. In considering whether it should do so, the Court will have regard to the interests of group members whose claims are proposed to be resolved by some mechanism advanced as part of the proposed settlement.

477 In any case where the Court is asked to exercise the jurisdiction conferred by s 33V(2), the interests of the group members will loom large. That is because the group members are not represented and will not have a further opportunity to consider whether to participate in the settlement or not. Also of significance will be the fairness of the settlement as between group members: *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330 at [85] (Beach J)

478 The effect of the exercise of the jurisdiction conferred by s 33V(2) will be that the controversy concerning the common questions will be resolved on terms which provide for distribution of money to group members on a particular basis provided for in the orders (which may be expected to involve orders which will enable the settlement to operate with finality as to some or all of the claims of some or all of the group members).

### Settlement CFO

479 Two questions remain. The first question is whether there is any particular characteristic of a Settlement CFO which means that its inclusion within proposed terms of settlement or discontinuance of representative proceedings means that the Court is unable to approve the settlement.

480 The second question is whether the jurisdiction conferred by s 33V(2) should be read as not extending to allowing the Court to make an order as to distribution of money that may be described as a Settlement CFO, even though the Court is persuaded that the terms of settlement should be approved and concludes that it is just to make orders of that kind.

481 For reasons that have been given, the Court's approval jurisdiction is not confined in a manner that would prevent the approval of a settlement that included such a term. Rather, the question whether it was approved would depend upon the exercise of the Court's protective jurisdiction to approve, being a jurisdiction that is guided by general law principles.

482 The fact that s 33V(1) invokes the approval jurisdiction of the Court in an unqualified way is a significant contextual reason why s 33V(2) should be construed as facilitating the implementation of approved settlements having regard to the characteristics of representative proceedings (and the limited authority of the representative applicant) rather than curtailing in some way the universe of terms that may form part of an approved settlement.

483 Further, as s 33V(2) confers jurisdiction to make orders of a particular kind if it gives approval, it is 'quite inappropriate' to read the provision 'by making implications or imposing limitations which are not found in the express words': *Owners of the Ship, Shin Kobe Maru v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421. Powers conferred on courts are not to be construed as subject to limitations which their terms do not require: *Commonwealth of Australia v SCI Operations Pty Ltd* (1998) 192 CLR 285 at [26] (Gaudron J).

484 As to the proposition that there is considered *dicta* of the High Court in *BMW Australia Ltd v Brewster* to the effect that an order cannot be made under s 33V of a kind that would allow a third-party funder to be paid a percentage of the settlement monies, for reasons that have been given, s 33V is concerned with a very different subject matter to that which was before the High Court in that case. I agree with Lee J that the question as to the justness of an order to be made under s 33V(2) is broader than what was in issue in *BMW Australia Ltd v Brewster*. Further, I agree with his Honour that the practical consequences of the argument to the effect that the order can only allow for payment to group members counts against the contention.

485 As to the *obiter* statements by Kiefel CJ, Bell and Keane JJ in forming part of the five member majority in *BMW Australia Ltd v Brewster*, those statements were directed to an unfairness that would follow if unfunded members were required to join in accepting the same funding terms as those which had been agreed by funded members: at [85]‑[90]. It must be borne in mind that the High Court was concerned with the validity of an order made at an early stage of the representative proceedings by which, in effect, the terms of a CFO were approved by the Court with the consequence that all group members (whether funded or unfunded) were treated as if they had agreed to those terms.

486 The exercise by the Court of its protective approval jurisdiction in relation to proposed terms of settlement or discontinuance does not operate in the same way. On an approval application the Court is not being asked to determine funding terms that will form the basis upon which representative proceedings are conducted such that the funder will be able to recover, in accordance with those terms, from any proceeds of claims the subject of the representative proceedings. A CFO approved at that stage and for that purpose confined the Court's approval jurisdiction because, in order for it to be given effect, it required any approval to be considered on the basis that the funder was entitled to remuneration under the terms of the CFO.

487 A Settlement CFO, if ordered, would form part of an approval. Its justification would be found in the circumstances as they pertained at the time of the settlement. It would be the outcome of an evaluative process undertaken in the interests of all group members and the interests as between them. It would be informed by the protective role that the Court undertakes in exercising the approval jurisdiction. It would be a term of settlement that may be proposed on the basis that it would be a fair mechanism by which to remunerate the funder not on the basis that there had been some earlier order imposing those terms on all group members.

488 Significantly, the reasons of the plurality expose a concern with an approach by which unfunded group members were to be required to agree to terms as to a percentage which was justified on the basis that it had been agreed to by the representative applicant (and any funded members) at the outset of the proceedings. Their Honours reasoned at [87] that 'there is no reason why the amount taken from unfunded group members' awards should be directed to the litigation funder, much less that an order to that effect should be made at the outset of the proceeding rather than on the occasion contemplated by s 33ZJ(2) [of the *Federal Court of Australia Act*].'

489 Section 33ZJ(2) is directed to an instance where the Court has made an award of damages in a representative proceeding. It provides that the representative party may apply for any costs that are not recovered from the respondent to be recovered out of any damages awarded. There is further provision in s 33ZJ(3) that the Court may also make any other order that it thinks just. As has been explained, in many instances a settlement will be proposed in circumstances where the nature of the representative proceedings is such that any damages award may be confined to the claim of the representative applicant with individual awards of damages being unable to be determined on a common basis.

490 The plurality then stated: 'Unfunded group members have no contractual or other relationship with the funder. Nor have they any liability to the funder. The funder has no right to that money under contract or under equitable principles': at [87].

491 The Court then went on to refer to a preference for a FEO as the solution to the problem of 'free riding'. It was said to be a better way to achieve the equitable spreading of cost because it takes as its starting point 'the actual cost incurred in funding the litigation': at [88]. The plurality accepted that 'it must be accepted that the burden of the amounts that funded group members have agreed to pay to the funder under their agreements with the funder must be distributed fairly': at [88]. The view was expressed that a FEO was apt to equitably distribute those amounts 'whereas a CFO seeks to impose an additional cost by imposing new obligations on the unfunded group members'.

492 It may be observed that these characteristics of a CFO do not pertain to a Settlement CFO. It need not be proposed by reference to agreed funding terms. It may be proposed on the basis that it is a fair and reasonable settlement term in circumstances where the funder has met the costs and disbursements of the representative proceedings and taken on the risks described earlier in these reasons, for the benefit of all group members as reflected in the terms of settlement that are presented for approval. In approving the settlement, the Court is not being asked to make a Settlement CFO because it reflects the terms agreed with funded members (although that may be part of the circumstances that are said to support the reasonableness of the proposed order - namely that many group members were willing to enter into those terms). Rather, the Court is exercising its protective jurisdiction which includes the scrutiny of the reasonableness of any amounts to be paid to the funder.

493 The plurality did briefly address the position where a settlement is reached. Their Honours did so without adverting to the terms of s 33V. After referring to the availability of FEO order where a settlement is reached, their Honours reasoned as follows at [89]:

A settlement must be approved by the court, and, in approving a settlement, the court must be satisfied that it is 'fair and reasonable to all group members'. A settlement that allows some group members to ride for free would not be fair and reasonable to the other group members.

(footnotes omitted)

494 However, the reasons of the plurality did not address the nature and significance of the protective aspects of the Court's approval jurisdiction that is invoked by s 33V(1) and applied to presentative proceedings. As has been explained, in the exercise of that jurisdiction, the Court may approve a settlement on the basis of the payment of a percentage of the settlement monies to a third-party funder which is a different percentage to that agreed by the third-party funder with the representative applicant (and any funded members). That is to say, the vice (in the view of the plurality) of the type of order that was under consideration in *BMW Australia Ltd v Brewster* whereby the terms of the CFO to be made early on in the representative proceedings is sought to be justified by reference to the terms agreed by funded members (and not by unfunded members) does not pertain. Rather, in the case of the Court considering whether to approve a Settlement CFO as part of a settlement of representative proceedings as required s 33V(1), the Court is guided by the general law principles that apply to the exercise of its approval jurisdiction.

495 At the time of considering whether to approve a settlement, it is quite possible that the Court may view with circumspection a settlement which contemplates the payment to a funder of a proportionate share of money to be paid under the settlement based solely upon the fact that it reflects the terms agreed with a small group of funded members before the representative proceedings were commenced (or early on in the conduct of those proceedings). However, the position may be different where a considerable number of group members agreed to those terms or where the terms may be demonstrated by evidence to conform with prevailing market terms upon which those in the business of providing funding are willing to do so or where the Court is persuaded that the value of the costs met and the risks borne by the funder for the benefit of all group members enable the Court to conclude that the proportionate share is just. Whether or not such an approach is possible and appropriate will depend upon the Court's assessment at the time of approving the settlement. In making that assessment, the Court will also consider whether approval of the settlement might not be given on the basis that a FEO was more appropriate in all the circumstances.

496 In those circumstances, I agree with Moshinsky J that the observations by the plurality in *BMW Australia Ltd v Brewster* 'clearly favour the making of a funding equalisation order over a common fund order (implicitly, at the conclusion of a proceeding)' and that their Honours do not thereby express a concluded view that there is no power under s 33V to make a common fund order at the time of approving a settlement as required by s 33V(1): *Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Limited (No 2)* at [72].

497 I can see no reason why the inclusion of a term of the proposed settlement that could be described as a CFO in and of itself would be a reason why a settlement must not be approved by the Court in the exercise of its approval jurisdiction. Further, given the evident purpose of s 33V derived from the context of Part IVA and an understanding of the nature of representative proceedings, I see no reason to conclude that a Settlement CFO is somehow such that it could not be 'just' in any and all cases. If that is so, there is otherwise no foothold in the language of s 33V(2) for concluding that a Settlement CFO is a kind of order that falls outside the jurisdiction conferred by s 33V(2).

498 As to the reasons by the other members of the majority in *BMW Australia Ltd v Brewster*, Gordon J said at [141]:

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

(footnote omitted)

499 The above statement is not concerned with whether it would be within the terms of s 33V(2) to make an order distributing to a funder a proportionate share of money to be paid under an approved settlement (or whether a settlement that included such a term could be approved). Rather, it is concerned with the basis upon which such an approval might be justified. It emphasises that the Court's approval jurisdiction is not to be exercised in the interests of the funder. There is nothing in that observation that means that a Settlement CFO cannot be made under s 33V(2).

500 Other statements by Gordon J to the effect that the Court does not have power to make a CFO reflect her Honour's usage of that term as explained at [135]:

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

(footnote omitted, emphasis in original)

501 Significantly, her Honour described a CFO as an order usually made early on in representative proceedings being pursued on an open class basis which imposes an obligation in circumstances that do not refer to the approval of a settlement: at [135].

502 The reasons of Nettle J focus upon the terms of s 33ZF and the absence of an intention in enacting Part IVA to address the commercial interests that entrepreneurial litigation funders may have in addressing uncertainties on their part as to the financial viability of funding representative proceedings: at [126]. They expressly differentiate s 33ZF(1) from the detail and specificity of s 33V: at [125].

503 Finally, as Lee J has explained, the proposition that s 33V(2) does not extend to making a Settlement CFO is contrary to a considerable body of jurisprudence in this and other Courts.

504 For those reasons, I agree with Lee J that s 33V confers a discretionary power to approve a settlement that is a just resolution of the representative proceeding and that a Settlement CFO is not a type of order that is outside the conception of a just order that could be made under s 33V(2).

505 Respectfully, it follows that the reasoning to contrary effect by O'Callaghan J in *Davaria Pty Limited v 7-Eleven Stores Pty Ltd (No 13)* [2023] FCA 84 at [179]-[191] should not be adopted in answering the reserved question.

## Issue as to the terms of the reserved question

506 I agreed that the reserved question should not be amended to include the question whether there was equitable power to make a Settlement CFO. I did so because of the difficulties alluded to by Lee J when it comes to expressing a view as to the absence of equities without understanding the particular factual circumstances. That said, equity has a long history of adjusting rights to assets or funds to allow fair recompense to those parties whose action has preserved or protected particular assets or funds. They have included instances where court and other costs have been incurred in bringing proceedings to establish an entitlement to assets or funds.

## Issue as to whether the reserved question is hypothetical

507 For the reasons given by Lee J I agree that it is appropriate to answer the reserved question.

## Form of order

508 For the reasons I have given, I agree with Lee J that the reserved question should be answered in the affirmative. However, as I have indicated, I would answer the question in the following way: 'If the Court has approved the terms of settlement or discontinuance in the exercise of its approval jurisdiction, yes'.

509 I agree that there should be no order as to costs.

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| I certify that the preceding eighty-five (85) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Colvin. |

Associate:

Dated: 12 October 2023

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  |  |
| Respondents |  |
| Fourth Respondent: | A.F. SPINKS PTY LTD |
| Fifth Respondent: | AARROD PTY LTD |
| Seventh Respondent: | AGOSTINO GROUP HOLDINGS PTY LTD |
| Eighth Respondent: | ALERUN PTY LTD |
| Tenth Respondent: | ALJAWIDA PTY LTD |
| Eleventh Respondent: | ALLEECO PTY LTD |
| Twelfth Respondent: | ALMIC HOLDINGS PTY LTD |
| Thirteenth Respondent: | ALVARO RESTAURANTS PTY LTD |
| Fourteenth Respondent: | ARN TAS INVESTMENTS PTY LTD |
| Fifteenth Respondent: | ANJOHSCO PTY LTD |
| Sixteenth Respondent: | ANMASAL PTY LTD |
| Seventeenth Respondent: | ARCHIE ENTERPRISES PTY LTD |
| Eighteenth Respondent: | ARDEEN PTY LTD |
| Nineteenth Respondent: | ASHDABS PTY LTD |
| Twentieth Respondent: | AUZCAN PTY LTD |
| Twenty First Respondent: | BL FITZGERALD PTY LTD |
| Twenty Second Respondent: | BAKSTON PTY LTD |
| Twenty Third Respondent: | BALLAVARRA PTY LTD |
| Twenty Fourth Respondent: | BALLENA PTY LTD |
| Twenty Fifth Respondent: | BARTASE PTY LTD |
| Twenty Sixth Respondent: | BASILE ENTERPRISES PTY LTD |
| Twenty Seventh Respondent: | BDZ GROUP PTY LTD |
| Twenty Eighth Respondent: | BELVIEW ENTERPRISES PTY LTD |
| Twenty Ninth Respondent: | BERGER PTY LTD |
| Thirtieth Respondent: | BERWICK ENTERPRISES PTY LTD |
| Thirty First Respondent: | BERWICK SOUTH ENTERPRISES PTY LTD |
| Thirty Second Respondent: | BILJAC PTY LTD |
| Thirty Third Respondent: | BK DUNCAN PTY LTD |
| Thirty Fourth Respondent: | BLACKSTEN PTY LTD |
| Thirty Fifth Respondent: | BLENIN PTY LTD |
| Thirty Sixth Respondent: | BRATE PTY LTD |
| Thirty Seventh Respondent: | BRAYCON HOLDINGS PTY LTD |
| Thirty Eighth Respondent: | BRODIE RESTAURANTS PTY LTD |
| Thirty Ninth Respondent: | CABLESCO PTY LTD |
| Fortieth Respondent: | CADMUN PTY LTD |
| Forty First Respondent: | CAHOW PTY LTD |
| Forty Second Respondent: | CAISER PTY LTD |
| Forty Third Respondent: | CAPALOY PTY LTD |
| Forty Fourth Respondent: | CARACAL INVESTMENTS PTY LTD |
| Forty Fifth Respondent: | CEDALLA PTY LTD |
| Forty Sixth Respondent: | CELLET PTY LTD |
| Forty Seventh Respondent: | CENTHEAD PTY LTD |
| Forty Eighth Respondent: | CERTIFY PTY LTD |
| Forty Ninth Respondent: | CHASMIC PTY LTD |
| Fiftieth Respondent: | CHIAPELLO HOLDINGS PTY LTD |
| Fifty First Respondent: | CIRCLES OF GOLD PTY LTD |
| Fifty Second Respondent: | CISKE GROUP PTY LTD |
| Fifty Third Respondent: | CLEMANDOT PTY LTD |
| Fifty Fourth Respondent: | COLEDON PTY LTD |
| Fifty Sixth Respondent: | CORCORAN FOODS PTY LTD |
| Fifty Seventh Respondent: | COYNE ENTERPRISES PTY LTD |
| Fifty Eighth Respondent: | CRAAMA PTY LTD |
| Fifty Ninth Respondent: | CRANBOURNE NORTH ENTERPRISES PTY LTD |
| Sixtieth Respondent: | CRILLION PTY LTD |
| Sixty First Respondent: | DADAK PTY LTD |
| Sixty Second Respondent: | DASTIM PTY LTD |
| Sixty Third Respondent: | DDSN PTY LTD |
| Sixty Fourth Respondent: | DECORUS VITA PTY LTD |
| Sixty Fifth Respondent: | DELICIOUS DOUGH PTY LTD |
| Sixty Sixth Respondent: | DEMI PTY LTD |
| Sixty Seventh Respondent: | DENRICH PTY LTD |
| Sixty Eighth Respondent: | DIRECTWEST PTY LTD |
| Sixty Ninth Respondent: | EASTSIDE QSR PTY LTD |
| Seventieth Respondent: | EBURG PTY LTD |
| Seventy First Respondent: | EDEN CORPORATION PTY LTD |
| Seventy Second Respondent: | EMPAB PTY LTD |
| Seventy Third Respondent: | EMQUEST PTY LTD |
| Seventy Fourth Respondent: | EPREMA HOLDINGS PTY LTD |
| Seventy Fifth Respondent: | EVANS ARCHES PTY LTD |
| Seventy Sixth Respondent: | EVENLITE PTY LTD |
| Seventy Seventh Respondent: | EYRIE HOLDINGS PTY LTD |
| Seventy Eighth Respondent: | F & F LIEW PTY LTD |
| Seventy Ninth Respondent: | F & J MADON PTY LTD |
| Eightieth Respondent: | FAIRLIGHT RESTAURANTS PTY LTD |
| Eighty First Respondent: | FAITH GROUP PTY LTD |
| Eighty Second Respondent: | FAMILY CHIPS PTY LTD |
| Eighty Third Respondent: | FAVOTTO FAMILY RESTAURANTS PTY LTD |
| Eighty Fourth Respondent: | FISCHFOR4INVESTMENTS PTY LTD |
| Eighty Fifth Respondent: | FISHER GRACE PTY LTD |
| Eighty Sixth Respondent: | FOUR REDS PTY LTD |
| Eighty Seventh Respondent: | FOXHOW PTY LTD |
| Eighty Eighth Respondent: | FREELAKE PTY LTD |
| Eighty Ninth Respondent: | FRYDAYS PTY LTD |
| Ninetieth Respondent: | FULLMERE PTY LTD |
| Ninety First Respondent: | FURTHER PROOF PTY LTD |
| Ninety Second Respondent: | GAJJH UNITED PTY LIMITED |
| Ninety Third Respondent: | GAILERO PTY LTD |
| Ninety Fifth Respondent: | GARTON GROUP PTY LTD |
| Ninety Sixth Respondent: | GATMARCOLIN PTY LTD |
| Ninety Seventh Respondent: | GIDLEY HOLDINGS PTY LTD |
| Ninety Eighth Respondent: | GIFF GAFF PTY LTD |
| Ninety Ninth Respondent: | GIQSR PTY LTD |
| One Hundredth Respondent: | GLADSIDE PTY LTD |
| One Hundred and First Respondent: | GLENMORE PTY LTD |
| One Hundred and Second Respondent: | GOLDMAKK PTY LTD |
| One Hundred and Fourth Respondent: | GREENWICH INVESTMENTS (QLD) PTY LTD |
| One Hundred and Fifth Respondent: | GRIFFITH M PTY LTD |
| One Hundred and Sixth Respondent: | H & I SMITH PTY LTD |
| One Hundred and Seventh Respondent: | HALFWAY HAMBURGERS PTY LTD |
| One Hundred and Eighth Respondent: | HANCOCK JONES GROUP PTY LTD |
| One Hundred and Ninth Respondent: | HANGESID PTY LTD |
| One Hundred and Tenth Respondent: | HARRICO PTY LTD |
| One Hundred and Eleventh Respondent: | HAYDAR PTY LTD |
| One Hundred and Eleventh Respondent: | HAYDAR PTY LTD |
| One Hundred and Twelfth Respondent: | HBK HOLDINGS PTY LTD |
| One Hundred and Thirteenth Respondent: | HDF HOLDINGS PTY LTD |
| One Hundred and Fourteenth Respondent: | HIGOAL PTY LTD |
| One Hundred and Fifteenth Respondent: | HOLDEAST PTY LTD |
| One Hundred and Sixteenth Respondent: | HOLDFAST MANAGEMENT SERVICE PTY LTD |
| One Hundred and Seventeenth Respondent: | IMTUM PTY LTD |
| One Hundred and Eighteenth Respondent: | INVERELL M PTY LTD |
| One Hundred and Nineteenth Respondent: | J & E LEMBERG PTY LTD |
| One Hundred and Twentieth Respondent: | J. & M. HODGE PTY LTD |
| One Hundred and Twenty First Respondent: | J SADLER INVESTMENTS PTY LTD |
| One Hundred and Twenty Second Respondent: | JABAC PTY LTD |
| One Hundred and Twenty Third Respondent: | JABBA RESTAURANTS PTY LTD |
| One Hundred and Twenty Fourth Respondent: | JADAM FOODS PTY LTD |
| One Hundred and Twenty Fifth Respondent: | JAELJAM PTY LTD |
| One Hundred and Twenty Sixth Respondent: | JAKIARA QLD PTY LTD |
| One Hundred and Twenty Seventh Respondent: | JALPA FOODS PTY LTD |
| One Hundred and Twenty Eighth Respondent: | JAMADA PTY LTD |
| One Hundred and Twenty Ninth Respondent: | JAMADU (QLD) PTY LTD |
| One Hundred and Thirtieth Respondent: | JAMEL PTY LTD |
| One Hundred and Thirty First Respondent: | JAMERI PTY LTD |
| One Hundred and Thirty Second Respondent: | JANASEL PTY LTD |
| One Hundred and Thirty Third Respondent: | JANDA WHITEHOUSE PTY LTD |
| One Hundred and Thirty Fourth Respondent: | JARRON PTY LTD |
| One Hundred and Thirty Fifth Respondent: | JASIE PTY LTD |
| One Hundred and Thirty Sixth Respondent: | JATAM PTY LTD |
| One Hundred and Thirty Seventh Respondent: | JAVARI PTY LTD |
| One Hundred and Thirty Eighth Respondent: | JAYARK PTY LTD |
| One Hundred and Thirty Ninth Respondent: | JEFFERSON LANE ENTERPRISES PTY LTD |
| One Hundred and Fortieth Respondent: | JEMADA PTY LTD |
| One Hundred and Forty First Respondent: | JESMARDAN PTY LTD |
| One Hundred and Forty Second Respondent: | JETSRUS PTY LTD |
| One Hundred and Forty Fourth Respondent: | JOHN FRANKHAM PTY LTD |
| One Hundred and Forty Fifth Respondent: | JOMIK INVESTMENTS PTY LTD |
| One Hundred and Forty Sixth Respondent: | JONCLO HOLDINGS PTY LTD |
| One Hundred and Forty Seventh Respondent: | JORANDA PTY LTD |
| One Hundred and Forty Eighth Respondent: | JOSHMAT PTY LTD |
| One Hundred and Forty Ninth Respondent: | JUBCAN VENTURE PTY LTD |
| One Hundred and Fiftieth Respondent: | JUSTICE 2 PTY LTD |
| One Hundred and Fifty First Respondent: | KAB (QLD) PTY LTD |
| One Hundred and Fifty Second Respondent: | KAILEV PTY LTD |
| One Hundred and Fifty Fourth Respondent: | KALBAK PTY LTD |
| One Hundred and Fifty Fifth Respondent: | KATAHDIN PTY LTD |
| One Hundred and Fifty Sixth Respondent: | KATHRYN & IAN GARTON GROUP PTY LTD |
| One Hundred and Fifty Seventh Respondent: | KATTERN PTY LTD |
| One Hundred and Fifty Eighth Respondent: | KELLY FAMILY RESTAURANTS PTY LTD |
| One Hundred and Fifty Ninth Respondent: | KELLYCO RESTAURANTS PTY LTD |
| One Hundred and Sixtieth Respondent: | KESBES PTY LTD |
| One Hundred and Sixty First Respondent: | KEW ART PTY LTD |
| One Hundred and Sixty Second Respondent: | KILSYTH FOODS PTY LTD |
| One Hundred and Sixty Third Respondent: | KIRKWAN PTY LTD |
| One Hundred and Sixty Fourth Respondent: | KITTOLINK PTY LTD |
| One Hundred and Sixty Fifth Respondent: | KMA INVESTMENTS PTY LTD |
| One Hundred and Sixty Sixth Respondent: | KNI-TIME PTY LTD |
| One Hundred and Sixty Seventh Respondent: | KRAMFORD PTY LTD |
| One Hundred and Sixty Eighth Respondent: | KWA SIMBI PTY LTD |
| One Hundred and Sixty Ninth Respondent: | KYMAR NOMINEES PTY LTD |
| One Hundred and Seventy First Respondent: | LARDNER HOLDINGS PTY LTD |
| One Hundred and Seventy Second Respondent: | LEVEKE PTY LTD |
| One Hundred and Seventy Third Respondent: | LIME88 PTY LTD |
| One Hundred and Seventy Fourth Respondent: | LONGRIDGE PRESTON PTY LTD |
| One Hundred and Seventy Fifth Respondent: | LOUDOU PTY LTD |
| One Hundred and Seventy Sixth Respondent: | LOWGAN PTY LTD |
| One Hundred and Seventy Eighth Respondent: | LTD INVESTMENTS GROUP PTY LTD |
| One Hundred and Seventy Ninth Respondent: | LUCKY LAKES PTY LTD |
| One Hundred Eightieth Respondent: | LUGESAL PTY LTS |
| One Hundred and Eighty First Respondent: | LVANT MECCA PTY LTD |
| One Hundred and Eighty Second Respondent: | M&P HANLON INVESTMENTS PTY LTD |
| One Hundred and Eighty Third Respondent: | MACEY PTY LTD |
| One Hundred and Eighty Fourth Respondent: | MACKALLAN PTY LTD |
| One Hundred and Eighty Fifth Respondent: | MACTER PTY LTD |
| One Hundred and Eighty Sixth Respondent: | MADIMASE BEYOND 13 PTY LTD |
| One Hundred and Eighty Seventh Respondent: | MADMAC INVESTMENTS PTY LTD |
| One Hundred and Eighty Eighth Respondent: | MADMEL INVESTMENTS PTY LTD |
| One Hundred and Eighty Ninth Respondent: | MADTIME PTY LTD |
| One Hundred and Ninetieth Respondent: | MAJAB ENTERPRISES PTY LTD |
| One Hundred and Ninety First Respondent: | MAJERO INVESTMENTS PTY LTD |
| One Hundred and Ninety Second Respondent: | MAMMATH PTY LTD |
| One Hundred and Ninety Third Respondent: | MANHAD PTY LTD |
| One Hundred and Ninety Fourth Respondent: | MARC AUSTRALIA PTY LTD |
| One Hundred and Ninety Fifth Respondent: | MARJOM PTY LTD |
| One Hundred and Ninety Sixth Respondent: | MARJONS RESTAURANTS PTY LTD |
| One Hundred and Ninety Seventh Respondent: | MATTAUD PTY LTD |
| One Hundred and Ninety Eighth Respondent: | MAYMAC FOODS PTY LTD |
| One Hundred and Ninety Ninth Respondent: | MAZCAR PTY LTD |
| Two Hundredth Respondent: | MAZER PTY LTD |
| Two Hundred and First Respondent: | MC PETERS PTY LTD |
| Two Hundred and Second Respondent: | MCFAMILY ENTERPRISES PTY LTD |
| Two Hundred and Third Respondent: | MCKEIR PTY LTD |
| Two Hundred and Fourth Respondent: | MCKEOUGH GROUP GRETA PTY LTD |
| Two Hundred and Fifth Respondent: | MCMASTER & CO PTY LTD |
| Two Hundred and Sixth Respondent: | MC SQUARED PTY LTD |
| Two Hundred and Seventh Respondent: | MEADOWS FAMILY RESTAURANTS PTY LTD |
| Two Hundred and Eighth Respondent: | MEDURI ENTERPRISES PTY LTD |
| Two Hundred and Ninth Respondent: | MELROSE UNITED PTY LTD |
| Two Hundred and Tenth Respondent: | MELWELLO PTY LTD |
| Two Hundred and Eleventh Respondent: | MEMPHIS CORPORATION PTY LTD |
| Two Hundred and Twelfth Respondent: | MERSEY NOMINEES PTY LTD |
| Two Hundred and Thirteenth Respondent: | METIME INVESTMENTS PTY LTD |
| Two Hundred and Fourteenth Respondent: | MICAN ENTERPRISES PTY LTD |
| Two Hundred and Fifteenth Respondent: | MIELS FAMILY HOLDINGS PTY LTD |
| Two Hundred and Sixteenth Respondent: | MIJAN PTY LTD |
| Two Hundred and Seventeenth Respondent: | MIJO GROUP PTY LTD |
| Two Hundred and Eighteenth Respondent: | MILC NOMINEES PTY LTD |
| Two Hundred and Nineteenth Respondent: | MINSTOL PTY LTD |
| Two Hundred and Twentieth Respondent: | M & M BENSON INVESTMENTS PTY LTD |
| Two Hundred and Twenty First Respondent: | MOJJOS PTY LTD |
| Two Hundred and Twenty Second Respondent: | MPP PTY LTD |
| Two Hundred and Twenty Third Respondent: | MSJI PTY LTD |
| Two Hundred and Twenty Fourth Respondent: | MSJI QLD PTY LTD |
| Two Hundred and Twenty Fifth Respondent: | NEKA ENTERPRISES PTY LTD |
| Two Hundred and Twenty Sixth Respondent: | NELLANDI PTY LTD |
| Two Hundred and Twenty Seventh Respondent: | NEWSTORES PTY LTD |
| Two Hundred and Twenty Eighth Respondent: | NEZCOPIC (HOGAN’S CORNER) PTY LTD |
| Two Hundred and Twenty Ninth Respondent: | NFR HOLDINGS PTY LTD |
| Two Hundred and Thirtieth Respondent: | NGI HOLDINGS PTY LTD |
| Two Hundred and Thirty First Respondent: | N H H C PTY LTD |
| Two Hundred and Thirty Second Respondent: | NICO HOLDINGS PTY LTD |
| Two Hundred and Thirty Third Respondent: | NIEUMORR PTY LTD |
| Two Hundred and Thirty Fourth Respondent: | NIXMAX PTY LTD |
| Two Hundred and Thirty Fifth Respondent: | NO LIMITS PTY LTD |
| Two Hundred and Thirty Sixth Respondent: | NORCLIFFE PTY LTD |
| Two Hundred and Thirty Seventh Respondent: | NORTH SHORE QSR PTY LTD |
| Two Hundred and Thirty Eighth Respondent: | NORTH WEST INVESTMENTS PTY LTD |
| Two Hundred and Thirty Ninth Respondent: | NOWGUNNADOIT PTY LTD |
| Two Hundred and Fortieth Respondent: | OF GROUP PTY LTD |
| Two Hundred and Forty First Respondent: | OHTO PTY LTD |
| Two Hundred and Forty Second Respondent: | ORANGE BEAR AUSTRALIA PTY LTD |
| Two Hundred and Forty Third Respondent: | P J ANNELLS PTY LTD |
| Two Hundred and Forty Fourth Respondent: | PADERSON PTY LTD |
| Two Hundred and Forty Fifth Respondent: | PALSS PTY LTD |
| Two Hundred and Forty Sixth Respondent: | PANAREA ENTERPRISES PTY LTD |
| Two Hundred and Forty Seventh Respondent: | PARAMOR PTY LTD |
| Two Hundred and Forty Eighth Respondent: | PARCORP INVESTMENTS PTY LTD |
| Two Hundred and Forty Ninth Respondent: | PD AND KJ SHAW PTY LTD |
| Two Hundred and Fiftieth Respondent: | PEARSE GROUP PTY LTD |
| Two Hundred and Fifty First Respondent: | PEFIDY PTY LTD |
| Two Hundred and Fifty Second Respondent: | PENFREY NOMINEES PTY LTD |
| Two Hundred and Fifty Third Respondent: | PENNON ENTERPRISES PTY LTD |
| Two Hundred and Fifty Fourth Respondent: | PERTEX PTY LTD |
| Two Hundred and Fifty Fifth Respondent: | PETER & MARCELLE BAIN PTY LTD |
| Two Hundred and Fifty Sixth Respondent: | PETONA PTY LTD |
| Two Hundred and Fifty Seventh Respondent: | PLEXET PTY LTD |
| Two Hundred and Fifty Eighth Respondent: | POLLBURG PTY LTD |
| Two Hundred and Fifty Ninth Respondent: | P S & D R COOMES PTY LTD |
| Two Hundred and Sixtieth Respondent: | PS.ESC PTY LTD |
| Two Hundred and Sixty First Respondent: | QUEBANI PTY LTD |
| Two Hundred and Sixty Second Respondent: | RADWELL NOMINEES PTY LTD |
| Two Hundred and Sixty Third Respondent: | RAH NOMINEES PTY LTD |
| Two Hundred and Sixty Fourth Respondent: | RAINBOW BRIDGE PTY LTD |
| Two Hundred and Sixty Fifth Respondent: | RAW TALENT PTY LTD |
| Two Hundred and Sixty Seventh Respondent: | RELLOM HOLDINGS PTY LTD |
| Two Hundred and Sixty Eighth Respondent: | REMDA PTY LTD |
| Two Hundred and Sixty Ninth Respondent: | RETSILLACM PTY LTD |
| Two Hundred and Seventieth Respondent: | ROBANLOU PTY LTD |
| Two Hundred and Seventy First Respondent: | ROMALD PTY LTD |
| Two Hundred and Seventy Third Respondent: | ROSSGLEN PTY LTD |
| Two Hundred and Seventy Fourth Respondent: | SARONBELL PTY LTD |
| Two Hundred and Seventy Fifth Respondent: | SCETTELS PTY LTD |
| Two Hundred and Seventy Sixth Respondent: | SECCA HOLDINGS PTY LTD |
| Two Hundred and Seventy Seventh Respondent: | SEDAH PTY LTD |
| Two Hundred and Seventy Eighth Respondent: | SESJ PTY LTD |
| Two Hundred and Seventy Ninth Respondent: | SHARLUMAH PTY LTD |
| Two Hundred and Eightieth Respondent: | SHERLEE PTY LTD |
| Two Hundred and Eighty First Respondent: | SHILLINGTON GROUP PTY LTD |
| Two Hundred and Eighty Second Respondent: | SINCRO (WA) HOLDINGS PTY LTD |
| Two Hundred and Eighty Third Respondent: | SMSM PTY LTD |
| Two Hundred and Eighty Fourth Respondent: | SNR ENTERPRISES PTY LTD |
| Two Hundred and Eighty Sixth Respondent: | STEEKIM PTY LTD |
| Two Hundred and Eighty Seventh Respondent: | STOCKFAM PTY LTD |
| Two Hundred and Eighty Eighth Respondent: | STRENSON PTY LTD |
| Two Hundred and Eighty Ninth Respondent: | SWANSTAR NOMINEES PTY LTD |
| Two Hundred and Ninetieth Respondent: | T & K BRYANT PTY LTD |
| Two Hundred and Ninety First Respondent: | TAMRATH PTY LTD |
| Two Hundred and Ninety Third Respondent: | TANDER PTY LTD |
| Two Hundred and Ninety Fourth Respondent: | TARL PTY LTD |
| Two Hundred and Ninety Fifth Respondent: | TAROWOOD PTY LTD |
| Two Hundred and Ninety Sixth Respondent: | TONDOL PTY LTD |
| Two Hundred and Ninety Seventh Respondent: | TORCOOMES PTY LTD |
| Two Hundred and Ninety Eighth Respondent: | TROIS AMIGOS PTY LTD |
| Two Hundred and Ninety Ninth Respondent: | TROPHI RESTAURANTS PTY LTD |
| Three Hundredth Respondent: | TWOCOOL PTY LTD |
| Three Hundred and First Respondent: | TYMAD INVESTMENTS PTY LTD |
| Three Hundred and Third Respondent: | TYRELL GROUP HOLDINGS PTY LTD |
| Three Hundred and Fourth Respondent: | UMELCO PTY LTD |
| Three Hundred and Fifth Respondent: | VANT MANAGEMENT PTY LTD |
| Three Hundred and Sixth Respondent: | VIDROL PTY LTD |
| Three Hundred and Seventh Respondent: | VOMDAY PTY LTD |
| Three Hundred and Eighth Respondent: | WAVEMAX PTY LTD |
| Three Hundred and Ninth Respondent: | WAX UP PTY LTD |
| Three Hundred and Tenth Respondent: | WEIGHTMAN GROUP PTY LTD |
| Three Hundred and Eleventh Respondent: | WESLIN CO PTY LTD |
| Three Hundred and Twelfth Respondent: | WESTSIDE QSR PTY LTD |
| Three Hundred and Thirteenth Respondent: | WHITAYLEE & SONS PTY LTD |
| Three Hundred and Fourteenth Respondent: | WILBRIDGE SECURITIES PTY LTD |
| Three Hundred and Fifteenth Respondent: | WILGEN PTY LTD |
| Three Hundred and Sixteenth Respondent: | WINDMAR PTY LTD |
| Three Hundred and Seventeenth Respondent: | YASINCO PTY LTD |
| Three Hundred and Eighteenth Respondent: | YIPPY TRI-SMITH PTY LTD |
| Three Hundred and Nineteenth Respondent: | YOUNGHOLMES PTY LTD |
| Three Hundred and Twentieth Respondent: | ZACALE PTY LTD |
| Three Hundred and Twenty First Respondent: | ZACALEKYE PTY LTD |
| Three Hundred and Twenty Fourth Respondent: | ZOHO PTY LTD |