

# THE FATE OF CLASS ACTION COMMON FUND ORDERS: THE POLICY, PROCEDURAL AND CONSTITUTIONAL ISSUES OF A LEGISLATIVE REVIVAL

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*Common fund orders ('CFOs') have had a significant effect on Australian third-party-funded class actions by requiring all class members to make a contribution to the third-party litigation funder's fee in the event of a successful outcome. This altered past practice whereby only class members who had contracted with the litigation funder would be liable for such a contribution. However, in a 5:2 decision in BMW Australia Ltd v Brewster (2019) 94 ALJR 51 ('Brewster'), the High Court cast doubt on CFOs, determining that neither s 33ZF of the Federal Court of Australia Act 1976 (Cth) nor s 183 of Civil Procedure Act 2005 (NSW) provided a legal basis for making CFOs at the outset of proceedings so as to secure litigation funding support. In late 2020, the Commonwealth Parliamentary Joint Committee on Corporations and Financial Services recommended that legislation be enacted to 'address uncertainty' arising from Brewster in a manner that would enable CFOs to be made at settlement or judgment. In this article, the authors canvass normative arguments as to the merits of CFOs and compare the alternative practice of making funding equalisation orders. They also consider the related issue of courts setting overall funding commissions. Given the possibility of legislative intervention, they also review arguments as to the potential constitutional validity of CFOs, a matter that was raised, but received very limited treatment from, the High Court in Brewster.*

## I INTRODUCTION

Class actions are protracted and resource intensive. Accordingly, legal costs and disbursements associated with class proceedings are high.<sup>1</sup> Class representatives

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<sup>1</sup> Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Litigation Funding and the Regulation of the Class Action Industry* (Report, December 2020) 208 [14.7] ('PJC Report'); Peter Cashman and Amelia Simpson, 'Costs and Funding Commissions in Class Actions' (UNSW Law Research Paper No 20-87, Faculty of Law, University of New South Wales,

who initiate class proceedings on behalf of the class of persons harmed are typically not in a position to meet these costs themselves,<sup>2</sup> and so class law firms will generally act on a conditional fee basis.<sup>3</sup> In Victoria it is also possible for class law firms to seek a group costs order, and to effectively act on a contingency fee basis.<sup>4</sup> If the class proceedings are successful, ordinarily these legal costs including any conditional fee premium are deducted from the class settlement or judgment,<sup>5</sup> enabling their burden to be shared equitably among all class members.

Not many law firms in Australia are able to bear the high costs and risks associated with conditional or contingency fee arrangements.<sup>6</sup> Consequently, class actions will often require funding from third-party financiers.<sup>7</sup> Ensuring that the cost of this funding is also shared equitably among class members has led to the judicial development of several types of order. This article is primarily concerned with one of these orders, the common fund order ('CFO'), which was developed by the Full Federal Court in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* ('*Money Max*'),<sup>8</sup> and subsequently declared invalid by the High Court in *BMW Australia Ltd v Brewster* ('*Brewster*').<sup>9</sup>

This article comes on the heels of considerable agitation to enact legislation to either overturn or ringfence the scope of the *Brewster* decision. Much of that agitation was examined by the Parliamentary Joint Committee on Corporations and Financial Services ('PJC'), which, in late 2020, recommended that legislation be enacted to 'address uncertainty' in a manner that would enable CFOs to be

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December 11 2020) 45–6 <<https://ssrn.com/abstract=3765081>>, estimating that legal fees approximate 15 per cent of the settlement amount; Andrew Watson and Michael Donnelly, 'Financing Access to Justice: Third-Party Litigation Funding and Class Actions in Australia' (2014) 55(1) *Canadian Business Law Journal* 17, 17–18.

<sup>2</sup> Watson and Donnelly (n 1) 20–1.

<sup>3</sup> A conditional fee agreement is an agreement whereby payment of the class law firm's fees is contingent on the successful outcome of the action. It typically incorporates a premium on otherwise normal fees of up to 25 per cent. See, for example, *Legal Profession Uniform Law* (NSW) ss 181–3. Conditional fee agreements are available in civil matters in all Australian jurisdictions.

<sup>4</sup> In Victoria, a group costs order may be sought by the lead plaintiff in a class action enabling legal costs payable in the proceeding to be assessed as a percentage of the judgment or settlement and thus shared pro rata among all class members: *Supreme Court Act 1986* (Vic) s 33ZDA. Group costs orders are not yet available in other Australian jurisdictions.

<sup>5</sup> Australian Law Reform Commission, *Integrity, Fairness and Efficiency — An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Final Report No 134, December 2018) 83 [3.48] ('ALRC Final Report'). However, it is also possible to frame costs as an 'add on' to the settlement: see *Cantor v Audi Australia Pty Limited* (No 5) [2020] FCA 637 ('*Cantor*').

<sup>6</sup> Camille Cameron, 'Litigation as 'core business': Analyzing the Access to Justice and Regulatory Dimensions of Commercially Funded Class actions in Australia' in Deborah R Hensler, Christopher Hodges and Ianika Tzankova (eds), *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Edward Elgar, 2016) 205.

<sup>7</sup> See ALRC Final Report (n 5) 75, Table 3.1 and Figure 3.1, which show that the percentage of funded vs non-funded class proceedings grew steadily to 77 per cent between March 2017 and March 2018. (2016) 245 FCR 191 ('*Money Max*').

<sup>8</sup> (2019) 94 ALJR 51 ('*Brewster*'). The *Brewster* decision was a conjoined appeal from the Federal Court and from the New South Wales Court of Appeal. The Federal Court matter, *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21 ('*Westpac v Lenthall*'), is discussed in the judgment at 59–61.

made at settlement or judgment.<sup>10</sup> In making that recommendation, the PJC declined to adopt an earlier, broader recommendation from the Australian Law Reform Commission ('ALRC'). The ALRC was of the view that an explicit power to make CFOs at any stage of the proceeding (not just at settlement or judgment) was required as part of a phalanx of provisions that would enable all affected by wrongdoing to enjoy the benefits of class proceedings, not merely those who took active steps to participate by entering funding and retainer agreements.<sup>11</sup>

The purpose of this article is to critically consider whether such statutory intervention is warranted. It begins by examining the mechanics of CFOs, then considers normative arguments for and against the creation of a statutory power to make them. It also examines how *Brewster* affects other judicial powers such as the power to make equalisation or cost contribution orders and the power to review funding fees encapsulated within pre-existing funding agreements. Finally, the article considers constitutional barriers that may impede the enactment of legislation facilitating CFOs.

## II WHAT IS A COMMON FUND?

An order for a 'common fund' in Australian third-party-funded class actions refers to an order made in an open class proceeding,<sup>12</sup> which has the effect of requiring all class members — whether represented, identified or otherwise — to make a contribution to the third-party litigation funder's fee in the event of a successful outcome. It alters past practice whereby only those class members who had contracted with the litigation funder would be liable for such a contribution, notwithstanding that the entire class may have received the benefit of a finding or settlement.<sup>13</sup> The doctrine thus treats overall damages in a class action as a 'common fund' from which funders' costs may be deducted by the court regardless of whether the funder has a contract with the litigant.<sup>14</sup> Common funds appear to derive from equitable principles and, as noted by Lee J in *Klemweb Nominees Pty Ltd v BHP Group Limited* ('*Klemweb*'),<sup>15</sup> are now well-embedded in the law of the United States.

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<sup>10</sup> PJC Report (n 1) 122–5, ch 9 and recommendation 7. See further discussion below in Part II.

<sup>11</sup> ALRC Final Report (n 5) [4.1]–[4.2].

<sup>12</sup> An open class is where the class is not limited to clients of the lawyer or funder but covers all persons who have suffered the loss described in the class definition.

<sup>13</sup> *Perera v GetSwift Ltd* (2018) 263 FCR 1, 10, 14 (Lee J) ('*Perera*').

<sup>14</sup> See further *Brewster* (n 9) 58 [1] (Kiefel CJ, Bell and Keane JJ). Their Honours state that a CFO is 'characteristically made at an early stage in representative proceedings and provides for the quantum of a litigation funder's remuneration to be fixed as a proportion of any moneys ultimately recovered in the proceedings, for all group members to bear a proportionate share of that liability, and for that liability to be discharged as a first priority from any moneys so recovered'.

<sup>15</sup> (2019) 369 ALR 583, 610 [128] ('*Klemweb*').

## A United States Common Fund Doctrine

The common fund doctrine in the United States is quite old and is said to have its origins in two early Supreme Court cases,<sup>16</sup> *Trustees v Greenough*<sup>17</sup> and *Central RR & Banking Co v Pettus* ('*Pettus*').<sup>18</sup> The former case applied the idea in derivative litigation where a whole class of people — the shareholders of the corporation — benefitted from the litigation and were equitably called upon to bear a portion of the expense. The Court applied principles of trust law noting:

Where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts.<sup>19</sup>

In *Pettus* this was applied to a creditor class action against a corporate debtor and it was found that the plaintiff should be eligible for an award beyond what he had paid in fees, otherwise others who had benefitted would be 'free-riders'. The free-rider notion has subsequently been applied in a number of cases.<sup>20</sup> In *Boeing Co v Van Gerner*, the United States Supreme Court said that the common fund doctrine

rests on the perception that persons who obtain the benefit of a lawsuit without contributing to court costs are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefitted by the suit.<sup>21</sup>

The doctrine also appears in United States' disputes between plaintiffs and their attorneys on the one hand, and subrogated insurers on the other, where the latter have sought reimbursement of all plaintiff compensation obtained. The plaintiffs and their attorneys have used the doctrine to preserve an entitlement to legal costs where they have laboured to achieve the fund.<sup>22</sup>

<sup>16</sup> Mark J Loewenstein, 'Shareholder Derivative Litigation and Corporate Governance' (1999) 24(1) *Delaware Journal of Corporate Law* 1, 2.

<sup>17</sup> 105 US 527 (1881).

<sup>18</sup> 113 US 116 (1885).

<sup>19</sup> 105 US 527, 532 (1881).

<sup>20</sup> The doctrine appears in *Harrison v Perea*, 168 US 311 (1897); *United States v Equitable Trust Co*, 283 US 738 (1931); *Sprague v Ticonic National Bank*, 307 US 161 (1939); *Mills v Electric Auto-Lite Co*, 396 US 375 (1970); *Hall v Cole*, 412 US 1 (1973). See generally Wayne McIntosh and Cynthia Cates, *Multi-Party Litigation: The Strategic Context* (UBC Press, 2009) 28, 207.

<sup>21</sup> 444 US 472, 478 (1980).

<sup>22</sup> See, eg, *Wajnberg v Wunglueck*, 2011 IL App (2d) 110190; *Ex Parte State Farm Auto Ins Co*, 118 So 3d 699 (2012).

## B Common Funds in English Law

In English law, a doctrine of the same name and similar nature appeared in older estate litigation where the costs of a plaintiff executor and competing beneficiaries in a will dispute might be taxed on the basis that all beneficiaries contribute equitably.<sup>23</sup> This is an expression of the equitable doctrine of the trustee's right to indemnity from trust assets for costs reasonably incurred.<sup>24</sup> Trust law might thus provide some analogies with the doctrine, though it is important to note that class-action funders are not trustees. Lawyers for the representative party are clearly trustees as to damages settlements held by them but have usually not incurred financing costs payable to a funder for which they could claim indemnity from the fund (in fact the reverse is true in that lawyers will usually have been financially supported by the funders). Another possible analogy here might be that the representative party, as a fiduciary or trustee to group members for any overall sum received on their behalf, would have an equitable right of indemnity from that fund in relation to amounts owed to a funder for services rendered in recovering those sums (and the funder might in certain circumstances have a right against group members' damages by way of subrogation of the representative party's right).<sup>25</sup> Such a funding structure would have some difficulties, however, and class-action third-party funding arrangements have not developed along such lines.<sup>26</sup>

The English case of *National Bolivian Navigation Company v Wilson*<sup>27</sup> has been referred to in Australia by the Full Federal Court in *Westpac v Lenthall* as offering support for the common fund doctrine.<sup>28</sup> That case concerned, inter alia, costs orders in a representative proceeding brought in Chancery. The proceeding involved a representative suit by Wilson on behalf of himself and other bondholders who had suffered financial loss in a failed commercial venture to build canals and railways in Bolivia and Brazil. After appeals to the Court of Appeal<sup>29</sup> and House of Lords,<sup>30</sup> the trustees of the remainder of the bondholders' loan funds were ultimately ordered to repay the remaining funds proportionally

<sup>23</sup> Peter St John Hevey Langan, *Civil Procedure* (Sweet and Maxwell, 3<sup>rd</sup> ed, 1983) 327–8, referring to *Rules of the Supreme Court* 1965 (UK) O 62 r 28(1).

<sup>24</sup> *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319, 324–5 (Latham CJ), 335–6 (Dixon J).

<sup>25</sup> *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367 (Stephen, Mason, Aickin and Wilson JJ).

<sup>26</sup> This position is, nonetheless, consistent with the view that the court might adjudicate on these matters once a settlement is received (which is the most popular interpretation of *Brewster*, discussed see below in Part IIC. The fact that the representative party is usually not liable to the funder for the entirety of its fees is a stumbling block to this approach. A second, related difficulty is that while a funding agreement might conceivably make a representative party liable for all funding fees in proving common issues, it could hardly make them liable for funding fees relating to proving individual issues of group members.

<sup>27</sup> (1880) 5 App Cas 176 ('*National Bolivian*').

<sup>28</sup> *Westpac v Lenthall* (n 9) 49 [103] (Allsop CJ, Middleton and Robertson JJ).

<sup>29</sup> *National Bolivian Navigation Company v Wilson* (1879) 13 Ch D 1.

<sup>30</sup> *National Bolivian* (n 27).

to all bondholders. Wilson's legal costs were ordered to be paid out of the fund held by trustees on behalf of all bondholders.

The Full Court of the Federal Court in *Westpac Banking Corporation v Lenthall* noted of this decision:

There was no discussion of the doctrinal basis of the order, but it is plain that it was just and fair and a reflection of equity being equality: all bondholders who had benefited from the suit by Mr Wilson were responsible for a proportionate share of all proper costs, charges and expenses that he paid or for which he was liable in pursuit of an action that had realised a benefit for them.<sup>31</sup>

### C Common Fund Orders in Australian Class Actions

While CFOs had been made in several earlier cases at settlement,<sup>32</sup> the Full Federal Court decision in *Money Max* heralded a practice whereby CFOs could be made shortly after commencing proceedings. In that case and subsequent cases,<sup>33</sup> the CFO was made conditional on court approval of the terms of the funding agreement, although final approval of the funding commission rate was postponed until settlement or judgment when all matters related to liability, harm and scope of harm were determined.<sup>34</sup> The Full Court also held that, as a matter of principle, no class member should be worse off as a result of the making of a CFO versus other forms of expense sharing.<sup>35</sup> According to the Full Court, the power to make 'commencement CFOs'<sup>36</sup> stemmed from the Court's general power under s 33ZF of the *Federal Court of Australia Act 1976* (Cth) to make any order necessary to do justice in the proceeding.<sup>37</sup>

However, in a 5:2 decision in *Brewster*,<sup>38</sup> the High Court determined that, absent an express power, neither s 33ZF of the *Federal Court of Australia Act 1976* (Cth) nor its New South Wales counterpart, s 183 of the *Civil Procedure Act 2005* (NSW), provided a legal basis for CFOs. According to the High Court, these provisions do not extend to the making of a CFO at the outset of proceedings in order to secure litigation funding support. When considering the validity of CFOs,

<sup>31</sup> See further *Westpac v Lenthall* (n 9) 49.

<sup>32</sup> See, eg, *Pathway Investments Pty Ltd v National Australia Bank Ltd* (No 3) [2012] VSC 625; *Farey v National Australia Bank Ltd* [2014] VSC 625.

<sup>33</sup> See, eg, *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd* [2019] FCA 1500 ('Asirifi-Otchere'); *Duck v Airservices Australia* [2018] FCA 1541; *Pearson v State of Queensland* [2017] FCA 1096.

<sup>34</sup> *Money Max* (n 8) 209–10. In some later cases, a CFO was made with an indicative funding commission ceiling. See, eg, *Asirifi-Otchere* (n 33); *Carpenters Park Pty Ltd (as trustee of the Carpenters Park Pty Ltd Staff Superannuation Fund) v Sims Metal Management Ltd* [2019] FCA 1040 ('Carpenters'); *Perera* (n 13); *Impiombato v BHP Billiton Limited* [2018] FCA 1272 ('Impiombato').

<sup>35</sup> *Money Max* (n 8) 213–5. Other expense sharing orders such as a funding equalization order are discussed below in Part IV.

<sup>36</sup> See *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 384 ALR 650, 655–8 (Lee J) ('Davaria'), distinguishing between a 'commencement CFO', a 'settlement CFO' and a 'judgment CFO,'

<sup>37</sup> *Money Max* (n 8) 222–6.

<sup>38</sup> *Brewster* (n 9).

the High Court also examined other types of order that might enable the costs of advancing class proceedings to be spread among funded and non-funded class members. The majority Justices acknowledged that providing equity of contribution between funded and non-funded members was required to mitigate against ‘free riding’ by class members.<sup>39</sup> Provided they were made at the conclusion of proceedings, the Court therefore accepted that funding equalisation orders (‘FEOs’) were a valid means of ensuring justice as between group members.<sup>40</sup> From the High Court’s perspective, CFOs were not required to deal with free riders as FEOs already provided a solution to the problem.<sup>41</sup>

An FEO involves deducting a sum from non-funded class members’ compensation equivalent to what would be payable to litigation funders if those members had entered into litigation funding agreements. These amounts are then pooled and redistributed pro rata among all class members.<sup>42</sup> Thus, the amount of the funder’s entitlement from funded group members is deducted from the recovery of all putative group members (not just the funded group members). The sum deducted from unfunded group members is then paid back into the overall settlement sum (rather than to the funder). Consequently, FEOs do not augment the sums paid to the funder whereas other forms of expense sharing such as CFOs do augment such sums. Under a CFO, an amount equivalent to the funding commission that would have been payable is deducted from unfunded members’ compensation pro rata and then remitted to the funder.<sup>43</sup> The difference between class member returns under an FEO and a CFO is set out in modelling outlined in Table 1.

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<sup>39</sup> Ibid 71 [85] (Kiefel CJ, Bell and Keane JJ). See further 86 [167] (Gordon J).

<sup>40</sup> Ibid 72 [88]–[90] (Kiefel CJ, Bell and Keane JJ), 86 [169] (Gordon J).

<sup>41</sup> Ibid, 72 [88] (Kiefel CJ, Bell and Keane JJ).

<sup>42</sup> *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19, [14], [17] (Stone J); *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029, [28] (Finkelstein J); *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626, [58] (Gordon J); *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433, [85] (Murphy J) (‘*Earglow*’); *Liverpool City Council v McGraw-Hill Financial, Inc* [2018] FCA 1289, [61] (Lee J); *Clime Capital Ltd v UGL Pty Ltd* [2020] FCA 66, [13] (Anastassiou J) (‘*Clime Capital*’).

<sup>43</sup> See, eg, *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527, [12] (‘*Caason*’).

**Table 1 – Comparing Funding Equalisation Orders with Common Funds Orders**

<b>Assumptions for simplified model</b> (a) Open class action with two litigants with identical claims, one third-party funded, one unfunded. (b) A settlement of \$200,000. (c) The funder has a contractual right to 20 per cent commission from litigant One.  Note: Australian class actions in fact require at least seven members however the model uses only two for simplicity and illustration. Similar percentage results might be achieved with 100 funded and 100 unfunded litigants with identical monetary claims.	
<b>Scenario One — Funding Equalisation Order (FEO)</b>	
<i>Litigant A (funded)</i> \$100,000 claim <u>Less \$20,000 to funder</u> \$80,000 net to A	<i>Litigant B (unfunded)</i> \$100,000 claim _____ \$100,000 net to B
<i>Equalisation</i> Deduct \$20,000 from B — goes back to overall pool.	
\$80,000 + \$10,000 from A = \$90,000	\$80,000 + \$10,000 from A = \$90,000
<i>Possible further funder commission<sup>44</sup></i> <u>Less \$2,000 to funder (20 per cent of \$10,000)</u> \$88,000	_____ \$90,000
<i>Outcome</i> Litigant A receives \$88,000 Funder receives \$22,000.	Litigant B receives \$90,000

<sup>44</sup> The funding agreement may allow a funder to subsequently charge a further commission on the amount redistributed to the pool (of all class members) from unfunded class members' recoveries. This issue is discussed by Murphy J in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* (2018) 132 ACSR 258, 307 [222] ('*Petersen*') (see Part IV below) and by Beach J in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receiver and Manager appointed)(in liq)* (2017) 343 ALR 476, 490, 503 ('*Blairgowrie Trading*').

Scenario Two — Common Fund Order (CFO)	
<i>Litigant A</i> (funded) \$100,000 claim <u>Less \$20,000 to funder</u> \$80,000 net to A	<i>Litigant B</i> (unfunded) \$100,000 claim <u>Less \$20,000 to funder</u> \$80,000 net to B
<i>Outcome</i> Litigant A receives \$80,000 Funder receives \$40,000	Litigant B receives \$80,000
Scenario Three — Common Fund Order (CFO) with change to assumption (c) (Changed assumption — existence of CFOs and competition see market commissions reduce by a quarter to 15 per cent.)	
<i>Litigant A</i> (funded) \$100,000 claim <u>Less \$15,000 to funder</u> \$85,000 net to A	<i>Litigant B</i> (unfunded) \$100,000 claim <u>Less \$15,000 to funder</u> \$85,000 net to B
<i>Outcome</i> Litigant A receives \$85,000 Funder receives \$30,000	Litigant B receives \$85,000

Following *Brewster*, there has been a series of cases considering whether the High Court’s decision was confined to pre-settlement or pre-judgment CFOs and whether other powers such as ss 33V (approval of settlement) or 33Z (2) (distribution of judgment sums) of the *Federal Court of Australia Act 1976* (and their state equivalents) might be relied upon to make CFOs. On the one hand, there have been cases where the courts have determined that a power to make a CFO at settlement is available under s 33V.<sup>45</sup> On the other hand, some judges have expressed the view that the High Court’s pronouncements regarding the validity of CFOs and its preference for FEOs apply across the board.<sup>46</sup> At the time of writing, the Full Federal Court and the New South Wales Court of Appeal have

<sup>45</sup> See, eg, *McKay Super Solutions Pty Ltd (Trustee) v Bellamy’s Australia Ltd (No 3)* [2020] FCA 461, [31] (‘*McKay Super Solutions*’); *Clime Capital* (n 42) [9]; *Uren v RMBL Investments Ltd & Anor (No 2)* [2020] FCA 647, [50]–[53].

<sup>46</sup> See, eg, *Cantor* (n 5), [418].

declined to rule on the matter.<sup>47</sup> The uncertainty created by these divergent views prompted the PJC to recommend the enactment of a statutory provision apparently with the intent of ensuring that the courts are empowered to make a CFO at the resolution of class proceedings.<sup>48</sup>

In *Klemweb*,<sup>49</sup> a further issue arose as to whether a CFO could allow commission-based litigation funding by the lawyers for the lead plaintiff rather than just by a litigation funder. It was argued that this would indirectly allow a contingency fee to the lawyers in breach of s183 of the *Legal Profession Uniform Law*. A majority of the Full Court (Middleton and Beach JJ) found that, in formulating the terms of a CFO, the express or implied policy against contingency fees should be taken into account.<sup>50</sup> Conversely, Lee J suggested that the (state law) prohibition on contingency fees ought not inhibit the Federal Court in exercising its broad discretion to make orders to ensure justice in the proceeding, including what deductions should be made from a common fund.<sup>51</sup> The High Court's decision in *Brewster* throws further doubt on Lee J's dissenting view although a CFO incorporating a class law firm contingency-style fee remains a possibility if CFOs might still be made at settlement or judgment. Meanwhile, insofar as representative proceedings are concerned, in Victoria the public policy against contingency fees encapsulated within s 183 of the *Legal Profession Uniform Law* has been overridden by legislative reform facilitating a group costs order that all class members pay a contingency fee to the lead plaintiff's lawyer.<sup>52</sup>

Putting aside the question of whether the courts are validly empowered to make CFOs, the next Part of the article considers the normative arguments in support of explicitly enacting such a power.

### III NORMATIVE ISSUES

Many (but not all) of the normative arguments favouring a broad-based CFO power were explored in the *Money Max* decision. This Part canvasses these arguments considering subsequent case law and developments, including the ALRC's *Final Report on Integrity, Fairness and Efficiency — An Inquiry into Class*

<sup>47</sup> *Davaria* (n 36); *Brewster v BMW Australia Ltd* [2020] NSWCA 272.

<sup>48</sup> PJC Report (n 1) 125 [9.124], which recommends 'the Australian Government legislate to address uncertainty in relation to common fund orders, in accordance with the High Court's decision in [*Brewster*]'. That recommendation may not be entirely clear given that the precise ratio of *Brewster* is not universally agreed. However, the commentary in the PJC Report at 119–25 [9.96]–[9.122] suggests that the PJC has adopted views given in several courts that, although there is a lack of any power to make a CFO at an early stage in the proceeding, such a power remains (and should remain) at the point of settlement or judgment in a class action.

<sup>49</sup> *Klemweb* (n 15).

<sup>50</sup> *Ibid* 588 [22].

<sup>51</sup> *Ibid* 612 [137].

<sup>52</sup> *Supreme Court Act 1986* (Vic) s 33ZDA.

*Action Proceedings and Third-Party Litigation Funders* ('ALRC Final Report'),<sup>53</sup> the decision in *Brewster* and the PJC Report.

### A Reduction in Expensive Book Building Costs

Costs associated with book building can comprise a substantial component of a litigation funder's project management fees or costs, which will ultimately be recovered from the class compensation pool.<sup>54</sup> Book building refers to the process of recruiting class members to tripartite funding and retainer agreements.<sup>55</sup> It is a time consuming and expensive process, especially where the class is numerous and diffuse.<sup>56</sup> Recruitment and marketing methods include the use of websites, mainstream as well as social media exposure, and personal pitching to larger class members such as institutional investors.

Prior to *Money Max*, because litigation funders' entitlement to recoup the above fees and commission was primarily contractual, book building was critical to the viability of class proceedings.<sup>57</sup> Alternately, if the proceedings had already commenced and an insufficient volume of class members entered funding agreements, the proceedings might have to be discontinued pursuant to s 33N of the *Federal Court of Australia Act 1976* (Cth).<sup>58</sup>

Apart from being expensive, book building is thus inherently risky. Despite deploying substantial resources to engage class members, not enough class members might be recruited and the funders' book building costs might be wasted.<sup>59</sup> This partly explains why litigation funders have historically preferred shareholder class actions where larger institutional shareholders representing relatively high claim value can be more easily identified and recruited. Even where enough members can be recruited, time and effort expended explaining funding fees and commissions may also be wasted if the funder's return is subsequently reduced by a court when approving settlement.<sup>60</sup>

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<sup>53</sup> ALRC Final Report (n 5).

<sup>54</sup> *Perera* (n 13) 66 [246] (Lee J) ('*Perera*').

<sup>55</sup> *Brewster* (n 9) 72 [91] (Kiefel CJ, Bell and Keane JJ), 80 [133] (Gordon J).

<sup>56</sup> PJC Report (n 1) 104 [9.40].

<sup>57</sup> Kaitlin Ferris, 'The Increasing Role of Class Developments in Litigation' (2019) 153 *Precedent* 36, 38.

<sup>58</sup> Section 33N empowers the court to discontinue proceedings if the proceedings are no longer an efficient and effective means of obtaining collective redress. See further *Brewster* (n 9) 67 [65] (Kiefel CJ, Bell and Keane JJ), 81 [138]–[140] (Gordon J).

<sup>59</sup> *Ibid* 84–5 [160] (Gordon J).

<sup>60</sup> See, eg, *Rushleigh Services Pty Ltd v Forge Group Ltd (in liq) (rec and mgr apptd)* [2019] FCA 2113, [53]–[54] (Murphy J) ('*Rushleigh*'), in which settlement approval was given on basis that the funder undertook to reduce the agreed rate of 35 per cent commission to 23.94 per cent of the gross settlement; *Petersen* (n 44) 308 [231] (Murphy J), in which it was agreed that the funding commission rate be reduced from 25 per cent to 13.7 per cent in settlement approval proceedings. The court's power to fix funding commissions at settlement is discussed below at Part V.

By making all class members equally responsible for the costs of funding proceedings without the necessity of contractual entitlement, CFOs obviate the need for expensive book building.<sup>61</sup> This reduces the amount of transaction costs that might be passed onto class members by funders, and also reduces the potential for the wasted costs referred to above. By reducing transaction costs, class proceedings are made more efficient and, by this means, the amount of redress received by class members can be enhanced.

CFOs may also make it more likely that class actions involving comparatively high book-building costs will proceed. Examples of class actions that might not proceed because they are made economically unviable due to high book-building costs include mass torts where the ambit of the class is unknown and actions where the personal characteristics of class members, including their vulnerability, make recruitment difficult.<sup>62</sup> Permitting CFOs for these types of claims may therefore improve access to justice by broadening the scope of matters initiated as class proceedings, reorienting them away from their current domination by shareholder and investor matters.<sup>63</sup>

Conversely, others argue that book building should not simply be characterised as an unnecessary transaction cost that incentivises shareholder and investor proceedings at the expense of other worthy class proceedings. The *ALRC Final Report* outlined submissions which argued that book building had several useful functions.<sup>64</sup> By requiring funders to invest substantial sums in engaging with potential class members, these advantages included: reducing the prospects of funder and law firm teams racing to the court house and competing for the right to manage lucrative, large scale class claims; building a culture of engagement among class members; and subjecting the funder and law firm's class project proposal to market scrutiny. For these reasons, the ALRC did not recommend that CFOs should be mandatory.<sup>65</sup>

The PJC Report adopted many of the views that had previously been put to the ALRC regarding the utility of book building, opining that early stage CFOs may 'encourage commencement of class actions without undertaking investigations to determine interest among class members and the potential for less consideration of the merits and viability of the claims'.<sup>66</sup> In expressing this view and in ultimately recommending against empowering the court to make an early stage CFO, the PJC did not reference the data demonstrating that the majority of

<sup>61</sup> See, eg, *Perera* (n 13) 14 [25] (Lee J): 'Rather than the economics of a class action being dictated by the size of sign-up, a CFO allows an open class representative proceeding to be commenced without the necessity to build a book of group members who have bargained away part of the proceeds of their claim.'

<sup>62</sup> *McKay Super Solutions* (n 45) [16] (Beach J).

<sup>63</sup> ALRC Final Report (n 5) 75 [3.20] Table 3.3, showing that between 2013 and 2018, 76 per cent of all class proceedings filed in the Federal Court were either shareholder or investor claims.

<sup>64</sup> ALRC Final Report (n 5) 98 [4.32]–[4.33].

<sup>65</sup> *Ibid* 99 [4.35].

<sup>66</sup> PJC Report (n 1) 123 [9.112].

class proceedings are viable in that they were settled in a manner leading to beneficial outcomes for class members.<sup>67</sup> Nor did the PJC appear to take account of the deterrent power of the court to make adverse costs orders against lead plaintiffs, funders and, in egregious cases, law firms in the event that class claims are unsuccessful.

## **B Impact on the Funder–Class Member Relationship**

As noted, CFOs avoid the need for book building. Consequently, the relationship between class members, the class law firm and the litigation funder will be more attenuated for a greater volume of class members than might have been the case if closed-class proceedings were pursued. This increase in attenuation has certain implications. The first relates to the funder–class member relationship and the utility of a regulatory regime that assumes a contractual relationship between them. The second relates to the impact on class law firm duties to non-client class members.

While there is limited argument supporting the imposition of fiduciary obligations between funder and funded parties,<sup>68</sup> such a duty is less likely in respect of class members who do not enter funding agreements (though duties of representative parties to all group members is a developing area and may ultimately impact both funders and lawyers).<sup>69</sup> Consequently, if as a result of a CFO the volume of class members without funding agreements increases, then the reach of the litigation funder's fiduciary and contractual obligations will correspondingly decrease. The absence of fiduciary or contractual duties upon funders therefore imposes considerable responsibility upon the courts to protect unfunded class members from the impact of unfair funder behavior, such as that raised in *Botsman v Bolitho*.<sup>70</sup> This lack of funder obligations to the court prompted the PJC to recommend extending the duty to act consistently with the overarching

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<sup>67</sup> Vince Morabito, 'Shareholder Class Actions in Australia — Myths v Facts' (Research Paper, Department of Business Law and Taxation, Monash University, November 2019) 21 <<https://ssrn.com/abstract=3484660>>, noting settlement rates as follows: 'product liability class actions (57 per cent); mass torts class actions (60.8 per cent); employment class actions (62.9 per cent); and investor class actions (73 per cent)' and 55.5 per cent for shareholder actions'.

<sup>68</sup> Simone Degeling and Michael Legg, 'Fiduciaries and Funders: Litigation Funders in Australian Class Actions' (2017) 36(2) *Civil Justice Quarterly* 244. The argument made by these authors rests on typical funding terms that repose day-to-day management of litigation into the hands of funders.

<sup>69</sup> Thus, if a representative party makes decisions that are in reality made by funders and/or lawyers in whom they have contractually reposed decision-making power, and such decisions breach duties to the class, group member action against the representative party may ultimately lead to third-party indemnity claims by the latter against funders and lawyers. These types of issues are partly illustrated in *Dyczynski v Gibson* (2020) 381 ALR 1 ('*Dyczynski*'), where the Court noted that representative parties have fiduciary obligations to class members: 209.

<sup>70</sup> *Bolitho v Banksia Securities Limited* (Supreme Court of Victoria, S CI 2012 07185, commenced 27 July 2020). The problematic behavior of the funder and legal team are summarised in the PJC Report (n 1), 276–8, box 15.2.

purposes of the civil justice system to litigation funders. The PJC also recommended that litigation funders should be subject to cost penalties if they fail to comply with that duty.<sup>71</sup>

Meanwhile, regulatory developments post *Brewster* have added another layer of potential obligation between funders and class members. On 21 May 2020, the federal government announced that litigation funders would be subject to greater regulatory oversight by requiring them to hold an Australian Financial Services Licence ('AFSL') and to comply with the managed investment scheme ('MIS') regime.<sup>72</sup> The implementation of these new requirements involved removing exemptions from holding an AFSL and exemptions for litigation schemes,<sup>73</sup> effectively reinstating the decision of the Full Federal Court in *Brookfield Multiplex Funds Ltd v International Litigation Funding Partners Pty Ltd* ('*Brookfield*').<sup>74</sup> The amendments came into effect on 21 August 2020. The changes followed media and public debate about the increased incidence of class actions<sup>75</sup> (the extent of the increase being one matter of debate)<sup>76</sup> as well as concerns about high commissions and profits of unregulated funders and risks for businesses trying to trade through the COVID-19 pandemic.<sup>77</sup>

The background to this regulatory regime were reforms in the late 1990s under which financial services providers such as banks, insurers, superannuation funds and others were required to hold an AFSL under the *Corporations Act 2001* (Cth). Further, collective investment 'schemes' (such as public unit trusts) have for many years been required to be registered. 'Schemes' involve, inter alia, situations where people contribute money (or money's worth) to a common enterprise to produce financial benefits but do not have day-to-day operation of the enterprise.<sup>78</sup> Unregistered schemes are liable to be wound up by the Australian Securities and Investment Commission ('ASIC').<sup>79</sup>

<sup>71</sup> PJC Report (n 1) 287–8 [15.131].

<sup>72</sup> Josh Frydenberg, Commonwealth Treasurer, 'Litigation Funders to be Regulated Under the *Corporations Act*' (Media Release, 21 May 2020).

<sup>73</sup> Explanatory Statement, *Corporations Amendment (Litigation Funding) Regulations 2020* (Cth).

<sup>74</sup> (2009) 180 FCR 11. However, it should be noted that *Brookfield* appears contrary to the High Court's view of litigation funding as a credit facility in *International Litigation Partners Pte Ltd v Chameleon Mining NL (rec and mgr apptd)* (2012) 246 CLR 455, and therefore makes it harder to characterise even funded class members' interests as a contribution of money's worth to a scheme.

<sup>75</sup> See, eg, David Crowe, 'New Rules for Litigation Funders after Jump in Class Actions', *Sydney Morning Herald* (online, 22 May 2020) <<https://www.smh.com.au/politics/federal/new-rules-for-litigation-funders-after-jump-in-class-actions-20200521-p54vak.html>>.

<sup>76</sup> Ben Butler, 'Josh Frydenberg's Claim that Class Action Lawsuits Have 'Tripled' is Incorrect, Expert Says', *The Guardian* (online, 22 July 2020) <<https://www.theguardian.com/australia-news/2020/jul/22/josh-frydenbergs-claim-that-class-action-lawsuits-have-tripled-is-incorrect-expert-says>>.

<sup>77</sup> Tom McIroy and Michael Pelly, 'Crackdown on Class Action Funders' *Australian Financial Review* (online, 21 May 2020) <<https://www.afr.com/politics/federal/crackdown-on-class-action-funders-20200521-p54va0>>.

<sup>78</sup> As defined in the *Corporations Act 2001* (Cth) s 9.

<sup>79</sup> *Ibid* s 601EE.

ASIC has given some guidance as to how it will treat the requirements imposed by the 2020 regulatory regime,<sup>80</sup> including that there must be appropriate training, conflicts of interest management, professional indemnity insurance, nomination of responsible managers who demonstrate organisational competence, scheme constitutions and audited compliance plans.<sup>81</sup> On the other hand, on 20 August 2020, ASIC issued a legislative instrument providing relief from many aspects of the re-regulation.<sup>82</sup> This includes relief with the effect that:

1. Funders do not have to give a disclosure document to group members if the latter have not entered agreements with the funder or lawyer (and have not notified their intention to participate to the funder or lawyer).<sup>83</sup> This exemption applies if, first, the funder has made the disclosure document publicly available on its website for the class action; and, second, there is a prominent reference to the disclosure document and to the website where it may be accessed, in any notice to group members and in any advertising material for the class action. Despite this, disclosure documents must be given to group members before they sign up with the funders or lawyers.
2. The funder is exempt from the obligation to regularly value scheme property and the obligation under the AFSL provisions to maintain a register of all class members.<sup>84</sup>
3. Statutory provisions in relation to members withdrawing from a managed investment scheme do not apply to a group member withdrawing from a class action. Funders must permit withdrawal only if the group member opts out of the class action in accordance with the applicable court rules.
4. Funders are exempt from the main requirements for product disclosure set out in s 1013D(1)(l) of the *Corporations Act 2001* (Cth). These

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<sup>80</sup> *Corporations Amendment (Litigation Funding) Regulations 2020* (Cth).

<sup>81</sup> 'Litigation Funding', Australian Securities and Investments Commission (Web Page) <<https://asic.gov.au/regulatory-resources/funds-management/litigation-funding/>>.

<sup>82</sup> *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787* (Cth).

<sup>83</sup> This summary assumes that the funder is the nominated responsible entity. Class law firms cannot operate MIS: *Legal Profession Uniform Law* (NSW) No 16A of 2014; *Legal Profession Uniform Law Application Act 2014* (Vic) Sch 1 s 258.

<sup>84</sup> ASIC has also indicated that it will take no action with respect to registration of passive class members in open class proceedings under the MIS provisions. See Australian Securities and Investments Commission, 'No-Action Position for Responsible Entities of Certain Registered Litigation Funding Schemes in Relation to Member Registers' (Media Release, 21 August 2020).

requirements normally include the disclosure of benefits, risks and costs.<sup>85</sup>

The 2020 regulatory framework thus continues to distinguish between class members that enter litigation-funding agreements and those who do not. Nonetheless, as AFSL holders, funders must provide their services efficiently, honestly and fairly.<sup>86</sup> Funders also remain subject to an obligation to maintain adequate practices and to follow procedures for managing conflicts of interest that may arise between them, the lead plaintiff, class members and the class law firm.<sup>87</sup> Under the regime that operated between 2012 and 2020, it was unclear whether these duties applied to class members who do not engage with funders.<sup>88</sup> That uncertainty continues to apply under the current regime.<sup>89</sup> If commencement CFOs were resurrected, the need to resolve that uncertainty would become more acute as larger proportions of class members would be less likely to have any dealings with funders.

### C The Impact on the Lawyer–Client Relationship

In contrast with funders, a general consensus is emerging in favour of class lawyers owing an overarching fiduciary duty to class members.<sup>90</sup> Even if class lawyers' duties to class members who do not enter retainer agreements fall short of being fiduciary, *Dyczynski v Gibson* makes it clear that class lawyers at least have a duty to act in the interests of all class members.<sup>91</sup> However, the nature and scope of those duties when it comes to addressing difficult conflicts that arise when

<sup>85</sup> The last exclusion is puzzling as it seems to defeat much of the better disclosure rationale for making funded litigation a financial product in the first place and may create uncertainty as to what is required in the disclosure document.

<sup>86</sup> *Corporations Act 2001* (Cth) s 912A(1)(a).

<sup>87</sup> *Ibid* s 912A(1)(aa). Guidance in relation to how to fulfill these requirements is set out in Australian Securities and Investments Commission, *Regulatory Guide 248 Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest* (April 2013).

<sup>88</sup> At that time *Corporations Regulations 2001* (Cth) reg 5C.11.1(1)(b)(v) and (d)(iii) defined a litigation funding scheme and funding arrangements by reference to entry into a funding agreement. Following the 2020 revisions, this provision now exempts insolvency and single member litigation funding from the MIS regime: *Corporations Regulations 2001* (Cth), reg 5C.11.1(4) and (5).

<sup>89</sup> See *Corporations Regulations 2001* (Cth) reg 7.1.04N(3)(e), which defines a litigation funding scheme among other things by reference to a funding agreement to provide 'funding, indemnities or both under a funding agreement (including an agreement under which no fee is payable to the funder or lawyer if the scheme is not successful in seeking remedies) to enable the general members of the scheme to seek remedies'.

<sup>90</sup> Simone Degeling and Michael Legg, 'Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts Between Duties' (2014) 37(3) *University of New South Wales Law Journal* 914, which concludes that that class law firms owe fiduciary duties to non-client class members: 924–5. See further Jeremy Kirk, 'The Case for Contradictors in Approving Class Action Settlements' (2018) 92(9) *Australian Law Journal* 716, which states that 'there is good reason to think that the legal representatives of an applicant in a class action owe a fiduciary duty not only to the applicant but to all members of the class': 717.

<sup>91</sup> *Dyczynski* (n 69) 50 [209]–[10] (Murphy and Colvin JJ), 86–7 [378]–[9] (Lee J).

funding commissions are being reviewed is far from clear,<sup>92</sup> and the inter-relationship of these quasi-fiduciary obligations with the general duty of care and other professional duties even less so. For instance, there are statutory obligations upon lawyers to provide clear and timely advice to enable the client litigant to understand the relevant legal issues and to inform them about alternatives to a fully contested adjudication of the case.<sup>93</sup> Other obligations include a duty to disclose the basis upon which clients will be charged for legal services and to provide a reasonable estimate of those costs.<sup>94</sup> Whether these more specific professional obligations will apply to class law firms *apropos* class members who have not signed a retainer agreement is debatable.<sup>95</sup> In a real sense, the class law firm is representing non-client members and providing a service from which they benefit and for which they must indirectly pay pro rata when legal fees are deducted from the overall class settlement. On the other hand, given that unrepresented class members are not able to instruct the class law firm (and are often unidentifiable), that they are only liable to contribute to the costs of the lead plaintiff and other class members who enter retainer agreements rather than provide payment to the law firm directly, and that they can opt out without any obligation to the firm, it seems that they should not be categorised as clients. Nonetheless, where a law firm purports to settle the individual claim of an unrepresented group member it is unclear how they can do so without having some obligation toward them.

Again, the lack of clarity regarding the nature of fiduciary obligations and other professional duties of class law firms to class members with whom the firm has never engaged heightens the courts' responsibilities to non-client class members. By submitting funding and allied retainer arrangements to scrutiny, CFOs issued at an early stage of the proceeding provide the courts with a stronger platform for exercising those responsibilities in the main area where litigants and their lawyers' and funders' interests can conflict – legal and funding costs. The discussion in Parts III E and V below elaborates on this issue and, in particular, considers recommendations of the PJC which might otherwise empower the courts to undertake that scrutiny without the necessity of a CFO.

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<sup>92</sup> See, eg, *Botsman v Bolitho* (2018) 57 VR 68, 135–6 [327]–[37] (Tate, Whelan and Niall JJA) ('*Botsman*'). See further Kirk (n 90).

<sup>93</sup> *Australian Solicitors Conduct Rules* 2015 [7.1]–[7.2], made pursuant to *Legal Profession Uniform Law* (NSW) No 16A of 2014, s 427.

<sup>94</sup> *Legal Profession Uniform Law* (NSW) No 16A of 2014 s 174; *Legal Profession Uniform Law Application Act* 2014 (Vic) Sch 1 s 174.

<sup>95</sup> The *Legal Profession Uniform Law* (NSW) No 16A of 2014 s 6 and the *Legal Profession Uniform Law Application Act* 2014 (Vic) Sch 1 s 6 define a client as 'a person to whom or for whom legal services are provided' Yet in *Dyczynski* (n 69) Lee J opined that only class members who entered a retainer with the law firm were owed these statutory duties, see 86–87 [378]–[379].

### **D Increase in the Supply of Funding and Therefore Greater Vindication of Rights Through Class Proceedings and More General Deterrence Against Unlawful Activities**

*Money Max* did not of course expressly consider whether CFOs would make class proceedings a more attractive investment vehicle for litigation funders, and in so doing increase the availability of funding. However, some judicial<sup>96</sup> and academic<sup>97</sup> commentary post *Money Max* has suggested that obviating the need for undertaking book building (thereby decreasing costs) and increasing the pool of persons required to contribute to class financing (thereby boosting revenue) would make the funding of class actions more profitable and thus attract greater funding supply. Assuming many class actions could not proceed previously as a result of a shortfall in the availability of funding, increasing funding supply ought then to lead to an increase in the total volume of class actions. Provided the growing number of class actions are meritorious this will, in turn, enable greater numbers of those affected by harm to be compensated for the harm done to them, and can thereby enhance general deterrence against unlawful behavior.

Statistical data regarding class actions instigated post *Money Max* indicates that the number of class actions did increase, albeit from a very low base.<sup>98</sup> Nonetheless, as Morabito warns, that increase may be due to more Australian jurisdictions adopting class-action procedures rather than a direct flow-on from the CFO imprimatur. Moreover, as class actions have been increasing at a steady rate over the past 15 years, any increase post *Money Max* may simply reflect general trends rather than the impact of the decision itself. Morabito contends that, compared with Canada and Israel, Australia has a very low rate of class actions. Therefore, even if there was an increase in the volume of class actions as a result of the *Money Max* decision, that is likely to have had only a small impact on access to justice and general deterrence. Additionally, Morabito notes that the Australian data is made up of a significant number of parallel proceedings in respect of the same legal dispute, thus unduly inflating the volume of reported cases.<sup>99</sup>

Consistent with Morabito's explanation in its report, the PJC has also noted that recent class-action growth has been propelled by a wide range of factors, including increases in Australian jurisdictions adopting class-action procedures, growing maturity of the class-action system and the concomitant increased

<sup>96</sup> See, eg, *Brewster* (n 9) 83 [153] (Gordon J); *Westpac v Lenthall* (n 9) 29–30 [19] (Allsop CJ, Middleton and Robertson JJ); *Kuterba v Sirtex Medical Limited* (No 3) [2019] FCA 1374, [16] (Beach J).

<sup>97</sup> See, eg, Michael Legg, 'Ramifications of the Recognition of a Common Fund in Australian Class Actions: An Early Appraisal' (2017) 91(8) *Australian Law Journal* 655, 662–3; Stefanie Wilkins, 'CFOs in Australia: A New Step in Court Regulation of Litigation Funding: *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited*' (2017) 36(2) *Civil Justice Quarterly* 133, 143.

<sup>98</sup> Morabito (n 67) 13.

<sup>99</sup> *Ibid* 13–14.

expertise of its frequent users, misconduct identified by the Hayne Royal Commission Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, increasing avenues for civil compensation, and liberal regulation.<sup>100</sup>

IBISWorld reports an increase in the number of funders operating in Australia since the *Money Max* case, implying that funder return on investment since that decision did attract more market players.<sup>101</sup> However, that increase had been progressively building over a number of years and, like the data collected and analysed by Morabito, may be more reflective of the light-touch regime of regulation that operated in Australia between 2012 and 2020, a growing awareness of the litigation financing industry, a relative decline in the profitability of other categories of financial investment, and the rising number of larger scale, more profitable class actions, rather than the advent of CFOs. IBISWorld explains that while total litigation funder revenue has grown, revenue remains very volatile due to the unpredictable length and outcome of cases, and so, as a result, industry profit margins have fluctuated.<sup>102</sup> By the same token, overall the litigation finance industry is strongly outperforming GDP and remains on a growth trajectory, indicating that the demand for litigation funding still outstrips supply by a substantial margin.<sup>103</sup>

Given the difficulty in distinguishing between the impact of CFOs and general environmental trends that might favour an increase in class actions and funders, it is unclear whether the adoption of CFOs or their subsequent invalidation has had any significant bearing upon the supply of litigation funding or the volume of class actions. The introduction of AFSL and MIS requirements outlined above at 3B is far more likely to affect these matters.

### **E Greater Judicial Control of Funding Fees and Commissions and Increased Protection of Class Member Interests**

As the Court in *Money Max* noted, litigation funding commissions are typically the biggest single deduction made from funded class action settlements and judgments.<sup>104</sup> Consequently, one of the most significant impacts of CFOs was their effect upon litigation-funder commission rates. Between 2013 and 2018, funding commissions averaged 27.1 per cent of class recoveries.<sup>105</sup> The median percentage

<sup>100</sup> PJC Report (n 1) 30–2 [4.13].

<sup>101</sup> Kim Do, *Litigation Funding in Australia* (IBISWorld, Australia Specialized Industry Report OD5446, February 2019).

<sup>102</sup> Ibid 7.

<sup>103</sup> Ibid 10.

<sup>104</sup> *Money Max* (n 8) 208 [72] (Murphy, Gleeson and Beach JJ).

<sup>105</sup> Vince Morabito, 'An Evidence-Based Approach to Class Action Reform in Australia: CFOs, Funding Fees and Reimbursement Payments' (Research Paper, Department of Business Law and Taxation, Monash University, January 2019) 13 <<https://ssrn.com/abstract=3326303>>.

for funding commissions in all settled cases during that same period was 25.5 per cent.<sup>106</sup> However, a review of post *Money Max* case law undertaken by Morabito found that, in most instances, funder commissions were lower than these longer term average and median commission rates.<sup>107</sup>

The observation that funding rates decreased post *Money Max* has also been confirmed by some members of the judiciary.<sup>108</sup> In particular, Beach J commented that he did not

recall a reported case prior to *Money Max* where any efforts were made as part of judicial case management to reduce the contractual commission rates, which were usually around 35 to 40 per cent. Judges seemed to accept all of this as a *fait accompli* and applied funding equalisation mechanisms ... But CFOs addressed that vice to the advantage of group members. It gave the Court direct control over the commission rate. Thereafter, there has only been downward pressure on commission rates.<sup>109</sup>

Consequently, as funding commissions have fallen there has been growing recognition that, in the past, funding commissions in Australian class actions may have been too high.<sup>110</sup> Certainly, that was the view of the PJC, which characterized the profit made by litigation funders in class proceedings as ‘often unreasonable, disproportionate and unfair’.<sup>111</sup>

According to *Money Max*, the need for increased scrutiny of litigation funding commissions afforded by CFOs rests on: (1) information asymmetry between the funder and class members in relation to the costs and risks of class proceedings; (2) the absence of negotiation between the funder and many small value claimholders; and (3) class members’ dependence on funder support.<sup>112</sup> Thus, the Court approached the setting of funding commissions as a form of market failure that required it to step in and act as guardian of class members’ interests so as to avoid disproportionate and excessive commissions that did not properly reflect

<sup>106</sup> Ibid 12.

<sup>107</sup> Ibid 15–20.

<sup>108</sup> See, eg, *Carpenders* (n 34) [17]–[18] (Rares ACJ); *Lenthall v Westpac Life Insurance Services Ltd* (2018) 363 ALR 698, 705–6 [17]–[24] (Lee J) (‘*Lenthall v Westpac*’).

<sup>109</sup> *McKay Super Solutions* (n 45) [28] (Beach J). However, see the discussion below at Part V regarding the courts’ powers to vary funding commission rates.

<sup>110</sup> *Lenthall v Westpac* (n 108) 706 [22] (Lee J); *Australian Executor Trustee Ltd v Provident Capital Ltd* [2018] FCA 439, [25]–[26] (Rares JJ), in both cases citing Michael Legg, ‘A Critical Assessment of the Shareholder Class Action Settlements — The Allco Class Action’ (2018) 46(1) *Australian Business Law Review* 54, 64. However, see qualifying comments in *Kuterba v Sirtex Medical Limited* (No 3) [2019] FCA 1374, [16] (Beach J), indicating that there may be other explanations for the fall in funding rates post *Money Max*.

<sup>111</sup> PJC Report (n 1) 157 [13.53].

<sup>112</sup> *Money Max* (n 8) 208 [72] (Murphy, Gleeson and Beach JJ). See also Peter Cashman and Amelia Simpson, ‘Class Actions and Litigation Funding Reform: The Views of Class Action Practitioners’ (UNSW Law Research Paper No 20–73, Faculty of Law, University of New South Wales, December 4 2020) 18 <<https://ssrn.com/abstract=3765069>>, noting collated class-action practitioner views in favour of CFOs on the ground that they ensure court oversight of funder commissions and behaviour.

funders' commercial risks.<sup>113</sup> That role was particularly justified where class members who had not entered into funding agreements were required to contribute to funding costs.

Since the *Money Max* decision, and pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) (and its state equivalents), the Court's protective mandate has extended to reviewing agreed funding commissions at settlement.<sup>114</sup> The validity and rationale of these types of orders is considered below in Part V. At this point, however, it is worth noting that, while they might have been the catalyst for greater judicial scrutiny, the application of a judicial blowtorch to funding commissions is not necessarily tied to CFOs. Provided judges are able and willing to critically examine claimed funding commissions, it will still be possible for courts to allow funders to be appropriately recompensed for the risk they bear and ensure that members' interests are safeguarded. Although this will not occur *ex ante* and so could be unduly influenced by hindsight, judges are in a good position to evaluate the fairness and reasonableness of what was initially agreed compared with what is known at the time of settlement, especially if assisted by litigation funding fees assessors with financial and capital market expertise as recommended by the PJC.<sup>115</sup> Given that CFOs usually impose an upper cap on commissions with the proviso that they might subsequently be revised downwards,<sup>116</sup> *ex post* as opposed to *ex ante* inquiry may not lead to radically different outcomes.

Even if the PJC's recommendations regarding funding fees assessors are not enacted, given that contradictors are now routinely employed to ensure that adversarial investigation of legal costs and funder fees occurs<sup>117</sup> and given the more activist stand taken by the judiciary towards ensuring that class-action costs are proportionate with class-member returns,<sup>118</sup> it is anticipated that funder commissions will not unduly increase as a result of the decision in *Brewster*.

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<sup>113</sup> *Money Max* (n 8) 210 [82] (Murphy, Gleeson and Beach JJ).

<sup>114</sup> See, eg, *Endeavour River Pty Ltd v MG Responsible Entity Ltd* [2019] FCA 1719 ('*Endeavour River*'); *Petersen* (n 44); *Caason* (n 43); *Earglow* (n 42).

<sup>115</sup> PJC Report (n 1) 164 [11.92]–[11.93].

<sup>116</sup> See, eg, *Asirifi-Otchere* (n 33) [12.2] (Gleeson J); *Carpenters Park Pty Ltd (as trustee of the Carpenters)* (n 34) [4] (Rares ACJ). See also *Perera* (n 13) 73 [283] (Lee J), in which the cap imposed tied funding commissions to a multiple of expenditures.

<sup>117</sup> See, eg, *Endeavour River* (n 114) [36] (Murphy J); *Botsman* (n 92) 136 [334]–[336] (Tate, Whelan and Niall JJA). See also *Kirk* (n 90).

<sup>118</sup> See, eg, *Rushleigh* (n 60).

## **F Better Informed Class Members Prior to the Time Fixed for Opt-Out**

One advantage of CFOs is the information they provide to class members regarding their decision to remain in or opt out of the proceeding.<sup>119</sup> Even though the CFO may be subsequently varied once the quantum of the settlement or judgment is known, the CFO signals the maximum amount that the funder will be entitled to charge class members so that they can determine whether they are better off continuing to participate in the proceeding at an early point, before any limitation or opt-out periods might expire.<sup>120</sup>

## **G Discouragement of Closed Class Proceedings**

Under Australia's class action framework it is possible for class actions to be constituted on behalf of all those who have suffered harm due to the wrongdoing of the defendant (known as an open class proceeding) or on behalf of a defined segment of those who have suffered harm (known as a closed class proceeding).<sup>121</sup> In some cases, the closed class has been defined according to whether class members have entered legal retainer agreements or co-dependent legal retainer and funder agreements.<sup>122</sup> Being able to define the class in this manner has been described as a boon for litigation funders because it allows them to better manage their litigation and class dispersion risks,<sup>123</sup> and it disables free riders that might otherwise enjoy sharing in any open class compensation pool.<sup>124</sup>

However, as the ALRC pointed out in 2018,<sup>125</sup> closed classes appear antithetical to the principles of scale and broad-based access to justice that were built into the original recommendations made by the ALRC in 1988 when it proposed an Australian class-action regime.<sup>126</sup> In its 1988 report, the ALRC wanted to ensure 'a single binding decision that applies to all claimants and not just those who have taken active steps to join the class action'.<sup>127</sup> On the basis that this was the best way to secure access to justice, in its subsequent 2018 report the

<sup>119</sup> *Lenthall v Westpac* (n 108) 707–8 [29] (Lee J); *Impiombato* (n 34) [28] (Moshinsky J); *Blairgowrie Trading* (n 44) 502 [94] (Beach J); *Money Max* (n 8), 196 [13] (Murphy, Gleeson and Beach JJ).

<sup>120</sup> *Money Max* (n 8), 215 [110] (Murphy, Gleeson and Beach JJ).

<sup>121</sup> *Matthews v SPI Electricity Pty Ltd (No 13)* (2013) 39 VR 255, 274 [79] (Forrest J) ('*SPI Electricity*'); *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 ('*Multiplex Funds Management*').

<sup>122</sup> See, eg, *Multiplex Funds Management* (n 121).

<sup>123</sup> Jarrah Hoffman-Ekstein, 'Funding Open Classes Through Common Fund Applications' (2013) 87(5) *Australian Law Journal* 331, 334.

<sup>124</sup> ALRC Final Report (n 5) 67 [2.73]; *Perera* (n 13) 10–11 [16] (Lee J).

<sup>125</sup> ALRC Final Report (n 5) 90–2 [4.4]–[4.10].

<sup>126</sup> Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, December 1988).

<sup>127</sup> *Ibid* 44 [92].

ALRC recommitted to open, opt-out proceedings, recommending that Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended so that in future all class actions are initiated as open class actions.<sup>128</sup>

Nonetheless, up until September 2018 only 36 per cent of funded class actions were initiated as closed class proceedings where the class was defined according to entry into funding agreements.<sup>129</sup> Thus, prior to *Money Max*, funders were often prepared to finance open class proceedings and were not as concerned by free riders as might be supposed. It is likely that their concerns were allayed by the development of practices such as class closure orders that compelled class members to come forward and register with plaintiff law firms to participate in settlement,<sup>130</sup> the making of contribution or funding equalisation orders to mitigate against free riding,<sup>131</sup> and the other means at their disposal to refine class qualification criteria such as the imposition of a minimum claim threshold or the application of temporal or geographical limits upon class membership.

The data available indicates that, following *Money Max*, the number of funded actions that were commenced where the class was defined according to entry into a funding agreement fell from 36 per cent to 13.2 per cent.<sup>132</sup> Thus, *Money Max* did appear to discourage funded, closed-class proceedings, without the necessity of mandating an open-class regime. By this means, and depending upon the terms of any class closure orders made, the CFO may have contributed to ensuring that all aggrieved by harm were entitled to recover.

Insofar as class closure orders are concerned, it is important to note that Australian courts rarely make declarations on common issues binding on the original class as the ALRC envisaged. Once a settlement is in the wind, it is common to order class closure requiring all class members to register with the class law firm prior to a stipulated date to qualify for participation in the settlement.<sup>133</sup> As a result, the ALRC's aspiration for as broad a scope of recovery as possible may never be realized in practice, with or without CFOs.

In the past, closure orders were usually accompanied by orders that extinguished the claims of unrepresented and unregistered group members who failed to register within the stipulated time frame. Consequently, those class members ended up being worse off than they would have been as a member of a closed class they did not opt into (as their choses in action would not have been prematurely extinguished). Such an outcome was of particular concern to the New

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<sup>128</sup> ALRC Final Report (n 5) 90 rec 1.

<sup>129</sup> Morabito (n 105) 9.

<sup>130</sup> *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* (2017) 252 FCR 1, 22 [72]–[75] (Jagot, Yates and Murphy JJ); *SPI Electricity* (n 121) 273 [22]–[80] (Forrest J). However, readers should note the subsequent decision of *Haselhurst v Toyota Motor Corporation* (2020) 101 NSWLR 890 ('*Haselhurst*'), which held class closure orders invalid.

<sup>131</sup> Discussed below at Part IV.

<sup>132</sup> Morabito (n 105) 10.

<sup>133</sup> Simone Degeling and Michael Legg, 'Class Action Settlements, Opt-Out and Class Closure: Fiduciary Conflicts' (2017) 11(3) *Journal of Equity* 319, 322–4.

South Wales Court of Appeal in *Haselhurst v Toyota Motor Corp Australia Ltd* ('*Haselhurst*'),<sup>134</sup> which held that the power to contingently extinguish class members' claims fell outside of s 183 of the *Civil Procedure Act 2005 (NSW)* (and therefore implicitly its interstate and federal equivalents)<sup>135</sup> and was contrary to the overarching principle of an opt-out regime.

Reducing the capacity of the lead plaintiff and defendant to seek orders that limit the scope of persons entitled to claim compensation from the settlement pool may encourage the revival of closed classes as a means of limiting those likely to pursue claims, potentially making an early CFO a more attractive tool for dealing with multiple closed classes on the same issues. On the other hand, if enacted, the PJC's recommendation to introduce an express legislative power to order class closure would reverse the *Haselhurst* decision and favour open class proceedings.<sup>136</sup>

## H Reduction in Parallel Class Proceedings

Apart from enhancing access to justice in cases involving mass harm, other rationales of Part IVA of the *Federal Court of Australia Act 1976* (Cth) and its state equivalents include promotion of efficient use of judicial resources and consistency in the determination of common issues.<sup>137</sup> The institution of parallel class actions in respect of the same harm against the same respondent(s) runs counter to those rationales.<sup>138</sup> Apart from the extra-judicial resources required to consolidate actions and/or oversight collaboration arrangements,<sup>139</sup> evaluate whether competing proceedings should be declassified or stayed,<sup>140</sup> and deploy other mechanisms to reduce duplication,<sup>141</sup> if parallel class actions proceed (albeit in some consolidated form) they may impose considerable burdens on respondents and class members. First, parallel class actions are likely to make it more difficult to settle proceedings because it will be harder for respondents to achieve consensus between multiple teams of lawyers and funders employing

<sup>134</sup> *Haselhurst* (n 130).

<sup>135</sup> Unlike other states, Victoria has an express legislative power to order class closure: *Supreme Court Act 1986* (Vic) s 33ZG.

<sup>136</sup> The PJC has suggested that there needs to be an express legislated power to order class closure: PJC Report (n 1) 94 [8.50]. It should be noted, however, that such a law may 'acquire' a litigant's chose of action so that the constitutional issues and the need for just terms such as proper notice discussed in Part VI are also relevant to this issue.

<sup>137</sup> Australian Law Reform Commission (n 126) 8 [13].

<sup>138</sup> ALRC Final Report (n 5) 102 [4.49]–[4.50]. See also Michael Duffy, 'The Conundrum of Competing Class Actions and the Efficiency Question' (2019) 93(4) *Australian Law Journal* 270.

<sup>139</sup> See, eg, *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Ltd* (No 2) [2019] FCA 1061; *Southernwood v Brambles Limited* [2019] FCA 1021 ('*Southernwood*').

<sup>140</sup> See, eg, *Wigmans v AMP Ltd* [2019] NSWCA 243; *Perera* (n 13).

<sup>141</sup> See, eg, *McKay Super Solutions Pty Ltd v Bellamys Australia Ltd* [2017] FCA 947 in which the closure of one class proceeding was ordered and another was allowed to remain as an open class with a joint trial for both.

different retainer and funding models, thus prolonging proceedings and increasing costs for both respondents and class members. Second, multiple proceedings increase the costs borne by respondents in countering multiple pleadings, discovery and interlocutory applications. Third, multiple proceedings increase the transaction costs borne by class members who are deprived of the benefit of scale for legal fees.<sup>142</sup> Consequently, the ALRC recommended that as a matter of public policy only one class action should be permitted to proceed and the court should be given express power to resolve competing proceedings.<sup>143</sup> Its view was that requiring law firm and funder teams to compete before the court for the right to manage a single class action supported by a CFO would place downward pressure on funder and legal fees.<sup>144</sup>

The Full Federal Court in *Money Max* stated that, ‘by encouraging open class proceedings, a common fund approach may reduce the prospect of overlapping or competing class actions and reduce the multiplicity of actions that sometimes occurs with class actions’.<sup>145</sup> Experience, however, has demonstrated otherwise. In a report written at the end of 2019 examining whether class actions had grown out of control over the past five years, Morabito noted that in the prior two years related and competing class actions were more prevalent.<sup>146</sup> As argued in Part IIIB, it is difficult to definitively link any increase in class actions with the removal of the necessity to undertake extensive book building. It therefore appears that, following *Money Max*, competition for large-scale class actions has strengthened and that more law firm and funder teams are initiating proceedings in respect of the same matters. Legal professional bodies making submissions to the ALRC described this as a ‘race to the courthouse’ to gain first mover advantage.<sup>147</sup>

Simultaneously, and consistently with the ALRC’s views on a preference for single class proceedings, jurisprudence related to the stay of competing proceedings has therefore been building in response to the increased competition for lucrative large-scale claims. There have been several cases post *Money Max* where the Courts have been willing to evaluate the respective merits of competing class actions brought by diverse lawyer-funder teams and then choose which one of those teams ought to take carriage of the matter. Cases include *CJMcG Pty Ltd as Trustee for the CJMcG Superannuation Fund v Boral Ltd (No 2)*,<sup>148</sup> and *Perera v GetSwift*.<sup>149</sup> In *Wigmans v AMP Ltd*, a majority of the High Court confirmed the power of the New South Wales Supreme Court to stay competing class actions,<sup>150</sup>

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<sup>142</sup> *Perera v GetSwift Limited* (2018) 263 FCR 92, 121 [122] (Middleton, Murphy and Beach JJ) (‘*Perera Appeal*’).

<sup>143</sup> ALRC Final Report (n 5) 107 [4.63].

<sup>144</sup> *Ibid* 109–10 [4.75].

<sup>145</sup> *Money Max* (n 8) 196–7 [14] (Murphy, Gleeson and Beach JJ).

<sup>146</sup> Morabito (n 67) 13–14. Similar findings were made by the PJC: PJC Report (n 1) 118 [9.93].

<sup>147</sup> ALRC Final Report (n 5) 98 [4.32]–[4.33].

<sup>148</sup> [2021] FCA 350.

<sup>149</sup> *Perera Appeal* (n 142).

<sup>150</sup> [2021] 95 ALJR 305, 322–4 [72]–[83] (Gageler, Gordon and Edelman JJ).

and endorsed a multifactorial approach to this question, which included a comparison of competing funding proposals, costs estimates and proposed net return to members.<sup>151</sup> While CFOs may have been the catalyst for increasing judicial activism and creativity in finding solutions when responding to the long-running problem of parallel class proceedings, the use of powers such as consolidation, collaboration orders, declassing, and stays of proceedings is not contingent upon the continued validity of CFOs.

#### IV EQUALISATION ORDERS VS CFOs

As a result of the PJC's recommendation that legislation be enacted to explicitly empower the courts to make a CFO at settlement or judgment,<sup>152</sup> this part of the article considers the advantages such a power might provide. Plainly, issues such as the elimination of book building and the efficient management of parallel proceedings are not raised when proceedings are nearing termination. Further, as we have noted, issues related to the control of legal costs and funder fees can be addressed using other powers, which may themselves require additional legislative mandate. Rather, in this context it has been suggested that making provision for CFOs will provide the Court with greater flexibility to do justice. The position taken by the PJC may contradict the plurality of the High Court in *Brewster*, which was of the view that FEOs were sufficient to ensure that all those who benefitted from the class action contributed to the costs incurred.

Prior to the *Money Max* decision, FEOs were made more frequently than CFOs.<sup>153</sup> This was partly because FEOs do not compel involuntary payments to litigation funders but merely ensure parity between funded and non-funded class members. However, as Murphy J pointed out in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)*,<sup>154</sup> notwithstanding the pro rata redistribution of funding commissions, complete parity might not apply if the funding agreement allows the funder to subsequently charge a commission based on the 'grossed up' amount redistributed to funded class members from unfunded class members' recoveries. If the funding agreement so allowed, funded parties would be paying the funder a larger proportion of their settlement entitlement than non-funded parties. Accordingly, Murphy J opined that a contribution or CFO was 'a simpler and more transparent mechanism ... for fairly apportioning funding charges across the class'.<sup>155</sup>

<sup>151</sup> Ibid 330–1 [109]–[112] (Gageler, Gordon and Edelman JJ).

<sup>152</sup> PJC Report (n 1) [9.124].

<sup>153</sup> See Part II C above.

<sup>154</sup> *Petersen* (n 44) 307 [222]. See further Michael Legg, 'Ramifications of the Recognition of a Common Fund in Australian Class Actions: An Early Appraisal' (2017) 91 *Australian Law Journal* 655, 660.

<sup>155</sup> Ibid.

The issue of whether funding commissions might operate unequally because of their application to redistributed funds was not discussed in *Brewster*. However, provided the courts' powers to review and fix funder commissions and fees at settlement remains intact, the court could ensure greater parity by limiting funder commissions to the amounts net of redistributed funds.

Another pragmatic problem associated with FEOs relates to their administration where parallel class proceedings have been consolidated. The circumstances that arose in *Southernwood v Brambles Ltd* illustrate.<sup>156</sup> This case involved two overlapping securities class actions against the same respondent, Brambles Ltd. One of the proceedings had been instigated by William Kidd and Mary Collum as trustees for the Magness-Bennett Superannuation Fund (the 'Kidd proceedings') and the other by Holly Southernwood (the 'Southernwood proceedings'). The applicants in the Kidd proceedings were represented by class law firm Maurice Blackburn and were funded by Harbour Fund III LP, whereas the applicants in the Southernwood proceedings were represented by class law firm Slater & Gordon and were funded by IMF Bentham Ltd. Both proceedings were open class actions — that is, proceedings comprised of members who had entered funding agreements and those who had not. Each of the retainer and funding agreements in the two proceedings had different terms and conditions, including different rates of funding commission. To advance judicial efficiency and lower transaction costs, an order was made to consolidate the two proceedings. Murphy J also made a CFO, reasoning that a CFO allowed a single funding fee to be applied across the consolidated proceedings and also ameliorated the conflicts of interest that might arise between funded and non-funded members and between the Harbour versus the IMF funded members.<sup>157</sup>

This practical problem could be addressed in similar fashion to the parity problem outlined above. Provided the court's power to review and fix funder commissions and fees at settlement continues, when making an FEO order the court could reduce the potential disparity between class members subject to different funding regimes by also fixing a funder fee common to all funders in the consolidated proceedings.

Nevertheless, it is unlikely that FEOs will operate in a comparable manner to some of the more creative approaches to CFOs and orders related to parallel class proceedings that emerged post *Money Max*. One of these, discussed in *Wigmans v AMP Ltd*,<sup>158</sup> concerned orders proposed by Hammerschlag J in the *RCR Tomlinson*

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<sup>156</sup> *Southernwood* (n 139).

<sup>157</sup> *Ibid*, [73].

<sup>158</sup> (2019) 103 NSWLR 543, 547 [10] (Bell P).

*Ltd* matter.<sup>159</sup> Hammerschlag J proposed that only one of three competing class proceedings involving different teams of class law firms and funders should be permitted to proceed, and that the funders of each of the stayed proceedings should be given the option of financing the surviving proceedings at one third each. Clearly, such an approach would not be practically feasible except at the outset of proceedings and where the Court was empowered to fix the share of each funder's commission.

## V POWER TO REVIEW PRE-EXISTING FUNDING AGREEMENTS

As noted at Part IIIE, the protection of class members from disproportionate funding commissions has been a subject of concern.<sup>160</sup> Courts can certainly refrain from approving a settlement that may give de facto power to force funders to set their commission within a specified range.<sup>161</sup> However, as well as fixing funding rates pursuant to CFOs, post *Money Max*, and on similar policy grounds,<sup>162</sup> the court's power at settlement has been extended by some judges to overriding a contractually agreed commission rate.<sup>163</sup>

In *Money Max*, the Full Federal Court set out a list of non-exhaustive considerations to approve a funding fee in a class action as follows:

- (a) the funding commission rate agreed by sophisticated class members and the number of such class members who agreed. ...
- (b) the information provided to class members as to the funding commission. ...
- (c) a comparison of the funding commission with funding commissions in other Part IVA proceedings and/or what is available or common in the market. ...
- (d) the litigation risks of providing funding in the proceeding. ...
- (e) the quantum of adverse costs exposure that the funder assumed. ...
- (f) the legal costs expended and to be expended, and the security for costs provided, by the funder.

<sup>159</sup> No reference for this case was provided in the judgment of Bell P other than a date of a motion hearing of 5 August 2019. This would appear however to be a reference to transcript of that date before Hammerschlag J in the proceedings of *Ashita Tomi Pty Ltd ATF Esskay Super Fund v RCR Tomlinson Ltd* 2018/003-53304, *Barry Jones v RCR Tomlinson Ltd* 2010/000-94443 and *CIMCG Superannuation Fund v Tomlinson Ltd* 2019/001-78541 (see schedules of class action cases in Peter Cashman and Amelia Simpson, 'The Problem of Delay in Class Actions' [2020] UNSW Law Research Paper No 20-86, Faculty of Law, University of New South Wales, 13 January 2021), 128, 131, 133).

<sup>160</sup> See, eg, *Lenthall v Westpac* (n 108) 706 [22] (Lee J); *Petersen* (n 44) 286 [129] (Murphy J).

<sup>161</sup> See, eg, *Botsman* (n 92).

<sup>162</sup> See further Samuel J Hickey, 'Oversight or Interference? Judicial Intervention in Litigation Funding: *Earglow Pty Ltd v Newcrest Mining Ltd*' (2017) 36(4) *Civil Justice Quarterly* 420, 423-6.

<sup>163</sup> See, eg, *Rushleigh* (n 60); *Petersen* (n 44); *Blairgowrie Trading Ltd* (n 44); *Earglow* (n 42); *Camping Warehouse Pty Ltd v Downer EDI Ltd* [2016] VSC 784.

(g) the amount of any settlement or judgment. ...

(h) any substantial objections made by class members in relation to any litigation funding charges. ...

(i) class members' likely recovery 'in hand' under any pre-existing funding arrangements.<sup>164</sup>

Other possible considerations that have been raised in cases include appropriateness in general;<sup>165</sup> the level of outlays undertaken by the funder<sup>166</sup> (which may overlap with (f) but could, it is submitted, also include expenditures in the nature of borrowing costs); proportionality (or at least, lack of disproportionality);<sup>167</sup> reference to rates in foreign jurisdictions;<sup>168</sup> the risks faced by litigation funders in investing in litigation generally and in the case in question; and whether a funder has a diversified spread of litigation investments.<sup>169</sup> The public interest or social utility of the proceeding might also be a factor, though generally the connection between public interest and the quantum of funder's remuneration is not readily apparent.<sup>170</sup> It is submitted that a last general consideration might be the effects on encouraging access to justice<sup>171</sup> for meritorious (but not unmeritorious)<sup>172</sup> claims.

However, not all judges are of the view that a power to set commission rates exists.<sup>173</sup> In terms of precedent, it is notable that there is already an approval process for the reasonableness of funding agreements in certain types of funded (non-class action) claims brought by corporate and personal insolvency administrators pursuant to relevant insolvency legislation.<sup>174</sup> Nonetheless, legislative intervention may ultimately be required as the High Court has previously indicated unwillingness to review funding agreements.<sup>175</sup> Consistently with this, *Brewster* has cast doubt upon the reasoning in *Money Max* and the

<sup>164</sup> *Money Max* (n 8) 209–10 [80].

<sup>165</sup> *Ibid* 211–13 [92], [94], [96], referring to *Pharm-a-Care Laboratories Pty Ltd v Commonwealth* (No 6) [2011] FCA 277, [38], [42] (Flick J).

<sup>166</sup> *Blairgowrie Trading* (n 8) 511 [131] (Beach J).

<sup>167</sup> *Money Max* (n 8) 210 [82], 212 [94].

<sup>168</sup> *Blairgowrie Trading* (n 8) 508 [122] (Beach J).

<sup>169</sup> *Ibid* 508 [122] (Beach J).

<sup>170</sup> As to public interest litigation, see Damian Grave, Ken Adams, Jason Betts, *Class Actions in Australia* (Thomson Reuters, 2<sup>nd</sup> ed, 2012) 754–61; Peter Cashman, *Class Action Law and Practice* (Federation Press, 2007) 459–61.

<sup>171</sup> See Bernard Murphy and Camille Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30(2) *Melbourne University Law Review* 399.

<sup>172</sup> Victorian Law Reform Commission, *Civil Justice Review* (Report 14, May 2008) 182 [4.2].

<sup>173</sup> See, eg, *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289 [47], [52] (Lee J).

<sup>174</sup> See *Re ACN 076 673 875 (rec and mgr apptd) (in liq)* (2002) 42 ACSR 296; *Stewart, In the Matter of Newtronics Pty Ltd* [2007] FCA 1375; *Fortress Credit Corp (Australia) Pty Ltd v Fletcher* (2015) 318 ALR 597; *Ascot Vale Self Storage Centre Pty Ltd v Wallace-Smith* [2013] VSC 519; *CBA Corporate Services (NSW) Pty Ltd Re ZYX Learning Centres Ltd (recs and mgrs apptd) (in liq) v Walker* [2013] FCA 243, [8]; *Young v Thomson* [2017] FCAFC 140.

<sup>175</sup> *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 434–435 [92] (Gummow, Hayne and Crennan JJ).

absence of criteria to guide the exercise of discretion by the Court to fix a commission.<sup>176</sup> To address the lack of certainty, both the ALRC and PJC proposed going one step further. Each recommended a statutory requirement that the court approve each funding agreement as a whole, including not only commission rates but the nature and scope of indemnity provided to the lead plaintiff, the degree of control that might be exerted by the funder, whether the funder had the power to unilaterally appoint class counsel and so on.<sup>177</sup> In addition, to support the courts' scrutiny of funding agreements, the PJC recommended that courts be free to appoint a funding fee assessor with market capital or finance expertise, the costs of which would be borne by the funder.<sup>178</sup>

Clearly, notions of contractual freedom and certainty deserve respect, though the notion of power to vary a contractual term for unfairness has been accepted by the federal legislature in the *Australian Consumer Law*.<sup>179</sup>

## VI CONSTITUTIONAL IMPEDIMENTS

The common fund doctrine was challenged on constitutional and other grounds in the Full Federal Court,<sup>180</sup> the NSW Court of Appeal<sup>181</sup> and ultimately in the High Court in *Brewster*, where arguments included that the trial judges' decisions involved an acquisition of class members' property on other than constitutionally just terms and were beyond judicial power.<sup>182</sup> However, the High Court focused on the question of the statutory power to make a CFO and not on the two constitutional issues. Despite there being full submissions on the two constitutional questions, they were dealt with briefly by only two judges of the seven. This section therefore reviews the arguments put before the High Court and the Court's short consideration of those issues, and then provides some commentary.

### A Judicial Power

The first of the constitutional issues raised in *Brewster* was whether, if the relevant statutory provisions empowered the Federal Court to make a CFO, this

<sup>176</sup> *Brewster* (n 9) 66 [59] (Kiefel CJ, Bell and Keane JJ).

<sup>177</sup> ALRC Final Report (n 5) 170 [6.66], 171 [6.72]; PJC Report (n 1) 158 [11.58].

<sup>178</sup> PJC Report (n 1) 164–5 [11.92]–[11.95].

<sup>179</sup> *Competition and Consumer Act 2010* (Cth) sch 2, ss 23–5.

<sup>180</sup> *Westpac v Lenthall* (n 9).

<sup>181</sup> *Brewster v BMW Australia Ltd* [2019] NSWCA 35.

<sup>182</sup> The *Australian Constitution* s 51(xxxi) requires that acquisitions of property by the Commonwealth government take place on 'just terms'. Damages claims have been held to be property as choses in action: see Michael Duffy, 'Is a Cause of Action a Castle? Statutory Choses in Action as Property and s51(xxxi) of the Constitution' (2018) 42(1) *Melbourne University Law Review* 1.

would infringe the separation of powers by conferring on the Court power that was neither judicial nor incidental to the exercise of judicial power.<sup>183</sup> The appellants argued that:

1. If the power's object is not to determine what existing rights or obligations of the parties are, but 'to determine what legal rights and obligations should be created, then the function stands outside the realm of judicial power'.<sup>184</sup>
2. The 'power to determine what the future rights or liabilities of people in particular relationships should be was inherently non-judicial'<sup>185</sup> and in fact 'lay at the heart of the legislative function'.<sup>186</sup>
3. Any creation of rights by courts was strictly limited to using powers of a jurisprudential character historically or traditionally exercised by the courts.<sup>187</sup>
4. Where a law confers a discretion, an important indicium of judicial power is that the discretion is to be exercised according to legal principle or objective standard and not by reference to policy considerations or other matters not specified by the legislature.<sup>188</sup>

By contrast, the first to fourth respondents ('the representative claimants') argued that the power to make a CFO was both incidental to<sup>189</sup> and an exercise of judicial power.<sup>190</sup> They suggested that the notion that creation of rights could only be a judicial power if it had historic roots was a 'cramped conception of judicial power'.<sup>191</sup> They also argued that the fact that the power was given to a court was relevant to show it was judicial in nature.<sup>192</sup>

<sup>183</sup> Westpac Banking Corporation, 'Appellant's Submissions', Submission in *Westpac v Lenthall*, No S154 of 2019, 19 June 2019 [2] ('Appellant's Submissions').

<sup>184</sup> Ibid 14 [36], citing *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 189 ('*Precision Data Holdings*').

<sup>185</sup> Appellant's Submissions (n 183), citing *Sue v Hill* (1999) 199 CLR 462, 515 [132] (Gaudron J).

<sup>186</sup> Appellant's Submissions (n 183), citing *South Australia v Totani* (2010) 242 CLR 1, 86 [220] (Hayne J).

<sup>187</sup> Appellant's Submissions (n 183) 14 [38], citing *R v Davison* (1954) 353, 369; *R v Trade Practices Tribunal; Ex Parte Tasmanian Breweries* (1970) 123 CLR 361, 373, 387, 394; *Cominos v Cominos* (1972) 127 CLR 588, 591, 600, 605, 606, 607, 608; *Dalton v NSW Crime Commission* (2006) 227 CLR 490, 507–8 [45]; *Thomas v Mowbray* (2007) 233 CLR 307 328–9 [16]–[17], 331–3 [20]–[26], 345–7 [73]–[79], 352–3 [100]–[102], 356–7 [116]–[121]; *Palmer v Ayres* (2017) 259 CLR 478, 494–5 [37]–[40]; 495 [42].

<sup>188</sup> Appellant's Submissions (n 183) 16 [42], citing *Precision Data Holdings* (n 184) 191.

<sup>189</sup> Gregory Lenthall et al, 'Submissions of the First to Fourth Respondents', Submission in *Westpac v Lenthall*, No S154 of 2019, 23 July 2019 14 [37] ('First to Fourth Respondents' Submissions'), citing *Cominos v Cominos* (187), where the High Court found a power to make any other order necessary to do justice was ancillary to the court's jurisdiction in matrimonial causes matters.

<sup>190</sup> First to Fourth Respondents' Submissions (n 189) 15 [40].

<sup>191</sup> Ibid.

<sup>192</sup> Ibid 15 [41].

The fifth respondent (the funder) argued that CFOs set ‘a regime which enables the orderly progression of the litigation in service of the ultimate quelling of the controversy’ in the same manner as validly judicial interlocutory orders such as asset preservation, search and mediation.<sup>193</sup>

The Commonwealth and Queensland, as interveners, also emphasised the judicial nature of any orders necessary or appropriate to quell the controversy.<sup>194</sup> The Commonwealth went further and submitted that ‘effectuation of Commonwealth judicial power’ may require provision of legal services to a party.<sup>195</sup> It also submitted that a power or function may take its character as judicial or administrative from the body in which Parliament has located it.<sup>196</sup>

The question of the ‘creation of new rights’ raised the perennial debate about how the separation of powers squares with the concept of the development of the common law. Judges do not and cannot legislate, yet the common law develops, generally through the application of existing legal principle to new situations. In Edelman J’s words:

[I]t 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.<sup>197</sup>

In relation to the second submission, Edelman J noted that, although the calculation of the rate of remuneration for a CFO would be a difficult exercise on which minds may differ, it involved a process of balancing interests that was ‘quintessentially judicial’.<sup>198</sup> He also found that a CFO made on an interlocutory basis would aid the exercise of judicial power and was therefore a permissible incident of the exercise of judicial power.<sup>199</sup>

The other judge who dealt with this question, Gageler J, found that it was sufficient to bring s33ZF(1) within judicial power that it conferred 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.<sup>200</sup> He approved the observation of the Full Court that ‘considering and

<sup>193</sup> JustKapital Litigation Pty Ltd, ‘Fifth Respondent’s Submissions’, Submission in *Westpac v Lenthall*, No S154 of 2019, 23 July 2019 8 [32]–[33] (‘Fifth Respondent’s Submissions’).

<sup>194</sup> Attorney-General (Cth), ‘Submissions of the Attorney-General of the Commonwealth (intervening)’, Submission in *Westpac v Lenthall* No S154 of 2019, 29 July 2019 7 [22] (‘Commonwealth’s Submissions’); Attorney-General (Qld), ‘Submissions for the Attorney-General for the State of Queensland (intervening)’, Submission in *Westpac v Lenthall* No S154 of 2019, 29 July 2019 4 [12] (‘Queensland’s Submissions’).

<sup>195</sup> Commonwealth’s Submissions (n 194) 8 [24], citing *APLA Ltd v Legal Services Commissioner* (NSW) (2005) 224 CLR 322, 351 [30] (Gleeson CJ and Heydon J).

<sup>196</sup> Commonwealth’s Submissions (n 194) 8 [25], citing *White v Director of Military Prosecutions* (2007) 231 CLR 570, 595 [48] (Gummow, Hayne and Crennan JJ).

<sup>197</sup> *Brewster* (n 9) 98 [225].

<sup>198</sup> *Ibid* 98 [226].

<sup>199</sup> *Ibid* 98 [227].

<sup>200</sup> *Ibid* 77 [119].

deciding (upon application and evidence) what is appropriate or necessary to do justice in a proceeding' was clearly within the judicial mandate.<sup>201</sup>

In the authors' view, whether resort to the common fund doctrine creates new laws and thus exceeds the bounds of judicial power would depend to a degree upon the extent that the same are consistent or inconsistent with existing legal principle, which might include principles as to unjust enrichment, maritime salvage, quantum meruit and even equitable rights to indemnity.<sup>202</sup>

The argument that CFOs are judicial because they aid the quelling of a controversy was also dealt a possible blow by the plurality's finding that CFOs do not assist in determining any issue in dispute between the parties.<sup>203</sup> On the other hand, arguments that the assessment of a funding fee involves non-judicial policy questions could be met by reference to the frequent role of courts as valuers.<sup>204</sup> Lastly, the suggestion that a power is likely to be judicial because it is given to a judicial body (or administrative because it is given to an administrative body) appears to be a reference to the 'chameleon doctrine', which has received some support from the High Court where a power is given that contains both a judicial element and an administrative element.<sup>205</sup> That doctrine can nevertheless be somewhat circular and it has been suggested that its scope should be limited.<sup>206</sup>

Given the focus of this article on legislative intervention, a distinction should be drawn between possible future legislation to allow courts to make CFOs on the one hand, and the judicial interpretation of existing laws to the effect that those laws allow courts to create CFOs on the other. The submissions to the High Court did not generally focus on the issue of the separation of legislative and judicial power (though, as we have seen above, it did discuss at some length separation of judicial and executive or administrative power) or suggest that the latter judicial interpretation might in some way intrude into the legislative function. However, to the extent that any such argument was in the background, actual legislation would seemingly negate any particular problem of that nature. Further, insofar as

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<sup>201</sup> Ibid 77 [119].

<sup>202</sup> Though Edelman J was the only judge to give these issues any detailed consideration: *Brewster* (n 9) 90–2 [191]–[200]. Nettle J did not consider the separation of powers question but expressly doubted the relevance of salvage law to interpreting the power given by s33ZF (1): 78 [125].

<sup>203</sup> Ibid 65 [51] (Kiefel CJ, Bell and Keane JJ).

<sup>204</sup> Indeed, the plurality seemed open to the idea of the court determining a value for the service provided by funders: *Brewster* (n 9) 63 [41], 67–8 [68] (Kiefel CJ, Bell and Keane JJ).

<sup>205</sup> This is a so called 'double function' power as first identified in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. In *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 360, Gaudron J noted that some powers were essentially judicial and could only be conferred on courts under ch III of the *Constitution*, while other powers took their character from the tribunal in which they were reposed and the way in which they were to be exercised and thus could be conferred on courts or other tribunals as the Parliament chose.

<sup>206</sup> Kirby J noted in *Thomas v Mowbray* (2007) 233 CLR 307, 343 that while the nature of the body in which a function is reposed may assist in determining the 'judicial character' of that function, it could not eliminate the judicial duty to characterise the function. Hayne J also noted, at 462, that this limitation analogizing that a grant of statutory power to a federal court did not conclude the question whether the power thus given was a federal judicial power.

there were a problem of lack of criteria to guide the exercise of discretion by the court, legislation could also go a long way towards dealing with this by providing such criteria and also to give effect to rights and obligations 'for which the statute provides'.<sup>207</sup> Likewise, a specific statute conferring power to make CFOs should seemingly be able to be characterised as a judicial power provided that it was '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 (unspecified) policy considerations'.<sup>208</sup>

Nevertheless, even if CFOs, a law empowering the making of them, or both, can be seen as falling within judicial and, therefore, constitutional power, other constitutional issues might arise, as we shall see.

## B Acquisition of Property on Just Terms

The second constitutional issue that arose in *Brewster* was whether a law allowing common funds provided for acquisitions of property other than on just terms. It was submitted by the appellants that a CFO 'has the effect of taking from group members a valuable part of their rights relating to their causes of action, which rights are proprietary in nature'.<sup>209</sup> The rights taken were said to be 'property' within the meaning of s 51(xxxi) of the *Constitution*,<sup>210</sup> and there was said to be a corresponding acquisition on the funder's part. The CFO conferred on the funder a priority interest in any resolution sum, which was an identifiable benefit or advantage corresponding to class members' rights to any fruits of their choses in action.<sup>211</sup>

The appellants thus submitted that Parliament may not empower the Court to take property rights from one party and confer them on a non-party, without complying with the requirement of just terms under s 51 (xxx).<sup>212</sup> It should not achieve indirectly, through the conferral of judicial powers to acquire property, what it could not achieve directly by legislation or through the exercise of administrative power.<sup>213</sup>

In response, the representative party claimants argued that a CFO did not take away a portion of the fruits of the class members' choses in action, but put in

<sup>207</sup> See *Precision Data Holdings* (n 184) 191, referring to the discussion by Dixon J in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 165.

<sup>208</sup> *Ibid.*

<sup>209</sup> Appellant's Submissions (n 183) 17 [45].

<sup>210</sup> *Ibid.*, citing *Georgiadis v Australia and Overseas Telecommunications Corporation* (1994) 179 CLR 297 ('*Georgiadis*'), 303, 312, 320; *JT International SA v Commonwealth* (2012) 250 CLR 1, 33 [41], 67–8 [169], 74–5 [193], 95–6 [263]; *Smith v ANL* (2000) 204 CLR 493, 500–1 [7]–[8], 504–5 [22]–[23] ('*Smith*'); *Minister for Army v Dalziel* (1944) 68 CLR 261, 290.

<sup>211</sup> Appellant's Submissions (n 183) 18 [45].

<sup>212</sup> *Ibid.* 18 [46].

<sup>213</sup> *Ibid.*, citing *Cth v WMC Resources Ltd* (1998) 194 CLR 1, 90; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140, 199 [139] ('*ICM Agriculture*').

place a regime to *realise* those fruits.<sup>214</sup> They also noted that, in any event, Part IVA of the *Federal Court of Australia Act 1976* (Cth) already interfered with such choses by allowing them to be litigated without group members' consent, and that this had been found not to be an acquisition of property by the Full Federal Court in *Femcare v Bright*.<sup>215</sup> Finally, the claimants placed weight, as the Full Court had,<sup>216</sup> on the High Court's finding in *Airservices Australia v Canadian International Airlines Ltd* ('*Airservices Australia*'),<sup>217</sup> that statutory lien provisions over aircraft securing payments to the Commonwealth Civil Aviation Authority for services benefitting persons who had not contractually consented to those services did not effect an acquisition of property.<sup>218</sup>

The Commonwealth as intervener noted that s 51(xxxi) was primarily a grant of legislative power rather than a constitutional guarantee; that the relevant law had to be a law with respect to the acquisition of property for the just terms requirement to operate;<sup>219</sup> and that s 33ZF could not be so characterised.<sup>220</sup> It also suggested that the right acquired by the funder was not property, as it lacked permanence and stability.<sup>221</sup>

However, in *Georgiadis v Australia and Overseas Telecommunications Corporation*,<sup>222</sup> a vested cause of action for workers compensation was found by a majority of the High Court decision to be a piece of property capable of acquisition. This case would appear to be strong authority for the proposition that an accrued cause of action is property as a chose in action.<sup>223</sup> It is not clear what a court would make of the argument that the cost or risk of realising the same affects its proprietary status. It seems more likely that this cost might be relevant only to the value of that property.

## 1 Acquisition by Someone Other than the Commonwealth

None of the parties appeared to dispute the point that s 51(xxxi) applies to laws that facilitate acquisitions to the benefit of someone other than the Commonwealth (in this case, private funders). The point appears to be well-

<sup>214</sup> First to Fourth Respondents Submissions (n 189) 17 [47].

<sup>215</sup> (2000) 100 FCR 331. The Court found that where enforcement of a chose in action is for the benefit of the owner of the chose in action, the grant of authority to enforce it was not an alienation of the chose: [109] 356–7 (Black CJ, Sackville and Emmett JJ).

<sup>216</sup> *Westpac v Lenthall* (n 9) 52–5 [122]–[127].

<sup>217</sup> (1999) 202 CLR 133 ('*Airservices Australia*').

<sup>218</sup> First to Fourth Respondents Submissions (n 189) 19–20 [52].

<sup>219</sup> Commonwealth's Submissions (n 194) [37]–[38], 13–14.

<sup>220</sup> *Ibid* 14–17 [38]–[47].

<sup>221</sup> *Ibid* 18–19 [50].

<sup>222</sup> *Georgiadis* (n 210).

<sup>223</sup> *Brewster* (n 9) involved claims for damages as a result of the national recall of motor vehicles. *Georgiadis* (n 210) did make some points as to possible differences between choses in action arising under the general law and arising under statute [see generally Duffy (n 182)] but this issue — to the extent it was an issue — was not ventilated in *Brewster*.

settled.<sup>224</sup> The Attorney-General for Western Australia noted that extinguishment or modification of a chose of action was ordinarily an acquisition of property, though he suggested a CFO was not such an acquisition as it was more in the nature of a 'pre-emptive costs order'.<sup>225</sup>

## 2 Court Decision as an Acquisition of Property?

The appellants further argued that the CFO went beyond being an interlocutory step in the process of realising disputed choses in action or simply managing 'the procedural course of the litigation' and in itself was said to alter substantive proprietary rights'.<sup>226</sup> The Full Court had been careful to note that what would otherwise be an acquisition of property is not 'immunised because the power to acquire is conferred on a court'.<sup>227</sup> Yet the funder argued that the exercise of the power by a court, where the property was to be 'realised' by a court process, meant it was unconstrained by the just terms requirement.<sup>228</sup> The funder argued that the 'managerial or supervisory powers of a court which are apt to extinguish a chose in action to the benefit of a defendant' do not attract the operation of s 51(xxxi).<sup>229</sup>

As set out below, Edelman J suggested that a court order is unlikely to be characterised as an acquisition of property where a court makes an order for 'compensation for a wrong done or damages for an injury inflicted'.<sup>230</sup> In the authors' view this finding appears to turn on an analysis of causes of actions for damages as restoring a pre-existing position rather than 'acquiring' anything new (the concept of 'corrective' justice)<sup>231</sup>. To apply this to a funder, however, might again necessitate the enquiry of whether the funder would have a

<sup>224</sup> The argument that it applies to acquisitions to the benefit of someone other than the Commonwealth first received support from Williams J in *McClintock v Commonwealth* (1947) 75 CLR 1. See also *PJ Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382, 401–2 (Latham CJ) ('*PJ Magennis*'); *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 ('*Tooth & Co*'), 407 (Gibbs J), 407 (Mason J); *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480, 510–11 (Mason CJ, Brennan, Gaudron JJ), 526 (Dawson and Toohey JJ) ('*Australian Tape Manufacturers*'); *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 172 [23] (Mason CJ) ('*Mutual Pools*'); *Smith* (n 210) 506 [27] (Gaudron and Gummow JJ). A notable dissident from these views appeared to be Sir Owen Dixon: see *Andrews v Howell* (1941) 65 CLR 255, 281–2 (Dixon J); *W Blakeley & Co Pty Ltd v The Commonwealth* (1953) 87 CLR 501, 521 (Dixon CJ); *Attorney-General v Schmidt* (1961) 105 CLR 361, 372–3 (Dixon CJ) ('*Schmidt*'). See also Duffy (n 182), 30–4.

<sup>225</sup> Attorney General (WA), 'Submissions for the Attorney-General of the State of Western Australia (intervening)', Submission in *Westpac v Lenthall* No S154 of 2019, 29 July 2019, 4 [12] ('WA's Submissions').

<sup>226</sup> *Ibid* 19 [47].

<sup>227</sup> *Westpac v Lenthall* (n 9) 50–1 [114].

<sup>228</sup> Fifth Respondent's submissions (n 193) 11 [42]–[43].

<sup>229</sup> *Ibid* [47] 13.

<sup>230</sup> *Brewster* (n 9) 98–9 [230].

<sup>231</sup> That is, where damages correct the unjust position, restoring it to the just position. This is known as '*diorthotikos*' or 'making straight'. See Richard Posner, 'The Concept of Corrective justice in Recent Theories of Tort Law' (1981) 10(1) *Journal of Legal Studies* 187.

theoretical right of action against unfunded group members in the general law. If so, the court's discussion of unjust enrichment, analogies from admiralty law and other claims would again become relevant.

### 3 *Genuine Adjustment*

The appellants noted the Full Court's reliance on the doctrine that a law can fall outside the just terms requirement of s 51(xxxi) if it is a 'genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity' in circumstances where that relationship needs to be regulated 'in the common interest'.<sup>232</sup> However, the appellants argued that Part IVA of the *Federal Court of Australia Act 1976* (Cth) was a regime for the determination of existing legal rights, not their adjustment. They argued that s 51(xxxi) was a guarantee that 'prevents expropriation of the property of individual citizens, without adequate compensation, even where such expropriation may be intended to serve a wider public interest'<sup>233</sup> and suggested that 'the Full Court's overbroad application of the adjustment of rights cases is apt to reduce that guarantee to an empty shell'.<sup>234</sup> The Commonwealth reviewed the varying claims and rights in the proceeding and found an adjustment effected as 'necessary and appropriate for doing justice in the proceeding'.<sup>235</sup>

This was the only argument on s 51(xxxi) that was really dealt with by the High Court, and only by two judges. Edelman J noted:

A court order is unlikely to be characterised as an acquisition of property where a court makes an order for 'compensation for a wrong done or damages for an injury inflicted, or as a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity'. The expression 'adjustment of the competing rights, claims or obligations' is a loose description that encapsulates a wide range of orders that are made for principled reasons independently of any purpose of acquiring property. One example is an order that requires a defendant to make restitution of a payment made to them by mistake. That order is plainly not an acquisition of property. Another example is a CFO that provides for the reasonable remuneration of a service provider from a common fund, ensuring that remuneration is made for a non-gratuitous service and that the cost of the remuneration is spread across all group members whose common fund was obtained as a result of the service.<sup>236</sup>

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<sup>232</sup> *Westpac v Lenthall* (n 9) 52–5 [119]–[130]. The Full Court referred to the decision of *Australian Tape Manufacturers* (n 224) 510 (Mason CJ, Brennan, Deane and Gaudron JJ), where their Honours indicated that 'where an obligation to make a payment is imposed as ... a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity it is unlikely that there will be any acquisition of property within s 51(xxxi) of the *Constitution*'.

<sup>233</sup> Appellants' Submissions (n 183) 19 [48], citing *Smith* (n 210) 501 [9].

<sup>234</sup> *Ibid.*

<sup>235</sup> Commonwealth Submissions (n 194), 20 [51].

<sup>236</sup> *Brewster* (n 9) 98 [230].

Gageler J also dealt with the matter briefly, and in similar terms:

As to the suggested intrusion of s 33ZF(1) into the forbidden territory of s 51(xxxi) of the *Constitution*, it is sufficient to keep s 33ZF(1) outside the scope of the operation of s 51(xxxi) that the subject-matter of s 33ZF(1) is 'the adjustment of the competing rights, claims or obligations of persons in a particular relationship' through an exercise of such a judicial power.<sup>237</sup>

It is important to note that resort has been had to the genuine adjustment formula in several cases.<sup>238</sup> For example, the Full Court of the Federal Court in *Westpac Banking Corporation v Lenthall* had cited *Australian Tape Manufacturers v Commonwealth*,<sup>239</sup> which was a case involving a levy on blank tape to be used to compensate copyright owners. In that case, Mason CJ, Brennan, Deane and Gaudron JJ stated:

In a case where an obligation to make a payment is imposed as ... a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity, it is unlikely that there will be any 'acquisition of property' within s 51(xxxi) of the *Constitution*.<sup>240</sup>

This passage is sometimes cited as authority for the genuine adjustment doctrine,<sup>241</sup> though the passage itself refers to earlier authority from the judgment of Dixon CJ in *Attorney-General (Cth) v Schmidt*.<sup>242</sup> An 'adjustment of competing claims between citizens in a field which needs to be regulated in the common interest' was also referred to by Deane J in *Commonwealth v Tasmania*.<sup>243</sup> His Honour in that case in turn made reference to *Trade Practices Commission v Tooth & Co Ltd*,<sup>244</sup> where Stephen J discussed the distinction between 'taking' property and 'regulating' property — a distinction developed in American law.<sup>245</sup> In *Mutual Pools & Staff Pty Ltd v Commonwealth*,<sup>246</sup> a law restricted government refunds of invalidly levied tax. Mason CJ discussed cases where the transfer was incidental to the principal purpose sought to be achieved by a law<sup>247</sup> and thus lacked a recognizable independent character of acquisition;<sup>248</sup> it merely 'provided a means

<sup>237</sup> Ibid 77 [120], quoting *Schmidt* (n 224) 372–3 (Dixon CJ).

<sup>238</sup> See generally Duffy (n 182) 41–4.

<sup>239</sup> *Australian Tape Manufacturers* (n 224).

<sup>240</sup> Ibid 510.

<sup>241</sup> *Westpac v Lenthall* (n 9) 52 [119].

<sup>242</sup> *Schmidt* (n 224) 372–3. That case involved the acquisition by the Commonwealth of, inter alia, German property under the *Trading with the Enemy Act 1952* (Cth). While obviously dealing with regulation in the national public interest, the Court did not use the expression 'genuine adjustment' in its judgment.

<sup>243</sup> (1983) 158 CLR 1, 283–4.

<sup>244</sup> *Tooth & Co* (n 224).

<sup>245</sup> Ibid 414–15.

<sup>246</sup> *Mutual Pools* (n 224).

<sup>247</sup> Ibid 171.

<sup>248</sup> Ibid.

of resolving or adjusting competing claims, obligations or property rights of individuals as an incident of the regulation of their relationship'.<sup>249</sup>

The genuine adjustment notion was discussed again in *Health Insurance Commission v Peverill*,<sup>250</sup> where the extinguishment of the earlier right to receive payment from Medicare of a larger amount was effected as a genuine adjustment of competing claims, rights and obligations in the common interests between parties who stood in a particular relationship, and as an element in a regulatory scheme for the provision of welfare benefits from public funds.<sup>251</sup>

The doctrine is not, however, without uncertainties. In *Airservices Australia*,<sup>252</sup> Gummow J noted that the doctrine involved the notion that when private property is affected with a public interest it may be subject to regulatory control by the state,<sup>253</sup> but pointed out that 'many laws which affect property rights are in some sense made by the legislature in an attempt to resolve competing claims with respect to that property and its use'.<sup>254</sup> The result was that 'it may not be easy to draw a line between a law to which s 51(xxxi) applies and one which resolves competing claims or specifies criteria for some general regulation of conduct which is "needed" in the sense used in *Australian Tape Manufacturers*'.<sup>255</sup> The doctrine was subject to considerable analysis and some mild criticism in *ICM Agriculture Pty Ltd v The Commonwealth*,<sup>256</sup> with Hayne, Kiefel and Bell JJ noting that 'the vague and undeveloped character of the doctrine does call for caution in considering its application'.<sup>257</sup>

Nonetheless, the notion that requiring non-funded members to contribute to the costs of attaining the benefits they received is a genuine adjustment appears consistent with the plurality's view in *Brewster* that FEOs made at settlement are valid.

In relation to third-party litigation funding, for the exception to apply, the case may need to be made that third-party litigation funders' activities are in the public interest — presumably relying on the arguments about access to justice. As noted by Stephen J in *Trade Practices Commission v Tooth & Co Ltd*, a court would then need to consider the extent of the public interest to be protected and the extent of regulation essential to protect that interest.<sup>258</sup>

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<sup>249</sup> Ibid.

<sup>250</sup> (1994) 179 CLR 226.

<sup>251</sup> Ibid 236 (Mason CJ, Deane and Gaudron JJ).

<sup>252</sup> *Airservices Australia* (n 217).

<sup>253</sup> Ibid 299 [498].

<sup>254</sup> Ibid 299 [500].

<sup>255</sup> Ibid 300 [500].

<sup>256</sup> *ICM Agriculture* (n 213).

<sup>257</sup> Ibid 226 [218].

<sup>258</sup> *Tooth & Co* (n 224) 414–15.

#### 4 Just Terms

Lastly, the appellants argued that s 33ZF did not make provision for the acquisition of property (through the making of a CFO) to occur on ‘just terms’, and to that extent was invalid.<sup>259</sup> It was argued that ‘just terms’ entailed ‘full compensation’ for what was taken,<sup>260</sup> and that such a law must also ‘affirmatively provide just terms’ for that appropriation as an essential element.<sup>261</sup> Yet, s 33ZF did not do this as it did not require the Court to secure for each group member a compensatory benefit which equated to the value of what was taken.<sup>262</sup> In the authors’ view, if ‘just terms’ were required, this would involve demonstrating both: (a) the reasonable value of the service provided by the funder in return for receiving the fee and; (b) procedural fairness in the treatment of class members — most particularly unrepresented class members who had not signed fee agreements but would be charged fees. Demonstrating the former may require no more than evidence of reasonable valuation of the litigation funding service.<sup>263</sup> In order to demonstrate the latter, reasonable notice to class members whose choses are being affected seems a minimum requirement and might be achieved via comprehensive opt-out notice requirements.

What constitutes reasonable notice was discussed by the ALRC in their Report on Grouped Proceedings, which formed the backdrop to the enactment of Part IVA of the *Federal Court Act 1976* (Cth).<sup>264</sup> The ALRC was concerned that the costs to plaintiffs and their lawyers of funding individual notice to group members ‘may mean that the action cannot proceed’.<sup>265</sup> It thus recommended that the Court should not order that notice be given personally to each group member unless satisfied that it was reasonably practicable, and not unduly expensive to do so.<sup>266</sup> This recommendation was reproduced verbatim in s 33Y(5) of the *Federal Court of Australia Act 1976* (Cth). Procedural fairness considerations were therefore somewhat overridden by a strong policy bias that it was always better for actions to proceed — presumably on the basis of the access to justice argument.

In the CFO debate, and following *Haselhurst*,<sup>267</sup> it may be that ‘just terms’ for an acquisition of property might necessitate procedural fairness elevated from

<sup>259</sup> Appellants’ Submissions (n 183) [49] 19.

<sup>260</sup> Ibid, citing *Georgiadis* (n 210) 311 and *Smith* (n 210) 501 [10].

<sup>261</sup> Ibid, citing *PJ Magennis* (n 224) 402.

<sup>262</sup> Appellants’ Submissions (n 183) 20 [49].

<sup>263</sup> The plurality of the High Court in *Brewster* (n 9) seemed open to the idea of the court ascribing a value to the funder’s services: see 63 [41], 67–8 [68] (Kiefel CJ, Bell and Keane JJ). It has previously been pointed out that courts should be able to value a service such as litigation funding: see Honourable Ray Finkelstein, ‘Class actions: The Good, the Bad and the Ugly’ in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre, 2017), 432.

<sup>264</sup> Australian Law Reform Commission (n 126).

<sup>265</sup> Ibid.

<sup>266</sup> Ibid 83 [192].

<sup>267</sup> *Haselhurst* (n 130).

the somewhat cursory notice requirements of s 33Y(5).<sup>268</sup> This is a constitutional question in relation to just terms but it is also likely to be a policy question, given the call by the PJC and others for a legislative approach to common funds.<sup>269</sup>

Lastly, any legislative 'fix' by the Commonwealth to reinstate common funds can obviously only occur if it is within Commonwealth constitutional power.<sup>270</sup> The silence by the majority in *Brewster* on the constitutional question means that this may remain a live issue for a future legislature.

## VII CONCLUSION

The common fund doctrine, allowing an advance order for ultimate deduction of funding fees from all group members' damages, was found by the High Court in *Brewster* to go beyond the legislative provisions relied upon by courts to date. Yet common funds have certain advantages for plaintiffs in reducing book building costs in class proceedings. They may also allow greater court control of funding fees and discourage closed classes. Admittedly, they may also somewhat attenuate the legal relationship between funders and lawyers on the one hand and class members on the other, which is something that also needs to be considered. The recent PJC Report accepts that legislative intervention may be desirable to clarify matters, though the constitutional power of the Commonwealth to legislate in this manner was not definitively examined in *Brewster*. Constitutional impediments may arguably not arise, however, if any legislative intervention is careful to provide just terms to litigants. This may involve both procedural fairness through real notice and fair valuation of the funding benefit. Ironically, these are matters that courts have generally strived to achieve with CFOs.

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<sup>268</sup> It is worth noting that in the largest categories of class actions, shareholder and investor actions, the email addresses of shareholders are generally available from defendants or through share registries and that the costs of notification by this means would be negligible.

<sup>269</sup> Christine Caulfield 'Judge Calls for Legislative Fix in Wake of High Court's Common Fund Ruling' (9 April 2020) *Lawyerly* <<https://www-lawyerly-com-au.ap1.proxy.openathens.net/judge-calls-for-legislative-fix-in-wake-of-high-courts-common-fund-ruling/>>.

<sup>270</sup> Action by state legislatures is generally unconstrained by s51(xxxi). See *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.

