IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S154 of 2019

BETWEEN:

WESTPAC BANKING CORPORATION

First Appellant & Anor named in Annexure A

and

GREGORY JOHN LENTHALL

First Respondent & Ors named in Annexure A

10 **APPELLANTS' SUBMISSIONS**

Part I: Certification as to suitability for publication

1. This submission is in a form suitable for publication on the internet.

Part II: Issues arising for determination in the appeal

2. The appeal presents the following issues:

   a. Does s.33ZF of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), on its proper construction, empower the Federal Court to make a so-called "common fund order" in representative proceedings, requiring that part of the fruits of any success otherwise payable to each group member instead be paid to a funder?

20 b. In determining this question of construction, is the principle of legality engaged because of the effect of the common fund order on proprietary rights?

   c. If the answer to (a) is yes, does s.33ZF infringe the separation of powers by conferring on the Federal Court power that is neither judicial nor incidental to the exercise of judicial power?

   d. If the answer to (a) is yes, is s.33ZF properly characterised for the purposes of s.51(xxxi) of the *Constitution* as a law with respect to the acquisition of property?

   e. If the answer to (d) is yes, is s.33ZF invalid because it provides for the acquisition of property otherwise than on just terms?

Allens
Deutsche Bank Place, 126 Philip Street
Sydney NSW 2000

Telephone: 02 9230 4828
Fax: 9230 5333
Email: Malcolm.Stephens@allens.com.au
Ref: Malcolm Stephens 120721308-005

Part III: Certification as to notices under s. 78B of the *Judiciary Act 1903* (Cth)

3. Appropriate notices under s. 78B of the *Judiciary Act 1903* (Cth) were filed on 28 May 2019 and served on the Attorneys General: Core Appeal Book (**CAB**) at 137.

Part IV: Citation of relevant decisions below

4. The citations are *Lenthall v Westpac Banking Corporation* (2018) 130 ACSR 456: CAB at 9 (primary judge) and *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34: CAB at 69 (Full Court of the Federal Court).

Part V: Relevant facts

5. The appeal arises out of representative proceedings in the Federal Court under Part IVA of the FCA Act. The proceedings are brought by four named applicants on behalf of group members who acquired policies of insurance from the second appellant, Westpac Life Insurance Services Ltd, after receiving advice from financial advisers in Westpac Financial Planning.[1] Each of the four named applicants has signed a funding agreement with the fifth respondent, JustKapital Litigation Pty Limited (**JKL**), pursuant to which they have agreed to pay to JKL a proportion of any resolution sum that would otherwise be payable to them personally.[2] The represented group is very large, and may exceed 80,000 members.[3] Aside from the four applicants, none of the group members has signed a funding agreement with JKL.[4]

6. By an amended application filed on 18 June 2018, the applicants sought a common fund order that relevantly provided for JKL to be paid a funding commission from any resolution sum: CAB 6. At that time, pleadings had closed but the parties had not yet exchanged evidence. The primary judge ultimately made an order (**the Order**) that JKL shall, by way of commission and in addition to full reimbursement of costs paid, receive the lesser of (a) 3 times the total expenditure outlaid by JKL; and (b) 25% of the net recovery in any resolution (whether by settlement or judgment): CAB 46 at [6]. Under the "order of priority" created by the Order, payments to JKL were to be the first payments made out of the resolution sum: see FCAFC at [21]-[23] (CAB 81-82).

---

[1] *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34 (**FCAFC**) at [3] CAB 75.
[2] FCAFC at [4]-[5] CAB 75. A copy of the funding agreement signed by the first respondent is in the appellants' Book of Further Materials (**BFM**) at 39.
[3] *Lenthall v Westpac Banking Corporation* [2018] FCA 1422 at [14(f)] CAB 18.
[4] *Lenthall v Westpac Banking Corporation* [2018] FCA 1422 at [9], para 4 CAB 14-16.

7. The Order imposed a liability on group members,[5] albeit its practical implementation was contingent on the respondents, their solicitors and JKL providing an undertaking and there being a resolution sum. And its immediate and binding effect was to confer on JKL a right to part of the fruits of group members' interests in any judgment or settlement. To adopt Wigney J's language in *Blairgowrie Trading Ltd v Allco Finance Group Ltd*,[6] the practical effect of the Order was to create a "security interest (a first charge)" in favour of JKL over any pooled resolution sum – a sum comprised of part of the fruits of the choses in action of group members who have not sought to enter into any contract with it. By the Order, the "tree" producing those fruits (group members' choses in action) was rendered immediately less valuable, and JKL received a corresponding "entitlement" to a "return" or "commercial reward" (FCAFC at [102], [105], CAB 105-106) that provided sufficient incentive for it to guarantee ongoing funding for the proceedings (see FCAFC [27]-[28], CAB 83-84).

8. The appellants sought leave to appeal to the Full Court of the Federal Court, where leave was granted but the appeal dismissed. The appeal was heard concurrently with the NSW Court of Appeal's hearing of a referred matter which raised equivalent issues about the construction and validity of the corresponding provision in the *Civil Procedure Act 2005* (NSW) (**CPA**): *Brewster v BMW Australia Ltd* [2019] NSWCA 35 (***Brewster***).

Part VI: Argument

9. An order of the kind made by the primary judge has come to be referred to as a "common fund order". This is a misnomer, given the origins of the phrase.[7] The "common-fund doctrine", as it developed in the United States in the context of class actions, has the effect "that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to *a reasonable attorney's fee* from the fund as a whole".[8] As explained in *Boeing* at 478, the doctrine "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense". The doctrine requires that those who ultimately obtain the benefit of a lawsuit must share in the burden of the costs that have *in fact* been incurred by the person who expended money to secure that outcome. By exercising "jurisdiction over the

---

[5] As found by the Full Court: FCAFC at [5] CAB 75.
[6] (2015) 325 ALR 539 (***Blairgowrie***) at [60]. His Honour's language reflected the fact that the order his Honour declined to make would have had the effect of what is often referred to as "an assignment by way of charge": see, e.g., *Austino Wentworthville Pty Ltd v Metroland Australia Ltd* (2013) 93 ACSR 297 at [62](3). See also *In re Lawson Constructions Pty Ltd* [1942] SASR 201 at 204-205.
[7] Wigney J noted as much in *Blairgowrie* at [94]. See also [196].
[8] *Boeing Company v Van Gemert* 444 US 472 (1980) (***Boeing***) at 478 (emphasis added).

fund" in this manner the court prevents inequity by "spreading fees proportionately among those benefited by the suit": 478.

10. Such an order has two important characteristics. First, it is a tool for equitable redistribution of an *existing expense*. The avoidance of "unjust enrichment" through the equal sharing of expenses that have been incurred reflected "the traditional practice in courts of equity" in representative proceedings: *Boeing* at 478.[9] The case considered by the Full Court at [103] CAB 105-106, *The National Bolivian Navigation Company v Wilson* (1880) 5 App Cas 176, is another example of this practice being applied. Secondly, it is a tool for redistributing expenses *as between all those who benefited* from the plaintiff's expenditure and endeavours, as part of the final determination of the representative proceedings.

11. In contemporary class actions, the same principles support the making of so-called "funding equalisation orders" (**FEOs**) at the point of approving a settlement or giving judgment in the proceedings. FEOs prevent group members being "free riders", by ensuring that the burden of the funding costs incurred by group members who have signed funding agreements promising to pay a share of any resolution sum (so-called "funded group members") is shared proportionately with those who have not signed such agreements, but who ultimately receive the fruits of the proceedings that have been pursued on their behalf.[10] The expense being shared proportionately among all group members is one that exists independently of the order – it arises from the contractual promises that have been made by funded group members. The overall burden spread across the entire group, in the form of a return to the funder, is not created or increased by virtue of the order. The redistribution under an FEO is an adjustment of group members' interests *between themselves* as part of a settlement or judgment, and does not confer any financial benefit, or any interest of a proprietary nature, on a third party (the funder). The court is concerned only with ensuring an equitable outcome, having regard to existing legal rights and obligations of group members.

12. So-called common fund orders like the Order (**CFOs**) are fundamentally different. First, a CFO does not operate by reference to an *expense* that has been *incurred* by

---

[9] See *In re New Zealand Midland Railway Company Smith v Lubbock* [1901] 1 Ch 357 at 362-363 (representative proceeding brought by the plaintiff on behalf of herself and all other debenture-holders). In *Stanton v Hatfield* (1836) 1 Keen 358; 48 ER 344 the same principle was applied to allow recovery of the costs of a plaintiff, who had successfully brought a suit on behalf of himself and all other creditors of a testator, from the fund realised by the plaintiff for the benefit of all creditors. See Young, Croft and Smith *On Equity* (2009) at [15.190].

[10] *Money Max Int P/L v QBE Insurance Group Ltd* (2016) 245 FCR 191 (***Money Max***) at [5]; *Blairgowrie* at [164].

representative applicants or by funded group members. Second, it need have no connection with, and transcends, any contractual obligation borne by the applicants and funded group members: the CFO may strike an entirely new bargain, as in this case.[11] Third, it confers rights on the funder that did not otherwise exist. Fourth, it is the judicial order itself that is the *sole* source of that right (and the correlative liability) in respect of that additional commission payable out of any settlement or monetary award. Fifth, a CFO does not adjust group members' interests between themselves as part of an agreed or contested resolution of the proceedings. Rather, it is an exercise in granting a commercial return to a funder and spreading the burden of that commission across the group by in effect charging the fruits of all group members' interests with the proportionate percentage of the funding commission.

13. These distinctions are critical. The Full Court erred by failing to appreciate them and by characterising the question before it as being whether the Court was validly empowered to regulate whether group members should share the burden of a "cost" or "expense" which had been incurred on their behalf.[12] That in turn infected the Full Court's reasoning in identifying supposed historical analogies in Chancery.[13]

The proper construction of s.33ZF of the FCA Act

14. Properly construed, s.33ZF did not authorise the making of the Order. It relevantly provides that in representative proceedings the Court may "make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding". In considering whether these general words confer power to make a CFO, it is necessary to bear in mind the extraordinary nature of such an order, as summarised above. The Court is drawn into a role tantamount to that of a remuneration tribunal, fixing a "fair" commercial reward for the provision of financial services (see the observations of the primary judge at [22]-[23] CAB 20-21, [52] CAB 29). As the primary judge acknowledged during argument, in making a CFO the Court was engaged in a "very unusual judicial task" (at [11] CAB 17).

15. Four features are significant to the construction and validity of s.33ZF. First, a CFO deprives group members of part of their proprietary rights. Second, it does so by conferring interests on a third party (a funder), far in advance of any resolution of the proceedings.

---

[11] For example, Funding Agreement between Gregory John Lenthall and JKL dated 22 September 2017 (BFM 39). See [23]-[24] CAB 53.
[12] FCAFC at [18] CAB 80, [23] CAB 82, [28] CAB 83-84, [53] CAB 92, [91] CAB 101, [94] CAB 102. A further clear example of the failure to appreciate the distinction is at [104], where the Full Court called in aid the fundamental basis of FEOs as support for the existence of a power to make a CFO.
[13] FCAFC at [103]-[104] CAB 105-106.

Third, it involves a Court fixing a fair return for that third party where there are no specified practical criteria for making such a determination. Fourth, the Court is creating new rights, rather than enforcing existing ones. The fourth point is dealt with below in the context of the separation of powers argument (although obviously there is an overlap between the latter argument and the proper construction of s.33ZF). Each feature needs to be considered in the context of Part IVA as a whole.

16. ***Principle of legality:*** Group members have an entitlement to any fruits of their causes of action. That entitlement is proprietary in character and is assignable in equity for value.[14] The effect of a CFO is to diminish that proprietary right, and more broadly to effect a partial loss of group members' choses in action by rendering that property less valuable (see [7] above). The principle of legality is therefore engaged.[15] To construe s.33ZF as authorising the Court to make such an order is to read that provision as authorising the Court to "alter",[16] "modify"[17] or "curtail"[18] such proprietary rights. Without words of irresistible clearness manifesting an intention to permit such an interference,[19] s.33ZF should not be so construed. There are no clear and unambiguous words in s.33ZF evincing an intention to authorise Courts to reallocate the fruits of the litigation.

17. The Full Court reasoned (at [94] CAB 102) that its preferred construction of s.33ZF conforms entirely with the principle of legality because a CFO "not so much takes away from, as supports and fructifies, rights of persons that would otherwise be uneconomic to vindicate". This analysis is flawed. First, there is a false dichotomy implicit in the notion that a CFO does not "take away from … rights" because it instead "supports and fructifies" those rights. To identify a perceived advantage with the exercise of power, namely that it facilitates the conduct of proceedings to secure the fruits of litigation, does not avoid the conclusion that this end is achieved by interfering non-consensually with existing proprietary rights in respect of those fruits. Secondly, it is incorrect to suggest that the principle of legality is not engaged if the diminution in property rights can be seen to be bound up with some perceived countervailing benefit – here, the vindication and realisation of "common rights" (at [94]).

---

[14] *Peldan v Anderson* (2006) 227 CLR 471 at [27]; *Cummings v Claremont Petroleum NL* (1996) 185 CLR 124 at 145; *Glegg v Bromley* [1912] 3 KB 474 at 484, 486, 489.
[15] *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 682-683; *Lee v NSW Crime Commission* (2013) 251 CLR 196 at [307]-[312].
[16] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [36].
[17] *Bropho v Western Australia* (1990) 171 CLR 1 at 18.
[18] *Coco v The Queen* (1994) 179 CLR 427 at 437.
[19] *Potter v Minahan* (1908) 7 CLR 277 at 304; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [15], [56], [58]; *Lee v NSW Crime Commission* (2013) 251 CLR 196 at [308].

The principle cannot be avoided by applying a balancing test at the outset of the construction exercise. Had the legislature shown by clear words that it sought to authorise such an interference with proprietary rights *in order to* achieve perceived benefits, then it may be accepted that the provision was intended to operate in this way. But Parliament did not do so.

18. The Court of Appeal in *Brewster* similarly held (at [58]) that the principle of legality was not relevant to the construction of s.183 of the *CPA* because that provision is "located in a legislative regime where there is a clear adjustment of represented parties' right to litigate a cause of action, counterbalanced by a detailed series of protective provisions". The fact that *particular* rights that group members enjoy in relation to their causes of action, including the right to bring proceedings and obtain relief, are expressly modified by Part 10 of the *CPA* (and Part IVA of the FCA Act – see, e.g., s.33E) says nothing about the legislature's intention to interfere with *quite different* rights (particularly proprietary rights) of such people, namely by taking part of any fruits of their causes of action and giving them to a third party.

19. The "elaborate provision" made by the legislature (see *Brewster* at [60]) indicates with the necessary clarity the *particular* ways in which the legislature did intend to modify existing proprietary and other rights, and serves to define the boundaries of such intended interference. For example, s.33ZJ(2) of the FCA Act expressly provides that part of the damages awarded in representative proceedings may be applied to meet any shortfall in the recovery of costs incurred by the person who brought the proceedings. The legislature thus clearly specified its intention to interfere with the relevant right in a limited way.[20]

20. There are also important procedural protections associated with the incursion on existing rights. There is a mandatory procedure for notification of the commencement of proceedings and the right to opt out (s.33X(1)); a procedure for extending the time, beyond an earlier specified deadline, for group members to make a claim for a share of a damages award (s.33ZA(3)(c) and (4)); and careful specification of which rights of group members are, and are not, affected by judgment in a representative proceeding (s.33ZB). It is "improbable"[21] that the legislature intended that within this "elaborate scheme", with its various express adjustments to procedural rights and associated procedural protections, there also be a power lurking in the general words of s.33ZF to make a CFO, with all the extraordinary features that such an order has (as summarised above), if at any time the Court

---

[20] See *Northern Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [11].
[21] *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *Commissioner of Taxation v Tomaras* (2018) 362 ALR 253 at [100]-[101].

considers that to be appropriate or necessary to do justice in the proceeding. This is particularly so given that the very purpose of the scheme to regulate the representative parties' right to litigate the causes of action of a class of persons is to provide a procedure to secure to group members the fruits of such litigation. The statutory language reflects the "entitlement" of group members to such fruits.[22]

21. The reliance placed by the Court of Appeal in *Brewster* at [61] on the reasoning of Gageler and Keane JJ in *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [314] is misplaced. Their Honours were there addressing a scenario where "the legislature *has directed its attention* to the question of the abrogation or curtailment of the right, freedom or immunity in question and has made a legislative determination that the right, freedom or immunity is to be abrogated or curtailed" (emphasis added). It is this characteristic of the legislation that led their Honours to conclude that the presumption of legality cannot be invoked against "the very thing which the legislation sets out to achieve". This reasoning has no application in the present case, where there is no indication in the text or context that the very thing the legislature set out to achieve was that third party funders could receive a commission from the fruits of litigation otherwise due to group members. At its heart, the principle of legality is about making sure that the legislature squarely confronts[23] what it is doing where that affects existing rights and interests. It has not squarely confronted the prospect of courts reallocating part of the fruits of litigation from group members to funders – a proposition which is reinforced by the fact that there was no contemplation of CFOs when s.33ZF was enacted (see [32] below).

22. The Full Court also erred in approaching the issue of construction on the basis that s.33ZF is engaged where the rights of represented persons "would otherwise be uneconomic to vindicate".[24] Part IVA applies to *all* representative proceedings in respect of relevant causes of action of seven or more persons, *whether or not* they are individually economic to litigate. Part IVA cannot be construed as if it applies *only* to rights that would otherwise be uneconomic to vindicate. Making such an unwarranted assumption risks treating the rights of group members *generally* as a degraded form of property, not worthy of the protection from incidental statutory modification that is otherwise afforded by the principle of legality.

---

[22] See ss.33Z(2), 33Z(3).

[23] *R v Secretary for Home Department; Ex parte Simms* [2000] 2 AC 115 at 131, quoted in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [47] and in *Lee v NSW Crime Commission* (2013) 251 CLR 196 at [311].

[24] FCAFC at [94] CAB 102. See other references to similar effect at [19] CAB 80-81 and [28] CAB 83-84.

23. ***Judicial conferral of interests on third parties in advance of resolving the proceedings:*** The characteristics of a CFO as described at [6]-[7] and [12] above mean that it is not capable of being seen as "appropriate or necessary to ensure that justice is done in the proceeding" (s.33ZF(1)). The "proceeding" in which the Court's jurisdiction is invoked is that in which damages are claimed from a respondent. The parameters of the Court's task in that proceeding are charted by s.22 of the FCA Act, requiring it to grant all remedies to which a party is entitled "in respect of a legal or equitable claim" brought by him or her in the proceedings so as to determine "all matters in controversy between the parties", and by s.23, empowering it to make all orders it thinks appropriate "in relation to matters in which it has jurisdiction". Section 33ZF has no wider scope than those provisions – indeed, s.33ZF(2) expressly indicates that the power in s33ZF(1) fits within s.22's broader framework. Unlike an order specifying or adjusting the quantum of amounts payable to individual group members as part of the process of approving a settlement or delivering judgment, granting a funder a share of any fruits of the litigation (and doing so far in advance of determining the matter) is not a step that aids in the determination of the parties' legal interests *or in the resolution of matters in controversy between them*. The Court's role in the administration of justice is not to maintain the economic viability of extant litigation, but to *decide* disputes that parties prosecute to hearing. Attempting to ensure the ongoing representation of passive group members by reallocating any fruits of their choses in action to funders (particularly without their consent or agreement) goes far beyond what is properly to be understood, in the context of ss.22 and 23, as constituting *the doing of justice in the proceeding*.

24. The above construction is supported by *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 (***Jackson***), in which the majority identified similar limits on the Federal Court's general power in s.23 by construing the scope of "appropriate" orders against the backdrop of the nature of the Court's authority to decide matters brought before it. At a very attenuated level, it could be said that the impugned order in that case – an asset preservation order requiring the appellant to pay into court $3m as security for the satisfaction of any judgment – had some link with the administration of justice. The order went to the availability of funds, on an interim basis, to satisfy any award made in favour of the respondent. Nonetheless, this Court held that those orders went beyond the power under s.23 to grant relief (at 619; see also 621, 626-627). By creating and enforcing new rights rather than protecting and enforcing rights in respect of which the Court's jurisdiction was invoked (at 619), the orders "were not of a kind that it was within the power of the Federal Court to make as 'appropriate' in relation

to the proceedings before it or as an incident of its substantive jurisdiction to deal with those proceedings" (at 626-7). Similarly here: even if ensuring one funder's ongoing representation of group members could provide a means of "enabl[ing] the realisation of" those members' choses in action by "reduc[ing] ... the risk of the action not proceeding" (FCAFC at [91] CAB 101), the Order took the Court beyond the resolution of controversies to the imposition of a financial model to sustain pending litigation. It thus exceeded "what is in reasonable protection" of the legal rights sought to be vindicated (cf *Jackson* at 621).

25. ***Absence of practical criteria:*** Separately, it is significant that the criteria in s.33ZF – "appropriate or necessary to ensure that justice is done in the proceeding" – give no meaningful content to the discretionary exercise of *fixing a rate of return* to the funder. The absence of relevant practical criteria, in addition to being significant to the separation of powers argument (see further below), is itself a further contextual indication that s.33ZF was not intended to authorise orders of this kind.

26. ***Scheme of Part IVA:*** Despite its breadth, s.33ZF should not be treated as a vehicle for rewriting Part IVA.[25] A provision conferring general power on a court is, consistent with the principle in *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* (1994) 181 CLR 404 (***Shin Kobe Maru***) at 421, to be construed liberally but only as far as its text and context permit.[26] The Court in *Shin Kobe Maru* at 421 referenced *FAI General Insurance Company Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 290, where Gaudron J held that a discretionary power entrusted to a court should not be read down by reference to assumptions and considerations *external to the statute* in question. It remains necessary to ascertain the true meaning of the language in the statute which confers the power or discretion. That exercise necessarily takes account of contextual considerations, as well as other principles of construction including the principle of legality.[27]

27. The *Shin Kobe Maru* principle does not dictate the conclusion that s.33ZF confers power on the Court in representative proceedings to make any kind of order that it considers appropriate, regardless of the impact on existing substantive rights. As explained above, s.23 of the FCA Act does not extend to the "creation ... of rights" in addition to those for the

---

[25] *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168 at [52].
[26] *PMT Partners Pty Ltd (in liq) v Australian National Parks & Wildlife Service* (1995) 184 CLR 301 at 313; see also *Programmed Total Marine Services Pty Ltd v Ships "Hako Endeavour", "Hako Excel" and "Hako Esteem"* (2014) 315 ALR 66 at [23].
[27] *South Australia v Totani* (2010) 242 CLR 1 at [362].

protection or enforcement of which the jurisdiction of the Court was invoked (*Jackson* at 619; see also at 620-621, 626-627), and the same is true of s.33ZF.

28. Section 33ZF, located in a Division entitled "Miscellaneous", has been properly described as a "gap filling" power.[28] It should not be construed as empowering the Court to make a pre-emptive order about what proportion of any settlement sum or judgment award should be diverted to a funder, in circumstances where Part IVA elsewhere contains specific provisions regulating the processes of settlement and judgment.

29. Section 33V expressly empowers the Court to make such orders as are just with respect to the *distribution of any money* paid into court or by way of a settlement. This power is exercisable only when the Court is asked to approve a settlement or discontinuance. The default position is that group members must be given notice of an application for approval of a settlement under s.33V: s.33X(4). There is no requirement to give notice of any application for a CFO. Yet the purpose of ss.33X and 33Y was to give notice to group members of "events during the course of the proceeding *which may affect their rights*" (emphasis added): Explanatory Memorandum, *Federal Court of Australia Amendment Bill 1991* (**EM**) at [33].

30. Where a matter is resolved by a damages award, the powers of the Court are similarly specified. The Court "must",[29] in making an award of damages, make provision for the "payment or distribution of the money to the group members entitled" and is authorised to make directions in respect of such an award: s.33Z(2), (4). Section 33ZA further regulates the distribution of money to group members. As already noted, s.33ZJ(2) specifically empowers the Court, where it has made an award of damages and where the costs reasonably incurred by a representative party are likely to exceed the costs recoverable by the representative from the respondent, to order that an amount equal to the whole or a part of the excess be paid to that person *out of the (common fund of) damages awarded.* This is in circumstances where the Court may not award costs *against a group member* in Part IVA proceedings except under ss.33Q or 33R: s.43(1A). Section 33ZJ(2) thus gives statutory force to the traditional equitable principles referred to in [10] above. It also implements, in substance, a recommendation of the ALRC in the *Report on Grouped Proceedings in the Federal Court*

---

[28] *Ethicon Sàrl v Gill* [2018] FCAFC 137 at [17].

[29] The use of "must" strongly suggests that ss.33Z/33ZA/33ZJ confer the *only* power to make provision for the payment or distribution of the money comprising a damages award – see [31] below.

(Report No 46) (***ALRC Report***) that group members should have to contribute to the solicitor-client costs where monetary relief is awarded.[30]

31. The provisions described above *do* in clear words confer a power to interfere with the rights of group members in respect of the distribution of resolution sums, on certain conditions. There is no scope to construe a general power, not subject to the same conditions, as extending to those same matters. The scheme of Part IVA thus indicates that there is only "one power" to deal with the distribution of any resolution sum resulting from moneys paid into court, from settlement or from judgment (as the case may be).[31]

32. ***Legislative history:*** The legislative history and extrinsic material provide no support for the view that s.33ZF was intended to empower the Court to take away proprietary rights from group members through a CFO. On the contrary, the EM (at [3]) stated that "the procedural reforms in the Bill confer no new legal rights".[32] The history discussed by the Court of Appeal in *Brewster* at [68]-[75] clearly demonstrates that CFOs could not have been in contemplation at the time Part IVA was enacted. They are a very recent innovation.[33] At the time Part IVA was enacted, maintenance and champerty were tortious and perhaps[34] criminal in all jurisdictions within Australia except Victoria.[35] Importantly, the *ALRC Report* had recommended (reaffirming an earlier recommendation of the ALRC) that the crime and tort of maintenance be abolished, but specifically exempted *champerty* from that recommendation.[36] No recommendations were made by the ALRC to the effect that the Court should be empowered to facilitate funding of representative proceedings by effectively imposing a champertous relationship between group members and third party funders through CFOs. It is plain that the ALRC envisaged no such power, or system, of funding. Indeed, the *ALRC Report* stated at [318] that any funding agreements should not be with "third parties" and that private financing should not be "in consideration of a share in the proceeds … of the

---

[30] *ALRC Report* at [290]. The ALRC, at [289] accurately described this principle as being consistent with the "common fund doctrine" in the United States, citing *Boeing*. In *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168 at [39], Sackville J said that s.33ZJ implemented, in substance, this recommendation of the ALRC.

[31] *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at [59]; *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678.

[32] The EM added at [3] that the reforms "build on existing centuries old representative action procedure …". That procedure included the "equal sharing of expenses" referred to in [10] above.

[33] In *Money Max* at [133]-[136], the Full Court accepted that there were no precedents for the orders it ultimately made.

[34] See *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 (***Fostif***) at [85].

[35] *Abolition of Obsolete Offences Act 1969* (Vic), ss.2 and 4 (see *ALRC Report* at [274]). Even today champerty remains tortious and perhaps criminal in Qld, WA, Tasmania and the Northern Territory. Abolition corresponding with that in Victoria occurred in SA in 1992, in NSW in 1993 and in the ACT in 2002.

[36] *ALRC Report* at [317]. *Brewster* at [70] appears incorrectly to state that the ALRC recommended that the tort and crime of both maintenance *and* champerty should be abolished.

action".[37] Given this context, it is highly improbable that the legislature intended the general words of s.33ZF to confer on the Federal Court a power to make CFOs.

33. In *Fostif*, many years after the enactment of Pt IVA, this Court held that, at least in the four jurisdictions in which by 2006 maintenance and champerty had been abolished as torts and crimes (see [85]), there was no reason in public policy why proceedings funded by a third party should be stayed. That says nothing about the entirely different question of whether the legislature intended to empower the Federal Court effectively to impose, by judicial order, what would otherwise be a champertous arrangement.

34. The principle that legislation is "always speaking" (see *Brewster* at [75]-[76]) does not justify the conclusion that, while CFOs were not contemplated when Part IVA was enacted, s.33ZF should nevertheless now be construed as encompassing the power to make such orders. That interpretive principle is relevant when considering the meaning and denotation of particular words, in circumstances where there has been an evolution in meaning and the question is whether the language used is "adaptable to new circumstances".[38] The question here is not whether the understanding of what may be "appropriate or necessary" has evolved. It is whether Parliament intended that the power in s.33ZF, understood in the scheme and historical context of Part IVA as a whole and having regard to the impact on proprietary rights effected by CFOs, should extend to making orders of this kind. The answer is "no". For similar reasons, the Full Court's analysis at [88] (CAB 100) fails to observe the various limitations on s.33ZF's operation as explained above.

Separation of powers

35. A Commonwealth law may not validly confer on federal courts "functions which are not themselves part of the judicial power and are not auxiliary or incidental thereto".[39] The making of a CFO is an exercise neither of judicial power nor of power incidental to judicial power (cf FCAFC at [100], [106]). If s.33ZF should be construed as authorising the Federal Court to make such an order, it is invalid to that extent under Ch III of the *Constitution*.

36. ***Judicial power:*** Whilst "no single combination of necessary or sufficient factors identifies what is judicial power",[40] the determination of pre-existing rights has been

---

[37] The Full Court at [17] CAB 80 apparently failed to appreciate these limitations.
[38] *Aubrey v The Queen* (2017) 260 CLR 305 at [29]-[30].
[39] *Boilermakers Case* (1956) 94 CLR 254 at 271-278 (affirmed on appeal: (1957) 95 CLR 529).
[40] *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 577; see also *Palmer v Ayres* (2017) 259 CLR 478 (***Palmer***) at [43] (there is no "all-encompassing abstract definition of the judicial power").

described as its "core characteristic" or "hallmark".[41] If the power's object is "not to resolve a dispute about the existing rights or obligations of the parties by determining what those rights and obligations are but to determine what legal rights and obligations should be created, then the function stands *outside the realm* of judicial power".[42] In *Sue v Hill* (1999) 199 CLR 462 at [132], Gaudron J described as inherently non-judicial the "power to determine what the future rights or liabilities of people in particular relationships should be." In *South Australia v Totani* (2010) 242 CLR 1 at [220], Hayne J described the determination of rights and liabilities as lying "at the heart of the judicial function", whereas rights creation lies at the heart of the legislative function.[43]

37. In *Precision Data*, the relevant power conferred on the Corporations and Securities Panel was characterised as non-judicial particularly because the decision to be made by the Panel was "not an adjudication of a dispute about existing rights and obligations". Rather, the object of the Panel's enquiry and determination was "to create a new set of rights and obligations ... arising from such orders as the Panel may make in a particular case", which led to the conclusion that the relevant provision was valid.[44] The Court adopted the same approach in *Attorney-General (Cth) v Alinta Ltd.*[45] Here the same characterisation spells invalidity. To construe s.33ZF as authorising the making of a CFO is to construe it as authorising the Court to create rights (for the benefit of the funder).

38. It is true that a power exercised by a court may be judicial in character even though it involves no determination of pre-existing rights and although it empowers the creation of rights, provided that the power is of the same "jurisprudential character"[46] as powers "historically" or "traditionally" exercised by courts.[47] However, there is no history or tradition of the courts making anything akin to CFOs. As explained above, while the courts of equity historically ensured the equal sharing of a common burden in respect of *costs* that had been *incurred*, the courts were concerned only with the equitable distribution of a pre-

---

[41] Stellios, *The Federal Judicature* (2010) at [4.3]; *Ha v NSW* (1997) 189 CLR 465 at 503-504.
[42] *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 (***Precision Data***) at 189 (emphasis added).
[43] See also what was said by all seven Justices of this Court in *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 664, 666; and *R v Davison* (1954) 90 CLR 353 (***Davison***) at 368-370, 375.
[44] *Precision Data* at 189-190.
[45] (2008) 233 CLR 542 at [2]-[3], [14], [42], [88]-[90], [94], [96], [105] and [176].
[46] *Thomas v Mowbray* (2007) 233 CLR 307 (***Thomas***) at [15].
[47] See *Davison* at 369; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries* (1970) 123 CLR 361 at 373, 387, 394; *Cominos v Cominos* (1972) 127 CLR 588 (***Cominos***) at 591, 600, 605, 606, 607, 608 (note "decisive"); *Dalton v NSW Crime Commission* (***Dalton***) (2006) 227 CLR 490 at [45]; *Thomas* at [16]-[17], [20]-[26], [73]-[79], [100]-[102], [116]-[121]; *Palmer* at [37]-[40]; [42]ff.

existing burden, and not with the creation of a wholly new entitlement and corresponding liability. Accordingly, that doctrine, repetitively cited by the Full Court (e.g., at [103]-[104] CAB 105-106), is of no relevance. The leap from that ancient equitable doctrine to what is described at [105] strains the supposed analogy beyond breaking point. No sound historical analogy exists to support the proposition that powers of this kind formed part of the exercise of judicial power as understood in the tradition of English law at the time of Federation.[48] As to the Full Court's point in the first part of [102] (and see [74]), a CFO is not at all analogous to the power exercised (*after* salvage) by the old admiralty courts in favour of salvors.[49]

39. It has also been recognised that the power exercised by courts in respect of so-called "double function provisions" is judicial power. The explanation of such provisions in *Ex parte Barrett*[50] was that a law, in authorising a court to exercise authority, must implicitly be taken to have *created* a right or obligation in the "same breath" as conferring that authority, even though the creation is not expressly stated in the statutory provision. Critically, in a double function provision it is the legislature that creates the right or liability. The role of the court is to *give effect to* or enforce the rights and obligations *for which the statute provides*. That "legislative technique" is not in any way evident in s.33ZF.

40. The hypothetical provision postulated by the Full Court at [53] CAB 92[51] may well constitute a double function provision, setting out as it does a right and obligation as to the sharing of "costs and expenses" which is said to include a "funding commission" if "reasonably and appropriately expended". The Court is left to determine any dispute as to the right and obligation so created. This says nothing about s.33ZF, which bears no resemblance to that provision, to which the court may give effect. Thus, any right in the funder only exists if *the Court*, in its discretion, decides to create it.

41. Consistently with the two principles just described, the Full Court sought to ground its conclusions on judicial power in six authorities, each of which concerned a power that does have historic judicial roots[52] and/or was part of a double function provision[53] (FCAFC at [98]

---

[48] *Davison* at 369, 381-382; see *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1106, 1109 and the discussion of those principles by Gageler J in *Palmer* at [42]ff; and *Dalton* at [45].
[49] Cf, e.g., *Bligh, Harbottle & Co v Simpson (The "Fusilier")* (1865) BR & L 341 at 347; 167 ER 391 at 394.
[50] *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 155, 165-167. That account of this "legislative technique" was referred to with approval in *Precision Data* at 190-191.
[51] Contrary to what is said at [53] CAB 92, the appellants did not submit that section and order there set out were impermissible as infringing the separation of powers. The issue was not raised in the context of argument regarding judicial power.
[52] *Thomas* at [16]-[17], [79], [116]-[121] (power to make "binding over orders" to keep the peace); *Fisher v Fisher* (1986) 161 CLR 438 at 453-4 (power to alter property interests of marital parties); *Cominos* at 591, 600, 605, 606, 607, 608 (family maintenance orders and property settlements); *Davison* at 368-369, 375, 381-382.

CAB 103). But once it is appreciated that there is here no appropriate historical analogy and that s.33ZF is not a double function provision, that part of its reasoning falls away.

42. Moreover, 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 by reference to an objective standard or test prescribed by the legislature and not by reference to policy considerations or other matters not specified by the legislature".[54] Here the absence of any objective criteria in s.33ZF governing the discretion's exercise, as to the fixing of the funder's rate of return, supports the conclusion that the Court is exercising non-judicial power. The problem is not answered by the Court itself giving practical content to the section "through the technique of judicial interpretation and case management" (FCAFC at [100] CAB 104) and developing "approaches and principles upon which, with the assistance of evidence, lay and expert, to balance the competing interests and rights of the parties" (FCAFC at [102] CAB 105). That only highlights the absence of such criteria in the function as conferred by the legislation. The Court is left to "look for legal and factual criteria" (FCAFC at [102]), and then to apply those criteria in a manner that affects proprietary rights – a sphere that "fall[s] to be governed by principles of law", not judicial discretion.[55] The Court's role is akin to that performed by an administrative remuneration tribunal, fixing a level of commercial reward or market return for a litigation funder. Contrary to the Full Court's conclusions (at [99]-[100], [102]), this is not "quintessentially judicial". The exercise resembles more an exercise of non-judicial power "by reference to policy considerations or other matters not specified by the legislature",[56] such as what a judge considers to be "fair".[57]

43. ***Incidental power:*** The Full Court also erroneously treated the power to make a CFO as "incidental" to the exercise of judicial power (FCAFC at [100], [105], [114] CAB 104, 106, 108). The fact that a CFO bears a relationship with an ongoing proceeding does not make the exercise one which is incidental to the Court's core judicial function (the determination of existing rights). As this Court recently reaffirmed in a different context, "a provision cannot be said to be incidental to the subject matter of a power simply because *in a*

---

[53] See *Precision Data* at 191; *Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Ltd* (1943) 67 CLR 25 at 46, 54-5.
[54] *Precision Data* at 191.
[55] *Muschinski v Dodds* (1985) 160 CLR 583 at 616.
[56] *Precision Data* at 191.
[57] *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580.

general way it facilitates the execution of the power" (emphasis added).[58] The same caution should be applied in assessing whether a provision empowering a federal court to make certain orders grants power that is truly "incidental" in the relevant sense.

44. The limits of the Court's jurisdiction in terms of creating new rights were identified in *Jackson* – and a CFO does not "enable", "support" or "facilitate" the exercise by the Court of its judicial function[59] for the same reasons given at [23]-[24] above. Importantly, there is no true analogy between CFOs and traditional interlocutory orders, including those which have the effect of creating obligations or rights. Interlocutory injunctions preserve the subject matter of a dispute and prevent the practical destruction of the right claimed or to be claimed in substantive proceedings.[60] Freezing orders similarly protect the court's prospective enforcement process[61] by maintaining the status quo.[62] Preliminary discovery is designed to assist a party to pursue its asserted right to substantive relief.[63] All of these pre-trial procedures are "directed at the *future* exercise of judicial power, in aid of anticipated adversarial proceedings".[64] By contrast, CFOs play no part in supporting the Court to exercise its primary judicial function, namely to determine group members' entitlement to the relief sought. The requisite connection is not provided by a perception that an order granting a funder an interest in the fruits of group members' choses in action might ultimately enable the "vindicat[ion]" of rights (FCAFC at [105] CAB 106) that might not otherwise be litigated. This is remote from the Court's core judicial task.

Acquisition of property otherwise than on just terms

45. 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 (see [7] and [16] above). As the Full Court appeared to accept at [112] CAB 107, the rights taken are "property" according to the expansive meaning of that term within s.51(xxxi) of the *Constitution*.[65] But there is also a corresponding acquisition on the funder's part (cf FCAFC at [131]). The Order conferred on JKL a priority interest in any resolution sum, which is an

---

[58] *Spence v Queensland* [2019] HCA 15 at [69], quoting from *Gazzo v Comptroller of Stamps (Vict)* (1981) 149 CLR 227 at 240. See also *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 587.
[59] To apply the language of French CJ in *Momcilovic v The Queen* (2011) 245 CLR 1 at [91].
[60] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [10].
[61] *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at [47].
[62] *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [51].
[63] *Hooper v Kirella* (1999) 96 FCR 1 at [58].
[64] *Palmer* at [36] (emphasis added).
[65] *Georgiadis v Australia and Overseas Telecommunications Corporation* (1994) 179 CLR 297 (***Georgiadis***) at 303, 312, 320; *JT International SA v Commonwealth* (2012) 250 CLR 1 at [41], [169], [193], [263]; *Smith v ANL* (2000) 204 CLR 493 (***Smith***) at [7]-[8], [22]-[23]; *Minister for Army v Dalziel* (1944) 68 CLR 261 at 290.

identifiable benefit or advantage corresponding to group members' rights to any fruits of their choses in action. Putting aside the constraints imposed by other terms of the primary judge's orders, it is the kind of interest JKL could assign for value. Absent any assignment, JKL enjoys a right in relation to property that is valuable enough to induce its continued funding of the proceedings (see [7] above). And any assignment by group members of their choses in action, or of any fruits of those rights, could only occur subject to JKL's interest. These matters are sufficient to give rise to an "acquisition" within s.51(xxxi).[66]

46. If s.33ZF authorised the making of the Order, having regard to this legal and practical operation it is properly characterised as a law with respect to the acquisition of property.[67] The Full Court's primary reason for concluding otherwise was "the legislative power involved" (at [111] CAB 107), which it identified as ss.71, 76(ii) and 77(i) of the *Constitution* (at [113] CAB 107). The true source of power to make a law regulating the exercise of federal judicial power is s.51(xxxix).[68] There is no sound basis to treat that legislative power as sitting outside s.51(xxxi)'s scope. Indeed, such an approach jars with the established principle that s.51(xxxi) "abstracts power with respect to the acquisition of property from the other paragraphs of s.51."[69] Nor do such laws have a unique or singular character (cf FCAFC at [114] CAB 108) that means they cannot also be characterised as laws engaging s.51(xxxi). Whilst it may be accepted that the Court exercises judicial powers in such a way as to realise the benefits of a chose in action, it does not follow that Parliament may empower the Court to take property rights from one party and confer them on a non-party if thought appropriate or necessary, without complying with s.51(xxxi). The Commonwealth may not achieve indirectly, through the conferral of judicial powers to acquire, what it could not achieve directly by legislation or through the exercise of administrative power.[70] Section 33ZF's operation in respect of group members' substantive rights is sufficient to give that law a recognisable independent character[71] as a law with respect to the acquisition of property.

47. Nor is it correct to say that s.33ZF is not a law with respect to the acquisition of property because the Court, in making a CFO, performs an interlocutory step in the process of realising disputed choses in action (FCAFC [115] CAB 108). This is not simply managing

---

[66] See *Mutual Pools & Staff Pty Ltd v Cth* (1994) 179 CLR 155 (***Mutual Pools***) at 185; *ICM Agriculture Pty Ltd v Cth* (2009) 240 CLR 140 (***ICM***) at [82]-[83]; *Smith* at [7].
[67] *ICM* at [138]-[139].
[68] *Rizeq v Western Australia* (2017) 262 CLR 1 at [59].
[69] *Theophanous v Commonwealth* (206) 225 CLR 101 at [55], quoting from *Re DPP; Ex parte Lawler* (1994) 179 CLR 270 at 283.
[70] *Cth v WMC Resources Ltd* (1998) 194 CLR 1 at 90; *ICM* at [139].
[71] *Mutual Pools* at [115].

"the procedural course of the litigation". Rather, the CFO itself alters substantive proprietary rights. The possibility that the CFO may later be altered does not deny it that character.

48. The Full Court (at [117]-[130] CAB 109-113) also relied on an extension of the proposition[72] that a law falls outside 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". That characterisation was held to apply to s.33ZF, notwithstanding that Part IVA is quintessentially a regime for the determination of existing legal rights, not their adjustment. The verbal formula about "genuine adjustment" of competing rights was deployed in a particular context in *Mutual Pools* and *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134, where laws were enacted against the backdrop of existing relationships and pre-existing claims in respect of particular property. This Court has otherwise declined to apply the formula in the characterisation of laws. Broadening the formula's application beyond this context is inconsistent with the settled understanding of s.51(xxxi). On the Full Court's analysis, a law giving persons with no pre-existing claim over property an interest in that property is not caught by s.51(xxxi) so long as it effects a "genuine adjustment" of rights between people (notwithstanding that they have no contractual relationship and merely a connection created by the representative proceedings) and the regulation is justified in the "common interest". It may be assumed that Parliament generally seeks to legislate in the "common interest", and that a law adjusting rights by taking from some and giving to others will ordinarily be described as a "genuine adjustment". But the guarantee in s.51(xxxi) "prevents expropriation of the property of individual citizens, without adequate compensation, even where such expropriation may be intended to serve a wider public interest".[73] The Full Court's overbroad application of the "adjustment of rights" cases is apt to reduce that guarantee to an empty shell.

49. Finally, s.33ZF does not make provision for the acquisition of property (through the making of a CFO) to occur on "just terms". To that extent, it is invalid. "Just terms" entails "full compensation" for what is taken.[74] Whilst that guarantee does not "require a disregard of the interests of the public or of the Commonwealth", it nonetheless mandates "that a party

---

[72] Sourced in *Australian Tape Manufacturers v Commonwealth* (1993) 176 CLR 480 at 509-510, referred to in *Mutual Pools* at 171, 178 and *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 161.
[73] *Smith* at [9].
[74] *Smith* at [10]; *Georgiadis* at 311. In *Johnston Fear & Kingham v Commonwealth* (1943) 67 CLR 314 at 323 Latham CJ referred to "full and adequate compensation for the compulsory taking".

whose property is acquired shall have the pecuniary equivalent of the property acquired".[75] Further, the law providing for or authorising the acquisition must "affirmatively provide just terms"[76] for that appropriation. It is an essential element of the law to bring it within the power in s.51(xxxi). However, nothing in s.33ZF requires the Court to secure for each group member a compensatory benefit which equates to the value of what is taken from each group member. The fact that the Court must consider the order appropriate or necessary to ensure that "justice is done in the proceeding" does not mean that s.33ZF secures "just terms" (cf *Brewster* at [104]). These tests may pull in different directions. Whilst the latter requires consideration of whether an *individual* has been adequately compensated for the state's interference with his or her private property, the enquiry posed by the former is narrower in some respects (focusing on justice *in the proceeding*, i.e., in resolving the litigants' dispute) and broader in others (contemplating a balancing of the interests of *all* interested parties).

50. Contrary to the Full Court's reasoning (FCAFC at [132] CAB 113), it was not incumbent on the appellants to demonstrate that group members would not, in due course, receive something that was the pecuniary equivalent of the property acquired. It is the absence of any obligation to afford "just terms" that signals s.33ZF's invalidity.[77] The law is not saved by speculation about the possibility that a group member might in some cases receive a benefit that amounts to full compensation for what was taken.

Part VII: Orders sought by the appellants

51. The appellants seek the orders set out in the Notice of Appeal at CAB 134.

Part VIII: Time required for presentation of oral argument

52. The appellants estimate that they will need about 1.75 hours for oral submissions in chief.

Dated: 19 June 2019

Alec Leopold
Eleven Wentworth Chambers
T: 02 9221 1942
aleopold@selbornechambers.com.au

Stephen Free
Eleven Wentworth Chambers
T: 02 9233 7880
sfree@elevenwentworth.com

Celia Winnett
6th Floor Selborne
T: 02 8915 2673
cwinnett@sixthfloor.com.au

---

[75] *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 300.
[76] *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382 at 402.
[77] See, in a different context, *Wainohu v NSW* (2011) 243 CLR 181 at [69], [103].

Annexure A

WESTPAC LIFE INSURANCE SERVICES LIMITED

Second Appellant

SHARMILA LENTHALL

Second Respondent

SHANE THOMAS LYE

Third Respondent

KYLIE LEE LYE

Fourth Respondent

JUSTKAPITAL LITIGATION PTY LIMITED

Fifth Respondent