Post-Brewster Jurisprudence – The Future of the Common Fund Doctrine

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In December 2019, the High Court of Australia held, in BMW Australia Ltd v Brewster, that the making of common fund orders in the early stages of class action litigation was not authorised by the federal legislative class action regime and its New South Wales equivalent. These orders, which were endorsed by the Full Federal Court in October 2016, had increased both the interest of funders in Australian class actions and the types of class proceedings that they funded. This seminal judicial pronouncement has been reviewed closely by a number of federal trial judges, primarily with a view to answering the crucial practical question of whether Brewster prohibits the making of common fund orders when approving a settlement. The principal aim of this article is to explore this post-Brewster jurisprudence.

I. Introduction

Australia has had American-style class action regimes since 4 March 1992 when Pt IVA was inserted into the *Federal Court of Australia Act 1976* (Cth) (Pt IVA). Since then, four Australian State legislatures have enacted legislative class action regimes based on the Pt IVA regime.[1] Over the last 18 years or so, third-party litigation funders have become the most important non-party players in Australia's class action landscape. This is highlighted by the fact that, according to the latest empirical data, 60.5% of all the class actions filed in Australia over the period from 4 March 2017 to 3 March 2021 were supported by funders (funded class actions).[2]

In October 2016, the Full Federal Court in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (*Money Max*)[3] held that Pt IVA's s 33ZF gave the Court sufficient power to make a common fund order (CFO) soon after a funded class action had been commenced (Commencement CFO). Section 33ZF provides:

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

Murphy J, a member of the Full Federal Court in *Money Max*, subsequently explained that:

> [T]he common fund order means that all class members will pay the same pro rata share of legal costs and funding commission from the common fund of any amounts they receive in settlement or judgment. It is in the interests of justice in the proceeding that the burden of the legal costs and litigation funding commission charges incurred in achieving any favourable result falls equally upon all class members who stand to benefit from the proceeding.[4]

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[1] See *Supreme Court Act 1986* (Vic) Pt 4A; *Civil Procedure Act 2005* (NSW) Pt 10; *Civil Proceedings Act 2011* (Qld) Pt 13A; and *Supreme Court Civil Procedure Act 1932* (Tas) Pt VIII.

[2] Vince Morabito, *Courts See Record Number of Class Actions as Shareholder Proceedings Drop in Significance* (20 May 2021) lawyerly.com.au. Third-party litigation funders can be paid a percentage of a settlement sum or damages award in Australia while solicitors are barred from doing so unless they represent class representatives in class actions filed in the Supreme Court of Victoria and a court order authorises such contingency fee arrangements. The impact of this is that funders are able to take significant financial risks in return for significant rewards when law firms cannot.

[3] *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191.

[4] *Pearson v Queensland* [2017] FCA 1096, [22] (Murphy J).

By making Commencement CFOs in favour of third-party litigation funders the Full Court's *Money Max* decision obviated the previous need for funders and plaintiff lawyers to "book build" before the commencement of a class action. That is, before *Money Max*, funders could not be confident of receiving a commission from a class action settlement unless, before the claim commenced, a sufficient number of group members had promised to pay the funder's commission under contract. The cost of marketing a class action to group members to build an economically viable book prior to commencement was significant and prohibitive for many funders but it also gave the market a chance to test potential claims, as noted by the Law Council of Australia:

> The pre-*Money Max* need for a funder to build a book acted as a natural brake on competing actions. Funders had to "go to the market" with their funding proposals. If there was insufficient interest for a given funder, that funder did not proceed. There was "natural selection" before any action was commenced.[5]

Money Max offered the expectation of an early CFO thereby removing the need to book build and, unsurprisingly, this doctrine was embraced by a vast majority of litigation funders and encouraged a number of new funders to enter the market. As explained below, this led to a substantial increase in the number of funded open class actions. It also decreased the use of the so-called "closed class" device in funded class actions. A closed class is that in which group members are defined not only by their claims but also by the fact that they have entered into a funding agreement with the relevant funder.[6]

In the three years preceding *Money Max*, 33% of the funded Pt IVA proceedings filed employed closed class devices.[7] According to data collected by the third-named author, in the three years post *Money Max* when Courts were able to make CFOs in the early stages of the litigation, the closed class device was used in only 9.4% of funded Pt IVA proceedings.

The availability of Commencement CFOs provided a degree of commercial confidence to litigation funders resulting in open class claims with often large classes because there was some confidence of securing a financially viable return. According to the data collected by the third-named author, in the pre-*Money Max* period the top three claims in funded federal class actions were: shareholder claims (43.2%); investor claims (37.8%); and product liability claims (8.1%). Between *Money Max* and *BMW Australia Ltd v Brewster* (*Brewster*),[8] the top three areas of substantive claims pursued in funded federal class actions were shareholder claims (52.7%); consumer protection claims (18.9%); and employment claims (12.1%).

The last two categories in the post-*Money Max* period are particularly significant in discerning the impact of the common fund doctrine. Most of the funded class actions commenced on behalf of workers revolved around claims that they were paid less than what they were legally entitled to.[9] The consumer protection claims were mostly triggered by the numerous findings of illegal conduct in the banking and financial sectors made by the Hayne Royal Commission.[10] In many of these funded Pt IVA proceedings, brought after *Money Max* and dealing with consumer protection and employment claims, the individual claims of most claimants were of relatively modest value.

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[5] Law Council of Australia's submission dated 17 August 2018 to the Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-party Litigation Funders*, Discussion Paper No 85 (17 August 2018) [177] <https://www.alrc.gov.au/wp-content/uploads/2019/08/62_law_council_of_australia.pdf>.

[6] As Beach J opined: post the introduction of CFOs the pie has grown with greater demand for funding producing an increased supply of funding; there are more class actions because of a return to open class actions consistent with the *Federal Court of Australia Act 1976* (Cth) model and without the necessity to book build: *Kuterba v Sirtex Medical Ltd (No 3)* [2019] FCA 1374, [16].

[7] Vicki Waye and Vince Morabito, "When Pragmatism Leads to Unintended Consequences: A Critique of Australia's Unique Closed Class Regime" (2018) 19 *Theoretical Inquiries in Law* 303, 328.

[8] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574.

[9] See, for instance, *Turner v Tesa Mining (NSW) Pty Ltd* (2019) 290 IR 388.

[10] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (February 2019). See generally Christine Caulfield, *Royal Commission Class Actions Keep Rolling in, One Year after Hayne Report* (23 January 2020) lawyerly.com.au.

This scenario arose in a Pt IVA proceeding against Westpac Banking Corporation[11] which, together with a New South Wales class action concerning defective airbags, was before the High Court in *Brewster*. The High Court's "cancellation" of the Commencement CFO that had been made during the early stage of the Westpac class action generated great uncertainty as to whether the funder behind this Pt IVA proceeding would continue to fund it.[12] This is because, in the absence of a CFO and in light of the modest value of the individual claims, it becomes necessary for the funder to sign up as many claimants as possible in order to ensure that the proceeding remains financially viable.

BMW Australia Ltd v Brewster

As highlighted above, on 4 December 2019, the High Court of Australia held (by a 5:2 majority) in *Brewster* that the federal and NSW class action regimes do not empower trial judges to make Commencement CFOs.[13] A joint judgment was handed down by Kiefel CJ, Bell and Keane JJ (plurality judgment) while the remaining majority justices, Nettle and Gordon JJ, wrote separate judgments. The two dissenting justices, Gageler and Edelman JJ, also wrote separate judgments.

The seminal decision of the High Court in *Brewster* represents an inflexion point in the approach of Australian Courts to the regulation of litigation funding. At a high level of generality, *Brewster* has clarified the basis on which a CFO may *not* be made and in so doing, more precisely defined the limits of s 33ZF[14] as a "gap-filling" power. As a consequence, *Brewster* has been viewed as being likely to reduce, to a substantial extent, the interest of litigation funders in Australia's class actions market and, as a result, the extent to which the Pt IVA regime will be employed.[15]

The principal purpose of this article is to examine the judgments of the majority justices in *Brewster* and consider how they have been interpreted and applied by subsequent courts to advance the jurisprudence on the common fund doctrine. This post-*Brewster* jurisprudence has concluded its first phase. For analytical convenience and economy, this article defines this period broadly by the jurisprudence that has developed following the decision in *Brewster* to the first post-*Brewster* Settlement CFO made in *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (*Swann*).[16]

In October 2021, the *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* (Cth) was introduced which includes, *inter alia*, provisions that concern CFOs. This Bill represents the first substantive attempt at statutory regulation of CFOs by the federal legislature. However, rather than addressing judicial calls for clarity,[17] the primary focus of the Bill is directed at imposing arbitrary caps on legal fees and funder commissions. At the time of writing, the Bill has not become law. Despite this legislative development, the principles that inform an exercise of the power to make CFOs and similar orders will continue to be based on common law and post-*Brewster* decisions.

II. Re-defining the Common Fund Order

Post-*Brewster* jurisprudence has produced a profusion of definitions for a CFO, which depend upon the stage of the proceeding when such an order is sought or the exact nature of the order being made. The

[11] In this *Federal Court of Australia Act 1976* (Cth) proceeding there were more than 80,000 claimants, and the value of their individual claims for damages is believed to be between $2,000 and $15,000: *Westpac Banking Corp v Lenthall* (2019) 265 FCR 21, [5] (Allsop CJ, Middleton and Robertson JJ). With respect to consumer protection claims generally, see Jessica Zarkovic, *The Future of Consumer Class Actions in the Wake of Brewster* (24 June 2020) lawyerly.com.au.

[12] See Miklos Bolza, "Funder to Continue Backing Westpac Insurance Class Action, for Now", (12 February 2020) lawyerly.com.au.

[13] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574.

[14] And for a class action in the NSW Supreme Court, *Civil Procedure Act 2005* (NSW) s 183.

[15] And the extent to which the representative procedures in New South Wales, Victoria and Queensland will be employed.

[16] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625.

[17] *McKay Super Solutions Pty Ltd v Bellamy's Australia Ltd (No 3)* [2020] FCA 461, [34].

order has been referred to as a Commencement CFO,[18] Settlement CFO,[19] Judgment CFO,[20] an expense sharing order[21] and an equitable remuneration order.[22] The clearest attempt at a taxonomy appears in the judgment of Lee J in the Full Federal Court decision in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (*Davaria*) (with whom Middleton and Moshinsky JJ agreed).[23]

In examining the definitional diversity that now exists, it is easy to become distracted by what Beach J referred to as the "triviality of labels".[24] This article will only examine the definitional debate insofar as it illuminates the evolving contours of CFOs and jurisprudence in the first phase of post-*Brewster* decisions.

Part of the definitional debate arises from the shifting statutory foundation on which a CFO may be made under s 33V(2)[25] or s 33Z[26] in contrast to s 33ZF.[27] Following *Brewster*, the temporal aspect of the order is determinative on the question of power. This is consistent with the reasoning of the plurality on the permissibility of orders to distribute the proceeds of litigation at the conclusion of a proceeding:[28]

> The provisions of Pt IVA of the *FCA* and Pt 10 of the *CPA* expressly provide for the making of orders distributing any proceeds of a representative proceeding. As will be seen, the occasion for the making of such an order is the conclusion of the proceeding. At that stage, if the group members happen to be indebted to a litigation funder for its support of their claims, the value of the litigation funder's support to the group members will be capable of assessment and due recognition. *That stage is the appropriate occasion for orders for meeting and sharing the cost burden of the litigation because the value of the litigation and the extent of the burden will have been rendered certain.* In contrast, an application for a CFO at an early stage of a proceeding necessarily involves speculation on the part of the parties and the court in respect of these matters; and attention to matters of concern to the litigation funder which may not be shared by, and may well be contrary to the interests of, group members. [emphasis added]

There is a mischief in any attempt to comprehensively define the types of orders which may be generally characterised as a "CFO-type" order. The amorphousness of the term reflects the fact-specific nature of the order, which in turn informs the question of power to make the order. This is the context in which the Full Federal Court in *Davaria*[29] and the Court of Appeal of New South Wales in *Brewster v BMW Australia Ltd*[30] refused to answer the question "in the abstract"[31] or in an "evidentiary vacuum";[32]

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[18] *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501, [21].

[19] *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501, [22]–[25]; *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625.

[20] *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501, [28]–[30].

[21] *Lenthall v Westpac Banking Corp (No 2)* (2020) 144 ACSR 573, [3]; *Webster (Trustee) v Murray Goulburn Co-Operative Co Ltd (No 4)* [2020] FCA 1053, [110]; and *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647, [48].

[22] *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [49].

[23] *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501, [6]–[28].

[24] *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [49].

[25] Section 33V(1) of *Federal Court of Australia Act 1976* (Cth) provides that a Pt IVA proceeding "may not be settled or discontinued without the approval of the Court" while s 33V(2) provides that if such an approval is secured, the Court "may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court".

[26] *Federal Court of Australia Act 1976* (Cth) s 33Z(1) provides a list of the orders that trial judges may make in Pt IVA proceedings.

[27] It should be noted that the Full Court in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501 (*Davaria*) referred to alternate statutory bases for a Judgment CFO pursuant to ss 33ZJ, 33ZA and in equity: *Davaria*, [28] and [29]. The equitable grounds for such an order are explored in greater detail in *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625, [34]–[40] (Lee J).

[28] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [68] (Kiefel CJ, Bell and Keane JJ) (emphasis added).

[29] *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501.

[30] *Brewster v BMW Australia Ltd* [2020] NSWCA 272.

[31] *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501, [45], [46], [53].

[32] *Brewster v BMW Australia Ltd* [2020] NSWCA 272, [28(i)].

highlighting the fact-specific nature of the order and its nexus to the question of power. As cogently expressed by the Full Federal Court in *Davaria*:

> [T]he heterogeneity of orders which might be made (and yet still be described as a CFO) points immediately to the difficulty of answering questions as to power in the absence of an application for a precise form of order.

Although the Full Federal Court declined to answer the question, it laid out some instructive jurisprudence on the scope of s 33V and s 33Z to make such orders, at settlement or judgment, respectively.[33] As noted, *Davaria* explained the types of CFOs commonly made by a Court as a trichotomy; a Commencement CFO,[34] a Settlement CFO[35] and a Judgment CFO.[36] *Brewster* held that a Commencement CFO made pursuant to s 33ZF is without power.[37] In the decisions that have followed in the Federal Court, this taxonomy has been broadly adopted, with some exceptions, as discussed below.

It is worth noting that since *Brewster* the Courts have confronted the principle of "seriously considered dicta" that operates to preclude a lower court departing from the seriously considered dicta of a majority of a superior court, namely the High Court.[38] There was a transitionary debate immediately after *Brewster* as to whether there was seriously considered dicta of a majority of judges to the effect that the Court does not have any power to make a CFO at any time. The first phase of post-*Brewster* decisions in the Federal Court rejected this interpretation following close analysis of the respective decisions of the *Brewster* Court.[39]

A. Expense Sharing Order

The term "expense sharing order" has its provenance in the language of *Class Actions Practice Note* (GPN-CA) which was amended shortly after the decision in *Brewster*.[40] GPN-CA, at [15.4] refers to:

> [A]n appropriately framed order to prevent unjust enrichment and equitably and fairly to distribute the burden of reasonable legal costs, fees and *other expenses, including reasonable litigation funding charges or commission*. [emphasis added]

The term was first used by Lee J in *Lenthall v Westpac Banking Corp* (*Lenthall*) to describe an order which foreshadowed the applicant's intention to seek a CFO-type order at settlement or judgment.[41] The order in *Lenthall* was sought after *Brewster* and involved an application under ss 33X and 33Y to notify group members about the effect of *Brewster* upon an extant CFO made earlier in that proceeding and, consequently, the applicant's intention to seek an "expense sharing order" at a later stage in the proceeding. Lee J described an "expense sharing order" in the following terms:[42]

> The applicants contend that a notice ought now be sent to group members informing them that the common fund order (CFO) made in this proceeding was set aside by the High Court in Brewster. It is also suggested that the group members be informed of the present intention of the applicants to seek an order at the conclusion of the proceeding to distribute the burden of costs, fees and all other expenses equitably among

[33] *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501, [22]–[30].

[34] *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501, [21].

[35] *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501, [22]–[25].

[36] *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501, [26]–[30].

[37] *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501, [21].

[38] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, [134], [158], [178]. See discussion in *Lenthall v Westpac Banking Corp (No 2)* (2020) 144 ACSR 573, [13]–[16] (Lee J).

[39] *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647, [50]; *Lenthall v Westpac Banking Corp (No 2)* (2020) 144 ACSR 573, [13]–[16]; *McKay Super Solutions Pty Ltd v Bellamy's Australia Ltd (No 3)* [2020] FCA 461, [31]; *Fisher v Vocus Group Ltd (No 2)* [2020] FCA 579, [72]; *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [49]. A notable exception being the decision of Foster J in *Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 637, [421], [429], [476].

[40] Federal Court of Australia, *Class Actions Practice Note* (GPN-CA). Notably, GPN-CA was amended 13 days after the *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 decision.

[41] *Lenthall v Westpac Banking Corp (No 2)* (2020) 144 ACSR 573, [3], [12].

[42] *Lenthall v Westpac Banking Corp (No 2)* (2020) 144 ACSR 573, [3].

> all persons who have benefitted from the class action (as foreshadowed in the Class Actions Practice Note (GPN-CA) at [15.4]). In the balance of these reasons, I will describe this type of order, foreshadowed by the applicants to be made at the conclusion of the proceeding, as an *"Expense Sharing Order"*. [emphasis added]

Lee J later observed in *Davaria* that the term "expense sharing order" was used in *Lenthall* to distinguish the type of order contemplated by GPN-CA from the more orthodox CFOs that had been granted under s 33ZF pre-*Brewster*.[43] An expense sharing order was not sought or granted in *Lenthall*, rather the decision explored the jurisprudential foundations for such a future order being made for the purpose of determining the content of notices on the subject.

It is important to consider the scope of an expense sharing order contemplated under GPN-CA, as interpreted by *Lenthall*. The term, as used first in *Lenthall*, has a more expansive scope when compared to the orthodox pre-*Brewster* CFO, as it captures an order designed to "distribute the burden of costs, fees and all other expenses equitably among all persons who have benefitted from the class action".[44]

An expense sharing order cast in these terms describes a kind of "omnibus" order that captures all expenses of a proceeding which include "reasonable legal costs, fees and other expenses"[45] and not merely an order which apportions reasonable litigation funding charges and/or commission, or what may be described as an orthodox pre-*Brewster* CFO. This type of orthodox CFO was pithily described in *Brewster* by Edelman J in the following terms:[46]

> A common fund order is not a term of art. It loosely describes orders made by a court *providing for the remuneration of a litigation funder*, borne pro rata by the group members from a common fund of the proceeds recovered from the litigation. [emphasis added]

The expense sharing order foreshadowed in GPN-CA and examined in *Lenthall* appears to be a penumbral term, which is cast broadly so as to retain maximal flexibility for the Court to fashion orders that accord with the broad discretionary language of s 33V(2) to "make such orders as are just".

Despite the fact that this omnibus-type order may be available, it has not been the subject of any post-*Brewster* decision insofar as such an order could include all "reasonable legal costs, fees and other expenses".

More limited expense sharing orders were made by Murphy J in *Uren v RMBL Investments Ltd (No 2)* (*Uren*)[47] and *Webster (Trustee) v Murray Goulburn Co-Operative Co Ltd (No 4)* (*Webster*).[48] However, the orders were made on terms that conform to the more orthodox formulation of a pre-*Brewster* CFO. In both *Uren* and *Webster*, Murphy J described the expense sharing order in these general terms, being an order:[49]

> [T]o fairly and equitably distribute the burden of *litigation funding expenses* amongst all persons who have benefited from the action, and so as to avoid the unjust enrichment of the class members. For consistency described such an order I will adopt the description "Expense Sharing Order" used by Lee J in *Lenthall*. [emphasis added]

If adopted, an omnibus expense sharing order would significantly change the manner in which the Court has traditionally approached the task of assessing and apportioning legal costs and disbursements as being distinct from other litigation expenses, such as litigation funding expenses and commissions.

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[43] *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501, [10].

[44] *Lenthall v Westpac Banking Corp (No 2)* (2020) 144 ACSR 573, [3].

[45] Federal Court of Australia, *Class Actions Practice Note* (GPN-CA), [15.4].

[46] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [178] (Edelman J).

[47] *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647.

[48] *Webster (Trustee) v Murray Goulburn Co-Operative Co Ltd (No 4)* [2020] FCA 1053.

[49] *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647, [48]; see *Webster (Trustee) v Murray Goulburn Co-Operative Co Ltd (No 4)* [2020] FCA 1053, [10], [110].

B. Post-Brewster CFOs

As noted, the first "CFO-type" orders made post-*Brewster* were "expense sharing orders" made pursuant to s 33V(2) in *Uren* and *Webster*. In *Uren*, Murphy J referred to the wider scope of discretionary considerations relevant to the assessment of what is "just" under s 33V(2), compared to what is "appropriate or necessary to ensure justice is done in a proceeding" under s 33ZF. In making an expense sharing order, Murphy J placed reliance (in *Uren* and *Webster*) on the discretionary and fact-specific nature of a CFO made under s 33V(2):

> [I]f s 33V(2) empowers the Court to make a common fund order where it is just to do so, as it does, the real question is one involving the proper exercise of discretion which will necessarily be case-specific.[50]

Murphy J's reasoning in *Uren* and *Webster* provides a formative analysis of the principles of construction relevant to an exercise of power under s 33V(2) to make a CFO-type order:[51]

(i) the words of s 33V(2) are not qualified in any way that can be regarded as analogous to the words of limitation in s 33ZF – that the order is "appropriate or necessary to ensure that justice is done in the proceeding" (emphasis added) – which the plurality in Brewster emphasised (including at [19], [21], [46] and [50]). The only precondition to the exercise of power under s 33V(2) is that the Court considers the relevant order to be "just" with respect to the distribution of money paid under a settlement or paid into Court;

(ii) the power under s 33V(2) is only available to be exercised following approval of a settlement under s 33V(1). By that stage of a proceeding any litigation funding has already been provided and the relevant class action has been run to its conclusion. Thus an Expense Sharing Order under s 33V(2) has little or nothing to do with assuring a potential funder of the litigation of a sufficient level of return upon its investment, which was one of the main concerns of the plurality in Brewster (at [3]); and

(iii) relatedly, the power under s 33V(2) can only be exercised at a point when the expenses associated with bringing the proceeding to a successful conclusion for the applicant and class members have actually been incurred, rather than merely being estimated and prospective.

Uren and *Webster* were the first Federal Court decisions to make a CFO-type order post-*Brewster*. The orders were influenced by contextual factors that confine their precedential value. The exercise of discretion was dependent, in part, on the perceived injustice to the funder because they had agreed to finance the litigation on the reasonable expectation of a CFO being ordered "during a period when numerous single judges of this Court and intermediate courts of appeal had affirmed the availability of common fund orders made in the early stages of a class action".[52] Further, in the case of *Webster*, "the decision in *Brewster* was handed down after settlement had been reached and the plaintiff had filed an application under s 33V. Until the decision in *Brewster* there was a reasonable basis for the funder to apprehend that an order akin to a common fund order would be made".[53] In making an expense sharing order in *Uren*, Murphy J stated:

> Given that the Funder provided the finance that enabled the class action to be run to a successful conclusion on the basis of a common fund order, it would not in my view be "just" if the Funder was subsequently not remunerated fairly for the costs and risk it took on according to the terms upon which it acted.[54]

The remit of what is "just", as a matter of discretion, is necessarily broader under s 33V(2) than s 33ZF as it is not constrained by the words of limitation "in the proceeding" which the plurality in *Brewster* found constrained the interests to which the Court may have regard. As a matter of construction, the discretion in s 33V(2) permits an assessment of what is "just" with respect to the interests of non-parties

[50] *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647, [55]; see *Webster (Trustee) v Murray Goulburn Co-Operative Co Ltd (No 4)* [2020] FCA 1053, [117] for a similar conclusion.

[51] *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647, [51(b)–(d)]; and *Webster (Trustee) v Murray Goulburn Co-Operative Co Ltd (No 4)* [2020] FCA 1053, [112].

[52] *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647, [58].

[53] *Webster (Trustee) v Murray Goulburn Co-Operative Co Ltd (No 4)* [2020] FCA 1053, [121].

[54] *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647, [61].

such as litigation funders. Murphy J underscores this point by referring approvingly to Middleton J in *Mitic v Oz Minerals Ltd (No 2)*:

> Of course, s 33V(2) refers to orders that are "just" – this includes taking into account the fact that litigation funders assume the substantial costs and risks of a representative proceeding and should be allowed a commercially realistic return.[55]

C. Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)

Swann[56] was the first Settlement CFO to be made post-*Brewster* pursuant to s 33V(1). Importantly, Lee J sought to clear the field by finding, in the alternative, that there is ample power to make a Settlement CFO both under s 33V(2)[57] and in equity.[58]

In determining that a Settlement CFO of 25% was appropriate[59] Lee J set out a series of judicial guideposts to assist judges in the exercise of their discretion when considering making a Settlement CFO. Lee J drew upon the multifactorial approach elucidated by the Full Court in *Money Max*[60] to "develop criteria which may be relevant to assessing a reasonable return for providing litigation funding".[61] His Honour also referred extensively to examples of the Court determining reasonable remuneration in other judicial contexts[62] to reason by analogy that the Court is competent to do so in the context of the "recent development"[63] of litigation funding. The approach taken in *Swann* to re-state some first principles of construction to fix CFO rates may in part be seen as a response to the majority finding in *Brewster*. In finding that s 33ZF did not ground the power to make a Commencement CFO, the decision eschewed a mature line of authority that had developed since *Money Max* and which was premised on a principled interpretation of s 33ZF.

Lee J's finding that a CFO may be made in the Federal Court's equitable jurisdiction[64] is novel and consequential, creating a pathway for future decisions that may look beyond the statutory reach of s 33V, s 33Z, s 33ZJ or s 33ZA[65] as the foundation for such an order. Lee J found that a Settlement CFO may be consistent with the "general equitable principles that a person who benefits from another's efforts in producing a fund is obliged to provide appropriate value in return".[66] This finding is drawn from Lee J's analysis in *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Ltd*,[67] Edelman J in *Brewster* and an examination of authorities that support the general position that an equity may be raised in favour of a litigation funder for its efforts in bringing a common fund into existence.[68] Specifically, Lee J relied upon the principle that "it would be inequitable for the person who

[55] *Mitic v Oz Minerals Ltd (No 2)* [2017] FCA 409, [29].

[56] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625.

[57] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625, [13].

[58] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625, [34]–[40].

[59] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625, [32], excluding any recovery by Balance Capital for expenses incurred in obtaining After the Event Insurance ("ATE" insurance).

[60] *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, [80], referred to as authority in *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625, [21].

[61] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625, [22].

[62] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625, [24].

[63] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625, [23].

[64] Pursuant to *Federal Court of Australia Act 1976* (Cth) s 5(2).

[65] See *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501, [28] for an examination of s 33ZJ, s 33Z(1)(g) or s 33ZA as potential statutory bases for a Judgment CFO.

[66] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625, [37].

[67] *Klemweb Nominees Pty Ltd v BHP Group Ltd* (2019) 369 ALR 583, [130].

[68] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625, [37]–[39].

has created or realised a valuable asset, in which others claim an interest, not to have his or her costs, expenses and fees incurred in producing the asset paid out of the fund or property created".[69]

The decision of Edelman J in *Brewster* explored in greater detail the equitable foundations for a CFO based on general principles of "justice", which resonate with the language of ss 33V and 33ZF. His Honour described the difficulty applying the principle of unjust enrichment in Australia[70] but observed that there are exceptions to the general rule that "a person should not have to pay for a service they did not request"[71] which may arise under the doctrines of restitution[72] and contribution.[73] Indeed, in describing the historical context in which such equities may arise, Edelman J concluded that "the justice of ordering remuneration from a common fund to a litigation funder can be stronger than the cases of maritime salvors, bailees, tenants, trustees, liquidators, and solicitors".[74]

Significantly, Edelman J described how equity may approach the controversy of recovering a contribution from the open class by drawing an analogy with the principle of "remuneration for unrequested intervention"[75] which was said to have an "obvious resonance with the calculation of the remuneration of a litigation funder".[76] Edelman J held that remuneration of a litigation funder in the form of a CFO is not offensive to equitable doctrine in certain circumstances[77] and described such an order as being consistent with the "general principles of justice":

> The order spreads the cost and risk of the litigation proportionately between all group members; otherwise those with contracts with the litigation funder would pay for the benefit and the other group members would receive a windfall. In that respect, the order shares the foundations of the doctrine of contribution, requiring pro rata burden sharing by those under co-ordinate liabilities, a doctrine that is "bottomed and fixed on general principles of justice".[78]

D. Evans v Davantage Group Pty Ltd (No 3)

In this case, Beach J made a "CFO-type" order pursuant to s 33V(2)[79] finding that *Brewster* is "not authority for the proposition that there is no power to make a CFO-type order under s 33V(2)".[80] *Evans v Davantage Group Pty Ltd (No 3)* (*Davantage*)[81] represents the second Settlement CFO made post-*Brewster* and an important contribution to an emerging line of authority in the Federal Court in favour of Settlement CFOs.

Beach J did not engage in the definitional debate about what to call the order, but was prepared to make an order for reimbursement of the funder's commission and expenses in a manner broadly consistent with a pre-*Brewster* CFO. It is notable that the order included "after the event" (ATE) insurance expenses[82] (in contrast to *Swann*) and a commission calculated as a cost multiple equivalent to 28.8% of the gross settlement sum,[83] representing a compromise significantly below the entitlement in the funding

[69] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625, [37].

[70] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [192]–[194] (Edelman J).

[71] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [196] (Edelman J).

[72] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [193] (Edelman J).

[73] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [200] (Edelman J).

[74] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [200] (Edelman J).

[75] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [199]–[201] (Edelman J).

[76] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [199] (Edelman J).

[77] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [195]–[199] (Edelman J).

[78] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [200] (Edelman J).

[79] *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [49].

[80] *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [49].

[81] *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70.

[82] *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [74]–[78].

[83] *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [59].

agreement.[84] In deciding that the commission was fair and reasonable, Beach J was satisfied that the line of authority which pre-existed *Brewster* remains relevant to the interpretation of s 33V, stating "cases in the pre-*Brewster* era identify a number of relevant considerations that remain apposite in a post-*Brewster* environment that go to the question of whether the proposed commission is fair and reasonable".[85]

Beach J's decision offers an insightful contribution to the debate regarding return rates to group members. In particular, his Honour notes the distortive effect of using percentage returns to group members alone as a metric for judging the reasonableness of a resolution without appropriate context.[86] In *Davantage* the fund available to group members for payments represented only 37.4% of the gross settlement sum, which Beach J remarked "may shock the conscience of the uninformed".[87] A crucial fact obscured by this number is that registered group members recovered approximately 100% of their claim value[88] arising from the fact that only 1,244 group members of a potential pool of 27,000 registered to participate in the settlement. In this context Beach J remarked "the present case is a good example of the fallacious reasoning of those who take headline percentages of gross recoveries from settlement sums and seek to transmute them into the real returns of group members who have taken proper steps to protect their interests by registering their participation in any settlement".[89] Beach J further critiqued the artificiality of return rates that are reported in a factual vacuum and elide the delicate balance between the risks, merits and commercial dynamics of litigation. Referring to the earlier decision in *Kuterba v Sirtex Medical Ltd (No 3)*,[90] he said:

> No power contained in or philosophy underpinning Part IVA provides a proper basis for giving group members something for what turned out to be nothing or to give them something beyond what the true value of their claims are worth, reflecting the product of the face value times the probability of success times the probability of recovery. Moreover, to so artificially allocate is economically distortive and unnecessarily disincentivises the reasonable investment of time and expense in investigating, funding and prosecuting class actions.[91]

Davantage is another example of what Lee J called "legacy cases"[92] that were caught in the interstice between *Money Max* and *Brewster*. In these circumstances an earlier CFO was made in accordance with *Money Max*, and subsequently set aside following *Brewster*. The decisions in *Davantage*, *Swann*, *Webster* and *Uren* are cases in which this fact was relevant to a CFO-type order being made at settlement. For example, in *Davantage* Beach J specifically referred to this fact as informing what was "just" concerning the interests of the litigation funder in exercising his discretion under s 33V, in addition to the fact that group members had been given "extensive notice" of proposed payments to the litigation funder without objection.[93]

III. Judicial Attitudes to Litigation and Litigation Funders

In the reasoning of the majority in *Brewster* there is a doctrinal antipathy to the Court being asked to facilitate the commercial interests and machinations of third-party litigation funders.[94] The members of

[84] The funding agreement entitled the funder to a 3x costs multiple but the order sought by the applicant included an agreement to lower the funder's cost multiple to 1x, being $2.7 million. See *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [54] (*Davantage*). See how this interacted with the recovery of the initial ATE premium at [74]–[78]. Relevantly, the settlement in *Davantage* occurred in circumstances where the respondent was unable to satisfy a substantial judgment on the applicant's and group members' claims in the proceeding and each of the relevant insurers had denied coverage, see [33].

[85] *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [55].

[86] *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [62]–[65].

[87] *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [64].

[88] *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [65].

[89] *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [65].

[90] *Kuterba v Sirtex Medical Ltd (No 3)* [2019] FCA 1374.

[91] Referred to in *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [64].

[92] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625, [28].

[93] *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [52]–[54].

[94] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [3], [47], [50], [54], [83], [94] (Kiefel CJ, Bell and Keane JJ), [126] (Nettle J), [153]–[154], [158] (Gordon J).

the majority eloquently express concerns that the role of the Court is not to ease the "commercial anxieties of litigation funders"[95] by acting as brokers of their commercial returns or be involved in "promoting the prosecution of the proceeding".[96] There is an intuitive attraction to these general propositions. However, such a reductive analysis excises the commercial realities of litigation from the substantive outcome of access to justice and does not give sufficient regard to the realities of complex, risky, and protracted litigation. Litigation funding can arguably be seen as part of the essential machinery to ensure not only access to justice but to *sustain* meritorious litigation to its conclusion. Indeed, it was precisely this tension that Gageler J (in dissent) remarked upon:

> [T]he power [in s 33ZF] cannot be divorced from the principal object of Part IVA of enhancing group members' access to justice. … To my mind, it introduces an unrealistic dichotomy to postulate that an order that serves to shore up the commercial viability of the proceeding from the perspective of the litigation funder can have nothing to do with enhancing the interests of justice in the conduct of the representative proceeding.[97]

IV. Re-interpreting Section 33ZF

The question for determination in *Brewster* was whether s 33ZF enables a Court to make a CFO. In answering this question in the negative the plurality relied upon the words of limitation in s 33ZF to circumscribe the scope of its operation within the textual and contextual limits of Pt IVA.

An order for the benefit of a third-party was interpreted as outside the words of limitation "in the proceeding" found in s 33ZF, which as a matter of natural and ordinary construction must be confined to an order that "advance[s] the effective determination by the court of the issues between the parties to the proceeding".[98] The plurality expressed the position in the following terms:

> The making of a CFO does not assist in determining any issue in dispute between the parties to the proceeding; it does not assist in preserving the subject matter of the dispute, or in ensuring the efficacy of any judgment which might ultimately be made as between the parties; it does not assist in the management of the proceeding in order to bring it to a resolution. Nor does it assist in doing justice between group members in relation to the costs of litigation.[99]

As Lee J explained in the subsequent decision of the Full Court in *Davaria* (with whom Middleton and Moshinsky JJ agreed) the error made by previous courts had been to elide the words of limitation in s 33ZF itself:

> [T]he reference in the text of s 33ZF to the words "in the proceeding", indicates that the issue or problem must be one arising between the parties currently in that proceeding; the making of a Commencement CFO "does not assist in determining any issue in dispute between the parties to the proceeding" and hence is beyond the principled (albeit broad) scope of the power conferred by s 33ZF.[100]

The plurality reasoned that the object of a CFO made at an early stage in a proceeding is concerned with the antecedent question of whether an action *can* proceed, rather than *how* it should proceed to achieve a just result.[101] The plurality considered that a CFO made on this basis had at least two objectionable operations.

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[95] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [94] (Kiefel CJ, Bell and Keane JJ).

[96] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [3] (Kiefel CJ, Bell and Keane JJ); *Lenthall v Westpac Banking Corp (No 2)* (2020) 144 ACSR 573, [7].

[97] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [110] (Gageler J).

[98] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [50] (Kiefel CJ, Bell and Keane JJ).

[99] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [51] (Kiefel CJ, Bell and Keane JJ).

[100] *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (2020) 281 FCR 501, [35].

[101] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [47], [53] (Kiefel CJ, Bell and Keane JJ).

First, such an order seeks to accommodate the extraneous commercial considerations of a third-party, concluding that "[w]hether or not a potential funder of the claimants may be given sufficient financial inducement to support the proceeding is outside the concern to which the text is addressed".[102]

Second, such an operation stretches the legislative intent of s 33ZF beyond the text of the provision and makes an untenable assumption about "process for its own sake rather than the outcome of the process",[103] namely that "maintaining litigation, whatever its ultimate merit or lack thereof, is itself doing justice to the parties".[104]

A. Supplementary Power

Perhaps the most profound impact of *Brewster* is on the interpretation of s 33ZF. Section 33ZF has historically functioned as a broad discretionary power, enabling the Court to cure all manner of procedural and substantive maladies that arise in litigation that could not have been foreseen by even the most prescient legislature.[105] The construction advanced by the majority in *Brewster* has clarified the reach of s 33ZF within the dichotomy of *primary* and *supplementary* or "gap-filling" statutory provisions.

There is a majority finding that s 33ZF is a supplementary or "gap-filling" power, comprised of Gordon J,[106] Nettle J[107] and the plurality.[108] Central to this conclusion is a concern that its broad discretionary scope should not become a vehicle to rewrite the legislation.[109] It is not an independent source of power upon which a Court may fashion any order that is inconsistent with an existing statutory power. The plurality reasoned that such a construction:

> exalts the role of s 183 (and s 33ZF) above that of a supplementary or gap-filling provision, to say that it may be relied upon as a source of power to do work beyond that done by the specific provisions which the text and structure of the legislation show it was intended to supplement.[110]

The broad discretion conferred by s 33ZF is not a power "at large"[111] that may be exercised to ensure that justice is done generally, but it is a power to do so within the text and structure of Pt IVA and as an incident of, or supplementary to, some other power.

Beach J cogently summarises the reasoning of the plurality on this point in *Wetdal Pty Ltd v Estia Health Ltd* (*Wetdal*) and *Davantage* in the same terms:

> The plurality [in Brewster] emphasised that whilst the power provided by s 33ZF(1) is wide, it is essentially a supplementary or gap-filling power. And as a supplementary source of power for Pt IVA, it is not to be supposed that s 33ZF(1) was intended to meet the exigencies of litigation not adverted to at all by the provisions of Pt IVA. So, s 33ZF(1) may not be "relied upon as a source of power to do work beyond that done by the specific provisions which the text and structure of the legislation show it was intended to supplement" (at [70]). Section 33ZF(1) "cannot be given a more expansive construction and a wider scope of operation than the other provisions of the scheme" (at [70]). And to do so "would be to use … s 33ZF … as a vehicle to rewrite the scheme of the legislation" (at [70]). Rather, s 33ZF(1) has the effect of "support[ing] any interlocutory procedural order necessary to ensure that the pleaded issues are resolved justly between the parties" (at [21]). Of course, a just resolution could include a judgment (s 33Z) or a settlement approved by the Court (s 33V).[112]

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[102] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [50] (Kiefel CJ, Bell and Keane JJ).

[103] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [52] (Kiefel CJ, Bell and Keane JJ).

[104] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [52] (Kiefel CJ, Bell and Keane JJ).

[105] See, eg, *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [45] (Kiefel CJ, Bell and Keane JJ).

[106] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [82] (Gordon J) and in particular [145]–[147].

[107] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [82] (Nettle J) and in particular [124]–[125].

[108] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [69]–[70] (Kiefel CJ, Bell and Keane JJ).

[109] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [69] (Kiefel CJ, Bell and Keane JJ); referring to *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, [52]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (in liq)* (2015) 325 ALR 539, [100].

[110] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [70] (Kiefel CJ, Bell and Keane JJ).

[111] *Haselhurst v Toyota Motor Corp Australia Ltd* (2020) 101 NSWLR 890, [4], [106]–[107].

[112] *Wetdal Pty Ltd v Estia Health Ltd* [2021] FCA 475, [60] and *Evans v Davantage Group Pty Ltd (No 2)* [2020] FCA 473, [50].

The plurality judgment in *Brewster* engages in a close textual and contextual analysis of Pt IVA[113] to identify specific statutory contexts in which s 33ZF may be invoked[114] in order to demonstrate that the purpose and scope of s 33ZF is supplementary and not primary in nature. Their Honours conclude that s 33ZF is designed to deal with the "unforeseen difficulties"[115] which the legislature could not have contemplated at the time of enactment and that normally arise in the course of interpreting and applying a detailed statutory regime such as Pt IVA. However, resolving unforeseen difficulties does not "empower the courts to rewrite Pt IVA and Pt 10 respectively in order to pursue other objectives in different ways".[116]

Kiefel CJ, Bell and Keane JJ described the operation of s 33ZF and its NSW equivalent in the following terms:

> The statutory context, in which each of ss 33ZF and 183 appears, shows that each section is a supplementary source of power. It is not to be supposed that each section does much the same work as other provisions of Pt IVA of the *FCA* and Pt 10 of the *CPA*, or that each was intended to meet the exigencies of litigation not adverted to at all by those other provisions.[117]

In agreeing with the plurality, Gordon J referred to s 33ZF as a supplementary of gap-filling power that must be considered in the context of Pt IVA as a whole, by reference to other statutory provisions,[118] being "a power to do what is appropriate and necessary to advance the objective of Pt IVA".[119] In agreeing with the plurality, Nettle J expressed his support in the following terms:

> [A]s the plurality reason, seen in the context of Pt IVA of the *FCA Act* as a whole – as of course s 33ZF(1) must be construed – the broad generality of s 33ZF(1), compared to the detail and specificity of other provisions such as ss 33J, 33M, 33N, 33U, 33V, 33X, 33Z and 33ZA, suggests that s 33ZF(1) is in the nature only of a supplementary power to do what is necessary or incidental to achieve the objectives at which those other more detailed, specific provisions are aimed.[120]

One reading of this analysis leads to a conclusion that s 33ZF is not only supplementary but derivative, in that it relies upon another statutory power to operate. The work that it has to do is confined by the text and structure of the legislation it was intended to supplement.[121] On the specific question of the power to order a CFO, "the context of s 33ZF strongly implies exclusion of a construction of that provision that permits of the making of a CFO".[122]

A cogent and forceful riposte to the majority finding is found in the separate minority decisions of Gageler and Edelman JJ, who each found that s 33ZF empowers a Court to make a CFO.[123] Gageler and Edelman JJ contextualise the exercise of power under s 33ZF in the broader statutory scheme of Pt IVA (consistent with the plurality) but do not directly describe or confine the scope of s 33ZF as supplementary or derivative of some other power. The minority decisions of Gageler and Edelman JJ focus primarily on an examination of the submissions of each party, but in doing so are critical of the majority's reasoning.

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[113] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [62]–[80] (Kiefel CJ, Bell and Keane JJ).

[114] For example, *Federal Court of Australia Act 1976* (Cth) ss 33C, 33J, 33M, 33N, 33V, 33Z, 33ZA and 33ZB and in particular, s 33ZF(1).

[115] *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1, 4; 156 ALR 257, 260, referred to in *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [46] and [83] (Kiefel CJ, Bell and Keane JJ).

[116] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [82] (Kiefel CJ, Bell and Keane JJ).

[117] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [60] (Kiefel CJ, Bell and Keane JJ).

[118] Considered in the context of *Federal Court of Australia Act 1976* (Cth) as a whole and ss 33C, 33J, 33M, 33N, 33V, 33Z, 33ZA; and 33ZB in particular. See *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [147] (Gordon J).

[119] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [147] (Gordon J).

[120] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [124] (Nettle J).

[121] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [70] (Kiefel CJ, Bell and Keane JJ).

[122] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [125] (Nettle J). See also [145] (Gordon J).

[123] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [106] (Gageler J), [173] (Edelman J).

Gageler J interprets Wilcox J's decision in *McMullin v ICI Australia Operations Pty Ltd* (*McMullin*) as supportive of the broad discretion granted by s 33ZF[124] and an open-textured[125] approach to statutory interpretation which ultimately supports a conclusion that a CFO can be made under s 33ZF.[126]

Gageler J draws upon *McMullin* to highlight how s 33ZF is uniquely disposed to deal with the "unforeseen difficulties"[127] and "changing circumstances"[128] brought about by the emergence of the litigation funding industry in a manner that is consistent with the legislative intention and breadth of the discretion in s 33ZF.[129] In support of the conclusion that a CFO made under s 33ZF is within power, Gageler J refers to the four sentences in *McMullin*, which immediately precede the passage quoted by the plurality. This extract is instructive on the breadth of s 33ZF, and reads:

> Section 33ZF appears in Div 6 of Pt IVA which is headed `"Miscellaneous". It bears the marginal note "General power of Court to make orders". These two features support the conclusion, that would in any event arise from its wording, that s 33ZF(1) was intended to confer on the court the widest possible power to do whatever is appropriate or necessary in the interests of justice being achieved in a representative proceeding. It is understandable parliament should have thought it appropriate to make such a provision.[130]

This passage from *McMullin* does not sit comfortably with the narrower approach taken by the majority in *Brewster*; that s 33ZF is "supplementary" in the sense that it cannot operate outside what is "necessary or incidental to achieve the objectives at which those other more detailed, specific provisions are aimed"[131] and that s 33ZF was not intended "to meet the exigencies of litigation not adverted to at all by those other provisions".[132]

Gageler J's dissenting decision is critical of the majority's interpretation of the scope of operation of s 33ZF, stating:

> Few of the powers conferred by Pt IVA are so "limited and qualified" as to exclude the operation of other, more generally expressed powers located within the Part or elsewhere in the Federal Court Act. None of them is so limited or qualified as to confine the scope of s 33ZF(1) in any relevant respect.[133]

In Gageler J's view it is acceptable that statutory provisions have an intersecting locus of operation which does not limit or confine the application of the other. Gageler J referred to the way in which ss 33V(2), 33Z and 33ZJ may operate conformably with a "prior or contemporaneous" exercise of power under s 33ZF,[134] with the effect that, "[n]either alone nor in combination do ss 33V, 33Z and 33ZJ therefore prevent a CFO made under s 33ZF(1)".[135]

Echoing this analysis, Edelman J refers to the role that s 33ZF plays to make Pt IVA work effectively. In a rejoinder to the conclusion that s 33ZF is derivative or reliant upon the exercise of some other statutory power, Edelman J highlights the work that s 33ZF must do to address an absence of statutory power under s 33Z to order non-damage-based awards:

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[124] The plurality also accept the breadth of the discretion under s 33ZF as described in *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1; 156 ALR 257; however, the plurality describe a more discernible limit to this discretion at [47].

[125] See *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [123]–[124] (Nettle J); see also [171] (Edelman J).

[126] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [106] (Gageler J).

[127] *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1, 4; 156 ALR 257, 260, referred to in *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [46], [83] (Kiefel CJ, Bell and Keane JJ).

[128] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [100] (Gageler J).

[129] See the analysis of Gageler J in *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [98]–[106] (Gageler J).

[130] *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1, 4; 156 ALR 257, referred to by Gageler J: *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [98]–[99].

[131] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [124] (Nettle J).

[132] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [60] (Kiefel CJ, Bell and Keane JJ).

[133] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [116] (Gageler J) (footnotes omitted).

[134] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [117]–[118] (Gageler J).

[135] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [118] (Gageler J).

> Even more fundamentally, there is an obvious area where s 33ZF(1) must have a large area of operation in order to make the scheme operate effectively. This is in relation to awards other than damages… But s 33Z makes no provision for awards in representative proceedings of an account and disgorgement of a defendant's profits, orders to pay a debt, or orders for restitution of money, including restitution consequent upon court-ordered rescission.[136]
>
> … the words of s 33ZF(1) must extend to a power to make orders concerning distribution of payments arising from disgorgement of profits, restitution, debts due, or rescission of a contract and restitution of payments made under it.[137]

There is an interpretation of Edelman J's reasoning that agrees with the majority finding that s 33ZF is supplementary, in the sense that s 33ZF "fills the gap" in s 33Z to enable non-damage-based awards. However, it does not go so far as to say that an exercise of s 33ZF relies upon s 33Z for its power.

V. Section 33ZF Post-Brewster

The impact of *Brewster* on the interpretation of s 33ZF is beginning to emerge in post-*Brewster* decisions of the Federal Court and NSW Supreme Court, with varying results.

In *Haselhurst v Toyota Corp Australia Ltd* (*Haselhurst*)[138] the NSW Court of Appeal relied, in part, upon the reasoning of the majority in *Brewster* to find that the cognate of s 33ZF, s 183 of the *Civil Procedure Act 2005* (NSW), could not found an exercise of power to close the class for the purpose of settlement, a practice that previous courts had accepted.[139] Payne JA (with whom Bell P, MacFarlan, Leeming JJA and Emmet AJA agreed) relied upon the analysis of the majority to conclude that s 183 is supplementary in nature and "is not a source of power to do work beyond that done by the specific provisions which the text and structure of the legislation show the section was intended to supplement".[140]

Accordingly, an order for "soft closure" to facilitate settlement was rejected for want of power on the basis that existing statutory provisions cover the subject matter to which s 183 was being invoked[141] and it would be "incongruous to read a power into s 183 when other provisions of Pt 10 make specific provisions apt to accommodate that task but which operate at the conclusion of the proceeding".[142] The Court of Appeal ultimately found that the class closure order sought resulted in a contingent extinguishment of unregistered group members' rights and so could not be said to be necessary or appropriate to ensure that justice was done in the proceeding.

In *Prygodicz v Commonwealth (No 2)*[143] Murphy J reasoned that s 33ZF may be used to extend an opt out period, as an incident of the supervisory jurisdiction of the Court under s 33V. This finding was made in circumstances where the respondent (the Commonwealth) contended that the Court does not have power to extend an opt out period pursuant to s 33J(3) because no application had been made by a group member or party, as required by the section.[144] The respondent contended that following *Brewster*, s 33ZF "is not a source of power for the Court on its own motion to order that a person cease to be a group member, particularly in light of the specific power conferred by s 33J(3)".[145]

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[136] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [209] (Edelman J).

[137] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [211] (Edelman J).

[138] *Haselhurst v Toyota Motor Corp Australia Ltd* (2020) 101 NSWLR 890.

[139] For example, *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2017) 252 FCR 1, [74]–[75].

[140] *Haselhurst v Toyota Motor Corp Australia Ltd* (2020) 101 NSWLR 890, [106] (Payne JA). See analysis also at [105]–[114] which captures the plurality and Nettle and Gordon JJ's concurring opinions on this point.

[141] *Civil Procedure Act 2005* (NSW) ss 173, 177, 179.

[142] *Haselhurst v Toyota Motor Corp Australia Ltd* (2020) 101 NSWLR 890, [105] (Payne JA).

[143] *Prygodicz v Commonwealth (No 2)* [2021] FCA 634, [246]–[247].

[144] *Prygodicz v Commonwealth (No 2)* [2021] FCA 634, [246].

[145] *Prygodicz v Commonwealth (No 2)* [2021] FCA 634, [246].

In concluding that s 33ZF is not so confined, Murphy J referred to the context and structure of the representative regime under Pt IVA and the supervisory role of the Court under s 33V as the foundation for exercising the supplementary power of s 33ZF:

> In my view the Court has power to extend the time for opt out without there being an application by the parties or a group member. The power in s 33ZF is not restricted to ensuring justice is done in the proceeding only as between the parties as the Commonwealth submitted. Understood in the context of the representative regime, and taking into account the Court's protective role in relation to group members' interests in an application under s 33V, in my view the power in s 33ZF extends to ensuring that justice is done in the proceeding as between group members. In my view the ratio in Brewster does not extend as far as the Commonwealth contended.[146]

In *Wetdal*,[147] Beach J approved an order under s 33ZF for class closure, in contrast to the decision in *Haselhurst*.[148] In doing so, Beach J linked the exercise of s 33ZF to close the class to a *future* exercise of power under s 33V and for the present purpose of facilitating an effective mediation:

> [T]here is nothing in BMW evincing any intention that any just resolution (at [21]) be limited only to a judgment, so as to render beyond power an order which is directed to facilitating a mediation or the ultimate exercise of power under s 33V. Section 33ZF enables an order which is directed to ensuring that a mediation can proceed effectively, particularly if the ultimate goal is to facilitate an exercise of power under s 33V.[149]

In *Parkin v Boral*[150] the reasoning of the plurality in *Brewster* was invoked to reject an issue raised in oral argument about "whether a judgment made on the common issues could somehow operate *in rem* so as to bind group members, including by an order made under s 33ZF".[151] This approach was denied by Lee J because s 33ZB explicitly imposes a binding effect of a judgment on those who have not opted out of a proceeding and, as such, s 33ZF could not be used to alter the effect of s 33ZB. In reasoning to this conclusion, Lee J referred to the structural aspects of Pt IVA that flow from "the caution expressed by the plurality in *Brewster* that a provision such as s 33ZF cannot be used as a mechanism to rewrite the scheme of the legislation".[152]

VI. Common Fund Orders and Funding Equalisation Orders

The principle that all group members ought to equitably share in the costs of a proceeding was accepted by the plurality in *Brewster*.[153] Indeed, the plurality stated clearly that a settlement that allows "free riders" would not be fair and reasonable.[154] It is the mechanism by which the cost sharing is achieved that is a source of some controversy.

A majority in *Brewster* advanced an *obiter* opinion in favour of a Funding Equalisation Order (FEO) over a CFO[155] on the principled basis that it does not impose an additional cost on the unfunded class and takes as its starting point the actual costs incurred in funding the litigation.[156] The FEO mechanism

[146] *Prygodicz v Commonwealth (No 2)* [2021] FCA 634, [247].

[147] *Wetdal Pty Ltd v Estia Health Ltd* [2021] FCA 475.

[148] The significant difference of wording in the proposed order in *Wetdal Pty Ltd v Estia Health Ltd* [2021] FCA 475 (*Wetdal*) compared to *Haselhurst v Toyota Motor Corp Australia Ltd* (2020) 101 NSWLR 890 was determinative on why Beach J found it was distinguishable and indeed permissible to close the class. See *Wetdal*, [77]–[80].

[149] *Wetdal Pty Ltd v Estia Health Ltd* [2021] FCA 475, [92].

[150] *Parkin v Boral Ltd* [2021] FCA 889.

[151] *Parkin v Boral Ltd* [2021] FCA 889, [20].

[152] *Parkin v Boral Ltd* [2021] FCA 889, [20].

[153] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [85]–[90] (Kiefel CJ, Bell and Keane JJ).

[154] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [89] (Kiefel CJ, Bell and Keane JJ).

[155] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [74], [85]–[90] (Kiefel CJ, Bell and Keane JJ), [134], [167]–[169] (per Gordon J).

[156] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [88] (Kiefel CJ, Bell and Keane JJ), referred to approvingly in *Fisher v Vocus Group Ltd (No 2)* [2020] FCA 579, [74]; see also [134]. Importantly, Gordon J expressed a view that an CFO was without power in all contexts and thereby went further than the plurality in expressing a view that an FEO was not merely preferable to a CFO as the accepted solution, see [134]–[135] and [168]–[169].

was first devised by Maurice Blackburn, when making an application for settlement approval in the Aristocrat shareholder class action in 2008,[157] to ensure that the burden of the commissions and fees payable to funders would fall not only on those group members who entered into funding agreements with the funder (funded group members) but also on those participating group members who did not enter into a contractual relationship with the funder (unfunded group members).[158] As explained by Lee J, this mechanism:

> works by ensuring that the funder does not receive more than the total commission it would have received from the funded group members and hence the funded group members are not disadvantaged by having signed a funding agreement.[159]

The common fund doctrine differs from the funding equalisation mechanism to the extent that, under a CFO, the commission is deducted from the entitlements of those group members who did not execute a funding agreement and it is paid to the funder rather than being redistributed to all members of the represented group.[160]

In *Brewster* Gordon J expressed a view that a CFO was without power in all contexts and thereby went further than the plurality in expressing a view that an FEO was not merely preferable to a CFO but was an "accepted solution" without reference to alternatives.[161] Consequently, an initial response to *Brewster* in the Federal Court was that applicants amended their settlement applications to seek an FEO as a cautious response to the majority view in *Brewster*.[162] Indeed, in *Clime Capital Ltd v UGL Pty Ltd*, Anastassiou J specifically remarked that such an amendment occurred within hours of the *Brewster* decision.[163]

With respect, a significant omission in the High Court's analysis is that it does not consider circumstances in which an FEO may be inappropriate. The clearest example arises when only one person, the representative applicant, has entered into a funding agreement, as was the case in *Swann*,[164] *Uren*[165] and *Webster*.[166] Murphy J in *Uren* described this circumstance as "significant because a funding equalisation order in the present case could only operate to share across the class the applicant's personal obligation to pay a funding commission to the Funder".[167] The result is a *de minimis* redistribution of costs among the class, amounting to a "free ride" for unfunded members and a *de minimis* return to the litigation funder, which does not fairly recognise the risks and costs assumed by the funder in supporting the litigation to a successful conclusion.[168]

It is precisely these circumstances which the Court recognised in *Swann*,[169] *Uren*[170] and *Webster*[171] as weighing in favour of a CFO-type order being made over a FEO. The approach taken by the funder to contract only with the representative applicant was accepted as appropriate by the Court in those three

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[157] *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19.

[158] An FEO was made by the Federal Court to facilitate a number of class action settlements: see *Clime Capital Ltd v UGL Pty Ltd* [2020] FCA 66, [12] (Anastassiou J) and the references cited therein.

[159] *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289, [59] (Lee J).

[160] *Farey v National Australia Bank Ltd* [2016] FCA 340, [30] (Beach J). But see *Clime Capital Ltd v UGL Pty Ltd* [2020] FCA 66, [2], [3], [39] (Anastassiou J).

[161] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [134]–[135], [168]–[169] (Gordon J).

[162] *Clime Capital Ltd v UGL Pty Ltd* [2020] FCA 66, [2], [8]–[13]; *McKay Super Solutions Pty Ltd v Bellamy's Australia Ltd (No 3)* [2020] FCA 461, [2].

[163] *Clime Capital Ltd v UGL Pty Ltd* [2020] FCA 66, [2].

[164] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625, [26].

[165] *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647, [65].

[166] *Webster (Trustee) v Murray Goulburn Co-Operative Co Ltd (No 4)* [2020] FCA 1053, [119]–[120].

[167] *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647, [64].

[168] *Webster (Trustee) v Murray Goulburn Co-Operative Co Ltd (No 4)* [2020] FCA 1053, [119].

[169] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625, [26].

[170] *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647, [65].

[171] *Webster (Trustee) v Murray Goulburn Co-Operative Co Ltd (No 4)* [2020] FCA 1053, [119]–[120].

class actions. It may suggest that litigation funders should structure their funding arrangements in this manner in the future so as to avoid an FEO and improve their chances of securing a Settlement or Judgment CFO. In approving the expense sharing order in *Webster*, Murphy J stated that the inappropriateness of an FEO was relevant to the exercise of his discretion under s 33V:

> [W]hether an expense sharing order or a funding equalisation order is "just" is necessarily a case specific enquiry. In the circumstances of the present case, in which only the plaintiff entered into a funding agreement and no class members did so, a funding equalisation order would not be just or fair.[172]
>
> It would be unjust for class members to receive close to a free ride in the litigation and enjoy windfall gains, and unjust for the Funder to receive a return which would go nowhere near providing a commercially realistic return for the costs he paid and the risks he took in on funding the litigation.[173]

There is an assumption underlying the reasoning of the plurality and Gordon J that an FEO will reliably produce a better outcome for group members. As was observed by Murphy J in *Uren*, "a funding equalisation order is not always the appropriate counterfactual or comparator" to a CFO-type order.[174] Other relevant considerations as to the whether a FEO or a CFO is appropriate in all the circumstances include the following which arise from a relatively mature line of authority in the Federal Court:[175]

(1) The distribution and weighting of losses as between the funded and unfunded group;[176]
(2) Whether the funding agreement entitles the funder to recover from the "grossed up" amount redistributed to funded group members from unfunded group members' recoveries;[177] and
(3) Whether other expenses are included in the contractual obligations of funded group members under the funding agreement (eg project management fees) that would be levied upon the unfunded class under an FEO but not necessarily form part of a CFO.[178]

The above analysis does not assume that an FEO is inappropriate in all circumstances. In *Fisher v Vocus Group Ltd (No 2)*, Moshinsky J found that a FEO made under s 33V was appropriate and preferable to a CFO as it produced a significantly higher return to group members[179] and relied in part upon the plurality reasoning in *Brewster* that an FEO does not impose an additional cost on the unfunded class, taking as its starting point the actual costs incurred in funding the litigation.[180]

Part of the principled justification for the majority's preference, in *Brewster*, for a FEO over a CFO is that it minimises additional costs being levied against group members, particularly the unfunded open class. A counter-intuitive by-product of this preference is that it re-introduces an incentive for funders to undertake book-building, which is a significant contributor to the overall costs of a proceeding that are ultimately recovered against the whole class under an FEO.[181] FEOs incentivise book-building in order that the funder's contractual entitlements are maximised across the largest possible group. It will

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[172] *Webster (Trustee) v Murray Goulburn Co-Operative Co Ltd (No 4)* [2020] FCA 1053, [117].

[173] *Webster (Trustee) v Murray Goulburn Co-Operative Co Ltd (No 4)* [2020] FCA 1053, [119].

[174] *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647, [65].

[175] See, eg, *Blairgowrie Trading Ltd v Allco Finance Group Ltd (in liq) (No 3)* (2017) 343 ALR 476, in particular at [104] in which Beach J concluded that group members would be better off under a CFO than an FEO.

[176] *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, [55]–[60]; *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527, [162].

[177] *Blairgowrie Trading Ltd v Allco Finance Group Ltd (in liq) (No 3)* (2017) 343 ALR 476, [99(d)]; *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, [55]–[60]; *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527, [168].

[178] *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527, [167]–[168].

[179] The commission under a CFO was $6,198,254.40 (including GST) compared to an FEO of $3,897,735.37 (including GST): *Fisher v Vocus Group Ltd (No 2)* [2020] FCA 579, [74].

[180] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, [88] (Kiefel CJ, Bell and Keane JJ), referred to approvingly in *Fisher v Vocus Group Ltd (No 2)* [2020] FCA 579, [74].

[181] Prior to *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, in *Perera v GetSwift Ltd* (2018) 263 FCR 92 the Full Court of the Federal Court held that "having group members sign funding agreements serves 'no useful purpose', involves a 'waste of costs' and undermines the policy objectives of Part IVA in having 'open' class actions". This finding was echoed by the NSW Supreme Court in *Wigmans v AMP Ltd* [2019] NSWSC 603 in which Ward CJ found that book building should not be encouraged in circumstances where a CFO is sought, as it is wasteful, costly and serves no useful purpose.

be instructive to observe whether, in response to *Brewster*, funders re-engage in an aggressive book-building strategy, as occurred pre-*Money Max*, in order to secure future returns. Alternatively, funders may adopt the strategy taken in *Webster*, *Uren* and *Swann* and only enter funding arrangements with the representative applicant and speculate upon an exercise of discretion in their favour at settlement or judgment.[182]

The CFO and FEO are not the only mechanisms by which Courts may apportion the costs of a representative proceeding. Under the Victorian *Supreme Court Act 1986*, a Court may make a Group Costs Order (GCO) pursuant to s 33ZDA if it is satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding. The effect of a GCO is that "the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being the percentage set out in the order".[183] The first GCO was made by Nichols J in *Allen v G8 Education Ltd* in December 2021.[184]

The GCO is a novel statutory mechanism that eschews the orthodox prohibition against contingency fees and presents a type of halfway-house between the kind of omnibus expense sharing order contemplated under GPN-CA and a CFO. Crucially, the material distinction between a GCO and a CFO is that it applies to the legal costs of a proceeding only, but does not necessarily preclude the involvement of a litigation funder. A GCO changes the cost economics of a proceeding in a manner that encourages different and innovative funding structures (such as a cost sharing arrangement with a litigation funder;[185] adverse costs or security for costs cover only with commensurately lower commission rates to reflect lower risks undertaken by funders). In most cases a GCO would ameliorate the need for third-party funding entirely in circumstances where the law firm has sufficient resources to manage cost risks. The net result is that in the correct circumstances,[186] group members will be better off under a GCO than with a CFO as deductions from group member recoveries do not include a funder's expenses or commission and are capped at the rate specified in the order. In procedural respects the GCO is akin to a pre-*Brewster* CFO insofar as it confers discretion on the Court to fix the rate at which a sum representing legal fees may be recovered early in a proceeding and the merits of this approach.

The GCO is only available for proceedings commenced under the Victorian class action regime and the degree to which the GCO mechanism will be employed in the future depends on fact-specific considerations relevant to each proceeding. The GCO represents another tool in the armoury of the Court to regulate the costs of representative proceedings and is an example of a flexible legislative solution that confers discretion on the Courts to determine what is fair, reasonable and just in the circumstances.

VII. Conclusion

The finding of the majority in *Brewster* that s 33ZF cannot be a source of power for a Commencement CFO is likely to deflate enthusiasm for third-party funding of class actions. *Brewster* has also diminished the power of the Court to control litigation funding. In *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)*, Beach J made the following *obiter* remarks regarding the impact of *Brewster* on competing claims and the ability of the Court to effect commission rates:

> flowing from BMW Australia Ltd v Brewster, I now have less flexibility to deal with commission rates. In my respectful view, this is something that the legislature should address sooner rather than later. … Trial judges need flexible tools to regulate these funding arrangements and to tailor solutions to each individual case. And preferably that regulation should take place closer to the outset of proceedings rather than at the other end, particularly where competing class actions are in play.[187]

[182] If the *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* (Cth) becomes law it is expected that funders will try to avoid its effect by adopting this mechanism.

[183] *Supreme Court Act 1986* (Vic) s 33ZDA(1)(a).

[184] *Allen v G8 Education Ltd* [2022] VSC 32.

[185] See, eg, *Fox v Westpac Banking Corp* [2021] VSC 573.

[186] Compare with the decision in *Fox v Westpac Banking Corp* [2021] VSC 573 in which a GCO was not made.

[187] *McKay Super Solutions Pty Ltd v Bellamy's Australia Ltd (No 3)* [2020] FCA 461, [34].

Yet, in the face of *Brewster*, the common fund doctrine continues to offer a solution that does not suffer from the uncertainty of quixotic regulatory change[188] but benefits from the judicious and incremental development of the common law. The post-*Brewster* jurisprudence has made a cogent case that the power to make a CFO exists in statute, if made at a later stage in the proceeding.

It is suggested that post-*Brewster* Federal Court decisions, which have made Settlement and other CFO-type orders, have not eschewed the need for a discrete statutory power that authorises the making of CFOs, as was recommended by the Australian Law Reform Commission[189] and has been called for by the judiciary.[190] Statutory clarity on the power to make a CFO which is informed by the now evolved jurisprudence on the common fund doctrine in Australia would create certainty in the litigation funding market and enable the Court to appropriately safeguard the interests of group members while enhancing access to justice.

[188] For example, the introduction of the *Corporations Amendment (Litigation Funding) Regulations 2020* (Cth) in August 2020 that imposed new licencing and compliance requirements on litigation funders under the managed investment scheme regime of the *Corporations Act 2001* (Cth).

[189] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-party Litigation Funders*, Report No 134 (2018) Recommendation 3.

[190] *McKay Super Solutions Pty Ltd v Bellamy's Australia Ltd (No 3)* [2020] FCA 461, [34].