Keagan Lee*

COMMON FUND ORDERS: WHERE ARE WE NOW, AND WHERE TO NEXT?

I Introduction

The Australian class action regime, at its introduction in 1992,[1] promised a revolution for access to justice.[2] Since that time, the class action frameworks provided for in pt IVA of the *Federal Court of Australia Act 1976* (Cth) and the *pari materia* mechanisms in New South Wales,[3] Victoria,[4] and other states have been the subject of significant change. One of the most significant, recent changes came in *BMW Australia Ltd v Brewster* ('*Brewster*'),[5] in which the High Court severely limited the scope for courts to make common fund orders ('CFOs'). This article outlines the legal position before and after *Brewster*. It then investigates the benefits and limitations of CFOs and the extent to which the effect of the decision in *Brewster* is to limit access to justice. The article concludes that legislative reform to grant courts the express jurisdiction to make CFOs is necessary.

II Class Actions and Litigation Funding: A Social Good?

The existence of a mechanism for representative proceedings is generally perceived to be of social utility. Such proceedings expand the availability of access to justice. Assessing the extent to which a mechanism facilitates access to justice requires a compartmentalisation of the term 'access to justice'. As Stefan Wrbka, Steven Van Uytsel and Matthias Siems identify:

---

* LLB (Hons) Candidate, BCom (Acc) (Adel). The views expressed in this article are the author's own and are not those of any organisation with whom the author is or has been associated. The author would like to thank the anonymous peer reviewers, and the *Adelaide Law Review*'s editors and student editors for their insightful comments on this article.

1 See *Federal Court of Australia Amendment Act 1991* (Cth).

2 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174 (Michael Duffy, Attorney-General), quoted in Bernard Murphy and Camille Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30(2) *Melbourne University Law Review* 399, 402. See also Justice Michael Kirby, 'Law Reform: Past, Present, Future' (Speech, Alberta Law Reform Institute, 2 June 2008) 18.

3 *Civil Procedure Act 2005* (NSW) pt 10.

4 *Supreme Court Act 1986* (Vic) pt 4A.

5 (2019) 374 ALR 627 ('*Brewster*').

> The term *access to justice* consists of two parts: *access* and *justice*. In its literal meaning, *access* stands for the chance to reach or accomplish something, whereas *justice* refers to … the concept that everybody's rights are safeguarded. In a combined sense it traditionally represents the procedural ideal that everybody regardless of his [or her] financial, social or intellectual circumstances should be able to enforce his [or her] rights by suitable legal means.[6]

Representative proceeding regimes are well placed to achieve both components of the term 'access to justice' by providing remedies to persons who may 'not know what rights and remedies are available' or to those who fear the legal process.[7] They similarly provide an avenue to obtain a remedy in circumstances where the legal costs otherwise likely to be incurred are disproportionate to the remedy itself.[8] Such proceedings are especially necessary in modern society, the commercial environment of which raises the risk of 'mass wrongs, such as the mass-produced defective product, large-scale pollution, and misleading advertising or securities disclosures aimed at numerous consumers or shareholders'.[9]

Representative proceedings may also have an impact upon behaviour, typically corporate behaviour, by encouraging corporations to exercise greater caution in producing goods or communicating information due to fear of 'large judgments'.[10] Further, class action regimes allow defendants to avoid multiple, related proceedings,[11] because they allow multiple persons to vindicate their complaints in one set of proceedings. Consequently, class action regimes may[12] also facilitate economic use of judicial resources by limiting the number of separate proceedings that are pursued in relation to the same infringement of rights.[13] These propositions are, generally

---

6 Stefan Wrbka, Steven Van Uytsel and Mathias Siems, *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (Cambridge University Press, 2012) 27 (emphasis in original).

7 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, October 1988) 9.

8 Victoria, *Parliamentary Debates*, Legislative Council, 4 October 2000, 431 (MR Thomson, Minister for Small Business).

9 Michael Legg, 'Evaluating Class Action Effectiveness' [2015] (July–August) *Precedent* 10, 10–11.

10 Justin Scott Emerson, 'Class Actions' (1989) 19(2) *Victoria University of Wellington Law Review* 183, 188.

11 Alberta Law Reform Institute, *Class Actions* (Final Report No 85, December 2000) 54 [120]–[121].

12 There is some evidence to the contrary. See, eg: Thomas E Willging, Laura L Hooper and Robert J Niemic, *Empirical Study of Class Actions in Four District Courts: Final Report to the Advisory Committee on Civil Rules* (Report, Federal Judicial Center, 13 March 1996) 19; Roger Bernstein, 'Judicial Economy and Class Actions' (1978) 7(2) *Journal of Legal Studies* 349.

13 Mathew Good, 'Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions' (2009) 47(1) *Alberta Law Review* 185, 209.

speaking, uncontroversial. It is at the intersection between litigation funding and class actions where the controversy lies.

Consistently with this controversy, the law has historically taken a dim view of litigation funding. This view, rooted 'in Grecian and Roman law',[14] found expression in the offences and torts of maintenance and, as a species thereof,[15] champerty. The tort and offence of maintenance operated to prevent uninterested parties from countenancing or funding another's litigation.[16] Champerty arose if a maintainer sought to 'make a profit out of another'[17] person's action, ordinarily by taking a portion of the damages obtained.[18] These ancient offences have been abolished in each Australian state expressly[19] or by omission.[20] In New South Wales,[21] South Australia,[22] Tasmania,[23] and Victoria,[24] the torts have been expressly removed, though it remains in Western Australia,[25] while the position is unclear in Queensland.[26] Further, in at least New South Wales,[27] South Australia,[28] Victoria,[29] and Western Australia,[30] champertous agreements can be made void.

---

14 *Murphy Operator Pty Ltd v Gladstone Ports Corporation Ltd [No 4]* [2019] QSC 228, [72] (Crow J) ('*Gladstone Ports [No 4]*').

15 *Hill v Archbold* [1968] 1 QB 686, 694–5, 700 (Lord Denning MR, Winn LJ agreeing at 699).

16 *Neville v London Express Newspapers Ltd* [1917] 1 KB 402, 407 (Viscount Reading CJ); *Alabaster v Harness* [1895] 1 QB 339, 342–3 (Lord Esher MR).

17 *Trendtex Trading Corporation v Credit Suisse* [1980] QB 629, 654 (Lord Denning MR).

18 Ibid.

19 *Crimes Act 1900* (NSW) sch 3 cl 5; *Criminal Law Consolidation Act 1935* (SA) sch 11 cl 1(3) ('*CLCA*'); *Crimes Act 1958* (Vic) s 322A.

20 *Gladstone Ports [No 4]* (n 14) [105] (Crow J); *Criminal Code Act Compilation Act 1913* (WA) app B s 4; *Treacy v Rylestone Pty Ltd* [2002] WASC 178, [43]–[45] (Scott J); *Criminal Code Act 1924* (Tas) s 6; *Mok v DPP (NSW)* (2016) 257 CLR 402, 422 n 74 (French CJ and Bell J).

21 *Civil Liability Act 2002* (NSW) sch 2 cl 2.

22 *CLCA* (n 19) sch 11 cl 3(1).

23 *Civil Liability Act 2002* (Tas) ss 28E(ba)–(bb).

24 *Wrongs Act 1958* (Vic) s 32(1) ('*Wrongs Act*').

25 *Freehill Hollingdale & Page v Bandwill Pty Ltd* [2000] WASCA 150, [27] (Owen, Steytler and Miller JJ); *Freeman v Kellerberrin Farmers Co-Operative Co Ltd* [2008] WASC 182, [32] (Hasluck J); *Chandler v Water Corporation* [2004] WASC 95, [36] (Hasluck J). See also Law Reform Commission of Western Australia, *Maintenance and Champerty in Western Australia* (Discussion Paper, September 2019) 21.

26 *Gladstone Ports [No 4]* (n 14) [131] (Crow J); *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd* (1997) 72 FCR 261, 268 (Lockhart, Cooper and Kiefel JJ).

27 *Civil Liability Act 2002* (NSW) sch 2 cl 2(2).

28 *Hegarty v Keogh* [2020] SASC 237, [127] (Master Bochner).

29 *Wrongs Act* (n 24) s 32(2).

30 See, eg: *Clairs Keeley v Treacy* (2003) 28 WAR 139; *Clairs Keeley v Treacy* (2004) 29 WAR 479, 482 [1] (Steytler, Templeman and McKechnie JJ).

Nonetheless, the historical scepticism towards litigation funding has subsided to some extent. Significantly, the High Court in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (‘*Fostif*’)[31] restricted the operation of the maintenance doctrine. Justices Gummow, Hayne, and Crennan[32] (with whom Gleeson CJ agreed)[33] and Kirby J[34] found that the mere fact that representative proceedings were funded by a third party on terms that, if the action succeeded, the third party would be entitled to one third of the damages, did not render the proceedings an abuse of process. Justice Kirby in particular considered the utility of litigation funding in facilitating access to justice in representative proceedings.[35]

Justice Kirby’s views appear to have been vindicated. Between March 2006 and March 2007, there were only seven class actions instituted across Australia.[36] In the following twelve-month period, 26 class actions were instituted.[37] Since then, the number has ranged between 17 and 38 per year.[38] Further, the number of representative proceedings that are funded by third parties has been increasing over time, and ‘in 2017 and 2018, 77 per cent of finalised Federal Court class actions were third-party funded’.[39]

Thus, it has been said that litigation funding in representative proceedings ‘enhance[s] access to justice by reducing financial risk and postponing or removing the cost barrier to participation’.[40] In this sense, litigation funding ‘facilitate[s] access to collective redress which would otherwise be very limited’.[41] Ignoring for one

---

31 (2006) 229 CLR 386 (‘*Fostif*’).

32 Ibid 434–6 [91]–[95].

33 Ibid 407 [1].

34 Ibid 451 [146].

35 Ibid 449 [138].

36 Vince Morabito, *An Empirical Study of Australia’s Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (Report No 5, Global Class Actions Exchange, Stanford University, July 2017) 22–3 <http://globalclassactions.stanford.edu/content/empirical-study-australias-class-action-regimes-fifth-report-first-twenty-five-years-class-a>.

37 Ibid.

38 Ibid.

39 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Litigation Funding and the Regulation of the Class Action Industry* (Report, December 2020) 34 [4.22], citing Australian Law Reform Commission, *Integrity, Fairness and Efficiency: An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) 74 (‘*An Inquiry into Class Action Proceedings*’).

40 Victorian Law Reform Commission, *Access to Justice: Litigation Funding and Group Proceedings* (Final Report, March 2018) 3 [1.7].

41 Vicki Waye and Vince Morabito, ‘When Pragmatism Leads to Unintended Consequences: A Critique of Australia’s Unique Closed Class Regime’ (2018) 19(1) *Theoretical Inquiries in Law* 303, 304–5.

moment the means, litigation funding thus achieves the same positive ends that are central to class action regimes.

III The Law

A *Pre-Brewster*

Returning now to the means, it is necessary to understand the operation of CFOs and the problem they resolve. After *Fostif*, class actions would often be initiated with some members having signed funding agreements and some having not.[42] The latter were styled 'free-riders' on the basis that they obtained the benefit of the funding without contributing to it.[43] The original solution to this problem was to pursue 'closed' class actions.[44] Such closure could be achieved through one of two methods:[45] first, commencing with a closed class;[46] or, second, seeking a class closure order.[47] The first of these methods is effected by limiting a class to those who have 'entered into a litigation funding agreement'.[48] This approach does not extinguish the claims of non-signatories but would require such persons to pursue a remedy separately.[49] The second is effected by instituting an ordinary open class action and subsequently seeking orders that unfunded parties sign a funding agreement, opt out, or do nothing.[50] Doing nothing extinguishes the person's right to pursue a remedy.[51] These orders may be made in Victoria.[52] In New South Wales, however, such orders

42 Roger Gamble, 'Jostling for a Larger Piece of the (Class) Action: Litigation Funders and Entrepreneurial Lawyers Stake Their Claims' (2017) 46(1) *Common Law World Review* 3, 6.

43 Jacob Varghese and Lee Taylor, 'Mediating Australian Class Actions' (2015) 2(2) *Alternative Dispute Resolution Law Bulletin* 28, 28.

44 Gamble (n 42) 6.

45 *Caason Investments Pty Ltd v Cao [No 2]* [2018] FCA 527, [161] (Murphy J).

46 *Matthews v SPI Electricity Pty Ltd [No 13]* (2013) 39 VR 255, 262 [20] (Forrest J) ('*Matthews [No 13]*').

47 Gamble (n 42) 6.

48 *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 2]* [2010] FCA 176, [19] (Finkelstein J).

49 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275, 298 [173]–[178] (Jacobson J, French J agreeing at 277 [1], Lindgren J agreeing at 277 [2]).

50 See, eg, *Furnell v Shahin Enterprises Pty Ltd* (2021) 386 ALR 245, 257–60 [44]–[52] ('*Furnell*') in which White J discussed the decision of the New South Wales Court of Appeal in *Wigmans v AMP Ltd* (2020) 102 NSWLR 199 ('*Wigmans*') in which that Court found that class closure orders were impermissible in New South Wales.

51 *Matthews [No 13]* (n 46) 262 [23]; Waye and Morabito (n 41) 316–18.

52 *Supreme Court Act 1986* (Vic) s 33ZG; *Matthews [No 13]* (n 46).

have recently been held to be beyond the courts' jurisdiction.[53] Although the Federal Court has made such orders,[54] later decisions have followed the recent New South Wales authority.[55]

Alternatively, a court was able to resolve the 'free-rider' problem by making a funding equalisation order ('FEO') or a CFO.[56] The former involves reducing the amount of the settlement or judgment sum payable to unfunded class members and correspondingly increasing the amount of the settlement or judgment sum payable to funded class members[57] such that, accounting for funding costs, both unfunded and funded class members receive similar sums.[58] By reason of the equalisation principle that underlies these orders and concerns of interfering 'with the terms of arms-length commercial agreements',[59] courts are reluctant to vary the percentage payable to the funder, and their jurisdiction to do so has been questioned.[60] FEOs are typically made at the settlement stage or at the time that the court gives judgment.[61] CFOs, on the other hand, are generally made at an early stage of the proceedings with a rate to be set by the court at the appropriate time.[62]

---

53 See *Haselhurst v Toyota Motor Corporation Australia Ltd* (2020) 101 NSWLR 890; *Wigmans* (n 50) 214–19 [79]–[112] (Macfarlan, Leeming and White JJA).

54 See *Jones v Treasury Wine Estates Ltd [No 2]* [2017] FCA 296. See also *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2017) 252 FCR 1, 21–2 [74] (Jagot, Yates and Murphy JJ) ('*Melbourne City*').

55 See *Furnell* (n 50) 264 [73] (White J); *Owners of Strata Plan No 87,231 v 3A Composites GmbH [No 3]* [2020] FCA 748, [203] (Wigney J); *Pabalan v Coles Supermarkets Australia Pty Ltd* [2021] FCA 118, [7] (Perram J).

56 Michael Legg, 'Ramifications of the Recognition of a Common Fund in Australian Class Actions: An Early Appraisal' (2017) 91(8) *Australian Law Journal* 655, 657–8.

57 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19, [17]–[19] (Stone J); *Brewster* (n 5) 660 [134] (Gordon J); Ross Foreman, 'High Court's Rejection of Common Funds Shakes Up Class Action Landscape' [2020] (63) *LSJ: Law Society of NSW Journal* 72, 72.

58 *Re Banksia Securities Ltd (rec and mgr apptd)* [2017] VSC 148, [100] (Robson J).

59 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 211–12 [92] (Murphy, Gleeson and Beach JJ) ('*Money Max*').

60 *McKay Super Solutions Pty Ltd v Bellamy's Australia Ltd [No 3]* [2020] FCA 461, [28], [33] (Beach J) ('*Bellamy's Australia [No 3]*'). See also: *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289, [25], [42], [47]–[48] (Lee J) ('*McGraw-Hill*'); *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd [No 3]* (2018) 132 ACSR 258, 305 [209] (Murphy J) ('*Petersen Superannuation [No 3]*'); Justice MBJ Lee, 'Varying Funding Agreements and Freedom of Contract: Some Observations' (2017) 44(11) *Brief* 22, 26. But see: *Melbourne City* (n 54) 24–5 [90]; *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433, [157] (Murphy J) ('*Earglow*').

61 *Money Max* (n 59) 217 [126]–[128].

62 Ibid 221 [146]–[148].

B *Where Are We Now?*

The High Court in *Brewster* determined that the power conferred on the Federal Court[63] and, mutatis mutandis, the New South Wales Supreme Court[64] in representative proceedings to 'make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding' ('Power') did not extend to making CFOs.[65] The plurality, Kiefel CJ, Bell and Keane JJ (with whom Nettle J[66] and Gordon J[67] generally agreed), outlined six primary reasons for that conclusion. First, the Power does not permit the making of orders whose purpose is to enable the proceedings 'to go forward',[68] and CFOs are such orders.[69] Secondly, CFOs are 'not apt to ensure that justice is done in the proceeding'[70] but instead ensure the financial viability thereof.[71] Thirdly, the Power is supplementary, and does not 'meet the exigencies of litigation not adverted to'[72] in the provisions that surround it, especially with respect to the questions of whether proceedings should continue[73] and who should bear costs at the early stages[74] of the proceeding to ensure that they do continue.[75] Answering such questions would be an impermissibly speculative exercise.[76] Fourthly, courts cannot utilise the supplementary Power to facilitate access to justice where such access is denied for want of funding.[77] Fifthly, FEOs are more appropriate to do justice between the parties, and such orders are appropriately left to the end of the proceedings.[78] Finally, the Power is not to be used for the benefit of funders, especially to prevent funders from incurring expense in 'book building' (that is, seeking members for a closed class).[79]

---

63 *Federal Court of Australia Act 1976* (Cth) s 33ZF ('*Federal Court of Australia Act*').

64 *Civil Procedure Act 2005* (NSW) ss 183, 155 (definition of 'Court').

65 *Brewster* (n 5) 630 [3] (Kiefel CJ, Bell and Keane JJ), 658 [128] (Nettle J), 667 [170] (Gordon J).

66 Ibid 657 [124]–[125].

67 Ibid 658–67 [129]–[165].

68 Ibid 639 [49].

69 Ibid.

70 Ibid 640 [53].

71 Ibid.

72 Ibid 641 [60].

73 Ibid 642 [62]–[65].

74 Ibid 643 [68].

75 Ibid 643–6 [68]–[81].

76 Ibid 642–3 [67].

77 Ibid 647 [82]–[84].

78 Ibid 647–8 [85]–[90].

79 Ibid 649 [91]–[94].

Nonetheless, CFOs have lived to see another day. First, CFOs made before *Brewster* have survived, consistent with the position in *New South Wales v Kable*.[80] Secondly, the New South Wales Court of Appeal recently suggested that, because the ratio of *Brewster* is limited to prohibiting CFOs at the early stages of proceedings ('commencement CFOs'),[81] CFOs at settlement or judgment may be made.[82] The power to make such orders was said to be sourced in the requirement that '[r]epresentative proceedings may not be settled or discontinued without the approval of the Court'.[83] The Court of Appeal further considered that it likely would not be constrained by seriously considered dicta in the *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* sense[84] in making such CFOs.[85] This is because the High Court in *Brewster* did not directly consider the position with respect to settlement and judgment CFOs, and to operate on the assumption of what the High Court *might* find would be speculative.[86] The Court of Appeal did not, however, make a settlement CFO because one had not yet been proposed.[87]

In similar circumstances, before the parties had proposed a settlement CFO, the Full Court of the Federal Court in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* ('*Davaria*')[88] considered that it was not prevented by *Brewster* from making settlement or judgment CFOs. Further, in *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd [No 3]*,[89] Lee J approved a settlement CFO. Justice Beach followed suit in *Evans v Davantage Group Pty Ltd [No 3]*.[90]

Davaria was the subject of a recent application for special leave to appeal to the High Court. The applicant had expressed its intention to seek such leave shortly after the Full Court's judgment was delivered.[91] During the course of the special leave hearing,

80 (2013) 252 CLR 118, 133 [32] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), quoted in *Pearson v Queensland [No 2]* [2020] FCA 619, [264] (Murphy J) ('*Pearson [No 2]*').

81 *Brewster v BMW Australia Ltd* [2020] NSWCA 272, [38] (Bell P, Bathurst CJ agreeing at [1], Payne JA agreeing at [49]) ('*Brewster (NSWCA)*').

82 Ibid [39].

83 *Civil Procedure Act 2005* (NSW) s 173(1). See also *Federal Court of Australia Act* (n 63) s 33V(1).

84 (2007) 230 CLR 89, 150–1 [134], 159 [158] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

85 *Brewster (NSWCA)* (n 81) [33] (Bell P).

86 Ibid [33]–[36].

87 Ibid [46]–[48].

88 (2020) 384 ALR 650, 661 [42] (Lee J, Middleton J agreeing at 652 [1], Moshinsky J agreeing at 652 [4]) ('*Davaria*').

89 (2020) 385 ALR 625, 634 [33].

90 [2021] FCA 70, [49], [51] ('*Davantage Group [No 3]*').

91 Parliamentary Joint Committee on Corporations and Financial Services (n 39) 101 [9.27], citing Cat Fredenburgh, 'High Court Asked to Deal Death Blow to Common Fund Orders', *Lawyerly* (online, 7 December 2020) <www.lawyerly.com.au/high-court-asked-to-put-the-nail-in-the-coffin-of-common-fund-orders/>.

the applicant contended that the Full Court erred in considering that *Brewster* did not prevent it from making a settlement or judgment CFO.[92] Counsel for the applicant expressed the view that the reasoning in *Brewster*, as outlined above, applied equally to commencement, judgment, and settlement CFOs.[93] The High Court (Keane, Edelman and Gleeson JJ) considered that the application was not a suitable vehicle through which to determine the issue.[94] It may be gleaned from the transcript that the Court's reasons for so holding include, first, the fact that the funder and applicant had not participated in the hearing at first instance[95] and, secondly, the fact that the Full Court had not actually made a settlement or judgment CFO.[96]

Thus, as the law currently stands, commencement CFOs are prohibited. It is possible that settlement and judgment CFOs may be made, but an appellate court is yet to approve one. The position is thus one of uncertainty.

IV Need for Reform?

The uncertainty that characterises the current legal position with respect to CFOs requires clarification. Effective legislative reform could provide the solution. In late 2020, the Commonwealth Parliamentary Joint Committee on Corporations and Financial Services ('PJC') recommended legislative reform 'in accordance with' *Brewster*.[97] The Commonwealth Attorney-General[98] and Treasurer[99] have expressed publicly their willingness to act on and consult the public in relation to the PJC's recommendations. Specifically, there has been a focus on the PJC's recommendation to implement a maximum or graduated entitlement for litigation funders out of settlement agreements in representative proceedings.[100]

92 Transcript of Proceedings, *7-Eleven Stores Pty Ltd v Davaria Pty Ltd* [2021] HCATrans 113, 106–10 (NJ Young QC).

93 Ibid 105–10 (NJ Young QC).

94 Ibid 238–40 (Keane J).

95 Ibid 28–34 (Edelman J).

96 Ibid 10–14 (NJ Young QC), 15–18 (Keane J).

97 Parliamentary Joint Committee on Corporations and Financial Services (n 39) 125 [9.124].

98 Michael Pelly, 'Michaelia Cash Goes into Bat for Legal Consumers', *The Australian Financial Review* (online, 28 May 2021) <https://www.afr.com/politics/michaelia-cash-goes-into-bat-for-legal-consumers-20210525-p57uwx>.

99 Josh Frydenberg, 'Consulting on the Recommendations of the Parliamentary Joint Committee Report on Litigation Funding and Class Actions' (Joint Media Release, 28 May 2021).

100 Michael Pelly, 'Michaelia Cash Targets Class Actions "Feeding Frenzy"', *The Australian Financial Review* (online, 27 May 2021) <https://www.afr.com/politics/federal/michaelia-cash-targets-class-actions-feeding-frenzy-20210526-p57vd7>.

Before *Brewster*, in 2018, the Australian Law Reform Commission ('ALRC') recommended, inter alia, that courts be given express legislative jurisdiction to make CFOs.[101] Similarly, Michael Legg suggested in 2007[102] and 2011[103] that the 'common fund approach' would be the preferable solution to the 'free-rider' problem. This article advocates for the ALRC's and Legg's broader approach for reasons that follow.

A *Judicial Discretion*

Following a detailed analysis of many jurisdictions' class action regimes, the Law Reform Commission of Hong Kong concluded that 'one essential feature … predominates. It is that all class actions must be managed by the courts.'[104] A major limitation of the current position of CFOs in Australia is that it limits the courts' ability to manage class actions, a fact that Beach J identified in *McKay Super Solutions Pty Ltd v Bellamy's Australia Ltd [No 3]*, his Honour expressly requesting legislative reform: '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'.[105]

This limitation becomes apparent upon consideration of the High Court's proposed comparator for the CFO — the FEO.[106] Whereas courts determine the percentage to which the funder will be entitled in making a CFO,[107] they have not adjusted the percentage specified in the funding agreement for the purposes of an FEO.[108] The courts' ability to vary the percentage in the funding agreement, absent some equitable wrong, has been questioned.[109] This is not a problem for CFOs, which are

---

101 See *An Inquiry into Class Action Proceedings* (n 39) 9, outlining Recommendation 3.

102 Michael Legg, 'Institutional Investors and Shareholder Class Actions: The Law and Economics of Participation' (2007) 81(7) *Australian Law Journal* 478, 488.

103 Michael Legg, 'Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions: The Need for a Legislative Common Fund Approach' (2011) 30(1) *Civil Justice Quarterly* 52, 63 ('Reconciling Litigation Funding and the Opt Out Group Definition').

104 Law Reform Commission of Hong Kong, *Class Actions* (Report, May 2012) 5 [13] <https://www.hkreform.gov.hk/en/docs/rclassactions_e.pdf>.

105 *Bellamy's Australia [No 3]* (n 60) [34].

106 *Brewster* (n 5) 647–8 [85]–[90] (Kiefel CJ, Bell and Keane JJ), 667 [168]–[169] (Gordon J).

107 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) [No 3]* (2017) 343 ALR 476, 507 [118]–[119] (Beach J) ('*Blairgowrie Trading*').

108 *Bellamy's Australia [No 3]* (n 60) [28] (Beach J). See also Michael Legg, 'Litigation Funding of Australian Class Actions after the High Court Rejection of Common Fund Orders: *BMW Australia Ltd v Brewster*; *Westpac Banking Corporation v Lenthall* [2019] HCA 45' (2020) 39(4) *Civil Justice Quarterly* 305, 310.

109 *McGraw-Hill* (n 60) [25], [42], [47]–[48] (Lee J); *Petersen Superannuation [No 3]* (n 60) 305 [209] (Murphy J). But see *Earglow* (n 60) [157]. See also: Lee (n 60) 26; *Endeavour River Pty Ltd v MG Responsible Entity Ltd [No 2]* [2020] FCA 968, [4]–[5] (Murphy J). But see *Melbourne City* (n 54) 24–5 [90], in which Jagot, Yates and

separate from any agreement between the funder and the parties. Nonetheless, the funder will ordinarily[110] receive greater returns under a CFO than an FEO.[111] The return to the funder vis-à-vis the class is not, however, the end that the courts sought to achieve in making commencement CFOs.

B *Diminishing Access to Justice?*

The principal end that courts sought to achieve in making commencement CFOs was to ensure that the class remained open.[112] CFOs were effective in serving that end. For the period between *Fostif* in 2006, in which the High Court found that litigation funding was not contrary to public policy,[113] and the making of the first CFO in 2016,[114] 36% of funded representative proceedings involved closed classes.[115] On the other hand, between the making of the first CFO and 30 September 2018, notwithstanding an increased percentage of funded litigations, only 13.2% of funded representative proceedings involved closed classes.[116]

The reasons for this decrease are threefold, and each reason is cumulative. First, CFOs generally provide greater returns to funders,[117] and thereby encourage the funding of class actions generally. Secondly, CFOs reduce the expenses involved

Murphy JJ suggested in what is arguably obiter that courts 'can deal with' litigation funding commissions in a settlement approval application. Further, in *Earglow* (n 60), Murphy J considered that a court could 'reduce the funding commission to be deducted pursuant to the terms of settlement': at [157]. His Honour did not, however, consider the contention that such a reduction would not prevent the funder from seeking the shortfall from class members in separate proceedings: at [158]. Nor did his Honour vary the funding commission on the basis that it was 'fair and reasonable': at [194]–[196]. The questions in relation to the courts' jurisdiction to vary the percentage to which a funder is entitled under an FEO have still not definitively been resolved: see *Botsman v Bolitho* (2018) 57 VR 68, 142–3 [376]–[378] (Tate, Whelan and Niall JJA).

110 But see Justice Bernard Murphy, 'Civil Justice Reforms in Class Actions and Litigation Funding' (2019) 46(1) *Brief* 30, 32.

111 Greg Williams and Peter Sise, 'Did the High Court Really Strike Down Common Fund Orders in Brewster? Options Emerge for Class Action Litigation Funders', *Clayton Utz* (Blog Post, 21 February 2020) <https://www.claytonutz.com/knowledge/2020/february/did-the-high-court-really-strike-down-common-fund-orders-in-brewster-options-emerge-for-class-action-litigation-funders>.

112 See, eg: *Davantage Group [No 3]* (n 90) [44] (Beach J); *Blairgowrie Trading* (n 107) 505 [106] (Beach J); *Duck v Airservices Australia* [2018] FCA 1541, [17] (Bromwich J); *Money Max* (n 59) 196–7 [14], 218 [133] (Murphy, Gleeson and Beach JJ).

113 *Fostif* (n 31). See above nn 31–5 and accompanying text.

114 *Money Max* (n 59).

115 Vince Morabito, *An Evidence-Based Approach to Class Action Reform in Australia: Closed Class Actions, Open Class Actions and Access to Justice* (Report, October 2018) 9.

116 Ibid 10.

117 Williams and Sise (n 111).

in seeking individuals to sign funding agreements (known as 'book building').[118] Finally, and crucially, CFOs incentivise litigation funders to increase the number of members involved in a representative proceeding, irrespective of whether those members have signed funding agreements, on the basis that CFOs connect funders' returns to the number of class members insofar as, generally, the funder's return increases as the number of class numbers increases.[119] This, accordingly, provides an active incentive for litigation funders to facilitate open class actions.

When these features are understood, it becomes apparent that settlement or judgment CFOs do not remedy the absence of commencement CFOs; the function which CFOs serve — incentivising the funding of open class actions — is spent at settlement and judgment. For similar reasons, FEOs, which are made at settlement or judgment, do not provide an appropriate solution to the absence of commencement CFOs. Litigation funders may thereby be required to book build, for fear that such CFOs will not be available and absent the 'known and stable foundation'[120] of a commencement CFO.[121] The absence of commencement CFOs thus reduces the return for funders without correspondingly reducing the risk associated with funding litigation. For some, this equation may not balance, leading to a consequent reduction in funders' willingness to fund open class actions and a connected reduction in competition between funders.[122] This reduction in competition would be especially unfortunate in light of the High Court's recent approval of the 'beauty parade'[123] approach to selecting between competing class actions, which allows courts to determine which class actions will be stayed and which class action will be permitted to proceed.[124] In particular, the High Court considered that the funding agreements in competing class actions could be a relevant, though not determinative, consideration, such that the set of proceedings which involves the agreement which is most generous to class members could be permitted to continue.[125] Where, however, litigation funders cannot be certain of the secure basis that a commencement CFO provides, there are likely to be fewer competing class actions. The benefit of the 'beauty parade' approach is, accordingly, likely to be limited in the absence of commencement CFOs.

---

118 *Perera v GetSwift Ltd* (2018) 263 FCR 1, 14 [25] (Lee J) ('*Perera*'); Anthony Lo Surdo, 'Litigation Funding Revisited: All for One, One for All?' [2015] (17) *LSJ: Law Society of NSW Journal* 76, 76.

119 See, eg, *Perera* (n 118) 14 [25] (Lee J).

120 *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21, 45 [91] (Allsop CJ, Middleton and Robertson JJ).

121 Chris Pagent et al, 'The Top Ten Class Action Predictions for 2021', *Corrs Chambers Westgarth* (Blog Post, 12 March 2021) <https://corrs.com.au/insights/the-top-ten-class-action-predictions-for-2021>.

122 Ibid.

123 Parliamentary Joint Committee on Corporations and Financial Services (n 39) 70 [7.23].

124 *Wigmans v AMP Ltd* (2021) 388 ALR 272.

125 Ibid 300–1 [111], 302–3 [118]–[119] (Gageler, Gordon and Edelman JJ).

It is for the same reasons that implementing a maximum or graduated percentage entitlement for litigation funders, which the PJC considered,[126] does not provide a solution. A PricewaterhouseCoopers ('PwC') report[127] found that the PJC-recommended entitlement of 30% would have caused litigation funders to suffer a loss or break even in 36% of publicly available class action litigation outcomes.[128] PwC predicted that, in such circumstances, those cases would not have been pursued at all.[129] Instead, facilitating the exercise of judicial discretion by permitting courts to make CFOs — which enable the court to set a funding percentage when all pertinent information is before it — would ensure that funders are remunerated reasonably for adopting the risk of funding the proceedings whilst ensuring that the funding percentage is fair to class members. The courts are well positioned to make this assessment on a case-by-case basis.[130] In this way, the courts can strike an adequate balance between funders' interests and ensuring that class members receive funding to pursue their claims.

The benefits do not, however, reside solely with the funder. The increase of open class actions benefits class members who otherwise would not be able to pursue a remedy.[131] CFOs, by facilitating open class actions, also benefit defendants insofar as they consequently encourage finality as to the result, because all possible class members are bound thereby in an open class action.[132]

Pearson v Queensland [No 2] ('*Pearson [No 2]*')[133] offers a compelling example. The claim related to legislative and executive policies in Queensland that operated, between 1939 and 1972, to deprive Aboriginal and Torres Strait Islander peoples of wages.[134] The claim was initially commenced as a closed class,[135] until Murphy J was able to make an interdependent class opening order and a commencement CFO.[136] In passing, his Honour observed that the commencement CFO made in that case 'allowed thousands more people, many of whom are elderly, not well-educated, lack commercial and legal sophistication and who live in isolated communities, to

---

126 See Parliamentary Joint Committee on Corporations and Financial Services (n 39) 206 [13.62], outlining Recommendation 20.

127 PricewaterhouseCoopers, *Models for the Regulation of Returns to Litigation Funders* (Final Report, Omni Bridgeway, 16 March 2021) <https://omnibridgeway.com/docs/default-source/insights/regulation/class-action-centre/litigation-funding---final-pwc-report---march-2020.pdf?sfvrsn=6f7cc6ec_7>.

128 Ibid 4.

129 Ibid 16.

130 See, eg, *Money Max* (n 59) 195–6 [11].

131 *Pearson [No 2]* (n 80) [23] (Murphy J).

132 *Federal Court of Australia Act* (n 63) s 33ZB; *Civil Procedure Act 2005* (NSW) s 179.

133 *Pearson [No 2]* (n 80).

134 Ibid [1].

135 See *Pearson v Queensland* [2017] FCA 1096.

136 Ibid [3], [7]–[29] (Murphy J).

become class members and to share in the settlement'.[137] Absent the CFO, such persons would likely not have pursued separate claims and would, therefore, in effect be denied a remedy in respect of 'discriminatory, unjust and … disgraceful legislation and policies'.[138] Justice Murphy also identified the benefit for the defendant of finality in the proceedings.[139]

Firms are predicting that the uncertainty that surrounds CFOs may cause a rise, once again, in book building,[140] which is likely to effect a corollary increase in closed class actions. Such closed classes are antithetical to the 'opt out' approach that Australian class action regimes have adopted,[141] and will likely result in diminished access to justice,[142] thereby undermining two central tenets of the Australian class action milieu.[143]

Contrary to the position[144] of opponents to CFOs and the law's historical scepticism of litigation funding, litigation funding and CFOs have been found 'not [to have] caused the feared "explosion" in the number of class actions'.[145] Instead, CFOs reduce the pool of potential class actions by encouraging open class actions, disincentivising closed class actions, and consequently reducing the number of different groups seeking a remedy in respect of the same factual and legal matrix.[146]

The law's historical scepticism towards litigation funding also provides the foundation on which opponents of CFOs argue that CFOs should not be allowed because they increase the return to funders to the detriment of claimants.[147] Such an argument

137 *Pearson [No 2]* (n 80) [23].

138 Ibid [1].

139 Ibid [23].

140 Pagent et al (n 121); Odette McDonald and Eliot Olivier, 'Recent Developments in Common Fund Applications: *Pearson v State of Queensland* & *Blairgowrie v Allco Finance Group [No 3]*' (2017) 31(4) *Commercial Law Quarterly* 37, 37.

141 *An Inquiry into Class Action Proceedings* (n 39) 34–5 [1.54]; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 31–2 [39]–[40] (Gaudron, Gummow and Hayne JJ); *Abbott v Zoetis Australia Pty Ltd [No 2]* (2019) 369 ALR 512, 523–4 [36] (Lee J); *Matthews [No 13]* (n 46) 262 [21] (Forrest J).

142 See, eg, Lachlan Peake, 'Testing the Regulator's Priorities: To Sanction Wrongdoers or Compensate Victims?' (2020) 39(2) *University of Queensland Law Journal* 277, 297–8.

143 Stefanie Wilkins, 'Common Fund Orders in Australia: A New Step in Court Regulation of Litigation Funding: *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148' (2017) 36(2) *Civil Justice Quarterly* 133, 141–3.

144 Parliamentary Joint Committee on Corporations and Financial Services (n 39) 113–15 [9.74]–[9.81].

145 Gamble (n 42) 5.

146 Waye and Morabito (n 41) 309, 312–13, 328; Legg, 'Reconciling Litigation Funding and the Opt Out Group Definition' (n 103) 61.

147 Parliamentary Joint Committee on Corporations and Financial Services (n 39) 115–16 [9.82]–[9.86].

allows perfection to become the enemy of good,[148] and ignores the scenarios, such as that with which Murphy J dealt in *Pearson [No 2]*,[149] which require scope for judicial management.

V Conclusion

The legal position with respect to CFOs is unclear. At present, commencement CFOs are prohibited in New South Wales and Commonwealth courts, although there appears to be scope for courts in those jurisdictions to make settlement or judgment CFOs. In refusing to grant special leave in the *Davaria* litigation, the High Court declined to provide much-needed clarity. Nonetheless, even if the High Court were, through an appropriate vehicle, to preserve settlement or judgment CFOs, and dispel the uncertainty that exists in respect of such orders, legislative reform is necessary. It is preferable that courts be given express jurisdiction to make CFOs at *all* stages of representative proceedings such that they are able appropriately to craft orders to fit the circumstances before them. Such an approach would allow courts to balance the interests of class members with those of litigation funders to ensure that class actions remain open and that the Australian class action regimes serve their intended purpose of facilitating access to justice.

---

148 See, eg, Michael Molavi, 'Law's Financialization: Litigation Finance and Multilayer Access to Justice in Canada' (2018) 33(3) *Canadian Journal of Law and Society* 425, 437.

149 *Pearson [No 2]* (n 80). See Kaitlin Ferris, 'The Increasing Role of Class Actions: Developments in Litigation Funding' [2019] (July–August) *Precedent* 36, 41.