Outline of Discussion Points– Litigation Funding Panel

I. **Introduction of panelists and brief overview of our presentation**

II. **Barriers to Third-party funding and incentives for funding**

A. Rules against barretry, maintenance and champerty

B. Changes in the rules or exceptions to these doctrines that have reduced the barriers third-party funding

C. Cultural barriers to third-party funding (Yuri). Is there also resistance to third-party funding in Hong Kong and Singapore? (Charlie)

D. Law reforms or other Incentives promoting litigation funding in your jurisdictions (Scott to take the lead)

III. **Interactive discussion of specific issues**

A. Regulations, statutes or rules governing the conduct of attorneys that promote or impede third-party funding. How does the priority of worker claims in insolvency cases affect the need or incentive for funding? (Scott to take the lead on the worker rights issue)

B. Restrictions on contingency fees

C. The rise in ATE (after the event) insurance for cost judgments. Are cost judgments for fees and expenses a risk in your jurisdictions?

D. Must liquidators obtain court approval of funding agreements?

E. Must funders or their clients disclose the funding in the underlying case?

F. How much control can funders exercise over the litigation they are funding? What statutory or case-law restrictions affect the level of control that funders can exercise? Is it an unauthorized practice of law issue that restricts funders from exercising control?

iv. **Broader discussion of the present status of litigation funding in Australia, Hong Kong, Singapore and Japan**

A. More common in arbitrations and if so, why (Charlie to take the lead)
B. How does the opportunity or incentive for liquidators to pursue avoidance actions affect the use of third-party funding?

iv. What trends do you see in the future in your jurisdictions?

v. Questions from the audience

FEDERAL COURT OF AUSTRALIA

Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd [2009] FCAFC 147

CORPORATIONS – Managed Investment Schemes – whether a funded class action constitutes a Managed Investment Scheme – definition of Managed Investment Scheme – meaning of “interest”, “contribution”, “money’s worth”, “pooled”, “capable of being paid or supplied”, “common enterprise” and “benefit”

CORPORATIONS – injunctive relief – standing – proper construction of s 1324(1) – whether interest sufficient

Held: appeal allowed – arrangement constitutes a Managed Investment Scheme

Acts Interpretation Act 1901 (Cth), ss 15AB, 18A
Australian Securities Commission Act 1989 (Cth)
Companies Act 1961 (NSW), s 76
Companies Act 1961 (Qld), s 76
Corporations Act 1989 (Cth)
Corporations Act 2001 (Cth), Ch 5C, Pts 5C.4, 5C.11, ss 9, 601ED, 601FC, 601FD, 601FE, 601FF, 601GA, 601GB, 601HA, 1324(1)
Corporations Law
Corporations Legislation Amendment Act 1990 (Cth)
Federal Court of Australia Act 1976 (Cth)
Law Reform Commission Act 1973 (Cth)
Managed Investment Bill 1997 (Cth)
Managed Investments Act 1998 (Cth)

Australian Securities and Investments Commission v Emu Brewery Mezzanise Ltd (2004) 52 ACSR 168 cited
Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd (1999) 33 ACSR 403 distinguished
Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd (2000) 35 ACSR 620 cited
Australian Securities and Investments Commission v FUELbanc Australia Ltd (2007) 162 FCR 174 referred to
Australian Securities and Investments Commission v HLP Financial Planning (Aust) Pty Ltd (2007) 164 FCR 487 referred to
Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd [2001] WASC 329 distinguished
Australian Securities and Investments Commission v Takaran Pty Ltd (2002) 170 FLR 388 not followed
Australian Softwood Forests Pty Ltd v Attorney-General for the State of New South Wales; Ex relataione Corporate Affairs Commission (1981) 148 CLR 121 followed
Broken Hill Proprietary Company Limited v Bell Resources Limited (1984) 2 ACLC 157 applied

Burton v Arcus (2006) 32 WAR 366 not followed
CIC Insurance Limited v Bankstown Football Club Limited (1997) 187 CLR 384 referred to
Crocombe v Pine Forests of Australia Pty Ltd (2005) 219 ALR 692 not followed
FCR 174 referred to
Hance v Commissioner of Taxation [2008] ATC ¶20-085 referred to
IMF (Australia) Ltd (ACN 067 298 088) v Meadow Springs Fairway Resort Ltd (In Liq) (ACN 084 358 592) (2009) 253 ALR 240 followed
Kennon v Spry (2009) 251 ALR 257 referred to
Mier v F N Management Pty Ltd (2005) 56 ACSR 93 referred to
Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd (2007) 164 FCR 275 referred to
P Dawson Nominees Pty Ltd v Multiplex Ltd (2007) 242 ALR 111 referred to
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 referred to
Secretan v Hart (Inspector of Taxes) (1969) 1 WLR 1599 referred to

Australian Law Reform Commission and the Companies and Securities Advisory Committee, Discussion Paper 53: *Collective Investment Schemes* (Australian Law Reform Commission, 1992)
Australian Law Reform Commission and the Companies and Securities Advisory Committee, Discussion Paper 65: *Collective Investment: Other People's Money* (Australian Law Reform Commission, 1993)
Chitty on Contracts (30th ed, Thomson Reuters, 2008) Vol 1
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Ford's Principles of Corporations Law (LexisNexis Butterworths, subscription service) (service 34: 8/2002)
Oxford English Dictionary (2nd ed, Oxford University Press, 1989) Vol XII
Parliamentary Joint Committee on Corporations and Financial Services, *Managed Investments Bill 1997* (Department of the Parliament Library, 1997)
Patterson and Ednie, *Australian Company Law*, (Butterworths, looseleaf service) (update 27 September 1976)
The Macquarie Dictionary (4th ed, The Macquarie Library, 2005)
The New Shorter Oxford English Dictionary (4th ed, Oxford University Press, 1993) Vol 1
Wallace and Young, *Australian Company Law and Practice* (1965, Law Book Company Ltd)

BROOKFIELD MULTIPLEX LIMITED (ACN 008 687 063) and BROOKFIELD MULTIPLEX FUNDS MANAGEMENT LIMITED (ACN 105 371 917) v INTERNATIONAL LITIGATION FUNDING PARTNERS PTE LTD, 2117980 ONTARIO INC, MAURICE BLACKBURN PTY LIMITED (ACN 105 657 949), P DAWSON NOMINEES PTY LIMITED (ACN 004 743 408) and FREDERICK HENRY HART

VID 374 of 2009

SUNDBERG, DOWSETT AND JACOBSON JJ
20 OCTOBER 2009
SYDNEY (HEARD IN MELBOURNE)

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 374 of 2009**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**BROOKFIELD MULTIPLEX LIMITED (ACN 008 687 063)** **First Appellant**
	BROOKFIELD MULTIPLEX FUNDS MANAGEMENT LIMITED (ACN 105 371 917) **Second Appellant**
AND:	**INTERNATIONAL LITIGATION FUNDING PARTNERS PTE LTD** **First Respondent**
	2117980 ONTARIO INC **Second Respondent**
	MAURICE BLACKBURN PTY LIMITED (ACN 105 657 949) **Third Respondent**
	P DAWSON NOMINEES PTY LIMITED (ACN 004 743 408) **Fourth Respondent**
	FREDERICK HENRY HART **Fifth Respondent**

JUDGES:	**SUNDBERG, DOWSETT AND JACOBSON JJ**
DATE OF ORDER:	**20 OCTOBER 2009**
WHERE MADE:	**SYDNEY (HEARD IN MELBOURNE)**

THE COURT ORDERS THAT:

1. Within seven days of publication of these reasons, Multiplex file and serve written submissions concerning proposed forms of order;

2. Within 14 days of such publication, the respondents file and serve their submissions concerning all outstanding matters;

3. Within 21 days of such publication, Multiplex file and serve its reply to the respondents' submissions; and

4. The parties have liberty to apply.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using the Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

GENERAL DIVISION **VID 374 of 2009**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **BROOKFIELD MULTIPLEX LIMITED (ACN 008 687 063)**
First Appellant

BROOKFIELD MULTIPLEX FUNDS MANAGEMENT LIMITED (ACN 105 371 917)
Second Appellant

AND: **INTERNATIONAL LITIGATION FUNDING PARTNERS PTE LTD**
First Respondent

2117980 ONTARIO INC
Second Respondent

MAURICE BLACKBURN PTY LIMITED (ACN 105 657 949)
Third Respondent

P DAWSON NOMINEES PTY LIMITED (ACN 004 743 408)
Fourth Respondent

FREDERICK HENRY HART
Fifth Respondent

JUDGES: **SUNDBERG, DOWSETT AND JACOBSON JJ**

DATE: **20 OCTOBER 2009**

PLACE: **SYDNEY (HEARD IN MELBOURNE)**

REASONS FOR JUDGMENT

SUNDBERG AND DOWSETT JJ:

INTRODUCTION AND HISTORY

1 We have had the benefit of reading the reasons prepared by Jacobson J and gratefully adopt his Honour's summary of the facts. As far as is practicable, we will also adopt his Honour's terminology. For the sake of clarity, we should point out that we use the term "group member" to describe any one of the claimants on whose behalf proceedings against

Multiplex are brought. We use the term "scheme member" to identify each of those persons who is participating in the scheme as identified in the pleadings. It includes the group members and the Funder. MBC may also be a scheme member, but that possibility seems not to be relevant for present purposes, having regard to the way in which the case has been conducted.

2 Both Jacobson J and the primary Judge have referred extensively to the history of the corporations legislation as it concerns "interests" other than shares and debentures, which matter is now dealt with in Ch 5C of the *Corporations Act 2001* (Cth) (the "Corporations Act"). We should like to say a little more about that history.

3 The public offering of such interests has been regulated for many years. Prior to the enactment of the *Corporations Act 1989* (Cth) (the "1989 Act"), regulation had taken the form of a prohibition upon the offering of such interests unless:

- they were issued by a company;
- there was a deed which complied with the relevant legislation and had been approved by the Registrar of Companies;
- a Crown Law Officer (the Attorney-General, Minister for Justice or Solicitor-General) had approved the trustee or representative to act as such for the purposes of the deed; and
- there was a prospectus.

4 The deed was to be made between the management company (the company issuing the interests) and the trustee/representative, so that the latter could enforce it on behalf of interest-holders. The *Companies Act 1961* (Qld) is an indicative example. As enacted, the term "interest" was defined in s 76 to mean:

> … any right to participate, or interest, whether enforceable or not and whether actual prospective or contingent –
>
> (a) in any profits, assets or realisation of any financial or business undertaking or scheme whether in the State or elsewhere;
>
> (b) in any common enterprise whether in the State or elsewhere in which the holder of the right or interest is led to expect profits rent or interest from the efforts of the promoter of the enterprise or a third party; or

(c) in any investment contract,
whether or not the right or interest is evidenced by a formal document and whether or not the right or interest relates to a physical asset, but does not include–

(d) any share in or debenture of a corporation;

(e) any interest in or arising out of a policy of life insurance;

(f) any interest in a partnership agreement;

(g) any interests in a common fund established and kept under [various statutes]; or

(h) any prescribed right or interest or any right or interest of a prescribed class or kind declared by regulation to be an exempt right or interest for the purposes of this Division;

…

5 For an early history of the Uniform Companies Acts see Wallace and Young, *Australian Company Law and Practice* (1965, Law Book Company Ltd) at 300, and Patterson and Ednie, *Australian Company Law*, (Butterworths, looseleaf service) (update 27 September 1976) at 5129.

6 A similar definition of "interest" (or, after 1981, "prescribed interest") appeared in corporations legislation until enactment of the 1989 Act which, by operation of the *Corporations Legislation Amendment Act 1990* (Cth) became the Corporations Law. The Corporations Law defined the term "participation interest" in the terms previously used to define the terms "prescribed interest" and "interest", and defined the term "prescribed interest" to mean:

(a) a participation interest; or
(b) a right, whether enforceable or not, whether actual, prospective or contingent and whether or not evidenced by a formal document, to participate in a time-sharing scheme;

but does not include a right or interest, or a right or interest included in a class or kind of rights or interests, declared by the regulations to be an exempt right or interest, or a class or kind of exempt rights or interests, for the purposes of Chapter 7 … .

7 Under the Corporations Law the regulation of the issue of prescribed interests was largely in accordance with that prescribed for company securities. It is not necessary that we say any more about that legislation.

8 On 24 May 1991 the Attorney-General issued a reference under the *Law Reform Commission Act 1973* (Cth) and the *Australian Securities Commission Act 1989* (Cth). It referred to the need to ensure that there was a proper legal framework for "prescribed interests and like collective investment schemes". The term "collective investment schemes" was thereafter used to describe the subject matter of the reference, apparently including all schemes which involved the issue of prescribed interests as then defined. The reference was undertaken by the Australian Law Reform Commission and the Companies and Securities Advisory Committee. We shall refer to both bodies collectively as the "Commission".

9 It seems that the Commission encountered difficulties in developing one regulatory system for all schemes involving the issue of prescribed interests. In October 1992 it issued Discussion Paper 53 *Collective Investment Schemes* (Australian Law Reform Commission, 1992) ("DP53"), seeking submissions. At paras 3.30-3.35 it set out a number of options for the regulation of such schemes as follows:

> 3.30 ***Five options***. There are several ways in which the collective investments regulatory regime could deal with the need for differential regulation of collective investment schemes. It could
>
> - develop different rules for different functions and apply to each collective investment scheme the appropriate set of rules
> - restrict collective investment schemes to a single legal structure
> - exempt collective investment schemes that can demonstrate that they are adequately regulated elsewhere by the law (the residual regulation approach)
> - develop a consistent and thorough regime that is appropriate for a particular kind of collective investment scheme and permit other collective investment schemes to seek exemption from any of its provisions
> - develop a single consistent set of rules based on a particular kind or class of scheme and permit all schemes to seek exemptions from the regime (the discretionary regulation approach).
>
> 3.31 ***Different rules for different functions***. It has been suggested that the regulation required for the different functions performed by collective investment schemes cannot be provided by a single set of rules and that different rules should be devised to deal with each function. It is not apparent to the Review that this is so. If only a few of the rules are found to be inappropriate, and only for some schemes, it would be more cost effective to permit exemptions from inappropriate requirements than to create different regimes in which many of the rules are duplicated.
>
> 3.32 ***Permit one structure only***. Discussions with the ASC indicate that many of the difficulties experienced with the prescribed interest provisions arise because they can apply to an infinite variety of legal structures, not because of the different function performed by collective investment schemes.

> Clearly, it would be easier to design a set of rules for collective investment schemes if they all had the same legal structure (even though they may perform different functions). All companies limited by shares, for example, have the same basic structure, which is set out in the Corporations Law, yet they perform many different functions. An option for the Review, therefore, is to require all collective investment schemes, whatever function they perform, to be established under a single legislative structure.
>
> 3.33 ***The residual regulation approach***. A more flexible way of dealing with the difficulty of applying a single set of rules to all collective investment schemes would be to allow any scheme to seek an exemption from any rule on the basis that investors are adequately protected by the provisions of another regulatory regime to which the scheme is subject. The collective investment regulations would, in this approach, become the residual regulations which apply only to those schemes in which there is a gap in the other regulatory regime to which it is subject.
>
> 3.34 ***No exemption for managed funds***. The fourth option is to develop a single set of rules with the type of scheme that comprises the largest part of the collective investments industry … in mind, that is, collective investment schemes that provide a funds management function. The Review refers to these schemes as managed funds. The current prescribed interest provisions of the Corporations Law suggest that this approach was taken when they were developed. Collective investment schemes, other than those providing a funds management function, would be permitted to approach the regulator to seek an exemption from the rules. A clear definition of ‘managed fund’ is of central importance in this option. If ‘managed funds’ cannot seek exemption from any rule, operators of managed funds may seek to structure their schemes so that they appear to be collective investment schemes other than managed funds so they could apply for exemption from particular requirements. If the difficulties involved in defining managed funds could be overcome, this approach would have the advantage of certainty for both the regulator and operators of managed funds. At the same time it would provide the regulator with the flexibility to grant the exemptions necessary for the efficient operation of other collective investment schemes.
>
> 3.35 ***The discretionary approach***. This option takes into account the difficulty in developing a sufficiently robust definition of ‘managed fund’. By basing the regulatory framework on one function, namely the funds management function, this option retains the advantage of internal consistency inherent in the previous option. However, by allowing any scheme to seek an exemption, it seeks to overcome the rigidity which could be said to be present in the previous option. While it may be the intention of the proponents of this option to provide flexibility, it may be argued that a regulatory framework developed on the basis of its relevance and applicability to managed funds should not be able to be avoided by a managed fund. This option relies more heavily than the previous option on the integrity of the decisions of the regulator to provide a framework that will work efficiently and effectively.

10 This discussion recognized the very broad reach of the existing definition of the term “prescribed interest” and raised the possibility of regulating only some of those schemes. It also recognized the difficulty of defining any such narrower category. The category of

interest to the Commission seems to have been managed funds. At para 3.37-3.40, the Commission identified a managed fund as having the following attributes:

> • professional funds management;
> • pooling of smaller amounts of money;
> • a public offer … .

11 It observed that:

> This description does not appear to be sufficiently accurate to constitute a definition of the 'managed fund' subset of collective investment schemes. For example, it does not exclude collective investment schemes whose function is to operate a recreational venture on behalf of scheme members.

12 At 3.40 the Commission observed:

> Perhaps the only way to define a managed fund is to describe it. Managed funds could be described as collective investment schemes that meet the following criteria:
>
> • the participants pool their investments (that is, all investors share proportionately in the increase and decrease in the value of the portfolio) with an operator who is responsible for the purchase and management of a portfolio or asset
>
> • the investors have no effective day to day control of the management of the scheme
>
> • the amount of money invested in the scheme can be increased or decreased as the result of investors entering into, and exiting from, the scheme (that is, the scheme is not fixed in size)
>
> • participants have the right to have their investment redeemed on demand (subject to any notice period) or repaid at its market value on the expiry of a fixed term without the approval of the operator or of other scheme members.

13 These criteria were not adopted in the Commission's Report (No 65, "Collective Investments: Other People's Money") (the "Report") which is discussed below. However elements of the first and second criteria were to re-appear in the *Managed Investments Act 1998* (Cth) (the "Managed Investments Act"). In the Report the Commission observed at para 1.2:

> The term 'collective investment' covers a wide variety of investment schemes. Most involve a number of investors handing over their money or some assets to a professional manager who manages the total fund or collection of assets to produce a return which is shared by investors. A common form of collective investment is the unit trust, but there are many others. Most are subject to regulation under the Corporations Law as 'prescribed interests'.

14 At para 3.1 of the Report the Commission, treating the expression "collective investment schemes" as exhaustively describing the subject matter of its inquiry, proceeded to identify such subject matter. It said:

> All schemes that raise funds from investors and invest the funds could be called collective investment schemes in the broader sense of the term. This chapter considers which of them should be a 'collective investment scheme' for the purposes of the Corporations Law. It considers each of these kinds of scheme in turn to see if any of them should be excluded from regulation as a collective investment scheme under the Corporations Law.

15 At paras 3.4 and 3.5 the Commission referred to the definition of "prescribed interest" in the Corporations Law and pointed out that in DP53 it had "expressed concern at some apparent anomalies arising from the current definition of 'prescribed interest'". It then considered whether an alternative definition could be developed which, unlike the existing definition, would not require the exclusion of many different types of scheme. At 3.5 it suggested that identifying features of a prescribed interest in future legislation might:

> … focus on schemes that provide investors with a funds management function. Suggested identifying features included
>
> - pooling of resources by investors
> - an absence of day to day control of the management of a scheme by investors
> - investors having the right to redeem their investments … .

16 However the Commission noted that in DP53 it had "acknowledged that not all collective investment schemes provide a funds management function, referring particularly to 'enterprise' schemes such as yabby or ostrich farms and recreational or 'lifestyle' schemes." It concluded that it was not possible to develop a more precise definition of the relevant subject matter of the reference. It recommended that there should be regulation of schemes described as "collective investment schemes", the definition of which term was to be based upon the existing definition of "prescribed interests", and that the latter term be abandoned.

17 We have given detailed attention to DP53 and the Report lest it be thought that the Managed Investments Act simply gave effect to that Report. It did not do so, at least insofar as concerns the question of definition. In particular it is significant that the Report did not recommend any substantial change to the relevant definition, but highlighted the difficulties in developing a new, and narrower, definition.

MANAGED INVESTMENTS ACT

18 The Managed Investments Act inserted a definition of the term "managed investment scheme" into s 9 of the Corporations Law (now the Corporations Act) (the "s 9 definition") and also added Ch 5C. When the *Managed Investments Bill 1997* (Cth) was introduced, the explanatory memorandum stated that it represented the Government's response to the recommendations in the Report. Although the Bill reflected many of the recommendations concerning the regulation of investment schemes, it did not adopt the Commission's recommendation that relevant schemes be described as "collective investment schemes", nor the recommendation that the definition of that term reflect the previous definition of "interest". The Managed Investments Act requires the registration of some schemes which satisfy the s 9 definition (s 601ED(1)) and prohibits the operation of unregistered schemes which are required to be registered (s 601ED(5)). The s 9 definition as enacted in 1998 defines a managed investment scheme as:

> (a) a scheme that has the following features:
>
> > (i) people contribute money or money's worth as consideration to acquire rights (***interests***) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not)
> >
> > (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the ***members***) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders)
> >
> > (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions); or
>
> (b) a time-sharing scheme;
>
> but does not include the following:
>
> (c) a partnership covered by an application order made for the purposes of section 115
>
> (d) a body corporate (other than a body corporate that operates as a time sharing scheme)
>
> (e) a scheme in which all the members are bodies corporate that are related to each other and to the body corporate that promotes the scheme
>
> (f) a franchise

(g) a statutory fund maintained under the *Life Insurance Act 1995*

(h) a regulated superannuation fund, an approved deposit fund, a pooled superannuation trust, or a public sector superannuation scheme, within the meaning of the *Superannuation Industry (Supervision) Act 1993*

(i) a scheme operated by an Australian bank in the ordinary course of its banking business

(j) the issue of debentures or convertible notes by a body corporate

(k) a barter scheme under which each participant may obtain goods or services from another participant for consideration that is wholly or substantially in kind rather than in cash

(l) a retirement village scheme operating within or outside Australia:
  (i) under which the participants, or a majority of them, are provided, or are to be provided, with residential accommodation within a retirement village (whether or not the entitlement of a participant to be provided with accommodation derives from a proprietary interest held by the participant in the premises where the accommodation is, or is to be, provided); and
  (ii) which is not a time-sharing scheme

(m) a scheme that is operated by a co-operative company registered under Part VI of the *Companies (Co-operative) Act 1943* of Western Australia or under a previous law of Western Australia that correspondents to that Part

(n) a scheme of a kind declared by the regulations not to be a managed investment scheme.

19 There have been some amendments to exemption provisions in the definition of a managed investment scheme since it was first enacted. Those amendments are not material for present purposes.

20 Section 9 also contains the following definition:

> ***interest*** in a managed investment scheme means a right to benefits produced by the scheme (whether the right is actual, prospective or contingent and whether it is enforceable or not).

21 In the Second Reading Speech, Mr Miles (the Parliamentary Secretary to the Prime Minister) said:

> Managed investment schemes are any type of scheme where an investor purchases an interest from a professional manager who manages the funds received to produce a return. Schemes encompass a wide range of investment products and services including property, equities and cash management trusts as well as smaller schemes such as ostrich farms and pine plantations.
>
> …

> One factor which has made these schemes popular with investors is that they allow them to diversify their investments into areas which, traditionally, have required large sums to participate. Another is that they also allow investors, who might otherwise lack the skill or confidence to participate in direct investment opportunities, to rely on the expertise of professional investment managers.
>
> This bill is not concerned with the superannuation segment of the managed funds industry, which includes products provided by superannuation funds and approved deposit funds. … The segment of the managed funds industry with which the bill is concerned is non-superannuation managed investments, which are at present regulated as prescribed interests under the corporations law.

22 The Bill was referred to a Joint Parliamentary Committee. In its report dated 1 April 1998, the Committee reproduced some elements of those remarks as follows:

> 1.1 Managed investment schemes are schemes where an investor purchases an interest in a fund which is managed by a professional manager to produce a return for the investor. They encompass a wide range of investment products and services including property, equities and cash management trusts, as well as smaller schemes such as ostrich farms and pine plantations. Approximately $85 billion is invested in managed investment schemes at present and the amount continues to grow by about $20 billion a year.
>
> 1.2 These schemes allow investors to diversify their investments over a wider range of investment types than might otherwise be available and allow them to have their funds professionally managed.
>
> 1.3 The Bill is not concerned with superannuation funds which are dealt with under the *Superannuation Industry (Supervision) Act 1993*.

23 At a superficial level, these statements might suggest that Ch 5C of the Corporations Act deals with a relatively narrow range of investment schemes. However the process of identifying the schemes to which Ch 5C applies must still commence with an inquiry as to whether a particular scheme satisfies para (a) (or para (b)) of the s 9 definition. In *Australian Softwood Forests Pty Ltd v Attorney-General for New South Wales; Ex relatione Corporate Affairs Commission* (1981) 148 CLR 121, the Court considered the definition of "interest" in the Uniform Companies Acts. At 129-130 Mason J said (Gibbs CJ and Stephen J concurring):

> Apart from any considerations which may be derived from the general context in which the statutory definition appears, there is no very good reason for reading the words down. The context is that of prohibitions against issuing or offering to the public for subscription or purchase or inviting the public to subscribe for or purchase "interests" unless there is in force in relation to them an approved deed and unless there is provided information similar to that which is prescribed in connection with an offer to the public of shares. Indeed the prospectus provisions of the Act are applied to offers to the public of "interests" as if they were shares … . This context supplies no reason for denying that the proposed activities constitute a "financial or

> business undertaking or scheme" within the meaning of the statutory definition.
>
> That a very wide meaning should be given to "interest" is attested by the exclusion from the statutory definition of shares and debentures … , interests in life assurance policies … and, subject to some qualifications, interests in partnership agreements … . The presence of the power to exempt by regulation other rights or interests from the definition … is also of telling significance.
>
> There are real difficulties in the suggestion that the Court can read down the very comprehensive definition of "interest" by reference to the supposedly unintended consequences of a literal reading on everyday commercial transactions. The definition is so general and all-embracing that it is impossible to say that it necessarily excludes particular transactions which appear to be covered by the general words. The hazards of adopting such a course are not dispelled by the absence of a supporting context. It would be different if we could glean from the legislative provisions an overall purpose which, being limited in scope, justified a reading down of the definition. Unfortunately in this case the search for a legislative purpose takes us back to the very words of the definition for the intended scope of the operative provisions depends so heavily on the comprehensive language of that definition. As Young C.J. observed … in discussing the meaning of "interest" as defined in s.76(1): "If it were said that we should give effect to the purpose Parliament wished to achieve, we must first ascertain the purpose and that can only be ascertained from the language used".

24 The passage, or parts of it, have been applied to the definition of "managed investment scheme". See *Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd* (2000) 35 ACSR 620 at [17]; *Burton v Arcus* (2006) 32 WAR 366 at [51]; and *Australian Securities and Investments Commission v Emu Brewery Mezzanise Ltd* (2004) 52 ACSR 168 at [80]. We also note the observation by the learned authors of *Ford's Principles of Corporations Law* (LexisNexis Butterworths, subscription service) (service 34: 8/2002) at [22.470]:

> Managed investment schemes are residual investment opportunities remaining after shares and debentures are considered. The concept of investment opportunity is elusive. In the present context the legislation is concerned only with those offerings of investment opportunities which are so similar to offerings of shares and debentures that regulation about them calls for regulatory techniques that developed in relation to offerings of shares and debentures.

25 Apart from requiring the registration of certain managed investment schemes, Ch 5C regulates the constitution and conduct of registered schemes and imposes duties upon the responsible entities which manage them. For example, there must be a written constitution which is legally enforceable as between members and the responsible entity. See s 601GA. There must also be a compliance plan to ensure compliance with the provisions of the Corporations Act and the scheme constitution. See Pt 5C.4. There are many other requirements.

26 Clearly, many schemes which satisfy the requirements of para (a) of the s 9 definition will not require registration. The s 9 definition includes 13 categories of exclusion, plus the power to exclude other kinds of scheme. Section 601ED further narrows the range of schemes which must be registered. Part 5C.11 provides for exemption and modification orders. When it was said in the Second Reading Speech and in the Joint Parliamentary Report that the Managed Investments Act was not concerned with superannuation funds, the statement was correct to the extent that superannuation arrangements are not regulated by that Act. Such funds are expressly excluded from the s 9 definition by para (h), suggesting that it was thought that they might otherwise have fallen within para (a) of that definition. The references in those statements to a professional manager, to purchasing interests (as opposed to contributing money or money's worth) and managing funds do not refer to express elements of the s 9 definition. It is likely that the statements were generalizations concerning the way in which Ch 5C was expected to operate rather than indications as to the proper construction of the s 9 definition.

27 Jacobson J has set out paras 19.3 to 19.7 of the Explanatory Memorandum relating to the Managed Investments Bill 1997. Although that passage demonstrates an intention to clarify the definition which was to engage the proposed regulatory regime, it says little or nothing about the approach to be taken to construing the s 9 definition.

28 The primary Judge concluded that for present purposes the requirements of para (a) of that definition were not satisfied. We will consider the correctness of that conclusion at a later stage. However we will first consider some more general remarks made by his Honour. At [37] he said:

> The upshot of this reasoning is that the arrangements with the funder and [MBC] do not create a managed investment scheme. This should not come as a surprise. First, with the evident purpose of the legislation in mind, the essence of a managed investment scheme, stripped of all its technicalities, is a scheme in which people invest money (or money's worth) in a common venture with the expectation of profit that will result from the efforts of others. That is not what has happened here.

29 In our view, that statement as to the "essence of a managed investment scheme" is of little assistance in construing the Act and may be misleading. We have referred to the difficulties experienced by the Commission in seeking to identify with precision the subject matter of such a generalization. It abandoned the task as too difficult. With all respect, his Honour's approach seems not to recognize those difficulties. Further, it is difficult to infer an

intention to exclude an undefined category of schemes which would otherwise be within para (a) of the s 9 definition in light of the extensive list of express exclusions contained in the definition and the power to exclude or exempt others administratively.

30 His Honour continued:

> Second, the obligations that would come into existence if this were a managed investment scheme, assuming they could be put into effect, would afford group members little protection of the kind envisaged.

31 In the Report at 2.5 the Commission identified the risks against which any regulatory system would guard. They were:

> - investment or market risk – the risk that the investment will decline in value, either because the market as a whole declines in value or because the particular investments of the scheme decline in value
> - institution risk – the risk that the institution which operates the scheme will collapse
> - compliance risk – the risk that the operator of a scheme will not follow the rules set out in the scheme's constitution or the laws governing the scheme, or will act fraudulently or dishonestly.

32 We consider that to be a fair summary of the risks likely to be encountered by investors. Although the risk of a decline in value of the investment may not be particularly relevant to a scheme of the present kind, one can imagine a situation in which such a risk could arise. There may be a risk that claims will be devalued by a decline in the fortunes or asset position of Multiplex, the Funder or MBC or by the likely incurrence of previously unexpected costs, necessitating some action to protect the group members' interests. It is not difficult to imagine circumstances in which there could be institutional or compliance risk. Many of the provisions of Ch 5C are designed to minimize such risks. We refer particularly to ss 601FC, 601FD, 601FE, 601FF, 601GA, 601GB, 601HA and subsequent sections dealing with compliance plans. It is no answer to say that a solicitor's duty would sufficiently safeguard the interests of group members against professional misconduct by MBC. However such a matter may be relevant in connection with any contemplated exercise of the power conferred by para (n) of the s 9 definition or that conferred by Pt 5C.11.

33 For present purposes, the proper approach to the application of the s 9 definition is to identify whether or not para (a) is fairly satisfied. If so, and assuming that there is no exemption pursuant to paras (c) to (n), then the question is whether or not the scheme must be registered pursuant to s 601ED. It is not helpful or possible to limit the operation of para (a)

of the s 9 definition by reference to some implied limitation to be derived from the Ch 5C regulatory scheme itself. In that respect, the remarks by Mason J in *Australian Softwood Forests* 148 CLR at 129-130 are apposite for present purposes.

APPLICATION OF THE S 9 DEFINITION

34 As Jacobson J has pointed out, Barrett J, in *Australian Securities and Investments Commission v Takaran Pty Ltd* (2002) 170 FLR 388 at [12], identified five elements in para (a) of the s 9 definition. They were:

> … first, the act of contribution of money or money's worth by several persons; secondly, the accruing to those persons in return (as consideration) of certain rights to benefits produced by the scheme; thirdly, pooling of the contribution or other use of them in a common enterprise; fourthly, an objective or expectation of accrual of benefits to persons for the time being holding the rights generated by contributions; and, fifthly, absence of day-to-day control over the operation of the scheme by those persons.

35 Whilst such an approach to the section may have been appropriate for the task undertaken by Barrett J, in the present case, it may lead to confusion. Firstly, the approach does not sufficiently recognize that the requirements of subparas (a)(i) and (a)(ii) are discrete, and that each must be satisfied. Secondly, it describes the relationship between contributions and rights to benefits in language which does not quite reflect that of subpara (a)(i) of the s 9 definition. Thirdly, the description of the relationship between pooling or use in a common enterprise and benefits differs from the language used in subpara (a)(ii). We prefer to approach the problem by addressing the sub-paragraphs separately and in accordance with their terms. Of course, as Jacobson J has pointed out, there is now no dispute as to compliance with subpara (a)(iii). Before considering subparas (a)(i) and (a)(ii), it is necessary to consider the meaning of the word "scheme" in the introductory part of the s 9 definition.

"A scheme that has the following features …"

36 In *Australian Softwood Forests* 148 CLR at 129, Mason J said that "… all that the word 'scheme' requires is that there should be 'some programme, or plan of action' …". His Honour then continued:

> The next step is that, … the statutory definition [of "interest"] is not concerned with the identity of the person or persons who carry it [the scheme] on. It is not material that the person who offers the "interests" to the public does not himself carry on the

> undertaking or scheme. Nor does it matter that by subscribing for an interest a member of the public will constitute himself as one who is engaging in carrying on the enterprise.
>
> Nor again does it matter that the subscriber by accepting the offer constitutes himself as one who executes some elements of the scheme and derives from so doing a financial advantage which is not earned by other participants whose activities relate to other elements of the scheme. It is not an objection to an enterprise qualifying as an undertaking or scheme that it consists of a number of parts or elements, the participation of individual parties being limited to one to one of these or elements, their profit or remuneration being derived from the particular activities in which they engage. There is nothing in the notion of an undertaking or scheme that requires or implies that there is joint participation in everything comprised in a plan or that there must be a sharing or pooling of profits or receipts.

37 Although these observations concern the definition of "interest" in earlier legislation, they are helpful in closing off unnecessary lines of enquiry concerning the s 9 definition. For present purposes, there is no reason to doubt that there was, and is, a programme or plan of action. The primary Judge observed at [12]:

> It is hard to avoid the conclusion that the agreements brought into existence a plan of action. In essence the plan involves: (a) putting in place a group of persons willing to participate in proceedings against Multiplex; (b) ensuring that those persons would not be exposed to costs; (c) retaining a firm of solicitors that would act on the group's behalf; and (d) making sure that the legal fees would be paid.

38 This approach overlooks some aspects of the scheme, particularly:

- the deferred payment of up to 25% of MBC's fees, and the possibility that such amount and interest thereon might not be paid at all;
- the arrangements for reimbursing and remunerating the Funder; and
- the consequential interests of MBC and the Funder, as well as the group members, in the successful resolution of the proposed litigation.

39 We would prefer to describe the scheme as having the following purpose:

- To facilitate the realization of claims by group members against Multiplex, using legal services to be provided by MBC at the expense of the Funder;
- which company also undertakes to meet any order for costs made against group members or any order for security for Multiplex's costs;
- with the intention that the Funder be reimbursed from, and derive a profit from, the proceeds of such realization; and

- that the group members be otherwise protected from any liability for their own costs, any order that they pay Multiplex's costs, or any order that they give security for costs in the relevant proceedings.

40 Steps in the scheme include:

- the Funder offering to undertake the payment of group members' costs, to meet any order for costs made against group members, and to provide security for costs if necessary;
- MBC offering to accept instructions on the basis that it will look to the Funder for its costs and outlays in accordance with the terms of the scheme;
- the group members accepting the Funder's offers and instructing MBC accordingly;
- the subsequent conduct of the matter; and
- the distribution of the Resolution Sums.

41 Performance of the scheme involves the observance by each party of its obligations thereunder.

42 The s 9 definition focusses upon contributions to the scheme by the group members and the Funder, and benefits to be derived from the scheme by those parties. As to the group members, Multiplex pleads in para 40 of the further amended statement of claim that they contributed as follows:

> Dawson Nominees, Frederick Hart, and the Group Members are required to pay money's worth as consideration for the benefits under the Brookfield Multiplex Group Funding Agreement and the Brookfield Multiplex Group Retainer pleaded in paragraph 39 above, being the obligations undertaken by those persons pursuant to the Brookfield Multiplex Group Funding Agreement and the Brookfield Multiplex Group Retainer, which include:
>
> (a) Dawson Nominees, Frederick Hart and each of the group members irrevocably authorises and directs Maurice Blackburn to receive any Resolution Sum in respect of its claim against the Brookfield Multiplex Group and to immediately pay any Resolution Sum into an account kept for that purpose;
>
> …
>
> (b) if Dawson Nominees, Frederick Hart or any Group Member obtains any settlement or judgment in respect of its claims against the Brookfield

> Multiplex Group, it will treat any such moneys received as the Resolution Sum, and will call such moneys to be delivered to Maurice Blackburn to be dealt with as part of the Resolution Sum, this being a continuing obligation that survives any termination of the Brookfield Multiplex Group Funding Agreement other than termination for serious breach by the Funder;
>
> …
>
> (c) Dawson Nominees, Frederick Hart and each of the Group Members irrevocably authorises and directs Maurice Blackburn to pay out of the account referred to in paragraph (a) above all of the payments to the fund referred to in clause 10.1 of the Brookfield Multiplex Group Funding Agreement; …

43 Pursuant to each funding agreement any moneys received in connection with a group member's claim (other than by way of costs) are described as the "Resolution Sum". This includes amounts so derived other than by way of participation in the scheme. See the definition of "Resolution Sum" in cl 1.1 and cl 8.3 of the Funding Agreement. All Resolution Sums are to be held by MBC in order to meet the group members' obligations to the Funder and then for distribution to the group members.

44 The benefits or rights to benefits to be derived by the group members are pleaded in para 39 as follows:

> …
>
> (a) Dawson Nominees, Frederick Hart and the Group Members are able to pursue claims against the Brookfield Multiplex Group, and to participate in any successful resolution by settlement or judgment of the Dawson Nominees Proceeding, without having to provide any security for costs and without any liability to the Brookfield Multiplex Group or to Maurice Blackburn or to the funders in the event that there is judgment for Brookfield Multiplex in the Dawson Nominees Proceeding;
>
> …
>
> (b) The Funders agree to pay all invoices issued by Maurice Blackburn during the Dawson Nominees Proceeding, and Dawson Nominees, Frederick Hart and the Group Members have no obligation to pay any legal costs or disbursements in respect of services provided by Maurice Blackburn in relation to the prosecution of their claims against the Brookfield Multiplex Group unless and until there is a successful resolution of those claims either by way of judgment or settlement;
>
> …
>
> (c) If there is a successful resolution of their claims against the Brookfield Multiplex Group, Dawson Nominees, Frederick Hart and the Group Members do not have any liability to pay any legal costs or disbursements in respect of

services provided by Maurice Blackburn until such Resolution Sum has been paid;

…

(d) If there is a successful resolution of their claims against the Brookfield Multiplex Group, Dawson Nominees, Frederick Hart and the Group Members are entitled to a pro rata share in the balance of any resolution sum, after payment of certain amounts to the Funders;

…

(e) The amount payable by Dawson Nominees, Frederick Hart and the Group Members for legal costs or disbursements in respect of services provided by Maurice Blackburn in relation to the prosecution of their claims against the Brookfield Multiplex Group cannot exceed the total of any amount received by way of judgment or settlement together with any amount received by way of a costs order in any relevant proceeding;

…

(f) The costs involved in the prosecution of their claims against the Brookfield Multiplex Group are spread amongst Dawson Nominees, Frederick Hart and the Group Members;

…

(g) The Funders undertake to bear any adverse costs order in any proceeding regarding the claims of Dawson Nominees, Frederick Hart and the Group Members against the Brookfield Multiplex Group;

…

(h) The Funders agree, as soon as reasonably practicable upon any request from Maurice Blackburn, to provide a written undertaken to the respondents in the proceeding to pay any costs order made against Dawson Nominees, Frederick Hart or Group Member in the proceedings brought against the Brookfield Multiplex Group, insofar as such costs were incurred during the term of the Brookfield Multiplex Group Funding Agreement; and

(i) the Funders undertake to provide any security for costs ordered in any proceeding regarding the claims of Dawson Nominees, Frederick Hart and the Group Members against the Brookfield Multiplex Group;

…

45 In para 41 Multiplex pleads that the benefits pleaded in para 39 are produced by the scheme:

> … in that only those persons who acquired an interest in securities issued by Brookfield Multiplex Group between 2 August 2004 and 30 May 2005 and who entered into a Brookfield Multiplex Group funding agreements are entitled to such benefits, including the right to share in any sum achieved by way of settlement of or

judgment in the Dawson Nominees Proceedings.

46 Multiplex also pleads that the Funder made contributions to, and is to derive benefits from, the scheme. In para 41B it pleads that:

> The Funders are required to pay money, or money's worth, as consideration for the benefits under the Brookfield Multiplex Group Funding Agreement pleaded in paragraph 41A above:
>
> (a) the Funders are required to pay, and have paid, all legal costs and disbursements of Dawson Nominees, Frederick Hart and Group Members incurred by Maurice Blackburn and which have been invoiced by Maurice Blackburn to the Funders;
>
> (b) the Funders are required to procure, and have procured (or have had procured on their behalf), one or more irrevocable Standby Letters of Credit in favour of Maurice Blackburn in a form and for such an amount as required by Maurice Blackburn, as security for the obligations imposed upon the Funder by … the Brookfield Multiplex Group Funding Agreement; and
>
> (c) the Funders are required to procure (where ordered to do so), and have procured (or have had procured on their behalf), security for Brookfield Multiplex's costs of the Dawson Nominees Proceedings. The security has been provided by way of a bank guarantee having been requested of the Commonwealth Bank of Australia by the Bank of Montreal, Toronto, Canada on the account of Siskinds, in favour of the District Registrar of the Victorian District Registry of the Federal Court of Australia, such security being provided in discharge of the obligations owed by the Funders under … the Brookfield Multiplex Group Funding Agreement.

47 In para 41A, Multiplex pleads the benefits to be derived by the Funder as follows:

> (a) if there is a successful resolution of the claim brought by Dawson Nominees, Frederick Hart and the Group Members, the Funders are entitled to an amount from the Resolution Sum equivalent to that paid by the funders to Maurice Blackburn in respect of legal costs and disbursements incurred in relation to the prosecution of the claims of Dawson Nominees, Frederick Hart and the Group Members against Brookfield Multiplex …; and
>
> (b) if there is a successful resolution of the claim brought by Dawson Nominees, Frederick Hart and the Group Members, the Funders are entitled to a percentage of the balance of the Resolution Sum, which percentage is calculated in accordance with … the Brookfield Multiplex Funding Agreement … .

48 In para 41C Multiplex pleads that the benefits pleaded in para 41B are produced by the scheme and that they are derived from, and depend upon execution by Dawson Nominees, Frederick Hart and group members of the Brookfield Multiplex Group Funding Agreement and Brookfield Multiplex Group Retainer and the performance by the parties of their respective obligations thereunder.

49 As we have observed, we would have thought that MBC was also to make contributions to the scheme by foregoing payment of one quarter of its professional fees until such time as the proceedings are successfully resolved. In that event, it will receive the remaining 25% of its fees plus interest. However Multiplex seems not to have relied upon this aspect of the matter.

Subparagraph (a)(i) - "… people contribute money or money's worth as consideration to acquire rights (interests) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not) …"

50 The requirements of the subparagraph are:

- that people contribute money or money's worth;
- as consideration to acquire rights to benefits;
- such benefits being produced by the scheme.

"contribute money or money's worth"

51 In connection with subpara (a)(i) of the s 9 definition, the primary Judge found that group members contributed money or money's worth, but that such contributions were not made in consideration of the acquisition of rights to benefits. Multiplex appeals against the latter aspect of the finding. By notice of contention, the respondents plead that his Honour erred in finding that there were any contributions, and in finding that the contributions constituted money or money's worth. As to the latter point we consider that the promises given by the group members and by the Funder may properly be described as "money's worth". We respectfully adopt the reasons given by Jacobson J for so concluding.

52 The primary Judge considered that the word "contribute" means "make available", "pay" or "supply", referring to the decisions in *Crocombe v Pine Forests of Australia Pty Ltd* (2005) 219 ALR 692 at [52]-[53] and *Burton v Arcus* (2006) 32 WAR 366 at [56]-[57]. In our view, the word "contribute" has a somewhat more specific meaning. *The New Shorter Oxford English Dictionary* (4th ed, Oxford University Press, 1993) Vol 1 gives, as its primary meaning:

> Supply or pay along with others to a common fund or stock.

The Macquarie Dictionary (4th ed, The Macquarie Library, 2005) gives the primary meaning as:

> To give in common with others; give to a common stock or for a common purpose.

53 In other words, the requirement for contribution foreshadows the requirement for pooling or use in a common enterprise to produce financial benefits identified in subpara (a)(ii) of the s 9 definition. The respondents submit that subparas (a)(i) and (ii) of the s 9 definition and ss 601FC and 601GA of the Corporations Act demonstrate that, for the purposes of subpara (i) any contribution must be:

> (a) capable of being "paid" or "supplied";
>
> (b) capable of being "pooled" or "used" in a "common enterprise" to produce benefits;
>
> (c) apt to be held separately from the property of the responsible entity, to be valued, and held in trust for the member (i.e., in this case, for the person making the contribution);
>
> (d) apt to be "invested" or "dealt with".

54 The respondents submit that the group members' promises are not capable of being so characterized. It is not clear whether the respondents also submit that the contributions allegedly made by the Funder suffer from the same deficiencies. Point (a) depends upon the meaning of the word "contribute" in subpara (a)(i) of the s 9 definition. Point (b) is derived from para (a)(ii) of that definition. Point (c) is derived from s 601FC(1)(i) and (j). Point (d) is derived from s 601GA(1)(b).

55 Whilst it is appropriate, in construing the s 9 definition, to consider the interaction of its parts, it may not be appropriate to look to the operative provisions of Ch 5C in that process. When, in *Australian Softwood Forests* 148 CLR 121, Mason J spoke of "unintended consequences of a literal meaning", he was warning against such an approach. If, in construing a definition which identifies the subject matter to be regulated by a regulatory regime, it is clear that a key regulatory provision cannot apply to a particular arrangement or situation which prima facie falls within the definition, then there may be justification for a narrower reading of the definition. However, if other regulatory provisions are capable of application, then it may be inappropriate to adopt that approach. In that situation, it cannot be said that there is a clear intention that the regulatory regime should not apply to the particular

arrangement or situation. Further, it will often be difficult to determine whether, or how, a particular provision may operate in all future circumstances. It may be unwise to construe the definition narrowly merely because there may be difficulties in applying part of the regulatory regime.

56 The scheme of the Corporations Act is to define the term "managed investment scheme" in s 9 and to regulate some of those schemes pursuant to Ch 5C. Many of the regulatory provisions will affect the constitution and conduct of any scheme which must be registered. In other words, if a scheme falls within the s 9 definition, and if it is required to be registered, then it must be constituted and conducted so as to comply with Ch 5C. It follows that one cannot hold that a particular scheme is not within the s 9 definition simply because its structure does not comply with the requirements of Ch 5C. If the scheme must be registered then it must be constituted and conducted so as to permit registration.

57 Before considering the respondents' submissions we should point out that ss 601FC and 601GA speak of "scheme property", which term is defined in s 9 as follows:

> ***scheme property*** of a registered scheme means:
>
> (a) contributions of money or money's worth to the scheme; and
>
> (b) money that forms part of the scheme property under provisions of this Act or the ASIC Act; and
>
> (c) money borrowed or raised by the responsible entity for the purposes of the scheme; and
>
> (d) property acquired directly or indirectly, with, or with the proceeds of, contributions of money referred to in paragraph (a), (b) or (c); and
>
> (e) income and property derived, directly or indirectly, from contributions, money or property referred to in paragraph (a), (b), (c) or (d).

58 We turn to the particular points made by the respondents as identified above.

Point (a) – capable of being paid or supplied

59 The group members promise to allow the Funder a financial benefit in the event of a successful resolution of their claims. The Funder, in effect, promises to pay for legal services, to meet any order for costs made against group members, and to meet any order for security for costs. It also agrees that each group member will become contractually entitled

to the balance of his or her Resolution Sum after the Funder's claims have been met. As we have said, we consider that these various promises are to provide money's worth. The question is whether they are contributed. It may not be correct to say that in giving such promises the relevant parties "pay" money's worth. However we have no difficulty in concluding that they "give" or "supply" it. We have previously observed that the word "contribute" generally involves the concept of giving for a common purpose. Perhaps unfortunately, the s 9 definition does not identify to whom, to what or for what purpose such contributions are to be made. Although a scheme may be treated as an identifiable entity for the purposes of Ch 5C, it is, of course, not a legal person. We consider that the intention is that the contributions be for the purposes of the scheme, regardless of the identity of the person to whom they are to be paid, given or supplied.

60 At [3] the primary Judge found that the group members' instructions to MBC included instructions to perform work for the common benefit of persons who had entered into funding agreements with the Funder as well as work in connection with specific claims. In other words the promises by the group members were given for the purpose of securing legal services for the group as a whole, and so each promise was a contribution in the sense to which we have referred. That collection of promises is the Funder's inducement to accept and fulfil its obligations. The Funder's promises were given for the purpose of advancing its own interests and those of the group. In our view, its promises to individual group members were to be used collectively to provide legal services to individual group members, the whole group and itself. The group members' promises and the Funder's promises were contributed for the purposes of the scheme.

Point (b) – capable of being pooled or used in a common enterprise

61 The respondents submit that the relevant "contributions" for the purposes of subpara (a)(i) are not capable of being pooled and used in a common enterprise as required by subpara (a)(ii), and so cannot be contributions for the purposes of subpara (a)(i). Much of what we have said concerning the meaning of the word "contribute" suggests that this argument is without foundation. Nonetheless, it will be better if we consider it further as part of our consideration of subpara (a)(ii). In any event we see no reason to limit subpara (a)(i) so as only to apply to contributions which are capable of complying with subpara (a)(ii).

Point (c) – held separately, valued and held in trust for scheme members

62 It is said that the promises cannot be held separately from the property of the responsible entity, valued or held in trust for scheme members. It is also submitted that each promise must be held for the benefit of the group member making it. That submission misconceives the effect of s 601FC(2). The benefit of each promise is to be held on trust for the benefit of all scheme members.

63 These propositions rely upon s 601FC(1)(i) and s 601FC(2). We see no difficulty in holding the promises by group members and the Funder separately from other property. Indeed, it is difficult to see how they could be mixed. We also see no difficulty in valuing them. The respondents, in fact, said very little about these matters. As to the requirement that scheme property be held on trust by the responsible entity, the respondents submit that it is difficult to see how the burden of group members' promises may be held on trust for them. They accept that the benefit of such promises may be so held.

64 As we have previously observed it may be inappropriate to base a construction of the s 9 definition upon perceived difficulties in applying one aspect of the Ch 5 regulatory regime. If a particular arrangement is within the s 9 definition, and if it is required to be registered, then by force of the legislation, scheme property is to be held on trust by the responsible entity. It may be that this requirement necessitates some degree of adjustment to traditional views as to the appearance and functions of a trust, but Parliament may take such a step. The mere fact that there may be difficulty in giving effect to s 601FC(2) does not justify a narrowing of the clear meaning of the s 9 definition.

65 In any event, we see no real difficulty in the present case. Firstly, we cannot see that the burden of the group members' promises is of any relevance. We are rather concerned with the benefits. The promises are primarily for the ultimate benefit of the Funder but, in the interim, they provide the basis upon which the Funder is willing to meet its obligations under the scheme. The Funder may not enforce the promises absent a favourable realization of the claims. Further, it may lose any potential benefit if it breaches the Funding Agreements so as to entitle the group members to determine them. See cl 15 of the Funding Agreement. There is no difficulty with the concept of a contractual promisee holding the promise on trust for another. See *Chitty on Contracts* (30th ed, Thomson Reuters, 2008)

Vol 1 at 1-191 and 18-078 et seq although, in general, there must be an intention to create a trust. Regardless of whether the Funder had such an intention, its absence cannot prevent the statutory imposition of a trust relationship. Given the role that the promises play in fulfilling the aim of the scheme, there is nothing curious about the fact that the group members should be treated as having an interest in them.

66 As to the Funder's promises, the benefit of each is vested in the individual group member to whom it is made. However it is clear that all parties intend that the benefit of the Funder's promises concerning legal services be enjoyed by the scheme members collectively. Such services are for common legal work as well as for work on individual claims. Similarly, the promises to meet any order for security for costs will provide a common benefit. Superficially, there may be a difficulty in asserting that the responsible entity (presumably the Funder) holds the benefits of such promises on trust for scheme members as it does not hold any title to them. A possible answer is that each scheme member has impliedly promised to hold the benefit of the Funder's individual promise upon trust for the scheme members generally, and that s 601FC(2) vests the benefit of that promise in the responsible entity.

67 In any event, we do not see these difficulties as relevant to the task of construing the s 9 definition.

Point (d) – investing or otherwise dealing with scheme property

68 Finally, it is submitted that the promises are not "apt to be invested or dealt with" as contemplated by s 601GA(1)(b). That section requires that a scheme constitution make provision for the responsible entity having power to invest or otherwise deal with, scheme property. Once again, the respondents did not really develop this submission. The requirement is only that the constitution provide for such power. It does not require that all scheme property be capable of investment. As to "dealing with" the promises, the expression is very wide, and may include assignment, by way of security or otherwise, enforcement of the promises or protection of their value. Again, we see no basis in s 601GA(1) for reading down the s 9 definition.

69 We should say something about one other matter. The respondents submit that Multiplex relies upon the finding by the primary Judge that the group members' undertakings

constituted equitable assignments of future property. It is said that this matter was not the subject of pleading. Reference was made to a passage in the transcript of the proceedings at first instance (at TS 60 ll 10-20), which passage the transcript and the respondents attribute to Mr Bathurst QC, counsel for Multiplex. It is said that in that passage, counsel effectively eschewed reliance on such assignments. Multiplex submits that the relevant statement was actually made by counsel for the first and second respondents, Mr Sheahan SC. Mr Sheahan said that he had no recollection concerning the matter. Multiplex's submission may be correct. There is no apparent reason why Mr Bathurst would have interrupted Mr Sheahan at that point in his submissions. His Honour obviously did not understand Multiplex to have eschewed such reliance. In any event it does not matter. The relevant facts were pleaded. Whether or not they could be characterized as evidencing an equitable assignment seems to be of little significance.

"as consideration to acquire rights to benefits"

70 The fourth and fifth respondents submit that the benefits of the various promises were not acquired in consideration of the contribution of money's worth, but rather upon entry into the relevant agreements. This submission seems to distinguish between entering into a contract and receiving the benefit of it. However, in the present case, the promises made by each of the group members and the Funder were made in consideration of their acquiring rights to share in the relevant Resolution Sum or Sums and the benefit of the Funder's promises concerning legal services, costs orders and security for costs. It may be true that the benefits for group members and the Funder were derived pursuant to their contracts, but that is the way in which the scheme works. It involves the exchange of contractual obligations. We suspect, although we are not entirely sure, that this submission, if accepted, would effectively exclude from the s 9 definition many, perhaps all, schemes in which the promoter enters into individual contracts with members. That is clearly not the purpose of the legislation.

"benefits produced by the scheme"

71 The remaining question in connection with para (a)(i) of the s 9 definition is whether or not the relevant benefits were produced by the scheme. The benefits derived by group members were, subject to the Funder's rights to participate in any Resolution Sums:

- the provision of legal services at no cost to the group members;
- absence of exposure to any adverse costs order;
- the benefit of the Funder's promises to provide security for costs; and
- the benefit of contractual rights to participate in the distribution of the Resolution Sums in accordance with the terms of the scheme.

The Funder derived the benefit of the right to participate in the distribution of the Resolution Sums in accordance with the terms of the scheme.

72 The primary Judge considered that it was necessary that the relevant benefit have been acquired by the contributors and produced by the scheme. At [20] his Honour observed that:

> The principal object of the scheme is to recover in litigation the loss which each group member says he or she has suffered as a result of the alleged wrong-doing by Multiplex. The recovery of damages or compensation is not, by any meaning, a "benefit" a group member has acquired. If any group member is entitled to recover damages or compensation from Multiplex it is because there is in existence a justiciable cause of action against Multiplex, a cause of action which exists separately from, and is antecedent to, the scheme. No group member has given value or paid for those causes of action as part of the scheme.

73 The word "benefit" is relevantly defined in s 9 to mean:

> (a) … any benefit, whether by way of payment of cash or otherwise; …

74 The New Shorter Oxford English Dictionary (4th ed) defines "benefit" as:

> … A thing well done; a good deed … . A kind deed; a favour, gift; a benefaction … . (An) advantage …"

75 The Macquarie Dictionary (4th ed) defines the term as:

> … an act of kindness … anything that is good for a person or thing.

76 Each group member claims to have a cause of action against Multiplex. Whether each has such a cause of action remains to be determined. Frequently, when a lawyer says that a person has a cause of action, he or she means that, on the person's version of events, there is a cause of action. Much trouble, time, effort and cost frequently lie between assertion of a cause of action and the derivation of a financial benefit. On the other hand, it is not unknown for somebody without a cause of action to make an unmeritorious claim and enjoy a degree of success. A process which enables or assists a claimant to turn a claim into an

amount of money, whether by judgment or settlement, seems to us to be a benefit. In the present case, each group member acquires a contractual right to share in his or her Resolution Sum in accordance with the terms of the scheme. It is reasonable to infer that each group member perceived some benefit or advantage in giving up part of any amount recovered in order to have access to legal services, protection from any adverse order as to costs and avoidance of any need to give security.

77 The relief from exposure to an order for costs should not be undervalued simply because the matter may be proceeding as a representative action. Even if group members, other than the representative party, may not generally be subject to such orders, a representative party may not be willing to accept that role unless other claimants offer appropriate indemnities. Further, an order for security for costs may have the effect of obliging other claimants to pay the other side's costs if the action is unsuccessful.

78 At [22] the primary Judge said:

> For an investor to obtain a benefit under a managed investment scheme he or she must acquire a right to some hoped for profit or gain the scheme will produce.

79 However subpara (i) of the s 9 definition speaks of "rights … to benefits produced by the scheme". We see no justification for substituting the words "profit" or "gain" for the word "benefit". Use of those words inevitably leads to a focus upon expenditure and receipts. The word "benefit" has a much wider meaning. Whilst there may be cases in which a managed investment scheme makes a gain or profit in which its members have interests, there will be other cases in which the scheme produces an outcome which is, itself, a benefit for members. The recreational or lifestyle schemes referred to in the Report are examples of that type of scheme. Again, it must be kept in mind that the "scheme" is not a legal entity.

80 The respondents submit that one must distinguish between "advantages that are merely direct incidents of the scheme" and "benefits produced by the scheme". One is tempted to ask why that distinction should be drawn. The approach seems to assume that a scheme must necessarily involve discrete stages involving entry into the scheme, operation of the scheme and emergence of benefits from the scheme. The s 9 definition does not prescribe such an approach. In the present case, the benefit to the group members will be cumulative in the sense that as legal services are provided, the claims will progress towards their anticipated

resolution. The definition simply does not require that the benefit be derived once and for all at the end of the undertaking.

81 It would do violence to language to deny that the opportunity to prosecute a claim, with virtually no exposure to any costs or outgoing in the event of failure, is a benefit. Such benefit will be the result of all parties carrying out their obligations under the scheme. It follows that it will be produced by the scheme. Similarly, any eventual financial yield to group members or to the Funder will be so produced.

The scheme satisfies subpara (a)(i)

82 We consider that the requirements of subpara (a)(i) of the s 9 definition are satisfied.

Subparagraph (a)(ii) – "… any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the members) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interest from holders) …"

83 The requirements of the subparagraph are:

- that any of the contributions are pooled, or used in a common enterprise;
- to produce financial benefits or benefits consisting of rights or interests in property;
- for the scheme members.

"any of the contributions are to be pooled, or used in a common enterprise"

84 The primary Judge, referring to the decision of Pullin J in *Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd* [2001] WASC 339, said that the word "pooled" has its ordinary meaning, and that it "describes an arrangement where there is a 'common fund into or from which all gains and losses of the contributions are paid', or 'a fund made up of numerous payments from the participants and used for a purpose they contemplate' ". His Honour considered that the phrase "to be pooled … to produce" implies that the intention must be to "pool the contributions and, by use of the pool, produce benefits". Other possible meanings were said to include "any aggregation of the interests or property of different persons made to further a joint undertaking or end by subjecting them to the same control and a common liability" and "a common fund or combination of interests

for the common adventure in buying and selling". The primary Judge then concluded that it was not possible to apply any of those meanings to the facts in question, at least in part because his Honour considered it "difficult" to pool choses in action because the concept of pooling "is a physical concept". His Honour conceded that choses in action might be "pooled" by being bundled together and dealt with as a bundle by, for example, sale or mortgage but considered that nothing of that kind had occurred in this case.

85 Multiplex submits that the promises were "aggregated in the hands of MBC", in that it was able to deal with the Resolution Sums in accordance with the agreements, and that such aggregation constituted pooling. It also submits that amounts actually received by way of Resolution Sums are to be pooled in the hands of MBC. His Honour considered that each group member had assigned to the Funder part of his or her Resolution Sum. In return the litigation Funder had agreed to provide funding for each group member. The result was a series of bilateral arrangements, not an aggregation of them. This approach appears to overlook the conclusion expressed at [3] that individual group members instructed MBC to perform work for their common benefit as well as in connection with individual claims.

86 The approach taken to pooling in *Knightsbridge* [2001] WASC 339 was based upon the decisions at first instance and on appeal in *Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd* (1999) 33 ACSR 403 (at first instance) and (2000) 35 ACSR 620 (on appeal). Both that case and *Knightsbridge* [2001] WASC 339 concerned contributions of money. However the s 9 definition clearly contemplates contributions other than of money.

87 In our view the term "pooled" in subpara (ii) bears a somewhat wider meaning than that suggested by the primary Judge. *The Oxford English Dictionary* (2nd ed, Oxford University Press, 1989) Vol XII, the *New Shorter Oxford English Dictionary* (4th ed) and the *Macquarie Dictionary* (4th ed) all demonstrate that the word "pool" has two distinct derivations, resulting in two broad categories of meaning which are distinct, but associated. The word was originally derived from a Germanic source. From that source its meaning, as a noun, is "a body of water or other liquid" with similar associated meanings. This usage focuses upon the physical accumulation of a substance in a particular location. As a verb it means "to form pools", focussing upon the process of accumulation.

88 All three authorities identify a second derivation from the French word “poule” meaning “hen”. In this sense (according to the *Oxford English Dictionary* (2nd ed)) the word means “In certain card games, etc: The collective amount of the stakes and fines of the players joining in the game”. The word may also mean “The receptacle containing the stakes” and “A game played on a billiard-table … each player contributing an agreed sum, the whole of which at the end falls to the winner”. Perhaps the term “hen” was treated as being synonymous with “prize”. Another meaning is “a common fund into or from which all gains or losses of the contributors are paid; hence, a combination of capitalists for united speculative operation in a stock or commodity; a combine”. Yet another is “[a]n arrangement between previously competing parties, by which rates or prices are fixed, and business or receipts divided, in order to do away with mutually injurious competition …”. As a verb in this sense the word means:

> To throw into a common stock or fund to be distributed according to agreement; to combine (capital or interest) for a common benefit; *spec.* of competing railways companies, etc,: To share or divide (traffic or receipts).

89 This second usage focusses not so much on physical pooling or co-location as upon the common purpose for which the relevant subject matter has been provided. Examples of pooling in the second sense suggest that physical pooling is not always necessary. One example of that usage identified in the *Oxford English Dictionary* (2nd ed) is as follows:

> Sometimes the proceeds of the traffic on competing lines are put into a common fund, and afterwards distributed according to conditions previously agreed on. This is called a “Financial Pool”. In other cases, arrangements are made for distribution of the traffic, each line agreeing to accept a specified proportion. This is called a “Physical Pool”.

90 In our view there is no justification for limiting the meaning of the word “pooled” by requiring that it involve a fund. In common experience many things other than money are pooled, including motor vehicles, typists and skills or talents. In such cases, there is no identifiable fund. Further, in its second sense the word “pool” does not necessarily involve a “physical concept”. The purpose for which particular resources are pooled may be fulfilled simply by knowing where resources are located and that they are available. Two other definitions were advanced by his Honour, namely “any aggregation of the interests or property of different persons made to further a joint undertaking or end by subjecting them to the same control and common liability” and a “common fund or combination of interests for

the common adventure in buying or selling". These definitions seem to be designed to meet specific situations and not to provide an exhaustive definition of the term "pool".

91 Given the very wide range of property which may fall within the term "money's worth" it may be inappropriate to approach the question of pooling with preconceived ideas about the arrangements which may be so described. Whether and how a particular type of property, being money's worth, can be pooled will depend very much upon its characteristics. It is not clear to us that individual contributions must be of a homogeneous character in order to be pooled. After all, the degree of uniformity amongst typists in a typing pool or cars in a car pool may vary substantially. Further, we not infrequently speak about pooling talents or skills, usually meaning a variety of talents or skills. However, assuming that we are speaking only about pooling like with like, the question is whether or not the promises made by the group members are to be pooled, and whether or not the promises made by the Funder are to be pooled.

92 It is likely that the pooling contemplated in para (a)(ii) of the s 9 definition is within the second sense discussed above rather than the first. The focus is not upon physical pooling, such as that which occurs with water or blood, but rather upon pooling for a purpose. In our view the definition would be satisfied if the contributions were available, and known to be available, for a relevant purpose, regardless of physical location. Of course, there may be reasons of convenience or security for keeping the contributions in one place. No doubt, in this case, the parties would want to keep the contractual documents in a secure place. However the pooling is effected by the group members making their individual promises available, ultimately for the Funder's benefit, but in the meantime, for the purposes of the scheme and the benefit of scheme members. That benefit is the role played by such promises in inducing the Funder to make its promises and to honour them. Any ultimate pooling of Resolution Sums may also satisfy the requirements of the definition. However there is a conceptual difficulty in relying upon it as the sole basis for holding that the requirement for pooling is satisfied in that such pooling may not occur. Further, the first and second respondents submit that this approach was not part of Multiplex's pleaded case. However we consider it to be within para 40 of the further amended statement of claim. In any event, it is not necessary that we finally resolve that matter.

93 As to the Funder's promises, similar considerations apply. In our view, there is a clear intention that its promises to each group member be used collectively to advance the scheme for the benefit of scheme members, as well as for work on individual claims.

94 We turn to the meaning of the term "common enterprise". The primary Judge referred to the following passage from the judgment of Mason J in *Australian Softwood Forests* 148 CLR at 133:

> An enterprise may be described as common if it consists of two or more closely connected operations on the footing that one part is to be carried out by A and the other B, each deriving a separate profit from what he does, even though there is no pooling or sharing of receipts of profits. It will be enough that the two operations constituting the enterprise contribute to the overall purpose that unites them. There is then an enterprise common to both participants and, accordingly, a common enterprise.

95 His Honour seems to have considered that Mason J was advancing an exhaustive definition of the term. In our view, he was not purporting so to do. His Honour was rather giving his reasons for rejecting an argument that a common enterprise necessarily involves "a joint participation in all elements and activities that constitute the enterprise". The above passage was designed to identify at least one way in which the requirement for a common enterprise might be satisfied short of such joint participation.

96 The *New Shorter Oxford English Dictionary* (4th ed) defines "enterprise" as "A piece of work taken in hand, an undertaking; *esp.* one that is bold, hazardous, or arduous … . The action of engaging in enterprises; *esp.* activity undertaken with an economic or commercial end in view." The Macquarie Dictionary (4th ed) defines the word to mean a "project undertaken or to be undertaken, especially one which is of some importance or that requires boldness or energy". The former authority defines "common" as meaning "Of a public or non-private nature … . Shared alike by all the persons or things in question …; having the same relationship to all the persons or things in question … . Belonging to more than one as a result of joint action or agreement". The latter authority defines "common" as "belonging equally to, or shared alike by, two or more or all in question".

97 The example given by Mason J demonstrates that separate actions by different participants, deriving separate profits, may constitute a joint enterprise if the actions are sufficiently closely connected and contribute to a shared purpose. However, in many cases,

there will be a much closer integration of actions and outcomes than is demonstrated in that example. There is, in the present case, a shared purpose, namely to prosecute the group members' claims to successful realization for the benefit of the group members, the Funder and MBC. The group members give appropriate instructions to MBC and promises to the Funder; the Funder provides funds; and MBC provides legal services. Each will derive a benefit from any success enjoyed by the scheme. In the case of the group members and the Funder, their benefits will come directly from the fruits of such success. MBC will indirectly benefit from that source because its outstanding costs and interest thereon will be received only if the Funder receives money from the pooled Resolution Sums.

98 The scheme is clearly an undertaking. As the dictionary definitions suggest, an enterprise may often be of an economic or commercial nature and may be bold, hazardous or onerous. None of these characteristics is said to be a necessary element of an enterprise, but at least some seem to be present in this case. We see little difficulty in characterizing the scheme as being of an economic nature from the points of view of the group members, the Funder and MBC. From the point of view of the Funder and MBC it is commercial. Perhaps, too, from the point of view of any institutional investor, it would be commercial. The intended litigation may or may not be bold, but there are risks. Indeed, a purpose of the scheme is to deal with those risks. There can be little doubt that the scheme may involve much hard work, depending upon Multiplex's attitude. The scheme is a common enterprise in the sense demonstrated by Mason J and described in the dictionary definitions. It belongs to "more than one as a result of joint action or agreement" or is shared.

99 We conclude that the scheme involves both pooling of contributions and use in a common enterprise. We should say something about the distinction between the two. Pooling will frequently be a question of degree. There may be cases in which relevant assets are utilized by individual members in such a way that it cannot readily be said that they are pooled. Using discrete parcels of land to produce crops which are pooled may be an example. In such a case, there may be use in a common enterprise but no pooling of the land. We do not mean to imply that land may never be pooled.

100 On our view of the case, the singular-plural problem, which was raised in argument and dealt with by Jacobson J, does not arise. The contributions are the promises of the group members and those of the Funder.

"to produce financial benefits or benefits consisting of rights or interests in property"

101 We turn to the question of benefits. We have already explained that the group members' promises are pooled to enable them to induce the Funder to fund the litigation. We have also explained why we consider that such arrangement confers a benefit upon the group members. It is a financial benefit in that the group members are protected from financial exposure. It is intended that those promises and the Funder's promises, together, will produce a successful realization of the group members' claims. That success will yield a financial benefit to group members, the Funder and, indirectly, MBC. The Funding Agreements also contemplate the possibility of a non-financial outcome. See the definition of "Resolution Sum". In that event, the benefits may involve rights or interests in property.

"for members"

102 Clearly, these benefits will inure for the benefit of scheme members, including group members, the Funder and MBC (indirectly).

The scheme satisfies subpara (a)(ii)

103 We are satisfied that the scheme satisfies subpara (a)(ii) of the s 9 definition.

RESPONSIBLE ENTITY

104 There is some debate about whether the Funder or MBC is presently the responsible entity for the purposes of Ch 5C. Both fulfil functions which might be thought to be part of the operation of the scheme, but neither is qualified to be a responsible entity as required by s 601FA. If either is operating the scheme, it will be in breach of s 601ED(5). There can be little doubt that between them, they are operating the scheme which is unregistered and lacks a responsible entity. The obvious consequence of our view that the scheme must be registered is that a qualified responsible entity must be appointed, unless the Australian Securities and Investments Commission ("ASIC") takes action to excuse the scheme from registration.

RELIEF

105 Multiplex seeks declaratory and injunctive relief. The respondents submit that it has no standing to seek injunctive relief, a question to which we will return. They do not submit that Multiplex lacks standing to seek declaratory relief. However a number of discretionary consideration are said to militate against the grant of such relief. They include:

- delay;
- that Multiplex seeks to stop the proceedings between the group members and Multiplex;
- that any declaratory relief lacks utility;
- that any grant of relief would prejudice the respondents;
- that no group member has been prejudiced by the failure to comply with Ch 5C;
- that only Multiplex has any interest in obtaining relief; and
- that a breach of s 601ED(5) may give rise to quasi-criminal liability.

106 The matter has been further complicated by the parties having agreed that in the event that the appeal succeeds, the matter should be referred to the primary Judge for further consideration as to appropriate relief. It is not clear whether the parties intend that the question of declaratory relief be so treated. However at least some of the discretionary considerations may go to that matter.

107 In our view the parties' agreement demonstrates a preoccupation with process rather than concern for the ultimate outcome. If the scheme falls within the s 9 definition and is required to be registered by virtue of s 601ED, some form of declaratory relief is almost inevitable. If the Court concludes that there has been, and continues to be, a breach of the law, the public interest and the need to maintain the dignity of the Court would dictate that the decision be recorded in some formal way.

108 We consider that Multiplex, as the respondent in the representative proceedings, is entitled to have confidence, in its dealings with MBC as solicitors on the record, that they are properly authorized to act, albeit in a representative action. It is also entitled to have confidence that the proceedings will not, in the future, be disrupted or delayed by any

intervention by ASIC or by a disgruntled group member, asserting an irregularity of the kind which Multiplex has demonstrated. That interest is sufficient to justify the grant of declaratory relief, although it may have to be balanced against the discretionary matters outlined above.

109 As to injunctive relief, the question of standing depends upon the proper construction of s 1324(1) of the Corporations Act which provides:

> Where a person has engaged in, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:
>
> (a) a contravention of this Act; or
> (b) attempting to contravene this Act; or
> (c) aiding, abetting, counselling or procuring a person to contravene this Act; or
> (d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or
> (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or
> (f) conspiring with others to contravene this Act;
>
> the Court may, on the application of ASIC, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction on such terms as the Court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.

110 In *Broken Hill Proprietary Company Limited v Bell Resources Limited* (1984) 2 ACLC 157 at 162 Hampel J observed:

> In my view the interests referred to in this subsection are interests of any person (which includes a corporation) which go beyond the mere interests of a member of the public. It is not necessary that personal rights of a proprietary nature or rights analogous thereto are or may be affected nor need it be shown that any special injury arising from a breach of the Act has occurred.

111 We consider that Multiplex's interest, as identified above, satisfies this test. It follows that the appeal should be allowed and the orders below be set aside. We understand that the parties wish to develop their arguments concerning discretionary matters. They should do so in writing. Such submissions should also address:

- the forms of any declaratory and/or injunctive relief;
- costs at first instance and on appeal; and
- in the event that the respondents propose to seek any form of statutory relief from ASIC, the question of a short deferment of the pronouncement of our orders.

112 Given the nature of these matters, it will be appropriate if Multiplex first address the forms of order, and that the respondents then make their submissions concerning all matters. Multiplex may then reply. We do not expect lengthy submissions.

ORDERS

113 We order that:

- within seven days of publication of these reasons, Multiplex file and serve written submissions concerning proposed forms of order;
- within 14 days of such publication, the respondents file and serve their submissions concerning all outstanding matters;
- within 21 days of such publication, Multiplex file and serve its reply to the respondents' submissions; and
- the parties have liberty to apply.

I certify that the preceding one hundred and thirteen (113) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Sundberg and Dowsett.

Associate:

Dated: 20 October 2009

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

GENERAL DIVISION **VID 374 of 2009**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**BROOKFIELD MULTIPLEX LIMITED (ACN 008 687 063)** **First Appellant** **BROOKFIELD MULTIPLEX FUNDS MANAGEMENT LIMITED (ACN 105 371 917)** **Second Appellant**
AND:	**INTERNATIONAL LITIGATION FUNDING PARTNERS PTE LTD** **First Respondent** **2117980 ONTARIO INC** **Second Respondent** **MAURICE BLACKBURN PTY LIMITED (ACN 105 657 949)** **Third Respondent** **P DAWSON NOMINEES PTY LIMITED (ACN 004 743 408)** **Fourth Respondent** **FREDERICK HENRY HART** **Fifth Respondent**
JUDGES:	**SUNDBERG, DOWSETT AND JACOBSON JJ**
DATE:	**20 OCTOBER 2009**
PLACE:	**SYDNEY (HEARD IN MELBOURNE)**

REASONS FOR JUDGMENT

JACOBSON J:

INTRODUCTION

114 This appeal arises from an application by the appellants ("Multiplex") for a declaration that the litigation funding arrangements and solicitors' retainers for two representative proceedings in this Court constitute an unregistered "managed investment scheme" as defined in s 9 of the *Corporations Act 2001* (Cth) ("the Act").

115 Multiplex sought declaratory and injunctive relief which would have had the effect of restraining the litigation funders, the solicitors and representative applicants in the proceedings from taking any steps pursuant to the litigation funding agreements and the solicitors' retainers.

116 The primary judge, Finkelstein J, said at [2] that "[w]hat lies behind this allegation is Multiplex's desire to stop the action in its tracks": *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 256 ALR 427. In dismissing the application, his Honour said at [6] that the difficulties in construing the definition of "managed investment scheme" fall away when the construction takes account of the purpose of Ch 5C of the Act.

117 At the heart of Multiplex's submission on the appeal was that the primary judge failed to have regard to the proper principles of construction, as explained in various authorities, which govern the definition of the term "managed investment scheme".

118 These principles include the proposition that the broad language of the statutory definition ought not to be read down to avoid the supposedly unintended consequences of a literal interpretation: *Australian Softwood Forests Proprietary Limited v Attorney General for the State of New South Wales; Ex relatione Corporate Affairs Commission* (1981) 148 CLR 121 at 129-130.

119 However, senior counsel for Multiplex, Mr T.F. Bathurst QC, conceded that at least in the case of ambiguity, it is permissible to refer to extrinsic evidence in accordance with s 15AB of the *Acts Interpretation Act 1901* (Cth). The thrust of his submission on this issue was that the extrinsic material is of little assistance.

120 It seems to me that in considering the issues raised on the appeal, it is necessary to have some regard to the legislative history. It is of course critical to the appeal to consider the terms of the litigation funding agreements and the solicitors' retainers in order to determine whether those arrangements fall within the definition of a "managed investment scheme".

121 There was debate between the parties as to whether, in determining that question, Multiplex was confined to the case pleaded in its Further Amended Statement of Claim. It

seems to me that it ought to be, although ultimately nothing turns on it. Nevertheless, I will set out the relevant paragraphs of the pleading later in my reasons.

122 A further issue which arises in the event the appeal is allowed is whether Multiplex has standing to bring the proceeding.

THE RELEVANT PROVISIONS OF THE ACT

123 The term "managed investment scheme" is defined in s 9 of the Act to mean:

> (a) a scheme that has the following features:
>
> (i) people contribute money or money's worth as consideration to acquire rights (***interests***) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
> (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (***the members***) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);
> (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions) […].
>
> [Emphasis in original]

124 The definition goes on to set out a list of 13 exclusions. These include a partnership with more than 20 members, a body corporate (other than one which operates a time sharing scheme), and certain other arrangements, schemes and statutory funds.

125 The term "interest" which is referred to in the definition of "managed investment scheme" is defined in s 9 as follows:

> ***interest*** in a managed investment scheme means a right to benefits produced by the scheme (whether the right is actual, prospective or contingent and whether it is enforceable or not).

126 The term "benefit" is defined in s 9 to mean, relevantly "any benefit, whether by way of payment of cash or otherwise […]".

127 The provisions of the Act which deal with managed investment schemes are contained in Ch 5C of the Act.

128 To register a managed investment scheme, a person must lodge an application with the Australian Securities and Investments Commission ("ASIC"): s 601(EA)(1). The application must state, *inter alia*, the name of the responsible entity: s 601(EA)(2). The application must be accompanied by certain documents including a copy of the scheme's constitution and a copy of its compliance plan: s 601(EA)(4).

129 ASIC must register the scheme within 14 days of lodgement unless it appears that certain requirements of Ch 5C in relation to the application, the responsible entity, the scheme's constitution or its compliance plan are not met: s 601EB(1)

130 The critical provision of Ch 5C on which Multiplex relies is s 601ED. That provision specifies that, subject to an exception which is not presently relevant, a managed investment scheme must be registered under s 601EB if it has more than 20 members.

131 Section 601ED(5) goes on to provide:

> (5) A person must not operate in this jurisdiction a managed investment scheme that this section requires to be registered under section 601EB unless the scheme is so registered.

132 Section 601EE provides:

> (1) If a person operates a managed investment scheme in contravention of subsection 601ED(5), the following may apply to the Court to have the scheme wound up:
> (a) ASIC;
> (b) the person operating the scheme;
> (c) a member of the scheme.
>
> (2) The Court may make any orders it considers appropriate for the winding up of the scheme.

133 The duties and powers of the responsible entity are set out in Div 1 of Pt 5C.2 of the Act.

134 Section 601FA provides that the responsible entity of a managed investment scheme must be a public company that holds an Australian financial services license authorising it to operate a managed investment scheme.

135 The responsible entity is to operate the scheme and perform the functions conferred on it by the scheme's constitution and the Act: s 601FB(1).

136 Section 601FC(1) provides, relevantly, that in exercising its powers and carrying out its duties, the responsible entity must:

> (h) comply with the scheme's compliance plan; and
> (i) ensure that scheme property is:
>   (i) clearly identified as scheme property; and
>   (ii) held separately from property of the responsible entity and property of any other scheme; and
> (j) ensure that the scheme property is valued at regular intervals appropriate to the nature of the property; and
> (k) ensure that all payments out of the scheme property are made in accordance with the scheme's constitution and this Act […].

137 There is a definition of "scheme property" in s 9 as follows:

> ***scheme property*** of a registered scheme means:
> (a) contributions of money or money's worth to the scheme; and
> (b) money that forms part of the scheme property under provisions of this Act or the ASIC Act; and
> (c) money borrowed or raised by the responsible entity for the purposes of the scheme; and
> (d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a), (b) or (c); and
> (e) income and property derived, directly or indirectly, from contributions, money or property referred to in paragraph (a), (b), (c) or (d).

138 Section 601FC(2) provides that the responsible entity holds scheme property on trust for the scheme members.

139 The requirements for the constitution of a registered scheme are contained in Pt 5C.3 of the Act.

140 The provisions which deal with the compliance plan of a registered scheme are contained in Pt 5C.4 of the Act.

141 It is not necessary for present purposes to set out or refer to these provisions.

142 Part 5C.5 provides for the establishment by the responsible entity of a compliance committee in the circumstances provided in s 601JA. The remaining provisions of that Part deal with the membership, functions and duties of the committee.

143 Part 5C.6 deals with members' rights to withdraw from a managed investment scheme. There are different provisions which apply depending upon whether the scheme is liquid or illiquid at the time of withdrawal.

LEGISLATIVE HISTORY: "INTERESTS", "PRESCRIBED INTERESTS"

144 The regulation of managed investment schemes under Ch 5C of the Act was introduced by the *Managed Investments Act 1998* (Cth). The new regime introduced by that Act replaced the regulatory regime originally introduced in the 1970s by various amendments to the State Uniform Companies Acts: Ford, Austin and Ramsay, *Ford's Principles of Corporations Law* (LexisNexis AU Online Subscription), [22.470].

145 An example of the earlier regime was to be found in the amendments to the *Companies Act 1961* (NSW) introduced by Act No 61 of 1971. That regime applied to "interests" and was contained in Div 5 of Pt IV which was headed "Interests other than Shares, Debentures etc".

146 "Interests" later became known as "prescribed interests" when the Uniform Companies Codes commenced in the early 1980s, but the substance of the definition was unchanged. As Ford observes at [22.470], the basic definition and regulatory regime under the Companies Codes were adopted in the *Corporations Law* in 1991, although over time there were developments and modifications.

147 The definition of "interest" introduced by the 1971 amendments to the *Companies Act 1961* (NSW) was contained in s 76 as follows:

> "Interest" means any right to participate, or interest, whether enforceable or not and whether actual prospective or contingent –
>
> (a) in any profits, assets or realisation of any financial or business undertaking or scheme whether in the State or elsewhere;
> (b) in any common enterprise whether in the State or elsewhere in which the holder of the right or interest is led to expect profits, rent or interest from the efforts of the promoter of the enterprise or a third party; or
> (c) in any investment contract
>
> whether or not the right or interest by a formal document and whether or not the right or interest relates to a physical asset […].

148 "Investments contract" was also defined in s 76 as follows:

> “Investment contract” means any contract scheme or arrangement which in substance and irrespective of the form thereof involves the investment of money in or under such circumstances that the investor acquires or may acquire an interest in or right in respect of property which under or in accordance with the terms of investment will, or may at the option of the investor, be used or employed in common with any other interest in or right in respect of property acquired in or under like circumstances.

Report of the Law Reform Commission and Companies and Securities Advisory Committee

149 On 24 May 1991, the then Federal Attorney-General asked the Australian Law Reform Commission and the Companies and Securities Advisory Committee to carry out a review of the regulatory framework for “prescribed interests” and “like collective investment schemes”. The review was carried out and, in 1993, the Commission and the Advisory Committee produced a joint report entitled “Collective Investments: Other People’s Money”.

150 The Report was critical of the then existing regulatory regime and made 185 recommendations. In particular, the Report recommended that the responsibility for a collective investment scheme should be with the operator of the scheme.

151 The Report also considered the question of whether the definition of “prescribed interest” should be amended. It said at [3.5]:

> The Review now accepts that it is not possible to replace the existing definition of ‘prescribed interest’ with a more precise definition of ‘collective investment scheme’ which applies to fund raising schemes other than those which are prudentially supervised or schemes in which the investors themselves are primarily responsible for the conduct of their scheme. The Review therefore **recommends** that the existing definition of prescribed interests in the Corporations Law should be the basis of the definition of ‘collective investment schemes’ to which the regulatory regime recommended in this report will apply. The Review also **recommends** that the expression ‘prescribed interests’, which is a less than helpful expression except to the cognoscenti, be abandoned in favour of ‘collective investment schemes’.
> [Emphasis in original]

152 Although the Report was tabled in 1993, its recommendations were not adopted until 1997 when the *Managed Investments Bill 1997* (Cth) was introduced by the then Treasurer, the Hon Peter Costello MP.

The Explanatory Memorandum to the *Managed Investments Bill*

153 The Explanatory Memorandum to the *Managed Investments Bill 1997* commenced by acknowledging that the Bill represented the Government’s response to the recommendations

in the Report of the Commission and the Advisory Committee, as well as to the Final Report of the Financial System Inquiry ("the Wallis Committee Report").

154 Paragraph 19.1 of the Explanatory Memorandum stated that s 9 of the *Corporations Law* would be amended to include a number of new definitions, including the term "managed investment scheme".

155 The following paragraphs of the Explanatory Memorandum are relevant:

> 19.3 The central definition of the Chapter 5C regime is that of '**managed investment scheme**'.
>
> 19.4 Managed investment schemes are currently regulated under the 'prescribed interest' provisions of the Law. The complex and seemingly all embracing definition of 'prescribed interest' has been widely criticised because of its lack of precision.
>
> 19.5 The definition of a 'managed investment scheme', to be inserted in section 9 (**proposed Schedule 2, item 16**), will provide greater certainty and guidance as to what investment arrangements are to be regulated under the Law. The definition sets out the key elements of a managed investment scheme for the purposes of the Law.
>
> 19.6 The essential features of a scheme are that:
>
> (a) persons contribute money or money's worth to acquire interests in the scheme – incorporating a purposive element in the definition
> (b) any of the contributions are pooled or used in a common enterprise to produce financial or other benefits to members; and
> (c) the members do not have day to day control over the operation of the scheme although they may be consulted.
>
> 19.7 Notably, the term 'used in a common enterprise' may include arrangements described as enterprise or agricultural schemes. The concept of a 'common enterprise' has been judicially considered on a number of occasions and continues to be relevant for the purposes of this definition. Since 'any of the contributions' are to be pooled, arrangements, such as those known as managed discretionary accounts or member discretionary master funds where part of the contributions made by a member to a scheme may not be pooled, will nonetheless fall within the definition.
>
> [Emphasis in original]

The Parliamentary Joint Committee

156 Following the publication of the Explanatory Memorandum, a Parliamentary Joint Committee recommended to the Parliament that the Managed Investments Bill be passed.

157 The Parliamentary Committee's written recommendation contained the following observations by way of background:

> 1.1 Managed investment schemes are schemes where an investor purchases an interest in a fund which is managed by a professional manager to produce a return for the investor. They encompass a wide range of investment products and services including property, equities and cash management trusts as well as smaller schemes such as ostrich farms and pine plantations. Approximately $85 billion is invested in managed investment schemes at present and the amount continues to grow by around $20 billion a year.
>
> 1.2 These schemes allow investors to diversify their investments over a wider range of investment types than might otherwise be available and allow them to have their funds professionally managed.
>
> 1.3 The Bill is not concerned with superannuation funds which are dealt with under the Superannuation Industry (Supervision) Act 1993.

158 The Parliamentary Committee made reference to the Report of the Commission and the Advisory Committee and to the recommendations of the Wallis Committee. It noted that the Wallis Committee recommended that the regulatory framework for public offer collective investments and superannuation should be harmonised and that both types of products should be subject to a single consumer protection regime:

> … bringing the structure of collective investments into line with that for superannuation funds, by introducing the requirement of a single responsible entity.

THE REPRESENTATIVE PROCEEDINGS

159 The representative proceedings were described by the primary judge at [1] of his reasons. As his Honour noted, P Dawson Nominees Pty Limited ("Dawson") is the representative party in one of the proceedings and Frederick Henry Hart ("Hart") is the representative party in the other.

160 The representative proceedings brought by Dawson and Hart against Multiplex seek damages or compensation for the alleged failure of Multiplex to comply with the obligation of continuous disclosure under ss 674 and 675 of the Act. The claims arise from the losses suffered by Multiplex in the construction of the Wembley Stadium and the allegation that Multiplex failed to notify the market about cost and budget over-runs which had a substantial adverse effect on the profitability of the project.

161 The proceeding brought by Dawson was described in some detail in an earlier interlocutory proceeding between the parties: *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 111; see also on appeal, *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275.

162 In that proceeding, the Court determined that Pt IVA of the *Federal Court of Australia Act 1976* (Cth) does not preclude a definition of a group which restricts membership of the group to persons who have entered into a litigation funding agreement at the commencement of the proceeding.

163 The Dawson representative proceeding was commenced on 18 December 2006. The Hart representative proceeding was commenced nearly two years later on 10 December 2008. The case management of both proceedings has been conducted by the primary judge. His Honour ordered that the proceedings be heard together and the "consolidated action should be ready for trial some time early next year".

164 There are well over 20 group members in each of the representative proceedings. The numbers set out at [5] of the primary judge's reasons indicate that there are in excess of 45 group members in the Dawson representative proceeding and over 100 in the Hart representative proceeding.

The Solicitors' Retainer

165 As the primary judge observed, all of the retainer agreements are in common form and it is necessary to refer only to the Dawson retainer agreement ("the Retainer").

166 The Retainer recites that Dawson wishes to prosecute its claims against Multiplex and that Dawson wishes to retain Maurice Blackburn Cashman ("MBC") upon the basis that the nominated litigation funder ("the Funder") will, on the terms set out in the litigation funding agreement ("the Funding Agreement"), pay MBC's costs and disbursements.

167 Clause 3.1 of the Retainer provides that Dawson instructs MBC to provide advice and legal services to Dawson as MBC may consider reasonably necessary to negotiate a

settlement of the “Claims”. That term is defined to mean Dawson’s claims and the claims that other persons may have against Multiplex.

168 Under cl 3.1, Dawson also instructs MBC to commence and prosecute the “proceedings” against Multiplex. That term is defined to include an action brought by Dawson, a representative proceeding and a “Test Case”. A “Test Case” is one that, in MBC’s reasonable opinion, will or is likely to determine important issues of liability or quantum for some or all of the other group members.

169 The scope of the legal work which may be performed by MBC under the Retainer includes work for the common benefit of other group members as well as work connected with the specific claims of other such persons.

170 No fees, costs or disbursements of MBC incurred by Dawson are payable by Dawson. Those expenses are to be met by the Funder in accordance with the terms of the Funding Agreement: see cl 4.1 of the Retainer.

171 The effect of those terms is that the Funder is to pay all of the disbursements and 75% of MBC’s fees on receipt of each invoice, with the remaining 25% of the fees to be payable only in the event of a successful outcome: cl 4.2.

172 Dawson is bound to provide full and honest instructions to MBC and to cooperate in the preparation of its own claims and those of the other group members: cl 8.4. That clause also binds Dawson to:

> accept and follow MBC’s reasonable legal advice, including advice as to reasonable Settlement offers when supported by Senior Counsel briefed by MBC […].

173 MBC is authorised by cl 12 of the Retainer to receive, on behalf of Dawson, any “Resolution Sum”. That term is defined to mean any amount for which the claims are settled or for which judgment is given in Dawson’s favour, or in favour of any other group member.

174 Clause 12.1 authorises MBC, upon receipt of the Resolution Sum, to pay it into an account kept for that purpose and:

- to combine in the one account amounts received in respect of the claims of other group members; and
- to disburse the Resolution Sum in accordance with the Funding Agreement.

175 Clause 13 sets out the events in which the Retainer may be terminated by MBC or Dawson. The events in which Dawson may terminate the Retainer include the filing of a Notice of Opting Out before any Opt Out Date set by the Court, or by Dawson effecting a settlement other than a group settlement.

176 If the Retainer is terminated, MBC remains entitled to payment of costs and disbursements incurred in respect of Dawson under the Retainer and the Funding Agreement prior to termination: cl 13.2.

The Funding Agreement

177 As with the Retainer, the Funding Agreements are in common form and it is sufficient to refer only to the Funding Agreement made with Dawson.

178 It appears that all of the Funding Agreements were initially made with the company now known as 2117980 Ontario Inc and were later assigned to International Litigation Funding Partners Pte Ltd.

179 The Funding Agreement contains a number of acknowledgments that the Funder has an interest in the Resolution Sum. One such acknowledgment is found in cl 4.1 which provides that in recognition of that fact, and the Funder's interest in the prosecution of the proceedings, Dawson directs MBC to consult with the Funder with regard to any significant issue in the proceedings and to properly consider its views as to the conduct of the proceedings.

180 Clause 4.2 of the Funding Agreement restates and reinforces the obligations of Dawson as stated in the Retainer to provide instructions to MBC and to accept and follow MBC's reasonable legal advice.

181 Clause 4.5 of the Funding Agreement prevents Dawson from having any communications with Multiplex, other than through MBC, or upon MBC's reasonable advice. That clause also prevents Dawson from disclosing to Multiplex any information provided to MBC or the Funder in relation to the claims against Multiplex.

182 The obligations in cl 4.5 survive the termination of the Funding Agreement: see cl 4.6. The apparent purpose of the clause is to avoid the possibility of Dawson (or any other group member) negotiating an individual settlement with Multiplex.

183 If there are settlement discussions, Dawson authorises MBC to advise the Funder and to invite the Funder to attend such discussions, as well as to report the detail of the discussions to the Funder. Dawson also authorises MBC to consult with the Funder about the terms of any proposed settlement: cl 4.10.

184 There is a further acknowledgment of the fact that the Funder has an interest in the Resolution Sum in cl 4.11. That clause provides that if there is a disagreement between Dawson and the Funder as to the appropriate terms of settlement, MBC will brief Senior Counsel to advise as to whether the proposed settlement is reasonable.

185 Clause 5 deals with the funding of the proceedings. The principal terms of this clause are that the Funder is to:

- pay all legal costs and disbursements reasonably incurred by Dawson and payable to MBC for the preparation and prosecution of the proceedings, including settlement negotiation;
- meet any adverse costs order; and
- provide any security for costs ordered by the Court.

186 Clauses 8, 9 and 10 deal with the receipt and application of the Resolution Sum.

187 Clause 8 repeats the obligation of Dawson contained in the retainer to authorise MBC to receive the Resolution Sum and pay it into an account for that purpose.

188 Clauses 9 and 10 contain a direction to MBC to pay to the Funder out of the Resolution Sum:

- Dawson's share of the fees, costs and disbursements paid by the Funder to MBC; plus
- a "commission" calculated as a percentage of the Resolution Sum determined by reference to the number of Multiplex shares purchased by Dawson and the date on which the proceedings are determined or settled.

189 The percentage fee payable to the Funder under this clause ranges from a minimum of 25% to a maximum of 40%. The lower percentage applies to purchases of more than 1,000,000 shares and is plainly referable to institutional investors.

190 The balance of the Resolution Sum is to be distributed to Dawson and other group members, pro rata by reference to the "Gross Recovery" of each such person.

191 Clause 12.4 provides that if Dawson acts in breach of the Funding Agreement, the obligations as to repayment of the legal fees and disbursements and payment of the Funder's "commission" continue to apply to any payment received by Dawson in respect of its claims against Multiplex.

192 That is to say, the Funder will be entitled to receive its commission and reimbursement for Dawson's legal fees and disbursements if Dawson negotiates an individual settlement or otherwise recovers on its claims against Multiplex.

193 Clause 15 deals with termination of the Funding Agreement by Dawson. It is sufficient to note for present purposes that Dawson remains liable under this clause to pay the Funder's commission if there is a settlement of a representative proceeding or a "group action" against Multiplex which is rejected by Dawson.

The Statement of Claim

194 The benefits or rights to benefits said to have been acquired by Dawson, Hart and the group members in accordance with paragraph (a)(i) of the definition of managed investment scheme are identified in [39] of the Further Amended Statement of Claim.

195 The benefits or rights which are identified are, for the most part, benefits which flow from the ability to pursue their claims against Multiplex without being subject to the ordinary incidents of litigation. They are all "benefits" which are said to flow from the Retainer and the Funding Agreement.

196 They are said to consist of the following:

- the absence of any obligation to pay legal fees or disbursements to MBC unless and until there is a successful resolution of the proceedings by way of receipt of the Resolution Sum;
- the absence of any obligation to provide security for costs of the proceedings;
- the entitlement to a pro rata share of the balance of the Resolution Sum after payment of their share of MBC's legal fees and disbursements and the Funder's commission;
- the cap on payment of legal fees by reference to their share of the balance of the Resolution Sum;
- the spreading of the costs of the litigation amongst Dawson, Hart and the group members; and
- the Funder's undertaking to meet any adverse costs order.

197 The contribution of money's worth which Dawson, Hart and group members are said to have been required to pay as consideration to acquire those benefits are identified in [40] of the Further Amended Statement of Claim.

198 All of those contributions are identified as obligations undertaken by Dawson, Hart and the group members in the Retainer and the Funding Agreement "which include":

- the authorisation to MBC to receive the Resolution Sum and to pay it into an account kept for that purpose;
- the obligation to treat any moneys received by them directly by way of a settlement or judgment as though it were the Resolution Sum and the concomitant obligation to pay it to MBC to be dealt with as part of the Resolution Sum;

- the authorisation to MBC to pay out of the Resolution Sum the amounts required to reimburse the Funder for its payment of the legal fees and disbursements paid to MBC; and
- the payment of the Funder's 25% - 40% commission out of the Resolution Sum.

199 The Funder is also said to obtain benefits or rights to benefits under the Funding Agreement. Those benefits are stated in [41A] of the Further Amended Statement of Claim and include:

- an entitlement to be reimbursed from the Resolution Sum for the amount paid by the Funder to MBC for the legal costs and disbursements of Dawson, Hart and the group members against Multiplex; and
- an entitlement to a commission, taken from the Resolution Sum in accordance with the Funding Agreement.

200 The contributions of money or money's worth said to have been made by the Funder as consideration to acquire those rights, benefits or rights to benefits, are stated in [41B] of the Further Amended Statement of Claim.

201 Those contributions consist of:

- the Funder's obligation to pay to MBC the legal fees and disbursements of Dawson, Hart and the group members;
- the requirement on the Funder to obtain standby letters of credit in favour of MBC as security for the Funder's obligations to meet MBC's invoices as well as to meet any adverse costs order; and
- the provision of a bank guarantee by the Funder as security for Multiplex's costs in the Dawson proceeding.

THE PRIMARY JUDGE'S REASONS

202 The primary judge considered that the question of whether the arrangements between the group members, MBC and the Funder satisfied the features of a managed investment scheme was a difficult one.

203 His Honour dealt with the question at two separate levels. First, he said at [6] that the difficulties fall away when the construction takes account of the purpose which underlies the regulation of managed investment schemes in Ch 5C of the Act. Second, he considered whether the Funding Agreements and the Retainer satisfied the features of each of the three paragraphs of the definition of managed investment scheme in s 9 of the Act.

204 The essence of the primary judge's reasons was that, although the arrangements constituted a "scheme", they do not amount to a managed investment scheme because the features identified in paragraphs (a)(i) and (a)(ii) of the definition are not satisfied.

205 In coming to that conclusion, his Honour analysed each of the component parts of the definition. He considered that some of the component parts of paragraphs (a)(i) and (a)(ii) of the definition are satisfied. However, ultimately, he concluded that:

- paragraph (a)(i) is not satisfied because the group members are not made to acquire rights to benefits produced by the scheme: see [20];
- paragraph (a)(ii) is not satisfied because the group members' contributions are not pooled and are not used in a common enterprise: see [28] and [31].

206 Although it was unnecessary for him to decide whether the third feature of the definition is satisfied, the primary judge expressed the view that it is, because "group members seem to have ceded control to [MBC]".

THE PROPER APPROACH TO CONSTRUCTION OF THE DEFINITION

207 The observations made by Mason J in *Australian Softwood Forests* about the breadth of the definition and the difficulties in reading down the comprehensive language were concerned with the definition of "interest" in the *Companies Act 1961*.

208 Nevertheless, his Honour's approach to construction has been applied to the definition of "managed investment scheme" in numerous authorities: see, eg, *Burton v Arcus* (2006) 32 WAR 366 at [51]; *Australian Securities and Investments Commission v Emu Brewery Mezzanine Ltd (ACN 104 639 410)* (2004) 52 ACSR 168 at [81]; *Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd* [2001] WASC 339 at [48]; *Australian Securities and Investments Commission v Takaran Pty Ltd* (2002) 170 FLR 388 at

[13]; *Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd* (2000) 35 ACSR 620 at [17].

209 Indeed, as Buss JA (with whom Steytler P and McLure JA agreed) said in *Burton v Arcus* at [51], it is "settled" that the broad words of the definition of "managed investment scheme" should not be read down.

210 So much may be accepted. But it does not follow that the Court is relieved from carrying out the primary object of statutory construction, which is to construe the relevant provision in a way that is consistent with the language and purpose of the statute considered as a whole: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69].

211 Moreover, the modern approach to construction emphasises the need to construe the provision in its context, having regard to, *inter alia*, the legislative history and relevant extrinsic material in order to ascertain the "mischief" which the statute is intended to cure: *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384 at 408.

212 The starting point is to consider the context in its widest sense, and this process may be undertaken without any reliance on s 15AB of the *Acts Interpretation Act*: *Bankstown Football Club* at 408; see also *Kennon v Spry* (2009) 251 ALR 257 at [89].

213 I do not consider that this is inconsistent with the observations of Mason J in *Australian Softwood Forests*. His Honour referred at 129 to the importance of context. His remarks at 130 about the comprehensive language of the definition must be considered in light of the statements in the Explanatory Memorandum to the *Managed Investments Bill* which point to the difficulties of the earlier definition and the search for greater certainty in the new definition of "managed investment scheme".

214 This is not to cast any doubt on the authorities, which I accept, to the extent that they discourage the reading down of the broad language of the definition influenced by any preconceptions of the unintended impact of the definition on particular transactions.

PRELIMINARY OBSERVATIONS

215 As Barrett J pointed out in *Takaran* at [12], the Act contains a definition of "managed investment scheme" but it does not define "scheme" for these purposes. Rather, it refers to the features of a scheme that make it a managed investment scheme.

216 The features of a scheme that bring it within the definition are divided into three sub-paragraphs, but Barrett J identified five features which are to be gleaned from the composite definition in the Act. These features are:

- the act of contribution of money or money's worth by several persons;
- the accruing to those persons in return (as consideration) of certain rights to benefits produced by the scheme;
- pooling of contributions or other use of them in a common enterprise;
- an objective or expectation of accrual of benefits to persons holding the rights, generated by the contributions; and
- absence of day to day control over the operation of the scheme by those persons.

217 Whilst it would of course be wrong to depart from the language of the Act in answering the questions before us, I consider that the five features identified by Barrett J accurately reflect the terms of the definition in s 9. They also assist in identifying the issues which arise on the appeal.

218 No issue arises as to whether the fifth feature, the absence of day-to-day control was satisfied. Reliance upon a notice of contention which would have raised this issue was abandoned at the hearing.

219 Four issues therefore arise. The first issue is whether the members contributed money or money's worth. The second issue is whether any such contributions were made in order to acquire rights to benefits produced by the scheme. The third issue is whether any such contributions were to be pooled to produce financial benefits for the members. The fourth issue is whether any such contributions were to be used in a common enterprise to produce financial benefits for the members.

220 A "scheme" is not a managed investment scheme unless it has the features identified above. No issue arises as to whether the Retainer or the Funding Agreements amounted to a scheme.

221 The parties proceeded upon the basis that the primary judge was correct in finding at [11]-[12] that these arrangements brought into existence a program or plan of action and that this was sufficient to constitute a scheme: *Australian Softwood Forests* at 129; *Takaran* at [13], [15].

222 The primary judge found that the plan involved: (a) putting in place a group of persons willing to participate in proceedings against Multiplex; (b) ensuring that the group of persons would not be exposed to liability for costs; (c) retaining a firm of solicitors that would act on behalf of group members; (d) ensuring that the solicitors' legal fees would be paid.

ISSUE 1 – WHETHER THE MEMBERS CONTRIBUTED MONEY OR MONEY'S WORTH

223 The word "contribute" means to "make available" (*Crocombe v Pine Forests of Australia Pty Ltd* (2005) 219 ALR 692 at [52]-[53]) or to "pay or supply", and it is implicit in the first limb of the definition of managed investment scheme that people pay or supply money or money's worth to or as directed by the promoter or operator: *Burton v Arcus* at [57].

224 The primary judge proceeded on the basis that the participants in the scheme were the Funder and the group members. He found at [14] that the contribution of the Funder is money (the payment of legal fees etc) or its promise to pay that money. No issue was taken with this on appeal.

225 However, the respondents took issue with the primary judge's finding as to the contributions made by group members. His Honour found at [14] that the contribution of group members was an assignment of future property, namely an assignment of the fruits of the litigation in the form of a promise to pay the group member's share of the Funder's commission out of the Resolution Sum.

226 It is true that the characterisation of the group members' contribution as an assignment was not pleaded, but nothing turns on this. The question which arises is whether the promise to pay a percentage of the Resolution Sum (and to reimburse the Funder for legal fees out of the Resolution Sum) constituted a contribution of money or money's worth.

227 I am prepared to proceed on the basis that the promise was a contribution in the sense referred to in the authorities because the group members agreed to supply or make available the relevant percentage of the Resolution Sum under the terms of the Funding Agreement. However, in saying this, I accept the force of the submission of the respondents that the Resolution Sum only comes into existence if a settlement or favourable judgment is achieved as a result of the proceeding. This suggests that the contributions here in question may not fall within the type contemplated by the definition.

228 The real question in relation to the first issue is whether the group members' contractual undertakings were contributions of money or money's worth.

229 The primary judge addressed this question by considering the English and Australian authorities which have dealt with the meaning of the phrase "money's worth". Only two of those authorities were concerned with the meaning of this phrase in the context of the definition of "managed investment scheme".

230 Those two authorities were the decision of Young CJ in Eq in *Crocombe* (referred to above) and the decision of a Full Court in *Hance v Commissioner of Taxation* [2008] ATC ¶20-085.

231 In *Crocombe*, Young CJ in Eq held that the contribution of interests in land by investors in a pine forest plantation scheme was a contribution of money's worth. His Honour emphasised the need to take a wide view of the meaning of contributions. He accepted that a contractual promise to contribute an interest in land to be used for the purposes of the venture was a contribution of money's worth: *Crocombe* at [49]-[54].

232 *Hance* was concerned with the tax treatment of income received and outgoings incurred in connection with the operation of a managed investment scheme. An issue arose as to the meaning of "money's worth". Their Honours (Finn, Dowsett and Edmonds JJ)

referred at [99]-[100] to English authorities, which were also cited in the present matter by Finkelstein J, for the proposition that the phrase means equivalent to money in the sense of something essentially material.

233 Finkelstein J was prepared to accept that the promises given by the group members were money or money's worth. He said at [19] that each promise was capable of being valued, notwithstanding the contingent nature of "the right that has been assigned".

234 The authorities to which the primary judge referred, including the decision of Buckley J in *Secretan v Hart (Inspector of Taxes)* (1969) 1 WLR 1599 at 1603, support the proposition that the phrase "money's worth" must be something which is essentially material.

235 This is borne out by a consideration of that phrase in its full statutory context.

236 Contributions of money or money's worth form part of the "scheme property" of a registered scheme: see definition in s 9. The "scheme property" of a registered scheme serves as a guide to what should be considered to be the property of an unregistered scheme: *Mier v F N Management Pty Ltd* (2005) 56 ACSR 93 at [26]-[28] per Keane JA.

237 The scheme property of a registered scheme (which includes contributions of money or money's worth) must be clearly identified as scheme property, held separately from the property of the responsible entity, and valued at regular intervals: s 601FC(1)(i) and (j). The responsible entity must hold it on trust for scheme members: s 601FC(2).

238 The duties and responsibilities of the responsible entity in relation to scheme property are clearly inapplicable to contributions that are not capable of being characterised as material in nature. But having regard to the mandate that the broad words of the definition should not be read down, I do not see that it is possible to exclude a contractual promise to pay a sum of money from the concept of "money's worth".

239 Whilst there may be practical difficulties in the discharge of the responsibilities of the responsible entity, for example, in relation to valuation of the contractual promises, this is not a reason for reading down the meaning of the statutory definition because provision is made

for exemptions of schemes which might unintentionally be caught by the definition: see s 601QA; *Australian Softwood Forests* at 130; *Knightsbridge Managed Funds* at [49].

240 It follows that, subject to the reservation I have expressed as to whether the contractual undertakings in relation to the Resolution Sum were contributions, I agree with the approach taken by the primary judge, namely that the promises given by the Funder and the group members were contributions of money's worth.

ISSUE 2 – WHETHER THE CONTRIBUTIONS WERE "CONSIDERATION TO ACQUIRE RIGHTS … TO BENEFITS PRODUCED BY THE SCHEME"

241 The primary judge held that this feature of the characteristics of a managed investment scheme was not satisfied.

242 The essence of his Honour's reasoning, expressed at [20]-[22], was that the group members' contributions were not consideration for the acquisition of a benefit produced by the scheme, because the object of the scheme was for group members to recover damages on a pre-existing cause of action against Multiplex. His Honour said:

> The recovery of damages or compensation is not, by any meaning, a "benefit" a group member has acquired. If any group member is entitled to recover damages or compensation from Multiplex, it is because there is in existence a justiciable cause of action against Multiplex, a cause of action which exists separately from, and is antecedent to, the scheme. No group member has given value or paid for those causes of action as part of the scheme.

243 The primary judge also said at [22] that although group members obtained a benefit from the scheme in that their claims are prosecuted "risk free", this is not a relevant benefit. He said that for an investor to obtain a benefit under a managed investment scheme, he or she must acquire a right to "some hoped for profit or gain the scheme will produce".

244 His Honour went on to say that although each group member may obtain an "advantage" from his or her risk free contribution to the scheme and from achieving economies of scale enabling the class action to be commenced, these are not benefits produced by the scheme.

245 It seems to me that there are a number of difficulties with his Honour's analysis.

246 First, the principal benefit which the group members acquired under the scheme was the contractual entitlement to a *pro rata* share of the balance of the Resolution Sum, after payment of their share of commissions, legal fees and disbursements.

247 This "benefit" is not identical to the justiciable cause of action which existed before the formation of the scheme. Rather, it is the realisation of the pre-existing cause of action and consists of a contractual entitlement to a share of the Resolution Sum.

248 Considerations relating to the administration of justice may suggest that the benefits which flow from a successful judgment ought to be treated as arising from the pre-existing cause of action. But once it is accepted that the scheme provides for a contractual benefit that is different from the pre-existing right, it seems to me to follow that it is a benefit produced by the scheme.

249 This is because "benefit" is defined in broad terms in s 9 of the Act to mean any benefit, whether by payment of cash or otherwise.

250 Also, under the 1971 amendments to the *Companies Act 1961*, an "interest" included any right to participate in the realisation of a business undertaking or scheme. This suggests that the contractual entitlement to receive a share of the Resolution Sum (if any) is a benefit produced by the scheme, and that the promise by a group member to pay commission and legal fees was the consideration for the acquisition of that benefit.

251 This approach is reinforced by the statements in the authorities that the words or expressions used in the earlier form of the definition are relevant to the meaning of the expressions contained in the new definition: *Knightsbridge Managed Funds* at [44]; see also Report of the Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money* at [3.5].

252 Second, in light of the broad definition of "benefit", there is force in the submission that the benefits comprised in the immunity from legal fees and exposure to costs orders are benefits produced by the scheme.

253 It is true that exposure to costs orders is limited by s 43(1A) of the *Federal Court Act* so that any analysis of the "benefits" of the scheme would have to bear in mind the incidents of representative proceedings under Pt IVA of that Act.

254 However, it is sufficient for present purposes to say that the conclusion I have reached about the benefit of the share in the Resolution Sum leads me to a different view from the primary judge on this feature of the scheme.

ISSUE 3 – WHETHER THE CONTRIBUTIONS "ARE TO BE POOLED"

255 The primary judge accepted that it may be possible to "pool" choses in action, but he found at [28]-[29] that the group members' contractual undertakings were not pooled in the present case.

256 His Honour considered the proper characterisation of the arrangements to be a series of bilateral arrangements, rather than an aggregation of the choses in action which are pooled in order to produce benefits for the members of the scheme.

257 It is true that, in a sense, every managed investment scheme involves a number of bilateral agreements. Nonetheless, I agree with the primary judge that the contractual promises in this case were not "pooled" in accordance with the meaning of that term as construed in the relevant authorities.

258 The meaning of the word "pooled" and the expression "to be pooled" were stated by Pullin J in *Knightsbridge Managed Funds* at [46] as follows:

> … the word ['pooled'] has its ordinary meaning. In particular, it will apply to describe arrangements where that is "a common fund into or from which all gains and loses of the contributors are paid" or "a fund made up of numerous payments from participants and used for a purpose they contemplate". The phrase "to be pooled … to produce" implies that the intention must be to pool the contributions and, by use of the pool, produce benefits. Pooling will occur where moneys are paid into or collected in an account: see *Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd* (2000) 35 ACSR 620 at [8], [9] and [13].

259 This statement was cited with apparent approval by Barrett J in *Takaran* at [13].

260 The same approach was adopted by the Western Australian Court of Appeal in *Burton v Arcus* at [60]-[66].

261 There are three principal reasons why the contractual undertakings of the group members are not "pooled" in accordance with those principles.

262 First, there is no common fund into or from which the gains or losses of the contributors are to be paid.

263 Whilst the Retainer and the Funding Agreements authorise MBC to receive the Resolution Sum and to combine it into one account, I do not consider this to be "pooling" in the sense required by the second limb of part (a)(ii) of the definition in s 9.

264 The payment of the Resolution Sum into one bank account, and the subsequent payments of the Funder's commission and group members' shares out of that account are merely matters of administrative convenience. They are carried out after the Resolution Sum has been received. They are not the pooling of the contributions required from the group members.

265 Second, other than in the sense referred to in the previous paragraph, there is no fund made up of payments or "contributions" from the participants and used for the purposes they contemplate.

266 Third, the expression "to be pooled" has a purposive element. This is clear from the observations of Pullin J and from the language of this limb of the definition. The contributions are to be pooled to produce benefit for the members; they are to be used for the purposes they contemplate: see also *Enterprise Solutions* at [9]; *Burton v Arcus* at [61]; *ASIC v Emu Brewery* at [101] per Simmonds J.

267 Here, the group members' contributions comprising their contractual authorisation to MBC to receive and disburse the Resolution Sum are not pooled to produce financial benefits.

268 It may be accepted that the scheme contemplates the identification of a sufficient number of group members so that funding becomes commercially worthwhile. Indeed, this may be part of what Barrett J referred to as the "blueprint" of the scheme: *Takaran* at [15].

269 But here, the purpose of the individual group members in giving their contractual undertakings was not to produce financial (or other) benefits from the pooling of those contributions. Rather, the purpose of them was to deal with the financial benefits consisting of the realisation of the members' claims for compensation, if and when produced.

270 The position here is unlike that which existed in *ASIC v Emu Brewery* where a form of promissory note was issued to lenders to raise funds. Those funds were then on-lent to another company in order to make possible particular finance arrangements for a specific project.

271 Simmonds J considered that the funds contributed to make possible the finance arrangements, which would produce the benefits contemplated by the contributors, were pooled: *ASIC v Emu Brewery* at [99].

272 Here, the contractual undertakings of group members may, in a loose sense, make possible the financial benefits that are contemplated. But it would be wrong to equate these promises with the provision of funds by a contributor which are combined in a discernible pool that is then used to produce financial benefits for the benefit of contributors.

ISSUE 4 – "COMMON ENTERPRISE"

273 The primary judge was of the view that the phrase "any of the contributions" makes it clear that not all of the contributions need be used in the enterprise. He considered it to be enough if a single contribution, for example the money contributed by the Funder, is used: see at [30].

274 With respect to his Honour, I do not agree that this is the proper construction of the second limb of part (a)(ii) of the definition of managed investment scheme in s 9.

275 The opening words of that limb have to be construed as a whole. As Mr Hutley SC submitted, the words “any of the contributions are to be pooled” imports the plural; there must be two or more contributions to be pooled. It is not possible to pool one contribution.

276 This is further emphasised by the use of the plural “are” in the expression “are to be pooled”. .It must follow that the words “used in a common enterprise” also imports the plural. What is required is that any two or more of the contributions are used in a common enterprise.

277 The relevant part of the phrase is “are to be pooled, or used in a common enterprise”. It is true that the word “are” does not specifically qualify the word “used”. But upon the meaning contended for by Multiplex, the phrase would have to be read as “is or are used in a common enterprise”. That would be contrary to a literal reading of the phrase and is not supported by the context.

278 Nevertheless, for reasons mentioned above, I think that the plural is necessarily imported by implications from the opening words and the context.

279 The primary judge went on to reject Multiplex’s submission that the network of contractual rights and obligations under the Retainer and the Funding Agreements constituted a common enterprise engaged in by group members, MBC and the Funder: see at [31].

280 His Honour said:

> In my opinion, where there is nothing more than an agreement to fund litigation on behalf of a group, whether that litigation be a representative proceeding, a class action or a test case, there is no joint participation in any enterprise. Nor, if it matters, is there a relationship between the group members and either the litigation funder or MB which could properly be described as an “enterprise”. For there to be an enterprise there must be something in the nature of a business or commercial undertaking; perhaps even something difficult, risky or hazardous. Litigation is not of that order.

281 Multiplex criticised his Honour’s suggestion that litigation is not “difficult, risky or hazardous”. The force of that criticism speaks for itself but it does not affect the primary judge’s conclusion.

282 A "common enterprise" was an element of the definition of "interest" in the 1971 amendments to the *Companies Act 1961*. For reasons already referred to, the meaning of the same term in the current definition is to be informed and assisted by the earlier authorities.

283 Those earlier authorities establish that an enterprise is a common enterprise if it consists of two or more closely connected operations with one part to be carried out by A and the other by B, each deriving a separate profit, and even in the absence of pooling or sharing of receipts of profit: *Australian Softwood Forests* at 133; *Knightsbridge Managed Funds* at [47].

284 The Retainer and the Funding Agreement provide for the Funder to obtain a separate profit, but this is the only aspect of the test stated by Mason J in *Australian Softwood Forests* that is satisfied.

285 Here it cannot be said that the contributions of the group members and the Funder, consisting of their respective contractual undertakings, are used in an enterprise where one part is carried out by the group members and another by the Funder, or by MBC.

286 The correct characterisation of the arrangements appears from the explanation of the nature of the promise to pay the Resolution Sum stated by a Full Court in *IMF (Australia) Ltd (ACN 067 298 088) v Meadow Springs Fairway Resort Ltd (In Liq) (ACN 084 358 592)* (2009) 253 ALR 240 at [72], [73] and [77]. It is part of the price or cost of the Funder's agreement to fund the litigation.

287 Moreover, it may be doubted whether the arrangements are properly characterised as an enterprise notwithstanding the risky nature of the undertaking. This is because I accept that a "common enterprise" must be a business or commercial undertaking. This seems to me to be clear from the use of that term in the earlier definition which was concerned with a "business undertaking or scheme" and profits derived from the efforts of a promoter.

288 Whilst a business undertaking is a broad concept, which would plainly extend to the efforts of the Funder, I doubt whether the contractual undertakings of group members can be so characterised. However, in view of the conclusion that I have reached that the network of

contractual arrangements is not a common enterprise, I do not need to deal further with this issue.

THE PRIMARY JUDGE'S REFERENCE TO POLICY AND PURPOSE

289 After construing the features of the "scheme", the primary judge stated that the "upshot" of his reasoning was that the arrangements between the Funder, MBC and the group members do not fall within the statutory definition: see [37].

290 He went on to say that it should not come as a surprise because the arrangements do not fall within the evident purpose of the definition "stripped of all its technicalities", and the registration of the scheme, if it were to fall within the definition, would not afford group members the protections of the kind contemplated by Pt 5C of the Act.

291 I reject the submission that this passage from his Honour's judgment indicates that he sought to construe the definition by impermissibly resorting to policy considerations to avoid the apparent unintended consequences of a literal reading of the definition.

292 First, it is clear that his Honour did construe, in an orthodox manner, the various limbs of the definition. Second, although I have departed from some of the reasons adopted by the primary judge, I have reached the conclusion that he was correct in finding that the arrangements do not constitute a managed investment scheme.

293 Third, I consider there is some force in the proposition that the context in which the statutory definition appears reinforces the view that the present arrangements do not constitute a managed investment.

294 The context includes the comments in the Explanatory Memorandum to the *Managed Investments Bill* and the recommendation of the Parliamentary Joint Committee. These comments, which I have set out above at [155] to [157], indicate that the regulatory regime introduced by Pt 5C was intended to govern collective investments where financial contributions are gathered from investors and are pooled or used in a common enterprise.

295 This can be seen most clearly in the requirements of registration (s 601ED(5)), operation by a public company with a financial services licence (s 601FA), and identification of scheme property which is to be held separately (s 601FC)(1)(i)) and on trust for members (s 601FC(2)).

296 What may be seen in the present case is the use by a promoter of the scheme, namely the Funder, of its own funds to obtain a financial benefit for the members. This is not to eliminate the possibility that MBC may also be a promoter. It serves to emphasise that what occurs here is not consistent with the regulatory purpose.

297 The evident purpose of Pt 5C is to protect the investment of pooled contributions, or contributions that are used in a common enterprise, by a person who has day-to-day control. For the reasons given above, that is not what occurs in the present case.

STANDING

298 Since in my view the arrangements constituted by the Retainer and the Funding Agreements do not constitute a managed investment scheme, it is unnecessary for me to consider the issue of standing.

299 However, there appears to be force in the submission of the respondents that Multiplex lacks the requisite standing.

300 This is most clearly illustrated by the provisions of s 601EE which stipulate the classes of persons who have standing to apply to wind up a scheme which operates in contravention of the requirement of s 601ED(5) that it be registered.

301 That is the contravention of which Multiplex complains, but it has no standing under s 601EE to have the scheme wound up. Standing is limited under that section to ASIC, the person operating the scheme, or a member of the scheme.

302 This may suggest that Multiplex has no standing to seek an injunction, but I do not need to express a concluded view on that question.

303 Nor do I need to consider whether a declaration would have had any utility: see eg *Australian Securities and Investments Commission v HLP Financial Planning (Aust) Pty Ltd* (2007) 164 FCR 487 at [14]; *Australian Securities and Investments Commission v FUELbanc Australia Ltd* (2007) 162 FCR 174 at [61].

CONCLUSION

304 The appeal should be dismissed. The orders I would make are that:

1. The appeal be dismissed

2. The appellants to pay the costs of the respondents of the appeal.

I certify that the preceding one hundred and ninety-one (191) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jacobson.

Associate:

Dated: 20 October 2009

Counsel for the First and Second Appellants:	Mr TF Bathurst QC with Mr SM Nixon and Mr DFC Thomas
Solicitor for the First and Second Appellants:	Mallesons Stephen Jaques
Counsel for the First and Second Respondents:	Mr J Sheahan SC
Solicitor for the First and Second Respondents:	Piper Alderman
Counsel for the Third, Fourth and Fifth Respondents:	Mr NC Hutley SC with Mr MBJ Lee
Solicitor for the Third Respondent:	Maurice Blackburn Pty Limited
Solicitor for the Fourth and Fifth Respondents:	Harris Legal
Date of Hearing:	5 August 2009
Date of Judgment:	20 October 2009

HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

Matter No S514/2005

CAMPBELLS CASH AND CARRY PTY LIMITED APPELLANT

AND

FOSTIF PTY LIMITED RESPONDENT

Matter No S515/2005

AUSTRALIAN LIQUOR MARKETERS PTY LIMITED APPELLANT

AND

DALE LESLIE BERNEY RESPONDENT

Matter No S516/2005

IGA DISTRIBUTION (VIC) PTY LIMITED APPELLANT

AND

WHELAN & HAWKING PTY LIMITED RESPONDENT

Matter No S517/2005

QUEENSLAND INDEPENDENT WHOLESALERS PTY LTD
APPELLANT

AND

SYDNEY RICHARD VEITCH MURRAY & ANOR RESPONDENTS

Matter No S518/2005

IGA DISTRIBUTION (SA) PTY LIMITED APPELLANT

AND

PAUL ASHLEY NEINDORF & ANOR RESPONDENTS

Matter No S519/2005

COMPOSITE BUYERS PTY LIMITED APPELLANT

AND

BARRY GEORGE WILLIAMSON & ANOR RESPONDENTS

Matter No S520/2005

IGA DISTRIBUTION PTY LIMITED APPELLANT

AND

JOANNE MARGARET GOW & ORS RESPONDENTS

Campbells Cash and Carry Pty Limited v Fostif Pty Limited
Australian Liquor Marketers Pty Limited v Berney
IGA Distribution (Vic) Pty Limited v Whelan & Hawking Pty Limited
Queensland Independent Wholesalers Pty Ltd v Murray
IGA Distribution (SA) Pty Limited v Neindorf
Composite Buyers Pty Limited v Williamson
IGA Distribution Pty Limited v Gow
[2006] HCA 41
30 August 2006
S514/2005 to S520/2005

ORDER

In each matter:

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 31 March 2005 and in their place order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation

A J Myers QC with H K Insall SC and A E Ryan for the appellants (instructed by Freehills)

S J Gageler SC with M J Leeming for the respondents (instructed by Robert Richards & Associates)

Interveners

H C Burmester QC with R A Pepper for the Attorney-General of the Commonwealth intervening in all matters (instructed by Australian Government Solicitor)

B W Walker SC with M C Walker seeking leave to intervene on behalf of IMF (Australia) Limited (instructed by McMahons National Lawyers)

K P Hanscombe SC with L W L Armstrong and K W Dawson seeking leave to be heard as amicus curiae for the Australian Consumers Association (instructed by Public Interest Advocacy Centre)

CATCHWORDS

Campbells Cash and Carry Pty Limited v Fostif Pty Limited

Practice – Representative proceedings – Supreme Court Rules 1970 (NSW), Pt 8 r 13 – Representative proceedings brought in each case by a licensed tobacco retailer to recover from its wholesaler licence fees paid from the beginning of the financial year commencing 1 July 1997 until the decision in *Ha v State of New South Wales* which declared the licensing scheme invalid and which licence fees were not paid to the taxing authorities – Proceedings financed by litigation funder – Proceedings intended to be conducted by litigation funder on behalf of those retailers who "opted-in".

Practice – Representative proceedings – Supreme Court Rules 1970 (NSW), Pt 8 r 13 – Whether provisions for representative proceedings in the Supreme Court Rules were validly engaged – "Same interest" – Common interest of fact or law – Whether there were, at the time the proceedings were commenced, numerous persons who had the same interest in the proceedings – Proceedings intended to be conducted on behalf of those retailers who subsequently "opted-in" – None had "opted-in" when proceedings commenced – Relationship between "same interest" and relief sought.

Practice – Representative proceedings – Stay of proceedings – Abuse of process – Public policy – Proceedings financed by litigation funder – Litigation funder sought out possible claimants – Retailer gave up to funder one-third of its claim – Whether the representative proceedings should be stayed as contrary to public policy or an abuse of process – *Maintenance, Champerty and Barratry Abolition Act* 1993 (NSW).

Practice – Discovery – Right to administer interrogatories in representative proceedings to identify others with the "same interest" in the proceedings.

Constitutional law (Cth) – Judicial power of Commonwealth – Abuse of process – Consistency of common law doctrine of abuse of process with judicial process.

Words and phrases – "abuse of process", "maintenance and champerty", "public policy", "representative proceedings", "same interest", "trafficking in litigation", "overriding purpose rule".

Maintenance, Champerty and Barratry Abolition Act 1993 (NSW).
Supreme Court Rules 1970 (NSW), Pt 1, r 3; Pt 8, r 13.

1 GLEESON CJ. The issues in these appeals, and the relevant facts, are set out in the reasons of Gummow, Hayne and Crennan JJ. I agree with what is said in those reasons concerning the issues of public policy and abuse of process. The Court of Appeal's decision, favourable to the respondents, on those issues has not been shown to be in error. The proceedings do not constitute an abuse of process, and there was no reason in public policy why they should have been stayed.

2 On the issue whether the provisions of the Supreme Court Rules 1970 (NSW), Pt 8 r 13(1), were validly engaged I would uphold the decision of the Court of Appeal. The decision of this Court in *Carnie v Esanda Finance Corporation Ltd*[1] appears to me to require that conclusion.

3 In order to explain why that is so, it is necessary to refer to some details of the litigation in *Carnie*, which, in certain respects, was a more difficult case for the plaintiffs than the present. The main problem is that the rule of court in question in *Carnie*, and in the present case, was based on a model taken from the nineteenth century, and was ill-adapted to the exigencies of modern commercial litigation funding. The rule is required to bear a weight for which it was not designed.

4 In *Carnie*, the persons on whose behalf the plaintiffs brought their representative action all had separate contracts with Esanda. There was, however, more to the problem than that. The contracts in question were variations of contracts of loan between Esanda, a finance company, and borrowers who were unable to comply with their original obligations, and required some relief. By the variation agreements, they were given an extended time to pay their debts. The plaintiffs originally sought a declaration that their variation agreement, and the variation agreements of other borrowers with whom Esanda had dealt in the same manner, were "null and void and of no effect"[2]. The reason for this was a failure to comply with certain provisions of the *Credit Act* 1984 (NSW) ("the *Credit Act*"). The plaintiffs brought the proceedings on behalf of themselves and all other persons who entered into variation agreements which did not comply with the relevant provisions of the *Credit Act*. The variation agreements, however, to the extent to which they relieved their original position, were beneficial to the borrowers[3]. There was a real doubt whether it was in the interests of the people the plaintiffs were claiming to represent to have their variation agreements declared null and void. The plaintiffs sought to

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1 (1995) 182 CLR 398.

2 *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382 at 386.

3 (1992) 29 NSWLR 382 at 385-386.

overcome this problem by modifying their claim to relief, but, as will appear, they were unable to make the problem disappear. It resulted from the nature of the contracts of variation. The three reports of the case, when it was before the Court of Appeal, then this Court, then Young J[4], all reveal the difficulty the plaintiffs had in formulating a claim for relief that did not have the capacity to disadvantage at least some of the people said to be represented.

5 This Court held that the provisions of Pt 8 r 13 were engaged. It also held, however, that there was a serious question whether the proceedings ought to continue as representative proceedings (a question of discretion as distinct from jurisdiction), and the matter was remitted to the Supreme Court of New South Wales. As Brennan J said[5], the application of the provisions of the *Credit Act* relied on "could prove to be a pyrrhic victory for a debtor".

6 When the matter went back to the Supreme Court of New South Wales, Young J recorded that a "very worrying aspect of [the] case [was] the possibility that [some borrowers] may, as a result of the plaintiffs' activity, which appears to have been taken without any reference to them, be left with a liability to Esanda"[6]. Young J imposed requirements as to explanatory circulars to be sent out in connection with an opt-in procedure that was devised in the absence of any provision in the rule to cover the situation. Subsequently, the plaintiffs announced that they were unwilling to incur the expense involved in meeting those requirements, and Young J, by consent, ordered that the action should not go ahead as a representative action.

7 A concern existed, and was recognized at all stages in *Carnie*, as to whether the proceedings were in the interests of all the other borrowers whom the plaintiffs claimed to represent. Yet this Court held that the rule was engaged and, in particular, that "the represented debtors" and the plaintiffs had the "same interest" in the action[7]. What was described by Mason CJ, Deane and Dawson JJ as "the requisite commonality of interest"[8] was held to follow from the common question of law (whether the variation agreements complied with the requirements of the *Credit Act*) that affected the rights and obligations that existed between Esanda and each individual borrower. This conclusion was

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4 *Carnie v Esanda Finance Corporation Ltd* (1996) 38 NSWLR 465.

5 (1995) 182 CLR 398 at 410.

6 *Carnie v Esanda Finance Corporation Ltd* (1996) 38 NSWLR 465 at 474.

7 The statement of claim said that the plaintiffs brought the proceedings on behalf of themselves and "the represented debtors" – see (1992) 29 NSWLR 382 at 385.

8 (1995) 182 CLR 398 at 405.

reached knowing that it was possible that some of the people whom the plaintiffs claimed to represent might be worse off if the action succeeded, and might not wish to be represented in the action. Hence the reservation of the discretionary issue, which turned out to be decisive. Yet, in *Carnie*, there was no other discretionary problem except such as arose from the potentially differing interests of some of "the represented debtors". If they all had the same interest in the broadest sense of that term, it is hard to see why there was any problem about allowing the proceedings to continue on a representative basis.

8 The inadequacy of the rule in making no prescription as to whether or not consent was required from borrowers who were represented, or as to procedures for opting in or opting out of the action, or as to notice to represented persons, or as to settlement or discontinuance of the proceedings, was treated by this Court as a matter affecting only the discretionary decision as to whether the proceedings should continue as discretionary proceedings, and not as affecting the initial engagement of the rule[9]. In the particular circumstances of that case, such inadequacy was a problem precisely because of the uncertainty about how some borrowers would be affected by the outcome of the action. From the point of view of the present plaintiffs, a notable feature of this Court's decision in *Carnie* is that the problem that was held to require the reservation and remitter of the discretionary issue was not regarded as standing in the way of a favourable decision on the jurisdictional issue. This Court held that the "same interest" existed, even though it appreciated that at least some of the borrowers, for good reason, might take a different view of where their basic interest lay. The decision to reserve and remit the discretionary issue highlights the decision on the jurisdictional issue.

9 On the question whether the rule is engaged, I am unable to distinguish *Carnie*. The statement of claim in *Carnie* asserted that the proceedings were brought by the plaintiffs on behalf of themselves and all other persons ("the represented debtors") who had entered into variation agreements which suffered from the same defects (in terms of compliance with the *Credit Act*) as did the plaintiffs' variation agreement. However, at the commencement of the action it was not known who those people were, or whether all (or any) of them would want to be represented in the action. The rule said nothing about obtaining their consent, or about procedures for opting in or opting out. This Court has left those difficulties to be worked out at the discretionary level of leave to proceed. In the present case the plaintiffs have sought to anticipate the problem. The summons contends that the proceedings are brought on behalf of themselves and all other persons ("the represented retailers") who paid the defendant supplier

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9 See, for example, (1995) 182 CLR 398 at 405 per Mason CJ, Deane and Dawson JJ.

during the relevant period the invalid excise (licence fee) and have not recovered the fee from the defendant. The summons in that respect appears to have been drafted to follow the form adopted in *Carnie*. The summons then anticipates an opt-in procedure, and says that the claim for relief will be made on behalf of the plaintiffs and members of the class earlier described who decide to opt in.

10 In the present case, there are common questions of law and fact affecting the rights and obligations between wholesalers and retailers resulting from the invalidity of the excise. Those identified by Mason P in the Court of Appeal[10] as common issues of law include not only the general matter of the scope of the principle established by *Roxborough v Rothmans of Pall Mall Australia Ltd*[11] but also the significance to the cause of action upheld in that case of certain specific legislation[12] and the relevance of the intention of individual retailers in evaluating their restitutionary claims. Common issues of fact included the invoicing practices of the defendants.

11 The relief sought in this case, unlike the relief sought in *Carnie*, does not appear to have the potential to harm the financial interests of any retailers. Of course, there may be other reasons why a retailer might prefer not to join in a lawsuit against a supplier. It is therefore, correct to say that participation in the proceedings, and any consequence for the rights of a retailer, is a matter of choice for the retailer. At the time of the commencement of the proceedings, it was not possible to identify any particular person who would opt in, and belong to the represented class. Yet in that respect, as it appears to me, the case is the same as *Carnie*.

12 Once it is accepted that the rule is engaged, and that the proceedings do not involve an abuse of process, then there is no independent ground for a conclusion that there should be an order, at least at this stage, that the matter should not proceed as a representative action. Mason P said:

> "One traditional function of representative proceedings is the avoidance of multiplicity of actions ... In my view there would have been a costly procedural morass if thousands of separate actions had been commenced by the various retailers ... The matters already addressed in these reasons demonstrate to my satisfaction that it is in the interests of justice to permit them to proceed along the lines of the opt-in basis proposed. Naturally, this will not preclude application for severance with

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10 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203.

11 (2001) 208 CLR 516.

12 *Business Franchise Licences (Tobacco) Act* 1987 (NSW) s 41(3).

> respect to particular issues that may have to be tried touching the rights of individual retailers."

13 There is no error in that approach.

14 There was an argument about the orders for discovery sought against the appellants, but to the extent that it raised issues going beyond abuse of process the argument was within a fairly narrow compass. Einstein J, at first instance, had found against the respondents on issues of jurisdiction and abuse of process. Mason P said:

> "Einstein J declined to make the orders for discovery/ interrogatories because he had concluded that the representative proceedings had the fundamental flaws discussed above. His Honour nevertheless indicated that there was no objection in principle to such relief, even for the purpose of ascertaining the members of the class. He pointed out that discovery for the purpose of identifying parties is a remedy known to the law."

15 Mason P went on to conclude that, once the conclusion that the proceedings were fundamentally flawed was rejected, there was no sufficient discretionary reason to refuse discovery *in limine*. The discretionary decision of the Court of Appeal on this point discloses no error, and should stand.

16 These appeals were heard together with *Mobil Oil Australia Pty Limited v Trendlen Pty Limited*. In that case a constitutional argument was raised, and the appellants in these appeals adopted the argument and were given leave to amend their notices of appeal accordingly. It is convenient to deal with the point in these reasons.

17 The first two steps in the argument are uncontroversial. The first step is that the proceedings involve an exercise of federal jurisdiction. The underlying foundation of the claim made in the proceedings is that the amounts sought to be recovered were duties of excise rendered invalid by s 90 of the Constitution. The second step is that federal jurisdiction can be exercised only in respect of a matter.

18 The third, and controversial step, is that there is no matter in relation to which federal jurisdiction may be exercised. Rather, it is said, there is a litigation funder seeking, for its own profit, to manufacture controversies between as yet unidentified retailers and their suppliers. In this context, "matter" does not mean a legal proceeding. For there to be a matter there must be "some immediate right,

duty or liability to be established by the determination of the Court"[13]. It is not necessary that there be a conscious disagreement between individuals. Representative proceedings, even of the most traditional kind, commonly involve circumstances in which some, perhaps many, group members are not aware of the proceedings. This point was made in *Mobil Oil Australia Pty Limited v Victoria*[14]. Furthermore, as the Attorney-General of the Commonwealth, intervening, pointed out, it is not unusual for judicial power to be exercised in relation to controversies generated by one person on behalf of another, such as a case where a person under a disability makes a claim through a tutor, next friend or guardian.

19 Because a matter is distinct from legal proceedings, it is "identifiable independently of the proceedings which are brought for its determination"[15]. The rights and liabilities as between retailers and their suppliers in consequence of the imposition of charges on account of an excise later held to be constitutionally invalid are the subject of an actual dispute between some retailers and some suppliers, and of a potential dispute between others. Even if the intervention of a litigation funder, seeking to promote an assertion by more retailers of their rights, be regarded as some form of intermeddling, there is no justification for denying the existence of a matter.

20 An alternative submission, also based on the assumption that what is involved is an exercise of federal jurisdiction, is that the common law doctrine of abuse of process is an inadequate rubric under which to consider the objections that can be taken to this kind of litigation, and that the proceedings offend normative implications to be derived from the structure of Ch III of the Constitution.

21 In *Chu Kheng Lim v Minister for Immigration*[16], Brennan, Deane and Dawson JJ identified as a limitation on the exercise of judicial power the requirement of consistency "with the essential character of a court or with the nature of judicial power". For the reasons given by Gummow, Hayne and Crennan JJ in their discussion of the abuse of process argument, with which I agree, there is no inconsistency with the essential character of a court or with the nature of judicial power involved in the exercise of federal jurisdiction invoked in the present case.

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13 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

14 (2002) 211 CLR 1 at 27 [22].

15 *Fencott v Muller* (1983) 152 CLR 570 at 603.

16 (1992) 176 CLR 1 at 27.

22 The appeals should be dismissed with costs.

23 GUMMOW, HAYNE AND CRENNAN JJ. In 1997, each of the appellants carried on business selling tobacco products by wholesale to supermarkets and other retailers. Together, the appellants had about 21,000 customers. As wholesalers of tobacco products the appellants paid licence fees pursuant to the *Business Franchise Licences (Tobacco) Act* 1987 (NSW) and equivalent legislation of other States and the Australian Capital Territory. Those licence fees were payable monthly and were calculated as a nominal sum plus a prescribed percentage of the value of tobacco sold in a period preceding the licence period.

24 On 5 August 1997 this Court held, in *Ha v New South Wales*[17], that the licence fees were duties of excise within s 90 of the Constitution, and hence were invalid. Subsequently, in *Roxborough v Rothmans of Pall Mall Australia Ltd*[18], this Court held that retailers, who had bought tobacco products from a licensed wholesaler on terms that the "invoiced cost" comprised the wholesale price of the products and a further amount representing the licence fee, could recover from the wholesaler, as money had and received, the amount paid for the licence fee and which the wholesaler had not remitted to the taxing authority by the date of the decision in *Ha*. The Court further held, in *Roxborough*, that the action for money had and received is not defeated simply because the plaintiff had recouped the outgoing from others (as the appellants in *Roxborough* had when they sold the goods to customers at a price which covered the amount they sought to recover from the wholesaler).

25 Mr Adrian Firmstone is the sole director of Firmstones Pty Ltd ("Firmstones"), a company which trades as "Firmstone & Feil, Consultants". Mr Firmstone said Firmstones provided "advice and assistance in relation to indirect tax matters, including with respect to the recovery for tobacco retailers of amounts referable to state tobacco licence fees paid by tobacco retailers to tobacco wholesalers". During 2002, Firmstones sought to encourage tobacco retailers to claim from wholesalers a refund of tobacco licence fees which the retailers had paid but the wholesalers had not remitted to the relevant taxing authority.

26 From March 2002, Firmstones wrote to tobacco retailers asking for authority to act on the retailers' behalf in recovering these amounts. The letters took various forms but all said that Firmstones' "success fee" was $33^1/_3$ per cent of any money received by the retailer from the tobacco wholesaler. If costs were

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17 (1997) 189 CLR 465.

18 (2001) 208 CLR 516.

awarded to the retailer, Firmstones would retain the sum awarded; if costs were awarded against the retailer, Firmstones would bear those costs. Reference was made in the letters to another company (GST Partners Pty Ltd or, later, Horwath GST Pty Ltd) being responsible for "the administration of this project", but it is not necessary to examine what that other company did, or how the fees received by Firmstones were to be divided between Firmstones and the other company.

27 In about the middle of September 2002, Firmstones retained a solicitor, Robert Richards & Associates, to act in what Mr Firmstone described to the sole principal of that firm, Mr Richards, as "[o]ur tobacco licence fee recovery project". Mr Richards was to be "the project's solicitor".

28 During 2002 and the first half of 2003, a number of claims were made and settled, but Firmstones believed that there were many retailers who had not considered making a claim. Firmstones formed the view that the limitation period for retailers to make claims against wholesalers expired at the end of June 2003[19].

The proceedings

29 On 30 June 2003, Firmstones caused Mr Richards to issue a number of summonses in the Commercial List of the Equity Division of the Supreme Court of New South Wales. Among them were summonses instituting the seven proceedings which give rise to the present appeals. It is not necessary to consider the other proceedings. For all practical purposes, the summonses issued in the seven matters which give rise to the present appeals were identical. It is convenient to take the proceedings between Fostif Pty Limited ("Fostif") as plaintiff, and Campbells Cash and Carry Pty Limited ("Campbells") as defendant, as typical of the others. The steps which have been taken in those proceedings have been taken in the others.

30 The Fostif proceedings were commenced as representative proceedings pursuant to Pt 8 r 13 of the Supreme Court Rules 1970 (NSW) ("the 1970 Rules")[20]. The plaintiff's contentions, recorded in the summons, alleged that the plaintiff "brings these proceedings on behalf of themselves and all other persons (the 'represented retailers')" who:

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19 *Limitation Act* 1969 (NSW), s 14(1)(a).

20 Representation of concurrent interests is now dealt with in Div 2 of Pt 7 of the Uniform Civil Procedure Rules 2005 (NSW).

"(a) during the whole or some part of the Relevant Period:

(i) were retailers of tobacco products carrying on business in one or more of New South Wales, Queensland, Victoria, South Australia, Australian Capital Territory and Tasmania;

(ii) purchased tobacco products sold to them by the defendant;

(iii) paid to the defendant the amount of the licence fee referable to the sales in (ii) as separately identifiable and severable parts of the consideration payable in respect of each sale;

(b) have not recovered from the defendant an amount or amounts referable to the licence fees paid to the defendant as referred to in (a)(iii) or otherwise released or agreed to release the defendant from any liability or alleged liability to make payment to them of the amount in (a)(iii)."

31 No person was named in the summons as a "represented retailer". Rather, the summons provided for what it described as "opt-in" procedures by which persons might later consent to becoming a plaintiff. This procedure was described in the summons in the following terms:

"1. The plaintiff claims the relief set out in this Summons on behalf of themselves and the class of unnamed persons referred to in paragraph 2 of the plaintiff's contentions below whom the plaintiff represents in the proceedings pursuant to the Supreme Court Rules 1970, Part 8, rule 13. By reason of the 'opt-in' procedures referred to below, at the time of judgment there will be no unnamed person in respect of whom judgment is sought. Once a member of the class of represented retailers has signed and returned an 'opt-in' notice to the plaintiff's solicitor that person will become a named plaintiff in the proceedings entitled to judgment in his, her or its favour.

2. The plaintiff proposes to give the unnamed members of the class whom the plaintiff represents an opportunity to decide whether they wish to be involved in the proceedings by the sending of an 'opt-in' notice to these persons. The members of the class will be required to sign and return the 'opt-in' notice to the solicitors for the plaintiff in order for these persons to become involved as plaintiff in the proceedings. Receipt by the plaintiff's solicitor of a signed 'opt-in' notice will establish that the represented retailer has consented to becoming a plaintiff."

Because the plaintiff and its solicitors were said to know the names and addresses of "some but not all [of] the unnamed members of the class whom the plaintiff represents" it was said that "it will be necessary for the defendant, who possesses this information, to discover it in the proceedings". The plaintiff said, in its summons, that it would "seek orders for such discovery from the Court at the earliest opportunity".

The applications at first instance

32 As foreshadowed in the summons, the plaintiff applied for orders that the defendant give discovery of documents and discovery by answering interrogatories revealing the names and addresses of "represented retailers" with whom the defendant had dealt between 1 July 1997 and 5 August 1997. The plaintiff further sought directions that, within 28 days of the defendant giving discovery, the plaintiff should send to each represented retailer an opt-in notice and accompanying letter. Both the draft notice, and the letter which it was proposed should be sent with it, recorded that Firmstones would receive $33^1/_3$ per cent of any amounts recovered, together with any amount awarded to the plaintiff as costs. The draft opt-in notice gave Firmstones authority to act on behalf of the retailer concerned in relation (among other things) to the conduct of, and the giving of instructions in, the proceedings, and "entering into settlement agreement(s) with the defendant(s) (provided the amount is not less than 75% of the principal amount claimed from the defendant(s))".

33 In response to these applications by the plaintiff, the defendant gave notice of motion for orders that the proceedings be dismissed or stayed as an abuse of process, or that the proceedings be struck out in so far as they purported to be representative proceedings, or alternatively not continue as representative proceedings.

34 On 11 September 2003, Einstein J published[21] reasons for decision concluding that there was "insufficient commonality of interest demonstrated presently to permit of a finding that it is appropriate for the proceedings to be permitted to go forward as representative proceedings". That conclusion was expressed as founding an order, pursuant to Pt 8 r 13(1), that the proceedings not continue as representative proceedings rather than as a conclusion about whether the rule had been validly engaged at the time the proceedings were commenced. Several distinct reasons were given for the conclusion that the Court should order

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21 *Keelhall Pty Ltd t/as "Foodtown Dalmeny" v IGA Distribution Pty Ltd* (2003) 54 ATR 75.

that the proceedings not continue as representative proceedings. In particular, Einstein J concluded that: (a) the "litigation funding arrangements proposed by the opt-in procedure are against public policy as well as comprising an abuse of the court process"; (b) the persons whom the plaintiff proposed to represent "cannot be said to have the 'same interest' in the proceedings"; and (c) contrary to the so-called "overriding purpose rule"[22], to permit the proceedings to go forward as representative proceedings, "far from facilitating the just, quick and cheap resolution of the real issues, would give rise to a procedural morass likely ultimately to be able to be resolved only by a disaggregation of the representative proceedings into separate proceedings". The parties were given leave to address further submissions about the orders that should be made.

35 Evidence tendered on the hearing of the applications with which the reasons for decision dealt had revealed that Firmstones had, by that time, already been retained by about 2,100 persons or entities who, so it was asserted, fell within the class of represented retailers described in the summonses that had been issued. After the reasons for decision were published, the plaintiff applied for orders that those who had already been retained by Firmstones should be given leave to elect to be joined as plaintiffs in the proceedings by filing a written consent to joinder.

36 On 7 November 2003, having considered the further application made by the plaintiff, Einstein J made orders[23] in the Fostif proceedings (and in the other proceedings) that they not continue as representative proceedings, that the plaintiff's applications for discovery and directions for the giving of opt-in notices be dismissed, and that the application to permit the joinder of additional plaintiffs also be dismissed.

37 Fostif (and the plaintiffs in each of the six other proceedings which give rise to the present appeals) appealed to the Court of Appeal (by leave of that Court) against the orders made by Einstein J. The Court of Appeal (Mason P,

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22 Supreme Court Rules 1970 (NSW), Pt 1 r 3, sub-rr (1) and (2) of which provided:

> "(1) The overriding purpose of these rules, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in such proceedings.
>
> (2) The Court must seek to give effect to the overriding purpose when it exercises any power given to it by the rules or when interpreting any rule."

23 *Ekaton Corporation Pty Ltd v Shahin Enterprises Pty Ltd* [2003] NSWSC 1018.

Sheller and Hodgson JJA) allowed[24] the appeals, set aside the orders of Einstein J and ordered that the proceedings continue as representative proceedings.

38 By special leave, the respondents in the Court of Appeal appeal to this Court.

<u>The issues in this Court</u>

39 The issues that arise in the appeal to this Court can be identified as being:

(a) whether the provisions for representative proceedings made by the 1970 Rules were validly engaged;

(b) if those Rules were validly engaged, whether the proceedings nonetheless should have been stayed as being contrary to public policy or as an abuse of process; and

(c) if those Rules were validly engaged, and if the proceedings were not to be stayed, was Einstein J right to order that the proceedings not continue as representative proceedings?

The parties' arguments in this Court were principally directed to the questions about public policy and abuse of process said to arise from the arrangements Firmstones had made, and proposed to make, with "represented retailers". It is convenient to deal first, however, with the issue about the representative character of the proceedings (again by reference to the Fostif proceedings) and to begin by examining the relevant rules of court.

40 In the submissions, the parties tended to speak of "class actions" as if there were a single, distinct kind of proceedings available by that name. However, the rules governing representative or group proceedings vary greatly from court to court. Two things of present significance follow from this. The first is that close attention must be given to the particular Rules of the Supreme Court upon which this litigation turns. The second is that the outcome of the present proceedings with respect to those Rules is not to be taken necessarily as indicating that there would have been the same outcome in proceedings under the rules of other courts.

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24 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203.

The 1970 Rules, Pt 8 r 13

41 At the time the proceedings were instituted, Pt 8 r 13 of the 1970 Rules provided:

> "**Representation: concurrent interests**
>
> **13** (1) Where numerous persons have the same interest in any proceedings the proceedings may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
>
> (2) At any stage of proceedings pursuant to this rule the Court, on the application of the plaintiff, may appoint any one or more of the defendants or other persons (as representing whom the defendants are sued) to represent all, or all except one or more, of those persons in the proceedings.
>
> (3) Where, under subrule (2), the Court appoints a person who is not a defendant, the Court shall make an order under rule 8 adding him as a defendant.
>
> (4) A judgment entered or order made in proceedings pursuant to this rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.
>
> (5) An application for leave under subrule (4) shall be made by motion, notice of which shall be served personally on the person against whom it is sought to enforce the judgment or order.
>
> (6) Notwithstanding that a judgment or order to which an application under subrule (5) relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from the liability.
>
> (7) This rule does not apply to proceedings concerning:
>
> (a) the administration of the estate of a deceased person; or
>
> (b) property subject to a trust."

Representative proceedings

42 The form of Pt 8 r 13 of the 1970 Rules can be traced through O 16 r 9 of the English Rules of the Supreme Court 1883, via r 10 of the Rules of Procedure set out in the schedule to the *Supreme Court of Judicature Act* 1873 (UK), to the former Chancery practice[25]. The former Chancery practice with respect to representative proceedings was considered by this Court in *Wong v Silkfield Pty Ltd*[26].

43 The former Chancery practice was governed by two principles. The first was that all persons materially interested in the subject-matter of the suit ought generally to be made parties so as to settle the controversy by binding to the final decree those interested. The second principle was that, in observing the first, care was required to avoid embracing in the proceedings parties with an insufficient interest and thereby risking a demurrer on the ground of multifariousness.

44 These questions of parties were determined "upon considerations of convenience with regard to the circumstances of each particular case"[27].

45 In 1901, Lord Macnaghten said[28] that "[t]he old rule in the Court of Chancery was very simple and perfectly well understood ... Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent." Part 8 r 13 of the 1970 Rules, like other rules derived from O 16 of the 1883 English Rules, referred to "numerous persons [having] the same interest in any proceedings". It is not to be supposed that referring to "the same interest" was intended to give the rule a narrower operation than the former Chancery practice when that practice was described by reference to "common interest". Rules like Pt 8 r 13, and the former Chancery practice, were intended to facilitate

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25 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 29-30 [33]-[34].

26 (1999) 199 CLR 255 at 261-263 [13]-[17] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ.

27 *Coates v Legard* (1874) LR 19 Eq Cas 56 at 59 per Sir George Jessel MR. See also *Templeton v Leviathan Proprietary Ltd* (1921) 30 CLR 34 at 76 per Starke J; *Cockburn v Thompson* (1809) 16 Ves Jun 321 at 325-326 [33 ER 1005 at 1007]; *Willats v Busby* (1842) 5 Beav 193 [49 ER 551].

28 *Duke of Bedford v Ellis* [1901] AC 1 at 8.

the administration of justice[29] and neither the Rules nor the former practice was to be restricted "to cases for which an exact precedent can be found in the reports"[30]. The principle on which rules of this kind were based was said[31], in 1901, to be "as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires".

46 Even so, in 1910, the English Court of Appeal held[32] that the rule could not be engaged where plaintiffs sued for damages for breach of separate and individual contracts. But such a narrow approach to Pt 8 r 13 of the 1970 Rules was rejected by this Court in *Carnie v Esanda Finance Corporation Ltd*[33]. The Court held in *Carnie* that persons having separate causes of action in contract or tort may have "the same interest" in proceedings for the purposes of Pt 8 r 13(1). The fact that the claims arose under separate contracts was held not sufficient of itself to defeat the rule's requirement that numerous persons have the same interest in the proceedings.

47 It is to be noted that Pt 8 r 13 of the 1970 Rules contained few provisions equivalent to those found in the more elaborate regulation of representative proceedings provided by Pt IVA (ss 33A-33ZJ) of the *Federal Court of Australia Act* 1976 (Cth). In particular, there are no provisions of the 1970 Rules that are immediately equivalent to the provisions of s 33C(1)(a) (requiring that seven or more persons have claims against the same person for the procedures of Pt IVA to be engaged), s 33J (providing for group members to opt out of representative proceedings), s 33T (empowering the Court to substitute another group member for a representative party not able adequately to represent the interests of the group) or s 33V (in so far as it requires the approval of the Court for settlement or discontinuance of the proceedings).

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29 *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 at 404 per Mason CJ, Deane and Dawson JJ.

30 *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426 at 443 per Lord Lindley.

31 *Taff Vale* [1901] AC 426 at 443 per Lord Lindley.

32 *Markt & Co Limited v Knight Steamship Company Limited* [1910] 2 KB 1021.

33 (1995) 182 CLR 398.

48 The absence of more elaborate provisions of the kind made by Pt IVA was held, in *Carnie*, to be no reason to give Pt 8 r 13 of the 1970 Rules a narrow construction or a narrow operation. As Mason CJ, Deane and Dawson JJ said[34]:

> "Much as one might prefer to have a detailed legislative prescription by statute or rule of court regulating the incidents of representative action, r 13 makes provision for an action to proceed as a representative action in a context in which there is no such legislative prescription. The absence of such a prescription does not enable a court to refuse to give effect to the provisions of the rule. Nor, more importantly, does the absence of such prescription provide a sufficient reason for narrowing the scope of the operation of the rule, as the Court of Appeal did[35], without giving effect to the purpose of the rule in facilitating the administration of justice."

Nevertheless, accepting these general propositions, the question which the present rule presents is, as Toohey and Gaudron JJ pointed out in *Carnie*[36]:

> "Do numerous persons have the same interest in the action which the [plaintiff has] commenced? If they do not then that is the end of the matter. If they do, then the action is properly begun and, unless the Court otherwise orders, it may be continued."

<u>Numerous persons having the same interest?</u>

49 In this Court and in the courts below, those who are appellants in this Court (the defendants to the original proceedings) submitted that there were not numerous persons who had the same interest in the proceedings which had been commenced. This submission was put in a number of ways. The appellants emphasised what they submitted was the circular nature of the definition of represented retailers, in effect, as those entitled to judgment against the appellants. This manner of identifying those who were, or were to be, represented was said to reveal that there was no substantial issue of fact or law between the persons thus identified and the appellants that was common to the represented parties. The appellants submitted that the law being settled in *Roxborough*, all that would be in issue was an examination of the separate contracts which each retailer had made with the appellant concerned.

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34 (1995) 182 CLR 398 at 404.

35 *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382.

36 (1995) 182 CLR 398 at 421.

50 As noted earlier, the bare fact that the claims made by those who are represented by the named plaintiff in a representative action arise out of separate contracts does not necessarily deny the existence of a common interest between the represented parties and the defendant. In this case, a common issue of fact and law could be found to exist in deciding which particular transactions undertaken by the parties fell within the principles decided in *Roxborough*. The appellants' submissions assumed that that inquiry would be very simple. That may or may not be so, but even if it is, the fact that an issue may be simply resolved does not deny its existence, and does not demonstrate that it is not an issue common to a number of claims arising out of separate contracts.

51 In the course of oral argument, however, a more deep-seated question emerged concerning the application of Pt 8 r 13(1) to the present proceedings. The authority given by Pt 8 r 13(1) to commence representative proceedings depended upon there being, at the time the proceedings were commenced, "numerous persons [having] the same interest" in the proceedings. So much follows from the opening clause of the rule: "[w]here numerous persons have the same interest in any proceedings the proceedings may be commenced". The procedure contemplated in these proceedings was that those who wished to take the benefit of the proceedings must "opt-in". None had done so when the proceedings commenced. Were there, at the time these proceedings were commenced, numerous persons who had the same interest in the proceedings?

52 The summons by which the proceedings were commenced first identified the persons on whose behalf the plaintiff brought the proceedings as "themselves and all other persons" who fell within the description given in the summons of "represented retailers". That description, the text of which is set out earlier in these reasons, identified "represented retailers", in effect, as any person who could make a claim against the defendant like the claim made in *Roxborough* and who had not released the claim or been paid. But the summons went on to describe an "opt-in" procedure which, if followed, would bring about the result that "at the time of judgment there will be no unnamed person in respect of whom judgment is sought". Read as a whole, it is apparent that the summons sought to institute proceedings the result of which would bind only those from within the class of represented retailers who actively chose to be bound.

53 That some (even all) of those whom it is alleged have the same interest as the named plaintiff know nothing of proceedings that are instituted on their behalf would not, standing alone, deny that numerous persons have the same

interest in the proceedings[37]. Such ignorance (if it persisted) might later be said to be relevant to whether the action should be continued as representative proceedings, but that is beside the present point which looks to the institution of the proceedings, not their continuation.

54 Accepting then that the rule did not require the separate identification of, and consent from, those who were said to constitute the "numerous persons", was there, nonetheless, a class of persons sufficiently identified that together could be seen to be "numerous persons [having] the same interest" in the proceedings? That question is not to be asked or answered in the abstract. It is a question that must be asked and answered with respect to the particular proceedings.

55 In the present cases, that requires consideration of the whole of the summons issued in each matter. Not least is that necessary because questions about the engagement of Pt 8 r 13 must be considered having regard to the purposes of the rule. A central objective of the representative procedures for which Pt 8 r 13 provided was the avoidance of multiplicity of proceedings and the efficient determination, once and for all, of controversies in which parties have the same interest. An important indication of the nature of the interest that numerous persons must have in proceedings instituted under Pt 8 r 13 was given by Pt 8 r 13(4). A judgment entered or order made in the proceedings "shall be binding on all the persons as representing whom the plaintiffs sue". What the rules were intended to achieve was a single judicial determination of common issues in a way that binds those who were interested in those issues. Whether the present matters fell within Pt 8 r 13(1) must be considered having regard to what the summons said about parties, what issues were raised in the proceedings, and what relief was sought in the proceedings.

56 The summons issued in the Fostif matter contained a prayer for relief claiming "[j]udgment against the defendant in favour of the plaintiff together with interest pursuant to section 94 of the Supreme Court Act (NSW)", "further or other orders", and costs. The nature or form of judgment sought was not further specified in the prayer for relief but it was apparent, from other parts of the summons (particularly the statement of the nature of the dispute and the statement of the plaintiff's contentions), that Fostif claimed judgment for a money sum, and that any who later chose to opt-in to the proceedings would make like claims. The amount of Fostif's claim was set out in a schedule to the summons. But when instituted, the proceedings made no other claim.

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37 *Wilson v Church* (1878) 9 Ch D 552; *Fraser v Cooper, Hall & Co* (1882) 21 Ch D 718.

57 At the time the summons was issued there were persons, other than Fostif, whom it could be said would be "affected" by a decision of the claim made by Fostif against Campbells. The most obvious persons "affected" were any other persons who had bought tobacco products from Campbells by transactions relevantly identical to the transactions identified as having been made between Fostif and Campbells. But when the proceedings were instituted, Fostif made no claim on behalf of any of those other purchasers. Their participation in the proceedings, and any consequence for their rights, depended upon them choosing to join the proceedings. Deciding Fostif's claim would decide no issue between any of those other purchasers and Campbells unless or until those others chose to participate in the proceedings. The only effect that the decision of Fostif's claim would have would be its precedential value.

58 At the time the summons was issued to commence the Fostif proceedings, there were no persons, other than Fostif, who had an interest in the proceedings which were instituted, as distinct from an interest in knowing which way the issues raised in those proceedings were decided. No other person had an interest in those proceedings because no order made or judgment given in the proceedings would bind that other person. No grant of declaratory relief was sought to resolve or determine any question[38] common to the "numerous persons" alleged to have "the same interest in the proceedings". The summons is thus to be distinguished from the statement of claim in *Carnie*, where the plaintiffs claimed declarations for the common benefit of "the represented debtors"[39]. No doubt it was hoped that the procedures for "opting-in", which the summonses contemplated would be followed *after* the proceedings had been instituted, would lead to there being numerous persons with the same interest, but that was a hope or expectation about future events.

59 It may readily be accepted that, when the proceedings in *Carnie* were issued, it may have been difficult to list all of the persons whom the plaintiffs represented. And some who met the relevant criteria may later have sought exclusion from representation. In that sense, one could not say at the time the proceedings in *Carnie* were issued who the plaintiffs represented. But it was clear that there were numerous persons who were represented. By contrast, in the *Fostif* proceedings, where it was sought to represent only those from within the class of represented retailers who actively chose to be bound, it could not be said that there was *any* person, let alone numerous persons, whom the plaintiff would represent.

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38 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 267 [27].

39 *Esanda Finance Corp v Carnie* (1992) 29 NSWLR 382 at 386.

60 The requirements of Pt 8 r 13(1) of the 1970 Rules were not met in the present matters. Neither when the proceedings were instituted, nor when Einstein J made his orders, were there numerous persons having the same interest in the proceedings that were commenced. The only persons who then had an interest in the proceedings were the named plaintiffs. That would be reason enough to conclude that the Court of Appeal erred in ordering that the proceedings should continue as representative proceedings. It is as well, however, to go on to consider the larger questions of public policy and abuse of process which were agitated.

Public policy and abuse of process in the courts below

61 As noted earlier, Einstein J held that the litigation funding arrangements, that had already been made and were proposed to be made by Firmstones, were "against public policy as well as comprising an abuse of the court process". It may be doubted, however, that any clear distinction was drawn at first instance between the principles that were to be applied under those two headings. At the least they were understood as being closely interconnected.

62 Campbells (and the defendants in the other proceedings) had relied in their notice of motion upon Pt 13 r 5 and Pt 15 r 26 of the 1970 Rules for their application that the proceedings be dismissed as an abuse of the process of the Court. The relationship between the 1970 Rules and the inherent power of the Supreme Court with respect to abuse of its process was considered in *Batistatos v Roads and Traffic Authority (NSW)* by Gleeson CJ, Gummow, Hayne and Crennan JJ[40]. No point respecting that relationship was taken by the parties in the present appeals. It appears also to have been assumed that what was engaged here by the reliance upon public policy was that category of abuse concerned with invocation of the procedures of the Court for an illegitimate purpose[41].

63 The Court of Appeal concluded that neither the role occupied by Firmstones in connection with the litigation, nor the particular funding arrangements that were made and proposed to be made, justified the staying of the proceedings. The Court concluded that whether proceedings funded by a litigation funder are an abuse of process depends on whether the role of that funder "has corrupted or is likely to corrupt the processes of the court to a degree

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40 (2006) 80 ALJR 1100 at 1108-1110 [19]-[26]; 227 ALR 425 at 431-433.

41 *Batistatos v Roads and Traffic Authority (NSW)* (2006) ALJR 1100 at 1108 [15]; 227 ALR 425 at 430.

that attracts the extraordinary jurisdiction to dismiss or stay permanently for abuse of process"[42]. In the present matters, the Court of Appeal identified several facts as requiring the conclusion that there was no abuse of process. First, the proceedings were under judicial supervision[43]; second, Firmstones' control of the litigation was "not excessive"[44]; third, Firmstones' fees were not excessive[45]; fourth, there was a solicitor on the record[46]; and fifth, the individual claims were small (making separate recovery processes unlikely[47]).

64 At first instance, Einstein J had characterised[48] Firmstones' activities as "trafficking in the retailers' litigation", and made[49] a number of more specific criticisms of the relationships that existed between Firmstones, the retailers and the solicitor engaged by Firmstones to act in "the project". Particular emphasis was given to statements made in correspondence between Firmstones and the solicitor to the effect that the solicitor was engaged by Firmstones as principal, not as agent for the retailers, and that Firmstones would "liaise with [its] clients, [the solicitor] will not directly liaise with [Firmstones'] clients".

65 In the Court of Appeal, Mason P, who gave the principal reasons of the Court, rejected[50] the criticisms made of the relationship between the solicitor and the retailers, concluding that the solicitor had adopted the normal role as a solicitor on the record in the litigation. Questions of public policy were treated[51] as having turned at first instance on whether the funding arrangements were

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42 (2005) 63 NSWLR 203 at 234 [132].

43 (2005) 63 NSWLR 203 at 235 [136].

44 (2005) 63 NSWLR 203 at 235 [137].

45 (2005) 63 NSWLR 203 at 236 [144].

46 (2005) 63 NSWLR 203 at 235 [136].

47 (2005) 63 NSWLR 203 at 237 [149].

48 *Keelhall Pty Ltd t/as "Foodtown Dalmeny" v IGA Distribution Pty Ltd* (2003) 54 ATR 75 at 100 [60].

49 (2003) 54 ATR 75 at 101 [64].

50 (2005) 63 NSWLR 203 at 223-224 [86].

51 (2005) 63 NSWLR 203 at 227 [105].

champertous. Mason P said[52] that the policy of the law had changed: "[t]he law now looks favourably on funding arrangements that offer access to justice so long as any tendency to abuse of process is controlled". Mason P concluded[53] that the present litigation should be regarded as falling within the principle that "[p]ublic policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation"[54].

The *Maintenance, Champerty and Barratry Abolition Act* 1993 (NSW)

66 Examination of questions of public policy must begin from consideration of the *Maintenance, Champerty and Barratry Abolition Act* 1993 (NSW) ("the Abolition Act"). By the Abolition Act the offence of maintenance, including champerty that, but for s 3 of the Act, would be punishable by the common law, was abolished. Section 4 of the Abolition Act provided that "[a]n action in tort no longer lies on account of conduct known as maintenance (including champerty)". Sections 3 and 4 indicated that the principles respecting maintenance and champerty were expressed both in the criminal law and the law of tort. But s 6 of the Abolition Act assumed that when the statute was enacted there may have been a more broadly based rule in the Australian common law. Section 6 provided that:

> "This Act does not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal, whether the contract was made before, or is made after, the commencement of this Act."

67 It is evident from s 6 of the Abolition Act that questions of maintenance and champerty are not to be regarded as always legally irrelevant. Section 6 assumes that considerations of public policy and illegality can still arise in connection with contracts providing for or dealing with maintenance or champerty. The Abolition Act, however, does not state explicitly whether questions of maintenance or champerty are relevant to issues of abuse of process. Nor does it deal directly with what scope is to be given to public policy or doctrines of illegality when the conduct in question is no longer to be characterised as criminal or tortious. To consider what scope might be given to

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52 (2005) 63 NSWLR 203 at 227 [105].

53 (2005) 63 NSWLR 203 at 227 [105].

54 *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA Civ 292 at [54] per Lord Phillips MR.

public policy and illegality in this context, it is necessary to look more closely at some aspects of the development of the law of maintenance and champerty.

<u>Some aspects of the development of the law of maintenance and champerty</u>

68 The law of maintenance and champerty has been traced to the Statute of Westminster the First (3 Edw I c 25) of 1275[55]. Some[56] trace it back to Greek law and Roman law. Be this as it may, Coke identified maintenance as an offence at common law[57] and champerty was a particular species of maintenance[58]. Although traditionally identified as a common law offence, several early statutes are understood as affirming or declaring that common law[59].

69 By the 19th century, the law of maintenance was understood by Lord Abinger CB[60] as:

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55 Dennis, "The Law of Maintenance and Champerty", (1890) 6 *Law Quarterly Review* 169 at 171. But see Winfield, "The History of Maintenance and Champerty", (1919) 35 *Law Quarterly Review* 50; Co Litt 368 b.

56 *Elliott Associates LP v Banco de La Nacion* 194 F 3d 363 at 372 (1999); Cohen and Schwartz, "Champerty and Claims Trading", (2003) 11 *American Bankruptcy Institute Law Review* 197 at 197.

57 2 *Coke's Institutes* 208.

58 Stephen defined the two terms in *A Digest of the Criminal Law (Crimes and Punishments)*, (1877) at 86 as:

> "Maintenance is the act of assisting the plaintiff in any legal proceeding in which the person giving the assistance has no valuable interest, or in which he acts from any improper motive.
>
> Champerty is maintenance in which the motive of the maintainor is an agreement that if the proceeding in which the maintenance takes place succeeds, the subject matter of the suit shall be divided between the plaintiff and the maintainor."

59 The statutes, ranging from 3 Edw I c 25 to 32 Hen VIII c 9 are collected in Lord Phillimore's speech in *Neville v London "Express" Newspaper Ltd* [1919] AC 368 at 426.

60 *Findon v Parker* (1843) 11 M & W 675 at 682-683 [152 ER 976 at 979].

> "confined to cases where a man *improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions,* or to make defences *which they have no right to make* ... [By contrast], if a man were to see a poor person in the street oppressed and abused, and without the means of obtaining redress, and furnished him with money or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up litigation and strife, and to be guilty of the crime of maintenance." (emphasis added)

Yet in *Bradlaugh v Newdegate*[61], Lord Coleridge CJ held that an action for maintenance at common law existed, but made no reference, in an extensive review of the authorities[62], to any requirement that the claim maintained be an *unjust* claim. Rather, the exceptions recognised to the general prohibition on maintaining the claim of another were seen as turning on whether the maintainer acted from charitable motives or because the person maintained was near kin, a servant, or in some like relationship to the maintainer[63].

70 Champerty included every kind of maintenance for reward, whether by sharing of the "thing in plea" or otherwise[64]. This understanding of champerty was originally seen as precluding the assignment of choses in action. The reason given in Coke's report of *Lampet's Case*[65] was:

> "the great wisdom and policy of the sages and founders of our law, who have provided, that no possibility, right, title, nor thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice."

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61 (1883) 11 QBD 1.

62 (1883) 11 QBD 1 at 7-9.

63 (1883) 11 QBD 1 at 11; *Harris v Brisco* (1886) 17 QBD 504 at 513-514.

64 Dennis, "The Law of Maintenance and Champerty", (1890) 6 *Law Quarterly Review* 169 at 179.

65 (1613) 10 Co Rep 46b at 48a [77 ER 994 at 997]. See also Co Litt 232b n.1.

71 As Winfield pointed out[66], Coke's theory was "perilously close to an anachronism". In *Norman v Federal Commissioner of Taxation*[67], Windeyer J said of *Lampet's Case* that "[i]t was a somewhat unsophisticated view of legal rights that led the common lawyers to classify choses in action and debts with mere possibilities, and to condemn all assignments of them as leading to maintenance".

72 Maintenance and champerty, though well known in early English law, "were known almost exclusively as modes of corruption and oppression in the hands of the King's officers and other great men"[68]. And as Buller J noted, in *Master v Miller*[69], "Courts of Equity from the earliest times thought the doctrine [of maintenance as applied to preclude assignment of choses in action] too absurd for them to adopt; and therefore they always acted in direct contradiction to it". But the law of maintenance and champerty was not wholly expelled from this realm of discourse, either by the course of decisions in equity permitting and giving effect to the assignment of choses in action, or by the provisions of s 25 of the *Supreme Court of Judicature Act* permitting such assignments.

73 Assignment of a chose in action "made with the improper purpose of stirring up litigation"[70] would raise questions of maintenance and champerty. But the mere assignment of the proceeds of litigation would not. If the assignment stipulated that the assignee should participate in the litigation, the assignment was lawful only "if he have some legal interest (independent of that acquired by the assignment itself) in the property in dispute; but that where his interest is generated only by the assignment itself, such a stipulation would be improper"[71].

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66 Winfield, "Assignment of Choses in Action in Relation to Maintenance and Champerty", (1919) 35 *Law Quarterly Review* 143 at 143 (Winfield, "Assignment of Choses in Action").

67 (1963) 109 CLR 9 at 26.

68 Winfield, "Assignment of Choses in Action", (1919) 35 *Law Quarterly Review* 143 at 143 referring to Winfield, "The History of Maintenance and Champerty", (1919) 35 *Law Quarterly Review* 50 at 65 and following.

69 (1791) 4 TR 320 at 340 [100 ER 1042 at 1053].

70 Winfield, "Assignment of Choses in Action", (1919) 35 *Law Quarterly Review* 143 at 149.

71 Winfield, "Assignment of Choses in Action", (1919) 35 *Law Quarterly Review* 143 at 152-154 citing, among other cases, *Harrington v Long* (1833) 2 My & K 590 [39

(Footnote continues on next page)

74 The distinction between the assignment of an item of property and the assignment of a bare right to litigate was regarded as fundamental[72] to the application of the law of maintenance and champerty. But drawing that distinction was not always easy[73]. And it was a distinction whose policy roots were not readily discernible, the undesirability of maintenance and champerty being treated as self-evident. Typical of the way in which the courts expressed this condemnation was the reference by Knight Bruce LJ[74] to the "traffic of merchandizing in quarrels, of huckstering in litigious discord". That the practices were criminal, and also gave rise to civil liability, was treated as sufficient reason to condemn them.

75 Yet practices no different in substance, from some of those condemned so roundly, became commonplace in the law of insolvency. Bankruptcy legislation[75] was held[76] to permit a trustee in bankruptcy who had commenced an action to sell and assign the subject-matter of the action to a purchaser for value. And, of course, the development of the doctrine of subrogation as applied to contracts of insurance[77] qualified the apparent generality of rules against maintenance and champerty.

76 No doubt it was against this background that, at the end of the 19th century, the courts of India and the Privy Council came to consider the

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ER 1069]; *Simpson v Lamb* (1857) 7 El & Bl 84 [119 ER 1179]; *Hutley v Hutley* (1873) LR 8 QB 112; *Rees v De Bernardy* [1896] 2 Ch 437; *Glegg v Bromley* [1912] 3 KB 474.

72 *Prosser v Edmonds* (1835) 1 Y & C Ex 481 [160 ER 196]; *Defries v Milne* [1913] 1 Ch 98; Williams, "Is a Right of Action in Tort a Chose in Action?", (1894) 10 *Law Quarterly Review* 143 at 147; Winfield, "Assignment of Choses in Action", (1919) 35 *Law Quarterly Review* 143 at 160.

73 Compare *Prosser v Edmonds* (1835) 1 Y & C Ex 481 [160 ER 196] and *Dickinson v Burrell* (1866) LR 1 Eq 337.

74 *Reynell v Sprye* (1852) 1 De G M & G 660 at 686 per Knight Bruce LJ [42 ER 710 at 720].

75 For example, *Bankruptcy Act* 1869 (UK), s 25.

76 *Seear v Lawson* (1880) 15 Ch D 426.

77 *Castellain v Preston* (1883) 11 QBD 380.

application of the law of maintenance and champerty in a society where one Indian judge (Phear J) is recorded[78] as having said that:

> "[s]peculation in law proceedings has assumed the dimensions and respectability of an ordinary trade; a large class in the community fattens and grows rich on the spoils of needy suitors; and litigation is maintained without reference to the wishes or interests of the nominal parties."

In *Ram Coomar Coondoo v Chunder Canto Mookerjee*[79], the Privy Council held that the English statues, which founded the then state of the English law, did not apply in India and held[80] that:

> "a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner."

Yet the Privy Council went on to say[81] that:

> "[A]greements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the *bonâ fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, – effect ought not to be given to them."

The basis for such careful watching was not further explained.

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78 Dennis, "The Law of Maintenance and Champerty", (1890) 6 *Law Quarterly Review* 169 at 186.

79 (1876) LR 2 App Cas 186.

80 (1876) LR 2 App Cas 186 at 210.

81 (1876) LR 2 App Cas 186 at 210.

77 What this brief and incomplete survey of the state of the English law, as it stood by the early years of the 20th century, may be understood as revealing is that the law of maintenance and champerty depended more upon assertion of consequences said to follow from the existence of the common law criminal offences of maintenance and champerty, than it did upon any close analysis or clear exposition of the policy to which the rules were intended to give effect. Thus, in *Alabaster v Harness*[82], Lord Esher MR said:

> "The doctrine of maintenance, which appears in the Year Books, and was discussed briefly by Lord Loughborough in *Wallis v Duke of Portland*[83], and more elaborately by Lord Coleridge, CJ, in *Bradlaugh v Newdegate*[84], does not appear to me to be founded so much on general principles of right and wrong or of natural justice as on considerations of public policy. *I do not know that, apart from any specific law on the subject, there would necessarily be anything wrong in assisting another man in his litigation. But it seems to have been thought that litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for the consequences of it, when unsuccessful.* Lord Loughborough, in *Wallis v Duke of Portland*, says that the rule is, 'that parties shall not by their countenance aid the prosecution of suits of any kind, which every person must bring upon his own bottom, and at his own expense.'" (emphasis added)

78 By the early 20th century, the law of maintenance and champerty depended upon the application of qualifications and exceptions hinged, for the most part, about what was an item of property as distinct from a bare right to litigate[85] and what sufficed as a common interest between maintainer and the maintained[86]. In *British Cash and Parcel Conveyors Limited v Lamson Store Service Company Limited*, Fletcher Moulton LJ said[87]:

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82 [1895] 1 QB 339 at 342, cited by Dixon J in *Stevens v Keogh* (1946) 72 CLR 1 at 28.

83 (1797) 3 Ves Jun 494 [30 ER 1123].

84 (1883) 11 QBD 1.

85 For example, *Fitzroy v Cave* [1905] 2 KB 364; *Glegg v Bromley* [1912] 3 KB 474.

86 cf *Holden v Thompson* [1907] 2 KB 489 and, later, *Martell v Consett Iron Co Ltd* [1955] Ch 363.

87 [1908] 1 KB 1006 at 1013-1014.

"The truth of the matter is that the common law doctrine of maintenance took its origin several centuries ago and was formulated by text-writers and defined by legal decisions in such a way as to indicate plainly the views entertained on the subject by the Courts of those days. But these decisions were based on the notions then existing as to public policy and the proper mode of conducting legal proceedings. Those notions have long since passed away, and it is indisputable that the old common law of maintenance is to a large extent obsolete. ... The present legal doctrine of maintenance is due to an attempt on the part of the Courts to carve out of the old law such remnant as is in consonance with our modern notions of public policy. ... Speaking for myself, I doubt whether any of the attempts at giving definitions of what constitutes maintenance in the present day are either successful or useful. They suffer from the vice of being based upon definitions of ancient date which were framed to express the law at a time when it was radically different from what it is at the present day, and these old definitions are sought to be made serviceable by strings of exceptions which are neither based on any logical principle nor in their nature afford any warrant that they are exhaustive. ... That there is still such a thing as maintenance in the eye of the law and that it constitutes a civil wrong and perhaps a crime is undoubted, and the general character of the mischief against which it is directed is familiar to us all. It is directed against wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse. But in my opinion it is far easier to say what is not maintenance than to say what is maintenance."

As was said in a radically different context (of construction of the *British North America Act* 1867 (Imp))[88]:

"Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared."

79 By ss 13 and 14 of the *Criminal Law Act* 1967 (UK) criminal and tortious liability for maintenance and champerty were abolished but, like s 6 of the Abolition Act, any rule of law as to the cases in which a contract involving maintenance or champerty is to be treated as contrary to public policy or otherwise illegal was preserved. In 1981, in *Trendtex Trading Corporation v*

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88 *Henrietta Muir Edwards v Attorney-General for Canada* [1930] AC 124 at 134.

Credit Suisse, the House of Lords held[89] that an agreement permitting a bank, which had guaranteed the costs of a party to litigation in which the bank itself was also interested, to sell the party's claims in the litigation "'savours of champerty,' since it involves trafficking in litigation – a type of transaction which, under English law, is contrary to public policy". Accordingly, the assignment of the cause of action was held to be void. Yet effect was given to so much of the agreement as conferred exclusive jurisdiction on a Swiss Court over disputes regarding "its conclusion, interpretation or fulfilment", by staying the action in England with a view to the Swiss Court deciding what effect the invalidity of the assignment, according to English law, had upon the agreement as a whole[90].

80 In the House of Lords, there was no examination of the content of the rule of public policy that was said to be engaged, beyond the reference made by Lord Wilberforce to trafficking in litigation[91]. In the courts below, in *Trendtex*[92], the accepted premise for argument appears to have been that there remained a public policy against at least some forms of maintenance and champerty. The limits of the application of that public policy were identified in the Court of Appeal as to be found in the existence and sufficiency of notions of common interest between the maintainer and the maintained[93].

81 It is important to notice that the House of Lord's conclusion in *Trendtex* (that the provision permitting sale of the cause of action was contrary to public policy – as "savour[ing] of champerty" and involving "trafficking in litigation") was not held to afford a defence to the claim that was made and was not itself a reason to stay the further prosecution of the action. The order for stay that was made was founded upon the exclusive jurisdiction clause, not upon any consideration of public policy concerning maintenance or champerty.

82 Indeed, as the respondents pointed out in the argument of the present appeals, before the enactment of the Abolition Act or its United Kingdom

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89 [1982] AC 679 at 694 per Lord Wilberforce.

90 [1982] AC 679 at 695 per Lord Wilberforce.

91 [1982] AC 679 at 694.

92 *Trendtex Trading Corporation v Credit Suisse* [1980] 3 WLR 367; [1980] 3 All ER 721 (Robert Goff J); [1980] QB 629 (CA).

93 [1980] QB 629 at 653 per Lord Denning MR, 669 per Oliver LJ (with whose reasons Bridge LJ agreed).

progenitor, the *Criminal Law Act* 1967, maintenance or champerty had not been held to constitute a defence to an action on the claim that was maintained, or a ground for staying such an action[94]. Of course it may be said that, at least for the most part, the cases reported about maintenance and champerty were principally directed to whether the maintenance agreement was to be enforced or to whether the named plaintiff had sufficient title to bring the action that was said to be maintained. But that does not detract from the validity of the observation that there was no case where maintenance or champerty was held to be a defence to, or reason enough to stay, the action that was maintained.

Abuse of process?

83 In the present matters, the appellants did not contend that maintenance or champerty provided any defence to the claims made against them. But they did contend that the nature of the funding arrangements made and to be made by Firmstones with retailers warranted the conclusion reached by Einstein J that those arrangements constituted an abuse of process.

84 The appellants sought to encapsulate their submissions on this aspect of the appeals by describing Firmstones' conduct as "trafficking" in the litigation. Expressed in that way, the appellants' submission may be understood as conflating two separate propositions: first, that the funding arrangements constituted maintenance or champerty and, second, that for the maintainer to institute and continue proceedings, in the name of or on behalf of plaintiffs who were thus maintained, was an abuse of process which could be avoided only by ordering a stay of the proceedings. The second of these propositions, about abuse of process, assumed that maintenance and champerty give rise to public policy questions beyond those that would be relevant when considering the enforceability of the agreement for maintenance of the proceedings as between the parties to the agreement.

85 In jurisdictions where legislation has been enacted to the same effect as the Abolition Act, the premise for the second proposition identified is not valid; there are several reasons to reject it. It is neither necessary nor appropriate to decide what would be the position in those jurisdictions where maintenance and champerty may remain as torts, perhaps[95] even crimes.

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94 *Hodges v State of New South Wales* (1988) 62 ALJR 190 at 193 per Brennan J; 77 ALR 1 at 6; *Martell v Consett Iron Co Ltd* [1955] Ch 363 at 421-422 per Jenkins LJ; *Roux v Australian Broadcasting Commission* [1992] 2 VR 577 at 609.

95 But see *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 203.

86 First, and foremost, s 6 of the Abolition Act preserved any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal. It preserved no wider rule of law. The Abolition Act abolished the crimes, and the torts, of maintenance and champerty. By abolishing those crimes, and those torts, any wider rule of public policy (wider, that is, than the particular rule or rules of law preserved by s 6) lost whatever narrow and insecure footing remained for such a rule. As Fletcher Moulton LJ had rightly said[96], nearly a century ago, the law of maintenance and champerty, even then, suffered:

> "from the vice of being based upon definitions of ancient date which were framed to express the law at a time when it was radically different from what it is at the present day".

Secondly, the asserted rule of public policy would readily yield no rule more certain than the patchwork of exceptions and qualifications that could be observed to exist in the law of maintenance and champerty at the start of the 20th century. As Fletcher Moulton LJ had also said[97], it was then "far easier to say what is not maintenance than to say what is maintenance". No certain rule would emerge because neither the content nor the basis of the asserted public policy is identified more closely than by the application of condemnatory expressions like "trafficking" or "intermeddling", with or without the addition of epithets like "wanton and officious"[98].

87 In the present matters, the appellants pointed to a number of matters which together were said to be important. First, there was Firmstones' seeking out of claimants, which the appellants described as "officious intermeddling". Secondly, there was the degree of control which Firmstones would have over the proceedings, the litigants' interests being said to be "subservient" to those of the "intermeddler"[99]. Firmstones' retainer of a solicitor to act for the plaintiffs and represented parties was said not to lessen Firmstones' control of the proceedings but to give rise to possible conflicts of duty for the solicitor. Thirdly, it was said

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96 *British Cash and Parcel Conveyors Limited v Lamson Store Service Company Limited* [1908] 1 KB 1006 at 1013.

97 *British Cash and Parcel Conveyors* [1908] 1 KB 1006 at 1014.

98 *Giles v Thompson* [1994] 1 AC 142 at 164 per Lord Mustill, citing *British Cash and Parcel Conveyors* [1908] 1 KB 1006 at 1014.

99 cf *Clairs Keeley (a Firm) v Treacy* (2004) 29 WAR 479 at 493 [71].

that Firmstones bought rights to litigate and did so with a view to profit. Firmstones was, so it was submitted, "a speculative investor in other persons' litigation".

88 Shorn of the terms of disapprobation, the appellants' submissions can be seen to fasten upon Firmstones' seeking out those who may have claims, and offering terms which not only gave Firmstones control of the litigation but also would yield, so Firmstones hoped and expected, a significant profit to Firmstones. But none of these elements, alone or in combination, warrant condemnation as being contrary to public policy or leading to any abuse of process.

89 As Mason P rightly pointed out[100] in the Court of Appeal, many people seek profit from assisting the processes of litigation. That a person who hazards funds in litigation wishes to control the litigation is hardly surprising. That someone seeks out those who may have a claim and excites litigation where otherwise there would be none could be condemned as contrary to public policy only if a general rule against the maintenance of actions were to be adopted. But that approach has long since been abandoned and the qualification of that rule (by reference to criteria of common interest) proved unsuccessful. And if the conduct is neither criminal nor tortious, what would be the ultimate foundation for a conclusion not only that maintaining an action (or maintaining an action in return for a share of the proceeds) should be considered as contrary to public policy, but also that the claim that is maintained should not be determined by the court whose jurisdiction otherwise is regularly invoked?

90 Two kinds of consideration are proffered as founding a rule of public policy – fears about adverse effects on the processes of litigation and fears about the "fairness" of the bargain struck between funder and intended litigant. In *Giles v Thompson*[101], Lord Mustill said that the law of maintenance and champerty could best "be kept in forward motion" by looking to its origins; these his Lordship saw as reflecting "a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants".

91 Neither of these considerations, whatever may be their specific application in a particular case, warrants formulation of an overarching rule of public policy that either would, in effect, bar the prosecution of an action where any agreement has been made to provide money to a party to institute or prosecute the litigation

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100 (2005) 63 NSWLR 203 at 229 [116].

101 [1994] 1 AC 142 at 164.

in return for a share of the proceeds of the litigation, or would bar the prosecution of some actions according to whether the funding agreement met some standards fixing the nature or degree of control or reward the funder may have under the agreement. To meet these fears by adopting a rule in either form would take too broad an axe to the problems that may be seen to lie behind the fears.

92 It is necessary to bear steadily in mind that questions of illegality and public policy may arise when considering whether a funding agreement is enforceable. So much follows from s 6 of the Abolition Act. Further, to ask whether the bargain struck between a funder and intended litigant is "fair" assumes that there is some ascertainable objective standard against which fairness is to be measured and that the courts should exercise some (unidentified) power to relieve persons of full age and capacity from bargains otherwise untainted by infirmity. Neither assumption is well founded.

93 As for fears that "the funder's intervention will be inimical to the due administration of justice"[102], whether because "[t]he greater the share of the spoils ... the greater the temptation to stray from the path of rectitude"[103] or for some other reason, it is necessary first to identify what exactly is feared. In particular, what exactly is the corruption of the processes of the Court that is feared? It was said, in *In re Trepca Mines Ltd (No 2)*[104], that "[t]he common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses". Why is that fear not sufficiently addressed by existing doctrines of abuse of process and other procedural and substantive elements of the court's processes? And if lawyers undertake obligations that may give rise to conflicting duties there is no reason proffered for concluding that present rules regulating lawyers' duties to the court and to clients are insufficient to meet the difficulties that are suggested might arise.

94 The appellants submitted that special considerations intrude in "class actions" because, so it was submitted, there is the risk that such proceedings may be used to achieve what, in the United States, are sometimes referred to as

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102 *Clairs Keeley* (2004) 29 WAR 479 at 502 [125].

103 *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2003] QB 381 at 413 [85].

104 [1963] Ch 199 at 219-220.

"blackmail settlements"[105]. However, as remarked earlier in these reasons, the rules governing representative or group proceedings vary greatly between courts and it is not useful to speak of "class actions" as identifying a single, distinct kind of proceedings. Even when regulated by similar rules of procedure, each proceeding in which one or more named plaintiffs represent the interests of others will present different issues and different kinds of difficulty.

95 The difficulties thought to inhere in the prosecution of an action which, if successful, would produce a large award of damages but which, to defend, would take a very long time and very large resources, is a problem that the courts confront in many different circumstances, not just when the named plaintiffs represent others and not just when named plaintiffs receive financial support from third party funders. The solution to that problem (if there is one) does not lie in treating actions financially supported by third parties differently from other actions. And if there is a particular aspect of the problem that is to be observed principally in actions where a plaintiff represents others, that is a problem to be solved, in the first instance, through the procedures that are employed in that kind of action. It is not to be solved by identifying some general rule of public policy that a defendant may invoke to prevent determination of the claims that are made against that defendant.

<u>Conclusions and orders</u>

96 It follows that the funding arrangements made and proposed to be made by Firmstones did not constitute a ground to stay the present proceedings. In light of the conclusion reached that the requirements of Pt 8 r 13 were not met when the proceedings were instituted or when Einstein J made his orders, it followed that the proceedings as then constituted could not continue as representative proceedings. It further follows that the orders which were sought in relation to discovery and the giving of opt-in notices were not to be made.

97 Accordingly, each of the appeals to this Court should be allowed with costs. In each matter, the orders made by the Court of Appeal on 31 March 2005

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105 Friendly, *Federal Jurisdiction: A General View*, (1973) at 120, referred to in *In the Matter of Rhone-Poulenc Rorer Inc* 51 F 3d 1293 at 1298 (1995) per Posner CJ.

should be set aside and in their place there should be orders that the appeal to that Court is dismissed with costs.

98 KIRBY J. Two proceedings are before the Court. They raise common issues. Each concerns representative proceedings brought in the Supreme Court of New South Wales for the recovery of amounts allegedly paid under State and Territory franchise licensing legislation. In August 1997 legislation of that type was held invalid under the Constitution[106] as imposing a duty of excise reserved to the Federal Parliament[107]. Those who paid the invalid taxes, not remitted to the taxing authority, want their money back.

99 In the first set of proceedings, the invalid legislation concerns the State and Territory licensing schemes enacted in respect of the sale of tobacco[108]. In the second, it concerns the sale of petroleum products[109]. Special leave was separately granted in the second proceedings to allow an appeal from a judgment of the primary judge (McDougall J)[110] in the Commercial List of the Equity Division of the Supreme Court of New South Wales[111]. This unusual course was taken to permit the parties to those proceedings to make submissions on the common issues. So indeed they did.

100 The two appeals were heard together. However, because there are separate and particular issues raised by the second appeal[112], it is appropriate to deal with it separately. Necessarily, the resolution of the first proceedings will be determinative of the common issues. I have taken into account the submissions made in the second appeal so far as they are relevant to the first proceedings.

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106 *Ha v New South Wales* (1997) 189 CLR 465 at 503.

107 Constitution, s 90.

108 Relevantly, *Business Franchise Licences (Tobacco) Act* 1987 (NSW); *Business Franchise (Tobacco) Act* 1974 (Vic); *Tobacco Products Regulation Act* 1997 (SA); *Tobacco Products (Licensing) Act* 1988 (Q); *Tobacco Business Franchise Licences Act* 1980 (Tas); *Business Franchise (Tobacco and Petroleum Products) Act* 1984 (ACT).

109 Relevantly, *Business Franchise Licences (Petroleum Products) Act* 1987 (NSW); *Business Franchise (Petroleum Products) Act* 1979 (Vic); *Petroleum Products Regulation Act* 1995 (SA); *Transport Co-ordination Act* 1966 (WA); *Petroleum Products Business Franchise Licences Act* 1981 (Tas); *Business Franchise (Tobacco and Petroleum Products) Act* 1984 (ACT).

110 *Trendlen Pty Ltd v Mobil Oil Australia Pty Ltd* [2005] NSWSC 741.

111 By Gleeson CJ and McHugh J on 30 September 2005.

112 *Mobil Oil Australia Pty Ltd v Trendlen Pty Ltd* [2006] HCA 42.

The recovery of invalid taxes

101 *Four cases in this Court*: The first proceedings involve the challenge of a number of wholesalers to a judgment of the Court of Appeal of the Supreme Court of New South Wales adverse to their position[113]. In so deciding, the Court of Appeal reversed the orders of the primary judge in those proceedings (Einstein J)[114]. By those orders, the primary judge had ordered that the proceedings not continue as representative proceedings under the Supreme Court Rules (NSW), Pt 8 r 13 ("the Rules")[115]. The primary judge also concluded that, in so far as the proceedings might be representative proceedings, he would exercise his discretion to stay them permanently, on the ground that they constituted an "abuse of process"[116]. He made further orders consequential upon the foregoing. He refused an order for discovery of the names and addresses of all other members of the class of retailers sought to be joined in the representative proceedings. He also declined to permit existing clients, who consented to that course, to elect to be joined in the proceedings as named plaintiffs[117].

102 All of the subject proceedings arise out of fees payable under the previous tobacco franchise licences legislation. This is therefore the fourth major case arising in this Court out of the scheme for such licences. The first case was *Ha v New South Wales*[118] which held that the New South Wales legislation in that respect was invalid[119]. The second case was *Roxborough v Rothmans of Pall Mall Australia Ltd*[120] which upheld the right of certain retailers, who had bought

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113 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 ("*Fostif*").

114 *Keelhall Pty Ltd t/as "Foodtown Dalmeny" v IGA Distribution Pty Ltd* (2003) 54 ATR 75.

115 These were the applicable rules at the time the proceedings were commenced. The representation of concurrent interests is now provided for in Div 2 of Pt 7 of the Uniform Civil Procedure Rules (NSW).

116 (2003) 54 ATR 75 at [143]. See extract in *Fostif* (2005) 63 NSWLR 203 at 212 [28] per Mason P (Sheller and Hodgson JJA concurring).

117 *Ekaton Corporation Pty Ltd v Shahin Enterprises Pty Ltd* [2003] NSWSC 1018. See *Fostif* (2005) 63 NSWLR 203 at 214 [42]-[43].

118 (1997) 189 CLR 465.

119 (1997) 189 CLR 465 at 503.

120 (2001) 208 CLR 516.

tobacco products from licensed wholesalers, to recover from the latter the amounts representing the purported "licence fees", paid by the retailers between 1 July 1997 and the date that *Ha* was decided[121] and not remitted to the taxing authority. The third case, *British American Tobacco Australia Ltd v Western Australia*[122] concerned the entitlement of the wholesaler to recoup from a State the licence fees paid to the State as an unconstitutional tax, notwithstanding State legislation that purported to regulate, and restrict, such recovery[123]. Now we have these appeals.

103 *The decision in Roxborough*: In *Roxborough*[124], I concluded that the legal solution to claims for the recovery of such unconstitutional taxes had to be framed in a way that was consistent with the postulate of constitutional invalidity. Such claims could not be decided solely by the invocation of private law remedies devised for *inter partes* litigation having no constitutional content. I rejected the appeals in that case by which tobacco retailers (who had already passed the licence fees paid by them on to their consumers) to recover the invalid tax from the wholesaler. I concluded that neither the law of constructive trusts, nor an implied contractual term nor any restitutory principle required, or permitted, such recovery[125].

104 Mine was a minority view. The other members of this Court, explaining their conclusions in differing ways[126], decided that a cause of action to recover the moneys paid by the retailers to the wholesalers did exist and could be prosecuted where the licence fee, of the kind struck down in *Ha*, had failed for constitutional reasons.

105 *The logic of Roxborough*: Whilst adhering to the view about recoverability that I expressed in *Roxborough* (and repeated in *British American Tobacco*[127]) it is appropriate in these proceedings that I should accept as the starting point for my reasons concerning the present attempted recoveries, the law as stated by the majority in *Roxborough*. That law necessarily acknowledges

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121 5 August 1997.

122 (2003) 217 CLR 30 ("*British American Tobacco*").

123 Namely, the *Crown Suits Act* 1947 (WA), s 6(1).

124 (2001) 208 CLR 516 at 563 [124].

125 (2001) 208 CLR 516 at 579-580 [174].

126 As noted by Mason P in *Fostif* (2005) 63 NSWLR 203 at 251 [234].

127 (2003) 217 CLR 30 at 67-69 [91]-[96].

that retailers may, in circumstances analogous to those found to exist in that case, recover monies paid to a wholesaler for the franchise licence fees later held by this Court to be unconstitutional where they were not paid over to the taxing authority.

106 Naturally, this conclusion presents a significant potential legal benefit to the retailers who are entitled to rely on it. This is especially so, because the majority rejected my conclusion that there was an "important constitutional value" that would oblige the retailers, as a condition of their own recovery, first to refund that recovery in an appropriate way to the consumers to whom the tax had been passed on[128]. This Court has held that such an obligation is not part of Australian law. Whilst repeating my doubts, it is also proper that I should proceed on that basis.

107 Approaching the attempted representative actions in this way, I turn to the issues argued in these appeals.

<u>The facts</u>

108 *The background facts*: Many of the facts relevant to an appreciation of the present proceedings are stated in the reasons of Gummow, Hayne and Crennan JJ[129]. Further detail concerning the several proceedings, and their distinct features, are contained in the reasons of Mason P, who wrote the principal reasons in the Court of Appeal[130].

109 In those reasons, Mason P describes the background to the litigation by the retailers to recover the invalid tobacco licensing fees[131]; the actual claims formulated in the proceedings[132]; the applications for discovery presented by the plaintiffs[133]; the applications for summary relief initiated by the defendants before the primary judge[134]; and the terms under which Firmstones Pty Ltd

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128 (2001) 208 CLR 516 at 563 [124], 570 [143], 578-579 [171].

129 Reasons of Gummow, Hayne and Crennan JJ at [23]-[38].

130 (2005) 63 NSWLR 203.

131 (2005) 63 NSWLR 203 at 208-209 [1]-[11].

132 (2005) 63 NSWLR 203 at 209-211 [12]-[20].

133 (2005) 63 NSWLR 203 at 211 [21]-[23].

134 (2005) 63 NSWLR 203 at 211-213 [24]-[35].

("Firmstones")[135], and related companies, undertook the "Project", described as the "tobacco licence fee recovery project", engaged solicitors and approached retailers with a view to recovering licence fees for those retailers in representative proceedings commenced in the Supreme Court for that purpose[136]. Those arrangements were detailed, complex and obviously very carefully planned. It is impossible to understand the conclusions to which the Court of Appeal came without a full appreciation of the entire project, as described by Mason P. I incorporate that description in these reasons. Cases reaching this Court should not be decided on a superficial appreciation of the facts. *A fortiori*, in important cases, involving novel questions of law, the facts require the most careful examination.

110 *Intransigent wholesalers*: In evaluating the issues presented by the appeals, it is also necessary to note further facts, some of them found by the Court of Appeal and others disclosed in uncontradicted evidence.

111 According to this material, following this Court's decision in *Roxborough*, which upheld the recovery rights of the tobacco retailers in that case, many Australian wholesalers (perhaps most) refunded the invalid tobacco licence fees. These were the fees collected from the beginning of the financial year commencing 1 July 1997 until the *Ha* decision was announced but not paid over to the taxing authorities. Some of the largest retailers involved (such as Coles Myer Ltd and Woolworths Ltd) reached prompt agreements with wholesalers to this effect in 2001. In 2002, some 9,500 smaller retailers brought proceedings against the two largest tobacco wholesalers, Philip Morris Ltd and British American Tobacco Australia Ltd. After a hearing, but before judgment, those proceedings were settled. British American Tobacco Australia Ltd refunded 105 per cent of the licence fees to the claimant retailers. Philip Morris refunded 100 per cent. That litigation was funded by a litigation funder, Insolvency Management Fund Ltd ("IMF"). In accordance with its agreement with the retailers concerned, IMF received 30 per cent of the refund[137]. The retailers received the balance.

112 At the same time, Firmstones, another litigation funder, acted for the Shell Company of Australia Ltd and some 900 retailers. These proceedings also resulted in the recovery of settlements from tobacco wholesalers on the basis that

135 The same descriptions will be used in these reasons as in the reasons of Gummow, Hayne and Crennan JJ at [25].

136 (2005) 63 NSWLR 203 at 215-224 [50]-[87].

137 (2005) 63 NSWLR 203 at 217 [59].

the wholesalers refunded 100 per cent of the licence fees involved[138]. It is a fair inference that, but for the foregoing proceedings, the residual wholesalers would not have refunded the outstanding invalid licence fees to the retailers concerned. On the face of things, they would not have done so voluntarily, merely on the basis of the retailers' apparent legal entitlements in accordance with the decision in *Roxborough*. To extract the refunds, litigation was necessary.

113 This was the context in which Firmstones caused the summonses, the subject of these proceedings, to be issued. As Mason P observed in the Court of Appeal[139]:

> "Firmstone[s] promoted the proceedings now before the Court as a last ditch effort for all of their existing and anticipated clients to be able to recover on what by this stage appeared to be well-established causes of action which had, to date, always culminated in favourable settlements following *Roxborough*."

114 As if in vindication of this assessment of the proceedings, on the very day the present case for the residual tobacco retailers commenced before the primary judge, other proceedings, likewise funded by Firmstones against the Tasmanian wholesaler, Statewide Independent Wholesalers Ltd, were also settled. They were concluded on the basis that the wholesaler undertook to repay so many of its retailers as it was able to identify the full amount of the licence fee levied between 1 July and 5 August 1997 and not remitted to the taxing authority by virtue of the *Ha* decision.

115 Viewed against this background, the proceedings brought against the present appellants were thus no more than an understandable outcome of the subject tobacco wholesalers' intransigence. If litigation was the only way to recover the unremitted licence fees from the remaining wholesalers who were holding out, where others had paid up, Firmstones' commencement of proceedings in the interests of the remaining retailers was scarcely surprising. This was especially so given the looming descent of a limitation bar[140].

116 The prospect that, in the available time, all the residual retailers (or many of them) would begin individual proceedings against the relucant wholesalers, often for relatively small amounts, facing such potentially stalwart resistance and unknown complications, was extremely remote. It is in this context that the

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138 (2005) 63 NSWLR 203 at 217 [56].

139 (2005) 63 NSWLR 203 at 217 [57].

140 In New South Wales, the *Limitation Act* 1969 (NSW), s 14(1)(a). See (2005) 63 NSWLR 203 at 208 [5], 213 [36]-[38].

importance of the representative proceedings initiated by Firmstones becomes easier to understand. And to justify.

117 Furthermore, the context of intransigence on the part of the wholesalers concerned assists in putting Firmstones' fees for the service that it offered to the tobacco retailers into proper perspective. Firmstones, and its principal, Mr Adrian Firmstone, accepted direct exposure to any order for costs in favour of the wholesalers that might be made in the litigation funded by them. In such litigation, Firmstones' fee was not invariably one third of the recovery. According to the evidence, in the case of two large retail groups, a negotiated fee of 25 per cent of the recovery was charged. In return for this variable and agreed fee, Firmstones undertook to conduct the litigation which was expertly defended; to bear all legal costs involved in the litigation; and to indemnify the individual retailers concerned against any adverse costs orders in favour of the wholesalers, should such adverse orders eventuate.

118 *The funder's obligations*: In the present proceedings, these promises involved no small commitment. Firmstones were required to provide security for costs in the sum of $1 million; to fund the proceedings involving voluminous evidence over three days before the primary judge; to bear the further costs of two days of hearing in the Court of Appeal; and now to pay additional costs in this Court. The retailers concerned were fully informed as to the terms that Firmstones offered. Not a few of the retailers apparently concluded that, given the choice, they were better off surrendering a third of their recovery instead of exposing themselves, individually, to the perils and costs of litigation and the chimera of total recovery. For the retailers, it seems that a bird in [Firmstones'] hand was worth two in the [litigious] bush.

119 Although the terms of Firmstones' agreement with individual retailers included the power to settle proceedings, this power was significantly qualified. It was subject to a precondition that Firmstones had first to recover a settlement that exceeded 75 per cent of the amount paid by the retailer as licence fees. Moreover, the authority which Firmstones proposed should be granted by retailers who "opted in" to the proceedings was to be on the same basis. Material before the Court of Appeal suggested that the conditions that Firmstones offered to the tobacco retailers for funding the present proceedings were more favourable than those approved by the Federal Court of Australia in *Re Addstone Pty Ltd (In Liq)*[141] and comparable to those approved in the United Kingdom[142] in proceedings of a similar kind, taken in that country.

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141 (1998) 83 FCR 583 at 590 per Mansfield J. There, the litigation funder was entitled to approximately 35 per cent of the net recovery.

142 *Re Claims Direct Test Cases* [2003] 4 All ER 508. See (2005) 63 NSWLR 203 at 236 [143].

120 To lawyers raised in the era before such multiple claims, representative actions and litigation funding, such fees and conditions may seem unconventional or horrible. However, when compared with the conditions approved by experienced judges in knowledgeable courts in comparable circumstances, they are not at all unusual. Furthermore, the alternative is that very many persons, with distinctly arguable legal claims, repeatedly vindicated in other like cases, are unable to recover upon those claims in accordance with their legal rights.

<u>The legislation and Rules of the Court</u>

121 *The legislation*: As explained in the reasons of Gummow, Hayne and Crennan JJ, the Fostif proceedings against Campbells[143] have been accepted as typical of the others in the present appeals. They were commenced under the Rules of the Supreme Court of New South Wales as in force at the times when the primary judge and the Court of Appeal decided these proceedings. Those rules were made in accordance with, and under, Pt 9 of the *Supreme Court Act* 1970 (NSW). In terms of their provisions[144], the relevant rules were addressed to the Supreme Court of New South Wales to be read in accordance with the "Overriding Purpose Rule". This rule required that Court to facilitate the "just, quick and cheap resolution of the real issues" in proceedings and to give effect to this "overriding purpose" when exercising powers given by the rules or when interpreting any particular rule.

122 Since the present proceedings were decided in the Court of Appeal, a significant portion of the rules, including Pt 8 r 13 and Pt 1 r 3, have been repealed[145]. This occurred upon the commencement of s 9 of the *Civil Procedure Act* 2005 (NSW). The purposes of that Act included the introduction of the Uniform Civil Procedure Rules (NSW). It was not suggested that, in deciding the complaints of error on the part of the Court of Appeal, this Court should do otherwise than to evaluate the decision of the Court of Appeal against the criteria stated in the rules applicable when the proceedings were decided. However, to the extent that the orders of the Court of Appeal remitted the proceedings to the

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143 Reasons of Gummow, Hayne and Crennan JJ at [29].

144 Supreme Court Rules (NSW), Pt 1 r 3(1), (2).

145 With effect from 15 August 2005. See Supreme Court Rules (Amendment No 405) (NSW), Sched 1. The rules governing representative proceedings and the overriding purpose in relation to the conduct of court proceedings have continued in ostensibly the same form (with some amendments). See *Civil Procedure Act* 2005 (NSW), Pt 6 Div 1; Uniform Civil Procedure Rules (NSW), Pt 2 r 2.1, Pt 7 r 7.4.

Equity Division to continue as representative proceedings[146], they would obviously have to continue under the new rules, as by then applicable.

123 The contrasting provisions for representative proceedings contained in the *Federal Court of Australia Act* 1976 (Cth)[147] are described in the reasons of Gummow, Hayne and Crennan JJ. Also mentioned there is the *Maintenance, Champerty and Barratry Abolition Act* 1993 (NSW) ("the Abolition Act"), by which the common law offence of maintenance (including champerty) was abolished in New South Wales, but subject to the preservation of "any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal"[148].

124 In considering the ambit of the continuing operation of the common law rules of maintenance and champerty upon contracts and court proceedings, this Court is, of course, stating the common law for the whole of Australia[149]. There are provisions equivalent to the Abolition Act in some other Australian States[150]. To some degree, the Abolition Act reflects developments that were already occurring in the common law[151]. However, because the subject proceedings were brought in New South Wales, any exposition of the law as it affects abuse of process and public policy in these proceedings, must conform to the applicable provisions of the Abolition Act.

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146 See (2005) 63 NSWLR 203 at 261 [292].

147 ss 33A-33ZJ. See reasons of Gummow, Hayne and Crennan JJ at [47]-[48].

148 The Abolition Act, s 6. See reasons of Gummow, Hayne and Crennan JJ at [66]-[67].

149 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-567; *Lipohar v The Queen* (1999) 200 CLR 485 at 507-508 [50]-[51] per Gaudron, Gummow and Hayne JJ, 551-553 [167]-[170] of my reasons; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 514 [2], 517-518 [15] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

150 *Wrongs Act* 1958 (Vic), s 32 (since 1969) and *Criminal Law Consolidation Act* 1935 (SA), Sched 11 (since 1992). In the United Kingdom, the *Criminal Law Act* 1967 (UK), ss 13 and 14 abolished criminal and tortious liability for maintenance and champerty. See Fleming, *The Law of Torts*, 9th ed (1998) at 689.

151 New South Wales Law Reform Commission, *Barratry, Maintenance and Champerty*, Discussion Paper No 36, (1994) at 7; cf Australian Law Reform Commission, *Managing Justice - A review of the federal civil justice system,* Report No 89, (2000) at 310-311 [5.25].

125 *The applicable rules*: The history of maintenance and champerty in the law of England is described in the reasons of Gummow, Hayne and Crennan JJ[152]. The origins and course of development of that body of law are illustrated there, with reference to the differing practice of common law and of equity[153]; the different approaches deemed proper in England and at least one of its colonies[154]; and the gradual realisation that some of the earlier judicial strictures against maintenance and champerty were in need of reconsideration in the light of modern conditions, analogous legal developments, practices in particular jurisdictions and the real impediments that commonly exist to affordable access to justice[155]. I will not repeat any of this material. It is usefully supplemented in the reasons of Mason P in the Court of Appeal[156].

The issues

126 Four issues were argued in these proceedings. The two principal issues were as follows:

(1) *The abuse of process issue*: This was the primary way in which, both in their oral submissions[157] and in their written submissions[158], the appellants challenged the decision of the Court of Appeal and sought restoration of the stay and other relief provided by the primary judge. The appellants submitted that the proceedings, funded by Firmstones, amounted to "trafficking in litigation", which was an abuse of process *per se*. As well, particular aspects of the arrangement were criticised, namely the control over the litigation enjoyed by Firmstones as the funder; the alleged subservience of the individual litigants' interests to those of an "intermeddling" stranger; the role assumed by the funder in "buying and

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152 Reasons of Gummow, Hayne and Crennan JJ at [68]-[82].

153 Reasons of Gummow, Hayne and Crennan JJ at [68]-[72].

154 Reasons of Gummow, Hayne and Crennan JJ at [76] by reference to *Ram Coomar Coondoo v Chunder Canto Mookerjee* (1876) LR 2 App Cas 186 at 210.

155 cf *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 79 ALJR 1620 at 1678-1679 [316]-[318]; 219 ALR 403 at 480-481.

156 *Fostif* (2005) 63 NSWLR 203 at 224-229 [88]-[112].

157 (2006) HCATrans 160 at [65]-[70] ["The primary submission … is that the continuation of the proceedings as a representative action is an abuse of the process of the Court and contrary to public interest"].

158 Relying on *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 at 702 per Lord Roskill; *Giles v Thompson* [1994] 1 AC 142 at 164 per Lord Mustill.

selling rights" to litigate before the courts; and the consequential involvement of those courts in the facilitation of what was described as an offensive and champertous ("spoils sharing") scheme[159];

(2) *The "same interest" issue*: The appellants, alternatively, submitted that the Court of Appeal had erred in disturbing the primary judge's conclusion that the plaintiffs had failed to show, within the terms of Pt 8 r 13(1) of the Rules, that "numerous persons had the same interest" in the proceedings warranting the commencement and continuance of the proceedings as a representative action. This issue was addressed by the primary judge and by the Court of Appeal in terms of the respective points of similarity and diversity in the several "interests" revealed in the claims of the numerous tobacco retailers involved in pursuing their entitlements against the wholesalers. However, in argument before this Court[160], the issue took quite a different turn. The debate shifted from being (as heretofore) about the potential disparities in the several interests of the many retailers. No longer was the issue viewed in terms of the retailers' personal agreements with the wholesalers; individual invoices disclosing or not disclosing the invalid tax; individual understandings - if that be relevant - as to what would and should happen in the event of invalidation; individual interests having regard to different statutory provisions in different States[161]; and different positions under the applicable limitations statutes. Instead, a wholly new focus was raised by the Court itself during argument.

127 In this way, a submission came to be formulated based upon the language of Pt 8 r 13(1) of the Rules. The new argument questioned whether the language of that sub-rule required those who commenced the proceedings to "have numerous persons who have the same interest ... *at the time of commencement*"[162]. It is this argument, critical to the application of the Rules permitting a representative action to be organised, that the reasons of Gummow, Hayne and Crennan JJ treat as determinative of these appeals[163].

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159 See eg (2005) 63 NSWLR 203 at 215 [48].

160 See [2006] HCATrans 160 at [1565]-[1570], [1680].

161 (2005) 63 NSWLR 203 at 248-249 [215]-[224] referring to *Business Franchise Licences (Tobacco) Act* 1987 (NSW), s 41(3) which was different from provisions in the legislation of other jurisdictions except the Australian Capital Territory.

162 See [2006] HCATrans 160 at [1660]-[1680].

163 Reasons of Gummow, Hayne and Crennan JJ at [49]-[60].

128 There are two subsidiary, and consequential, issues that follow the resolution of the first two issues. They arise only if the first two issues are decided in favour of the respondents. In such circumstances, it is necessary to consider whether the Court of Appeal erred in reversing the decision of the primary judge on the ancillary questions. These issues, numbered as the third and fourth issues, are as follows:

(3) *The discovery and interrogatories issues*: The primary judge refused discovery to the respondents and rejected their applications to administer interrogatories to the appellants so that the representative proceedings could be constituted out of the appellants' records. The relevant records, it was suggested, would provide details of *all* the retailers who had paid the unlawful licence fee to the appellants. Securing them would enable Firmstones to contact all those eligible to "opt in" to the proceedings on the terms proposed. For its part, the Court of Appeal concluded that "at an appropriate stage in the proceedings" the lead plaintiffs would be entitled to discovery, as asked, as to the details of all transactions falling within the scope of the representative proceedings so far as they "touch on matters in dispute" as were necessary for the "fair trial of the issues"[164]. Having indicated that view, the Court of Appeal concluded that the application for such relief was premature at the stage the proceedings had reached before it. At that time, by the appellants' choice, their defences had not yet been filed. Whilst indicating that the primary judge's refusal of discovery *in limine* was erroneous, the Court of Appeal, without itself making the orders sought, resolved the issue by remitting the proceedings for trial, such trial to be continued as representative proceedings, consistently with its reasons[165]; and

(4) *The constitutional issues*: Finally, the appellants raised constitutional issues. They contended that, if the respondents' actions were not to be permanently stayed as an abuse of process at common law and had sufficiently engaged the rules governing representative actions in the Supreme Court, proceeding in that way would amount to a constitutionally impermissible attempt to impose on the Supreme Court, in the exercise of federal jurisdiction, a duty to make orders other than in relation to a "matter", as contemplated by Ch III of the Constitution. According to the appellants, the proceedings were in federal jurisdiction because they ultimately arose out of the constitutional invalidation of the tobacco licence fees and the legal consequences of that decision. This, the appellants argued, was the eventual foundation of the respondents' claims.

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164 (2005) 63 NSWLR 203 at 258 [271].

165 (2005) 63 NSWLR 203 at 258-259 [272]-[275], 261 [292].

On that basis, the claims enlivened the requirements of the Constitution for the exercise of the judicial power of the Commonwealth. Within federal jurisdiction[166], the appellants submitted that the respondents' attempts to "create litigious controversies" where they did not otherwise exist and to use court processes of discovery and interrogatories to create controversies that did not previously need to be "quelled"[167] involved an impermissible distortion of federal judicial power. On that footing too, the present appellants claimed relief from this Court[168].

129 In my opinion, the Court of Appeal was correct in the determinations it made on each of the first three issues. As to the fourth issue, there is no substance in the appellants' constitutional objection to the representative proceedings, as contemplated by the applicable rule, or to the ancillary procedures of discovery and interrogatories (or opt-in procedures) designed to render such proceedings effective. Accordingly, the appellants' appeals fail. I will now proceed to explain these conclusions.

No abuse of process warranted a stay

130 *The representative facility*: As the Court of Appeal repeatedly pointed out in its reasons, it is essential to differentiate between the so-called *jurisdictional* issue (of whether the respondents had validly engaged the representative procedure permitted by the Rules of the Supreme Court) and the *discretionary* issue, concerning the conditions under which any such representative proceedings should be allowed to continue[169].

131 This Court clarified that distinction in *Carnie v Esanda Finance Corporation Ltd*[170]. Addressing the provisions of the same rules, applicable in that case (Pt 8 r 13), McHugh J said:

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166 *British American Tobacco* (2003) 217 CLR 30 at 44 [12] per Gleeson CJ, 50 [35] per McHugh, Gummow and Hayne JJ, 73 [111-112] of my reasons.

167 cf *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 458-459 [242] per Hayne J.

168 [2006] HCATrans 160 at 1350-1355. The appellants left the oral argument on this issue to Mobil Oil Australia Pty Ltd ("Mobil"), the appellant in the concurrent appeal. However, it pressed the argument in support of the reversal of the judgment below.

169 (2005) 63 NSWLR 203 at 239 [163].

170 (1995) 182 CLR 398 at 427 ("*Carnie*").

> "[A] plaintiff and the represented persons have 'the same interest' in legal proceedings when they have a community of interest in the determination of any substantial question of law or fact that arises in the proceedings. Other factors may make it undesirable that the proceedings should continue as a representative action, but that is a matter for the exercise of discretion, not jurisdiction."

132 In *Carnie*, each member of this Court acknowledged the ample character of the discretion afforded by the rules, where they applied, whereby a judge of the Supreme Court is obliged to consider whether the particular case is one appropriate to commence or continue as a representative action or whether that judge should "otherwise order"[171]. In making that decision, the judge of the Supreme Court is invested with very large powers that permit the taking into account of the types of consideration mentioned by Gleeson CJ when *Carnie* was decided in the Court of Appeal[172].

133 As the Court of Appeal pointed out in the present proceedings, the observations of Gleeson CJ in *Carnie* were approved by this Court[173], although this Court's orders reversed the disposition adopted by the majority of the Court of Appeal[174]. But, unless the issue of *jurisdiction* (or power) is separated from issues more appropriately considered as procedural and *discretionary*, error is bound to occur. The Court of Appeal obviously considered that this was what had occurred before the primary judge in the present case.

134 *Hostility to such proceedings*: Despite the ample terms in which the power was granted to the Supreme Court, by its rules, the primary judge had given effect to an *a priori* view that was hostile to representative proceedings. This was so although, once the preconditions for the constitution of representative proceedings were established, the proper focus of the primary

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171 (1995) 182 CLR 398 at 404-405 per Mason CJ, Deane and Dawson JJ, 408-410 per Brennan J, 415, 426 per Toohey and Gaudron JJ, 430-431 per McHugh J.

172 *Esanda Finance Corp Ltd v Carnie* (1992) 29 NSWLR 382 at 388. The considerations included "whether or not consent is required from persons who are to be group members in representative proceedings, the position of persons under disability, the right of a group member to opt out of a representative proceeding, alterations to the description of the group, settlement and discontinuance of proceedings, and the giving of various notices to group members".

173 See *Fostif* (2005) 63 NSWLR 203 at 239-240 [164] referring to *Carnie* in this Court (1995) 182 CLR 398 at 405 per Mason CJ, Deane and Dawson JJ, 431 per McHugh J.

174 See *Fostif* (2005) 63 NSWLR 203 at 239-240 [164]; *Carnie* (1995) 182 CLR 398.

judge's concern should have been upon the discretionary considerations upon which such proceedings should be allowed to continue in a way which was fair to opponents, protective of all those participating in the proceedings and defensive of the proper administration of justice.

135 *A priori* hostility to representative actions was a feature of several English decisions in the twentieth century following the wrong turning that was taken by the English Court of Appeal in *Markt & Co Ltd v Knight Steamship Co Ltd*[175]. Yet, both in *Carnie*[176] and in *Wong v Silkfield Pty Ltd*[177], this Court has been at pains to correct that approach so as to facilitate representative proceedings in which, under judicial supervision, the appropriate discretionary protections can be put in place.

136 The present appeals represent an attempt to turn back the judicial clock. This Court should adhere to the approach that it explained in *Carnie* and in *Wong*. It is no part of this Court's function to frustrate the achievement of the representative procedures provided for in the rules, so long as such procedures are valid and involve no offence to the Constitution.

137 In considering accusations that the funding arrangements introduced by Firmstones into the present proceedings amounted to an abuse of process, it is necessary to keep in mind the particular demands inherent in representative proceedings: the need to marshal effectively substantial resources; to gather voluminous evidence; to retain and pay competent counsel over a significant period; often to provide in advance substantial security for costs; to attend both to the general issues and to those particular to identified subcategories and individual cases; and to prove consequential losses usually with the evidence of several experts. In proceedings such as the present, faced with such daunting requirements, the ordinary tobacco retailer would commonly give up[178]. If the only way to vindicate legal rights was to bring individual proceedings or to find others with exactly the same interest, most ordinary retailers would abandon hope. They would not enforce legal rights of action belonging to them, existing in theory by analogy with the decision of this Court in *Roxborough*. They would withdraw rather than venture upon such expensive, stressful, perilous litigation. They would do this despite the earlier recovery by retailers of the unremitted taxes disgorged in circumstances apparently indistinguishable from their own.

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175 [1910] 2 KB 1021.

176 (1995) 182 CLR 398 at 404 per Mason CJ, Deane and Dawson JJ, 408 per Brennan J, 421 per Toohey and Gaudron JJ, 427 per McHugh J.

177 (1999) 199 CLR 255 at 260-263 [11]-[17], 266-267 [27].

178 See (2005) 63 NSWLR 203 at 234 [131].

Individually, for most or all of them, enforcement of legal rights would not be worth the cost, risk and effort.

138 It is against the inherent inequalities, presented by these litigious facts of life, that a representative action may, under proper conditions, afford a litigant with an individual claim a justifiable prospect to secure practical access to that litigant's legal rights in association with many others. The individual claim may (as in the case of many tobacco retailers in these proceedings) be comparatively small and hardly worth the expense and trouble of suing. But the aggregate of the claims of those willing to proceed together, as proposed by a funder and organiser such as Firmstones, might be very large indeed. What is a theoretical possibility, as an individual action or series of actions, needs therefore to be converted into a practical case by the intervention of someone willing to undertake a test case[179], followed by others willing to organise litigants in a similar position, and under appropriate conditions, to recover their legal rights by helping them to act together.

139 *The decisions in Carnie and Wong*: Obviously, there are some legitimate concerns about representative actions, and litigation funding[180]. However, it is important to assess accusations of "abuse of process" against the standards accepted by this Court in *Carnie*, freed from preconceptions and from hostility inherited from the thinking of judges in earlier and different times.

140 In *Carnie*, Mason CJ, Deane and Dawson JJ described the representative action, as provided by the Rule in question in these appeals, as designed[181]:

> "… to facilitate the administration of justice by enabling parties having the same interest to secure a determination in one action rather than in separate actions … It may be [the Rule] extends to a significant common interest in the resolution of any question of law or fact arising in the relevant proceedings. Be that as it may, it has now been recognised that persons having separate causes of action in contract or tort may have 'the same interest' in proceedings to enforce those causes of action."

141 *Prima facie*, then, it will not be an abuse of process, under the rules, for such persons to commence and continue proceedings for such purposes. On the contrary, this is the very object of the rules permitting representative actions.

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179 As, in a sense, *Roxborough* (2001) 208 CLR 516 was.

180 See (2005) 63 NSWLR 203 at 229-232 [114]-[123]; Aitken, "'Litigation Lending' after *Fostif*: An Advance in Consumer Protection, or a Licence to 'Bottomfeeders'?", (2006) 28 *Sydney Law Review* 171 at 176-180.

181 (1995) 182 CLR 398 at 404.

Because the rules in question were made with statutory authority, they must be given effect by courts according to their terms and purposes, unless doing so would involve the courts in unlawfulness, or because the rules exceeded the grant of power or involved a breach of the Constitution[182]. No one suggested that the rules were *ultra vires*.

142 The Court of Appeal was therefore correct to read this Court's decisions in *Carnie* and *Wong* as affirming a "more liberal [approach] in allowing representative actions to proceed"[183]. As McHugh J put it[184]: "[i]n the Age of Consumerism, it is proper that this should be so"[185]. If, to be effective, this necessitates at once a broader approach to the availability of representative actions and less hostility to litigation funding under judicially supervised conditions, so much is inherent in a procedure designed to enable parties with legal claims in the same interest to be organised into one action rather than fobbed off with the theoretical (but practically unavailable) entitlement to bring a multitude of individual actions separately[186].

143 *Real access to legal rights*: Apart from the foregoing considerations, it is important to recognise how exceptional it is for a court to bring otherwise lawful proceedings to a stop, as effectively the primary judge did in this case. It is very unusual to do so by ordering the permanent stay of such proceedings[187]. The Court of Appeal recognised this consideration. Properly, it emphasised that it was for the appellants to establish that the respondents' proceedings constituted an abuse of process[188].

144 The reason why it is difficult to secure relief of such a kind is explained by a mixture of historical factors concerning the role of the courts; constitutional considerations concerning the duty of courts to decide the cases people bring to

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182 And hence to the fourth issue.

183 *Carnie* (1995) 182 CLR 398 at 429 per McHugh J (referring to the judgment of Toohey and Gaudron JJ).

184 *Carnie* (1995) 182 CLR 398 at 429.

185 See (2005) 63 NSWLR 203 at 255 [254].

186 cf (2005) 63 NSWLR 203 at 238 [160]. See especially Australian Law Reform Commission, *Grouped Proceedings in the Federal Court,* Report No 46, (1988) at 8-9 [13]-[14].

187 *Williams v Spautz* (1992) 174 CLR 509 at 518-520.

188 (2005) 63 NSWLR 203 at 237 [151].

them; and reasons grounded in what we would now recognise as the fundamental human right to have equal access to independent courts and tribunals[189]. These institutions should be enabled to uphold legal rights without undue impediment and without rejecting those who make such access a reality where otherwise it would be a mere pipe dream or purely theoretical.

145 The importance of access to justice, as a fundamental human right which ought to be readily available to all, is clearly a new consideration that stimulates fresh thinking about representative or "grouped" proceedings[190]. It is this consideration that has informed the decisions of other Australian appellate courts[191] on such questions and also a decision of the Supreme Court of Appeal of South Africa[192].

146 *No abuse of process*: When the foregoing considerations are taken into account, I agree with the conclusion reached on this issue in the reasons of Gummow, Hayne and Crennan JJ[193]. In these appeals the appellants failed to demonstrate an abuse of process to warrant the primary judge's conclusion that they were entitled to a permanent stay on that basis[194].

147 I also agree with the reasons given by the Court of Appeal on this issue. In those reasons, Mason P successively rejects the arguments advanced by the appellants to sustain the primary judge's conclusion that the proceedings, in their existing form, constituted an abuse of process[195]. Thus, Mason P dismissed the criticisms addressed to the role of Mr Firmstone and his company[196]. He was

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189 See International Covenant on Civil and Political Rights, Art 14.1.

190 *Thai Trading Co v Taylor* [1998] QB 781 at 786 per Millett LJ; cf Aitken, "'Litigation Lending' after *Fostif*: An Advance in Consumer Protection, or a Licence to 'Bottomfeeders'?" (2006) 28 *Sydney Law Review* 171 at 177.

191 *Clairs Keeley v Treacy (a Firm)* (2004) 29 WAR 479 at 494 [73]-[74], 502 [124] per Steytler, Templeman and McKechnie JJ; *Clairs Keeley (A Firm) v Treacy* [2005] WASCA 86 at [58]-[59] per Steytler P, Roberts-Smith and McLure JJA.

192 *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 (6) SA 66 at 78-80 [42]-[46] per Southwood AJA (Harms, Cameron, Conradie and Lewis JJA concurring).

193 Reasons of Gummow, Hayne and Crennan JJ at [83]-[95].

194 See also Gleeson CJ at [1].

195 (2005) 63 NSWLR 203 at 215-237 [46]-[152].

196 (2005) 63 NSWLR 203 at 215-220 [50]-[74].

unconvinced by the criticisms voiced as to the involvement of the solicitor retained by the funder, Mr Richards[197]. He rejected the generalised complaints that the proceedings were likely *per se* to lead to an abuse of process, were contrary to public policy, as such, and constituted an impermissible "trafficking in litigation"[198]. He faced squarely the fact that it was inconceivable that the individual retailers, with an average claim of $1,000, would hazard the litigious risks and costs of pursuing their legal rights, were it not for the litigation funding that permitted this to happen and organised it so that it would[199].

148 I find all of the general and specific reasons in the Court of Appeal's decision convincing. I would endorse the reasons in the terms in which they are stated. They reinforce the conclusion on this issue expressed in the reasons of Gleeson CJ and the reasons of Gummow, Hayne and Crennan JJ in this Court. Moreover, they suggest the need for a facultative approach to the representative procedures envisaged by the rules. As I will show, that approach is missing from the reasons of the majority in this Court, when they turn to the second issue. With respect, it is wholly missing from the reasons which Callinan and Heydon JJ have written[200]. In my opinion those reasons disclose an attitude of hostility to representative procedures that is a left-over of earlier legal times. They are incompatible with the contemporary presentation of multiple legal claims. And, most importantly, they are fundamentally inconsistent with the rules made under statutory power and the need to render those rules effective.

149 *Conclusion: Court of Appeal was correct*: It follows that the Court of Appeal was correct to find error in the primary judge's conclusion that the proceedings should be permanently stayed as an abuse of process. This Court should affirm the Court of Appeal's conclusion. No separate consideration of the suggestion that the proceedings should be stayed as contrary to public policy is necessary. The suggested arguments of public policy, as they were presented, effectively amount to the same bases upon which the abuse of process was propounded. They involved no different or separate point. There was no abuse of process.

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197 (2005) 63 NSWLR 203 at 220-224 [75]-[87].

198 (2005) 63 NSWLR 203 at 224-232 [88]-[123].

199 (2005) 63 NSWLR 203 at 237 [148]-[149].

200 Reasons of Callinan and Heydon JJ at [267]-[284].

The representative proceeding rules were engaged

150 *The applicable rule*: To deal with the second issue, it is useful to repeat the applicable provision of the rules relating to these proceedings. Part 8 r 13 relevantly provided:

> "Representation: concurrent interests
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> 13 (1) Where numerous persons have the same interest in any proceedings the proceedings may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
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> …
>
> (4) A judgment entered or order made in proceedings pursuant to this rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.
>
> (5) An application for leave under subrule (4) shall be made by motion, notice of which shall be served personally on the person against whom it is sought to enforce the judgment or order.
>
> (6) Notwithstanding that a judgment or order to which an application under subrule (5) relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from the liability."

151 In *Carnie*[201], this Court made it clear that numerous persons may have the "same interest", and may thus satisfy the precondition for the engagement of Pt 8 r 13, although each person has a separate cause of action. Clearly, this is so because, otherwise, the rule would misfire. It would have a negligible application. Plainly, this would be contrary to its purpose. Moreover, all of the

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201 (1995) 182 CLR 398 at 404 per Mason CJ, Deane and Dawson JJ, 408 per Brennan J, 420-422 per Toohey and Gaudron JJ, 427-428 per McHugh J. See also *Fostif* (2005) 63 NSWLR 203 at 238 [158].

reasons in *Carnie* emphasised (as has been a common theme in many recent decisions of this Court[202]) that it is necessary to apply the language of the rule in question in preference to judicial paraphrases of it[203]. Such paraphrases, especially in older cases, can easily reflect the earlier judicial hostility to representative or grouped proceedings. That is why it is best to avoid them.

152 In order to make the rule effective for the achievement of its purpose and to fulfil the "Overriding Purpose Rule" of the rules themselves[204], the meaning and application of Pt 8 r 13 must thus be construed in a beneficial and facultative way. This is the general approach now taken by this Court to the construction of statutory language. It applies equally to court rules made under statutory power[205]. With respect, the majority in this Court have overlooked these important considerations of approach[206]. By their very nature, representative proceedings facilitate the "just, quick and cheap resolution of the real issues" where plaintiffs have the same interest. *A priori*, that is the "overriding purpose" of Pt 8 r 13. The achievement of this purpose should not be subverted by a unduly narrow and restrictive interpretation of the language of the Rule itself.

153 *The propounded interpretation*: The essential holding in the reasons of the majority is that the requirements of Pt 8 r 13(1) of the Rules were not met in the present proceedings[207]. The content of this holding is made clear by what follows. Thus, in the reasons of Gummow, Hayne and Crennan JJ, their Honours say:

> "Neither when the proceedings were instituted, nor when Einstein J made his orders, were there numerous persons having the same interest in the proceedings that were commenced. The only persons who then had an interest in the proceedings were the named plaintiffs."

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202 See eg *Weiss v The Queen* (2005) 80 ALJR 444 at 452 [31]; 223 ALR 662 at 671 and cases there cited.

203 See *Fostif* (2005) 63 NSWLR 203 at 242 [183].

204 Pt 1 r 3(1), (2). See above at [121].

205 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382.

206 cf my reasons in *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 264-266 [35]-[41].

207 Reasons of Gummow, Hayne and Crennan JJ at [58], [60]; reasons of Callinan and Heydon JJ at [214]-[226].

154 To understand this ruling and the "more deep-seated question" which was said to have emerged "in the course of oral argument"[208], it is necessary to appreciate that the ruling turns upon an extremely narrow view of the operation of Pt 8 r 13(1). Moreover, it is a view that did not constitute the basis upon which, up to the hearing in this Court, the appellants, in their oral or written argument, were complaining about the failure of the respondents to establish that the proceedings lacked the "same interest".

155 Thus, in their written submissions to this Court, the complaints of the appellants were that the respondents had merely shown that there "may be some common interest" of law or fact to be resolved in the representative proceedings; had defined the represented persons in such a self-fulfilling way as to preclude any real controversy over the propounded "same interest"; had presented a claim where the common issue was "illusory"; and had failed to seek any common relief.

156 These issues, which the appellants brought to this Court to "quell" in resolving their controversy with the respondents, were thus quite different from the ground upon which the reasons of the majority now find in the appellants' favour. This does not mean that the new point lacks substance. Sometimes, the examination of issues of construction or legal principle by this Court can produce fresh insights which others have earlier failed to perceive. Those others may have been influenced by previous assumptions about the content of the law or the approach that should be taken to new legal ideas. But when a new insight arises in this Court for the first time, it demands careful scrutiny of the point out of respect for the many who have gone before who, by hypothesis, have missed it[209]. They may all have been wrong. But, then again, they may not.

157 *Rejection of the interpretation*: There are several reasons why, in my view, the interpretation given to Pt 8 r 13 of the Rules in the reasons of the majority should be rejected.

158 First, the language of Pt 8 r 13(1), referring to the "same interest" postulates the existence of the "same interest" at a time *before* any proceedings have commenced. The reasons of the majority place their emphasis on the expression of the "same interest" in the proceedings *as commenced*. With respect, this is to invert the language of the sub-rule. The existence of the "same interest" is a precondition to the commencement of the proceedings. It is thus addressed to something wider, and different, from the exact way in which the

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208 Reasons of Gummow, Hayne and Crennan JJ at [51].

209 cf *Combet v The Commonwealth* (2005) 80 ALJR 247 at 307-308 [279]-[282] of my reasons; 221 ALR 621 at 697-698.

"interest" is expressed in the proceedings, once commenced. Indeed, in the context, the "same interest" must refer to an "interest" that is generic. It may be informed by, but not limited strictly to, the legal specification of the "proceedings" thereafter commenced (and continued). Once this time sequence in the text of the sub-rule is understood, it is plain that the "same interest" postulated may be broader than, and somewhat different from, the pleadings by which the "proceedings", when commenced, are expressed.

159 Secondly, this approach to the meaning of the "same interest" on the part of "numerous persons", before any "proceedings" may be commenced, is also a construction more likely to advance the purposes of the rule. That purpose is, exceptionally, to permit representative proceedings to be commenced and continued in the circumstances nominated. If the narrow view favoured in the reasons of the majority is adopted, the ambit of the application of the rule is severely cut back. The necessity of the "same interest" is not treated, as the text and purpose of the rule suggests it should be, as a precondition to the valid commencement of proceedings and as something that existed separately and independently from such proceedings. Instead, it is assimilated to the pleading of the proceedings. That approach turns the rule on its head and impedes its purpose. The purpose is to facilitate the litigation in the one proceeding of claims in respect of interests shared by "numerous persons" *before* such proceedings are commenced.

160 This Court should not frustrate the achievement of the purpose of the rule. On the contrary, as in *Carnie* and *Wong*, it should be astute to give effect to that purpose, as the language of the rule suggests. Any anxiety about the dangers involved in that purpose must not be permitted (so long as the rule is valid) to frustrate the achievement of its objective. Such anxiety can only properly be reflected at a later stage in the discretionary orders that are made in the course of the Court's supervision of the commencement and continuation of the proceedings and their enforcement against particular persons who claim exemption from any judgment or order under the rule[210].

161 Thirdly, this approach to the meaning of the "same interest" is, as the Court of Appeal recognised[211], the approach that was explained by this Court in *Carnie*[212] and endorsed in *Wong*[213]. In the latter case, five members of this Court said[214]:

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210 See eg Pt 13 r 8(6).

211 (2005) 63 NSWLR 203 at 238-255 [156]-[255].

212 (1995) 182 CLR 398 at 404 per Mason CJ, Deane and Dawson JJ, 408 per Brennan J, 421 per Toohey and Gaudron JJ, 427 per McHugh J.

"This rule provided for the commencement of proceedings by numerous persons having 'the same interest in any proceeding'. In *Carnie*, Mason CJ, Deane and Dawson JJ[215] expressed the view that to equate the meaning of the phrase 'same interest' with a common ingredient in the cause of action by each member of the class might not adequately reflect the content of the statutory expression. Their Honours said that the expression may extend 'to a significant common interest in the resolution of any question of law or fact arising in the relevant proceedings'. Brennan J[216] and McHugh J[217] were of opinion that a plaintiff and the represented persons had 'the same interest' when they had a community of interest 'in the determination of any substantial question of law or fact that arises in the proceedings'. Toohey and Gaudron JJ[218] treated as sufficient 'a significant question common to all members of the class' to be determined by the grant of declaratory relief."

162 These explanations of the words the "same interest" stand in sharp contrast to the approach now taken by the reasons of the majority. Here, the "same interest" postulated is that of the named plaintiffs and the other persons "affected", defined as persons who had bought tobacco products from the appellants by transactions of an identical or analogous kind as those made between the respondents and the appellants.

163 Fourthly, it is important to recognise that, in the present case, the proceedings came before the primary judge before the filing of any defences by the appellants. This being so, it was not possible, at that stage, to state with certainty what were the defined issues in the proceedings that any such defences would later identify. This is a further reason why it is erroneous, at such a preliminary stage, to speculate, as the majority do, on the issues that might later exist between other purchasers of tobacco products and the appellants, in advance of such pleadings[219].

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213 (1999) 199 CLR 255 at 260-261 [11].

214 (1999) 199 CLR 255 at 267 [27].

215 (1995) 182 CLR 398 at 404.

216 (1995) 182 CLR 398 at 408.

217 (1995) 182 CLR 398 at 427.

218 (1995) 182 CLR 398 at 421.

219 Reasons of Gummow, Hayne and Crennan JJ at [56]; reasons of Callinan and Heydon JJ at [216]-[226].

164 The fundamental mistake of the reasons of the majority is that they conflate the "interest" of other persons "in those proceedings"[220] with the stated requirement of the sub-rule that envisages that the "same interest" shall precede "any proceedings" and is thus not confined to the way those proceedings are later pleaded. The serious consequence of this approach is that it needlessly restricts the availability of representative proceedings, effectively to a class of persons who had an interest in the proceedings when they were instituted (as distinct from when they are decided)[221]. This restrictive approach destroys much of the utility of the rule as a facility for representative proceedings. Effectively, it prevents such proceedings being mounted to protect persons, standing in a like position but not yet organised, from the descent of a limitation bar. Indeed, it prevents such proceedings being used to gather those with like claims into a suitable procedure for the enforcement of their "concurrent interests"[222] and who decide to opt in to the proceedings. Especially against the background of the facultative approach that this Court has taken in *Carnie* and *Wong* (and the recognition in the reasons of Gummow, Hayne and Crennan JJ of the affirmative basis for facilitating proceedings of such a character[223]) the approach now taken by the majority should be rejected. It is not what the rule says. Nor is it what it has been held to say. Nor what it was intended to permit.

165 Fifthly, the provisions elsewhere in Pt 8 r 13 of the Rules reinforce the approach to the meaning of sub-r (1) that I, alike with Gleeson CJ, favour. The terms of sub-rr (4), (5) and (6) obviously contemplate procedures by which others, amongst the "numerous persons" contemplated by sub-r (1), may "opt in" to the representative action *after* the proceedings have been commenced. Of necessity, the "interests" of such persons will not have been defined at the time the "proceedings" were "commenced" in terms of the pleadings of such "proceedings". This serves to confirm that the "same interest" being spoken of in Pt 8 r 13(1) is an interest of a generic, not of a pleading, kind.

166 In the present case, the generic identity of interest was more than adequately established by reference to the class of retailers who had bought tobacco products from the appellants and who, like Fostif, had paid the appellants the unremitted invalid tax at the time defined by the delivery of this Court's decision in *Ha*. For the purpose of the sub-rule, and given its object, that was a sufficient specification of the "same interest". Clearly, it preceded the commencement of the proceedings. The proceedings then commenced, were

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220 Reasons of Gummow, Hayne and Crennan JJ at [51]-[58].

221 Reasons of Gummow, Hayne and Crennan JJ at [58].

222 "Representation: concurrent interests" is the heading to Pt 8 r 13.

223 Reasons of Gummow, Hayne and Crennan JJ at [88]-[96].

subject to subsequent judicial supervision. Without such supervision, they could not be continued. Specifically, they were subject to protection against the enforcement of any judgment or order where it was shown that "by reason of facts and matters particular to his case" a party was entitled to be exempted from liability[224]. This is the way that Pt 8 r 13 envisages that the individualities and peculiarities of particular transactions will be adjusted at the *discretionary* stage. It is not by denying the commencement of a representative action applicable to such cases at the *jurisdictional* stage.

167 Sixthly, so far as there is any suggestion that the approach adopted in the reasons of the majority is warranted because no common beneficial relief is sought[225], in the form of judgment claimed by Fostif in its pleading, this too involves the adoption of an approach unacceptably hostile to the purposes of representative proceedings. It is one particularly inappropriate at the stage that these proceedings have so far reached.

168 The notion that "common beneficial relief" is a necessary precursor to the proper invocation of Pt 8 r 13, as suggested by the majority[226], is erroneous. In fact, Callinan and Heydon JJ describe the "declaration" sought in *Carnie* as the "crucial" factor in the outcome of that case, allowing the two plaintiffs existing at the time the proceedings were commenced to properly claim "on behalf of themselves and all other persons"[227]. As Gleeson CJ sets out[228], a declaration was sought in *Carnie* because of the particular facts existing in that case. Indeed, in *Carnie*, a declaration was the only relief capable of being sought that would not have had the potential to harm the financial interests of likely plaintiffs. That problem is not present in this case[229]. Given that this Court accepts that parties need not have *precisely* the same cause of action to establish the "same interest" for the purposes of representative proceedings, it is difficult to comprehend how a specific claim for relief is determinative of whether or not there is a commonality of interests.

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224 Pt 8 r 13(6).

225 Reasons of Gummow, Hayne and Crennan JJ at [55]-[59].

226 Reasons of Gummow, Hayne and Crennan JJ at [58]; reasons of Callinan and Heydon JJ at [216], [221]-[226].

227 Reasons of Callinan and Heydon JJ at [225].

228 Reasons of Gleeson CJ at [7]-[11].

229 Reasons of Gleeson CJ at [11].

169 The "same interest" of which Pt 8 r 13(1) speaks is addressed to the issues existing before the proceedings are commenced. It is not addressed to the relief ultimately sought. When the defences are filed to the present proceedings, it would be open to the respondents to cure any supposed defect in their pleading by the amendment of the summons to include a claim for a declaration. A facultative approach to Pt 13 r 8(1) would permit the proceedings to continue, subject to such an amendment being made. In my view, that is a course that should be left, as the Court of Appeal envisaged, to the judge in the Commercial List to whom the proceedings were returned by that Court's order. It is not a reason for this Court to deny the continuance of the representative proceedings to secure the vindication of the "same interest" of the retailers who purchased their tobacco products from the appellants where so many other retailers with the "same interest" have already had their entitlements vindicated by the commencement of other, similar, proceedings.

170 Following this Court's decision in *Roxborough* and the predictably high degree of similarity in the dealings between tobacco wholesalers and retailers for the recovery of like unlawful taxes, it flies in the face of reality to deny the appellants' retailers, virtually alone, the opportunity to elect to "opt in" to the representative proceedings begun by the respondents with the similarity of their interests in mind. To the extent that, on closer examination and at a later stage, the interests proved not relevantly to be "the same" (a most unlikely conjecture in this case) adequate judicial means exist under Pt 8 r 13 of the Rules to permit judicial protection both of those interests and of the interests of the appellants. That would be the time for the appellants to agitate any alleged dissimilarity of interests. It is not necessary for a party, at the time of initiating a representative action, to vindicate such "interests" that may eventually be demonstrated to be "the same". The contrary view is incompatible with the language of the rule, the past authority of this Court, and with the achievement of the rule's purpose.

171 *Conclusion: the rule applies*: I would therefore reject the suggestion that Pt 8 r 13(1) of the Rules was not applicable to the present proceedings. Specifically, I disagree with the contention that, at the time the proceedings were instituted and when the primary judge made his orders, there were not "numerous persons having the same interest in the proceedings". To say that only the respondents personally had an interest in the proceedings is to ignore the very purpose of such proceedings, the way they were expressed and the intended operation of the Rules designed to permit just such representative actions to be brought on behalf of persons later organised into the proceedings by the "opt-in" procedure proposed by the respondents[230].

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230 cf reasons of Gummow, Hayne and Crennan JJ at [58]-[60].

172 I agree with Gleeson CJ[231] that the approach of the majority in this Court is inconsistent with the holding of this Court in *Carnie*. The approach of the majority ignores the obvious application of that decision and its demand that the decision-maker determine whether Pt 8 r 13(1) has been correctly invoked. In relation to this case, that inquiry asks[232]:

> "Do numerous persons have the same interest in the action which [Fostif] have commenced? If they do not then that is the end of the matter. If they do, then the action is properly begun and, unless the Court otherwise orders, it may be continued."

173 It is clear that there were numerous persons with the "same interest"[233] in the action commenced by Fostif on 30 June 2003. It must be remembered that in *Carnie*, this Court held that the onus was not on the plaintiffs to "identify every member of the class; rather it [was] to identify the class with sufficient particularity"[234]. This was clearly achieved by Fostif in the summonses to commence these proceedings, filed in June 2003. On any reading it is obvious that Pt 8 r 13(1) was properly invoked; the summonses described a class of "numerous other persons capable of being clearly defined who have the same interest in these proceedings"[235]. Thus, the possible existence of numerous parties and the requisite commonality of interest between them was satisfied.[236] This conclusion is reinforced by the fact that Firmstones was subsequently retained by around 2,100 persons or entities that "fell within the class of represented retailers" as defined in the representative proceedings[237]. Yet, in the reasons of Gummow, Hayne and Crennan JJ[238], it is argued that it was not

231 See reasons of Gleeson CJ at [2], [9]-[13].

232 (1995) 182 CLR 398 at 421 per Toohey and Gaudron JJ (Mason CJ, Deane and Dawson JJ concurring).

233 As defined in *Carnie* (1995) 182 CLR 398 at 404-405 per Mason CJ, Deane and Dawson JJ, 408 per Brennan J, 421, 424 per Toohey and Gaudron JJ, 427 per McHugh J and discussed above in these reasons at [161].

234 (1995) 182 CLR 398 at 422 per Toohey and Gaudron JJ.

235 (1995) 182 CLR 398 at 424 per Toohey and Gaudron JJ.

236 (1995) 182 CLR 398 at 405 per Mason CJ, Deane and Dawson JJ, 424 per Toohey and Gaudron JJ.

237 Reasons of Gummow, Hayne and Crennan JJ at [35].

238 See also the reasons of Callinan and Heydon JJ at [215], [222]-[223].

apparent from the proceedings, as commenced, that there was "*any* person, let alone numerous persons, whom the plaintiff would represent"[239]. That appears the very point upon which they decide these appeals in the appellants' favour[240]. I can only say that I am wholly unconvinced.

174 In so far as the appellants repeated in this Court their earlier separate and different grounds for contesting the existence of the "same interest" of "numerous persons" in the proceedings, I would reject those arguments for the reasons given by the Court of Appeal. Those reasons are encapsulated in that Court's conclusion that the present respondents had demonstrated that the rule was engaged on the footing that there were "substantial common issues of *law* linking the claims of each represented group of retailers" and that "the scope and applicability of *Roxborough* [constituted] a genuine issue in each proceeding"[241]. This conclusion was fully supported by reference to the terms of the summonses, to the written submissions filed before the primary judge and indeed to the submissions made by the appellants themselves in the courts below[242].

175 Moreover, the Court of Appeal found there were also common issues of *fact* likely to arise within each proceeding. Their existence reinforced the conclusion that the precondition to the commencement of the representative action as brought, was established[243]:

> "There is a single defendant named in each proceeding. The evidence discloses that within the relevant period its invoicing practices were either identical in all its dealings or contained variations about which the [plaintiffs] say with arguable justification there is no material distinction. At the very least, it is established at this stage that, within each separate proceeding, there are material common issues of fact (invoicing, warehousing, methods of calculating and passing on the licence fee by the wholesaler) that establish a sufficient community of interest to satisfy the Rule's jurisdictional requirement and indicate the appropriateness of the proceeding continuing as a unity pursuant to the Rule, at least for the time being."

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239 Reasons of Gummow, Hayne and Crennan JJ at [59]. (original emphasis)

240 Reasons of Gummow, Hayne and Crennan JJ at [58]-[60].

241 (2005) 63 NSWLR 203 at 247 [212]. (emphasis added)

242 (2005) 63 NSWLR 203 at 247-255 [213]-[255].

243 (2005) 63 NSWLR 203 at 255 [256].

176 The commonality of the parties and the identified issues of law and fact are established. It follows that no error has been shown in the understanding of the meaning of the rule or in its application that would warrant the intervention of this Court or its substitution of a different conclusion. On the second issue too the appellants fail.

The approach to discovery was correct

177 *Disclosure of identities*: The third issue was correctly perceived by the Court of Appeal to be whether, on the basis that the representative proceedings should not be stayed and were validly commenced, discovery and interrogatories as claimed by the respondents should be refused *in limine*[244].

178 The discovery orders requested by the respondent (and the interrogatories that they sought to have the appellants answer[245]) aimed at obliging the appellants to disclose the records of their transactions affecting "represented retailers", as defined in the respective summonses. The respondents sought to engage these procedures in aid of the prosecution of the proceedings as representative proceedings. The primary judge declined to make such orders. He did so because of his conclusions that the proceedings did not properly engage the rule for the commencement of representative proceedings or, if they did, that they should be stayed permanently as an abuse of process. Nevertheless, he indicated that he saw no objection, in principle, to the grant of such relief, although it was sought for the purpose of ascertaining the members of the class[246]. He accepted that discovery to identify potential parties was a remedy with a sound legal basis[247].

179 *Objections to such orders*: In this Court, the appellants maintained their objections to the provision of such relief. By hypothesis, it is necessary to consider their objections upon the assumption that the appellants' primary attack on the validity of the proceedings, as representative proceedings, has failed. This is so, because, were that attack to succeed, the ancillary questions would not arise for immediate determination.

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244 (2005) 63 NSWLR 203 at 260-261 [290].

245 Respectively under Pts 23 r 3 and 24 r 5 of the Rules. See (2005) 63 NSWLR 203 at 256 [260]-[261].

246 *Keelhall* (2003) 54 ATR 75 at 119-120 [152]-[153].

247 *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1 at 9-10 [24]-[26] per Wilcox, Sackville and Katz JJ. See *Fostif* (2005) 63 NSWLR 203 at 257 [264].

180 The appellants submitted that the discovery of the identity of persons whom the plaintiffs hoped to include as "represented retailers" did not relate to any matter or fact in issue in the proceedings as initially constituted; would impermissibly impose on the appellants an obligation to identify persons entitled to judgment against themselves; would involve the Court in facilitating a champertous project; and would be oppressive of the appellants solely for the purpose of furthering the financial benefit of Firmstones, which was not a party to the proceedings.

181 *The arguments rejected*: None of these arguments is persuasive. Identity discovery has a long history. The rules invoked by the respondent are broad enough, viewed with their overriding purpose in mind, to permit the making of the orders sought. Such orders would facilitate access to the determination of their legal entitlements of those who, being identified, subsequently elected to "opt in" to the representative proceedings on the terms proposed[248]. As has been recognised in the United States, the propriety and viability of a representative type action cannot, in some cases, be determined without discovery "as for example, where discovery is necessary to determine the existence of a class or set of sub-classes". In such cases it has been held that "[t]o deny discovery … would be an abuse of discretion"[249].

182 Once the initiation and continuance of the proceedings as representative proceedings is postulated (as it must be for this purpose) the relief sought by the respondents is no more than an appropriate invocation of the rules, designed to ensure that the proceedings, so commenced, are successfully and fairly brought to trial.

183 The appellants' claim of oppression is as unconvincing to me as it was in the courts below. It is hard to reconcile that claim with the contention, upon which the appellants relied for other purposes, that at the time of the hearing before the primary judge approximately 95 per cent of the potentially "represented retailers" remained customers of the appellants. In these circumstances, it is unsurprising that Mason P should have been "unpersuaded that the exercise is so oppressive that discovery should be refused outright with respect to such obviously pertinent information some of which is undoubtedly reasonably accessible"[250].

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248 cf *Oppenheimer Fund Inc v Sanders* 437 US 340 at 350-356 (1978) per Powell J (delivering the unanimous opinion of the Court).

249 *Kamm v California City Development Co* 509 F 2d 205 at 210 (1975).

250 (2005) 63 NSWLR 203 at 260 [289].

184 *The correct disposition*: The Court of Appeal concluded that the real problem presented by "the discovery dispute" was one of prematurity[251]. That Court's opinion was that it should be left to a judge in the Division of the Supreme Court where the trial of the proceedings would occur, to determine contested questions of discovery and interrogatories. Mason P recognised the assertion of the appellants, in their defence, that some (or all) of their retailers might fall into a class of persons who paid the amount of the tobacco licence fee referable to sales but without any "separately identifiable and serviceable parts of the consideration payable in respect of each sale" attributed to such fees. It was Mason P's view that "this is a matter to be explored in the litigation"[252]. I agree with that conclusion[253].

185 *Conclusion: orders correct*: It follows that I would reject the appellants' submission that discovery and interrogatories were unavailable to the respondents, as a matter of legal principle. The fashioning and implementation of such remedies was properly remitted to a single judge. That is where such procedural questions are normally decided, once it is concluded that the remedies are available as a matter of law.

186 No error has been shown in the Court of Appeal's treatment of the third issue. The appellants' submissions on this matter likewise fail.

The constitutional objection also fails

187 *Supposed absence of a "matter"*: By an amended ground of appeal, the appellants raised a constitutional issue that had not been agitated before the primary judge or the Court of Appeal. Notwithstanding this omission, the respondents did not suggest that the point was unavailable to the appellants, in this Court, either for legal[254] or procedural[255] reasons. In these circumstances, this Court must decide the issue. It cannot be ignored, given that it is presented as a fundamental legal defect in representative proceedings of the kind postulated by the respondents.

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251 (2005) 63 NSWLR 203 at 258 [273].

252 (2005) 63 NSWLR 203 at 261 [290].

253 See also the reasons of Gleeson CJ at [14]-[15].

254 *Gipp v The Queen* (1998) 194 CLR 106 at 116 [23]-[24] per Gaudron J, 169 [185] per Callinan J, 145-147 [117]-[119] of my reasons; *Crampton v The Queen* (2000) 206 CLR 161.

255 *Coulton v Holcombe* (1986) 162 CLR 1 at 7-9 per Gibbs CJ, Wilson, Brennan and Dawson JJ; cf my observations in *Roberts v Bass* (2002) 212 CLR 1 at 54 [143].

188 Essential to the appellants' argument of constitutional invalidity is the suggestion that the proceedings are within federal jurisdiction and that, therefore, they must, so far as invested in any court of a State, involve a "matter" in the constitutional sense of that word[256]. In *Fencott v Muller*[257], this Court explained:

> "[T]he unique and essential function of the judicial power is the quelling of such controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion."

189 The appellants argued that, on various grounds, the representative proceedings which the respondents sought to bring to trial offended this basal notion of the character and purpose of federal judicial power. Thus, the appellants submitted that, far from quelling existing controversies, the respondents were seeking to create controversies that otherwise did not exist[258]. They were stirring up controversies and enlisting courts in the exercise of federal jurisdiction, in their attempt to do so. They were endeavouring, without identifying those affected in advance, to obtain suspension of relevant limitation periods in respect of still unidentified persons. Moreover, they were doing this to make a personal profit for a third party who was an "alien to such future controversies", namely the funder, Firmstones. The appellants said that this was contrary to the fundamental assumptions of Ch III of the Constitution and was therefore constitutionally impermissible.

190 Alternatively, the appellants argued that the representative proceedings envisaged by the respondents amounted to the furtherance of an abuse of the judicial power of the Commonwealth which was constitutionally forbidden. In support of this way of presenting their argument, the appellants invoked observations made by members of this Court in *Nicholas v The Queen*[259]. They submitted that, for matters within federal jurisdiction, abuse of power (or process) had a constitutional foundation, resting on the implications necessary to

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256 Constitution, s 77(iii).

257 (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ.

258 cf *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 458-459 [242] per Hayne J; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355 [45] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 523-525 [24]-[25] per Gleeson CJ and McHugh J, 570-571 [165] per Gummow and Hayne JJ.

259 (1998) 193 CLR 173 at 208-209 [74] per Gaudron J, 226 [126] per McHugh J, 265 [213] of my reasons.

the Constitution as to how the judicial power would be deployed[260]. These arguments repeated the contention that the respondents' proceedings amounted to an abuse of process, but this time with a constitutional dimension.

191 *Federal jurisdiction*: I will assume that, in the proceedings, the Supreme Court of New South Wales was exercising federal jurisdiction. Whether that was so can sometimes be a matter of dispute and oversight[261]. On the approach that I favoured in *Roxborough*[262], the entitlements of retailers such as the respondents to recover payments made on a tax invalidated by the Constitution was to be found as an implication of the Constitution itself. Hence it was necessarily a "matter" within federal jurisdiction. As stated in *Roxborough*, that view was rejected by the majority of this Court. The majority treated the claim for recovery as one based on private rights of action, founded in the common law or equity.

192 Nevertheless, because the source of those private rights may ultimately be traced to a constitutional provision, I am prepared to accept that their enforcement is a matter "arising under the Constitution, or involving its interpretation"[263]. I can accept this conclusion more readily because of my own opinion as to the true character of the recovery action.

193 Because, therefore, the proceedings in the Supreme Court of New South Wales were in federal jurisdiction, vested in that Court pursuant to the Constitution, it was necessary for any State law (or the common law) applicable to the proceedings to be consistent with federal law, most especially with the Constitution itself. Otherwise, such State law would not be "picked up" and applied in federal jurisdiction pursuant to the *Judiciary Act* 1903 (Cth)[264]. Specifically, if Pt 8 r 13 of the Rules involved procedures that were inconsistent

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260 They referred by analogy to cases on contempt of court: *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 395-397 [16]-[25] per Gleeson CJ and Gummow J, 403 [47] per McHugh J; and on judicial impartiality: *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 362-363 [80]-[81] per Gaudron J, 373 [116] of my reasons.

261 As in *British American Tobacco* (2003) 217 CLR 30 at 41-42 [5] per Gleeson CJ, 50-51 [36] per McHugh, Gummow and Hayne JJ, 67 [92] of my reasons.

262 (2001) 208 CLR 516 at 559 [111], 579-580 [174].

263 *Judiciary Act* 1903 (Cth), s 39. See *British American Tobacco* (2003) 217 CLR 30 at 51 [37] per McHugh, Gummow and Hayne JJ.

264 ss 79, 80.

with the Constitution, it could not have any application to the exercise of federal jurisdiction[265].

194 *A "matter" exists*: The appellants' constitutional arguments should be rejected. It is true that the meaning of the word "matter" in the Constitution[266] and in the *Judiciary Act*[267] is somewhat elusive[268]. However, I remain of the view that "[i]t is undesirable that the word should be subjected to excessive refinement or submitted to inappropriate elaboration leading to unnecessary constitutional rigidity"[269].

195 The appellants' first argument, repeated by Mobil in the connected proceedings, bears a close similarity to the argument advanced by Mobil, and rejected by this Court in *Mobil Oil Australia Pty Ltd v Victoria*[270]. As recorded, the argument advanced by Mobil in that appeal was that[271]:

> "… parties who, having no consciousness of the controversy, are not involved in it. It therefore trespasses beyond the framework of a genuine justiciable controversy."

This was another way of saying that it could not amount to a "matter" for constitutional purposes.

196 In rejecting this argument, Gleeson CJ[272] pointed out that[273]:

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265 See my reasons in *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 163 [119]-[120].

266 Constitution, ss 75, 76, 77 and 78.

267 s 38.

268 See my reasons in *Abebe v The Commonwealth* (1999) 197 CLR 510 at 585 [215].

269 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 650 [156]. See also at 669 [209]-[210] per Callinan J.

270 (2002) 211 CLR 1.

271 (2002) 211 CLR 1 at 7.

272 (2002) 211 CLR 1 at 27 [22].

273 cf the arguments raised in *In re Freme's Contract* [1895] 2 Ch 778 at 780-781.

"It is not unknown for judicial decisions to determine the rights of people who were unaware of their existence, or even of people who were unborn at the time of the decision."

197 In their reasons, Gaudron, Gummow and Hayne JJ said of the Victorian provisions, permitting the "group proceedings" in issue in the earlier case[274]:

> "Although a proceeding under Pt 4A may affect the rights both of those who know of and support the prosecution of the proceeding and of those who do not know of it, Pt 4A does not compel the unwilling to continue to remain a group member. The unwilling may seek to opt out. Further, in affecting the rights of those who know of the proceeding and those who do not, a proceeding under Pt 4A is no different from representative proceedings of a kind common in the State Supreme Courts since federation and in their colonial predecessors."

198 In my reasons, I observed[275]:

> "… [D]ealing with representative claims, and doing so by adjudicating the rights of all who are in a class of persons, has long been a feature of the ordinary practice of courts. The order that results from representative proceedings of the traditional kind, and the order that results from proceedings of the kind for which Pt 4A provides will, absent some order to the contrary, finally bind all those in the class concerned, regardless of their particular state of knowledge of the proceeding. It is a judgment made in the exercise of judicial power."

199 The appellants' argument assumed that there could be no "matter" because there was no controversy until a legal proceeding had been instituted or formulated by the person seeking recovery. This view of the constitutional word was rejected by the Federal Court in *Hooper v Kirella Pty Ltd*[276] for reasons that I would endorse. The basic flaw in the appellants' argument is that it fails to take into account the fact that this Court, since its decision in *In re Judiciary and Navigation Acts*[277], has distinguished between a "matter" and the legal

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274 (2002) 211 CLR 1 at 34-35 [51] referring to Pt 4A of the *Supreme Court Act* 1986 (Vic).

275 (2002) 211 CLR 1 at 39 [65].

276 (1999) 96 FCR 1 at 13-16 [45]-[55] per Wilcox, Sackville and Katz JJ.

277 (1921) 29 CLR 257 at 265-266 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ. See also *Abebe v The Commonwealth* (1999) 197 CLR 510 at 523-525 [24]-[25] per Gleeson CJ and McHugh J, 555 [117] per Gaudron J, 570-571 [164]-[167] per Gummow and Hayne JJ, 588 [225] of my reasons.

proceeding in which the "matter" might be determined. A "matter" connotes a controversy "which might come before a Court of Justice"[278]. It is "identifiable independently of the proceedings which are brought for its determination"[279]. Thus a "matter" exists where there is a legal claim, "even though a right, duty or liability has not been established and, indeed, may never be established"[280].

200 In the present appeals, if individual retailers are aggrieved by reason of a legal obligation to pay unremitted moneys to the wholesaler on a constitutionally invalid tax and the wholesaler fails to refund that payment, there is a qualifying controversy. Hence there is a "matter". The retailers are aggrieved that the wholesaler has benefited from a legal windfall at their expense. The mere fact that, unless organised into representative proceedings, the retailers might not have the ready means to translate their grievance into legal proceedings to resolve the controversy does not alter the constitutional character of that grievance. It remains a "matter". The fact that the litigation funder, Firmstones, may have its own separate and additional interest in the retailers' grievance is also irrelevant to the constitutional character of that grievance in the first place.

201 Given that representative proceedings of various kinds preceded federation in Australia, it would be a very surprising outcome now to conclude, on a quasi-theological elaboration of the word "matter", that federal jurisdiction did not permit such proceedings to be brought. That conclusion would be specially surprising, in a representative proceeding of the "opt-in" variety, which is what the respondents propose in these proceedings. It would be remarkable given that there is no hint of a constitutional defect in the treatment of such proceedings by this Court in *Wong*, a case clearly in federal jurisdiction. Moreover, the existence of a constitutional problem was rejected by members of the Court in the earlier *Mobil Oil* case. It would be nothing short of astonishing if the federal jurisdiction for which Ch III of the Constitution provides were to be so constrained as to forbid such proceedings, given the broad national purposes for which that jurisdiction was provided by the Constitution and the potential utility of such proceedings in an age when mass production of goods and services

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278 *The State of South Australia v The State of Victoria* (1911) 12 CLR 667 at 675 per Griffith CJ.

279 *Fencott v Muller* (1983) 152 CLR 570 at 603 per Mason, Murphy, Brennan and Deane JJ.

280 *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1 at 15 [55] per Wilcox, Sackville and Katz JJ.

has a tendency to produce multiple claims of an identical or analogous character[281]. We should always remember[282]:

> "[The Constitution] … is the governmental charter of today's Australians. It belongs to the present and the future. It is not chained to the past[283]. It should be construed, so far as its text and structure permit, to avoid irrational rigidities or seriously inconvenient outcomes. Ordinarily, such rigidities and serious inconvenience will be inconsistent with the enduring character of the Constitution as the charter of government of a modern nation."

202 By "organising" persons into a legal action for the vindication of their legal rights, representative proceedings are not creating controversies that did not exist. Controversies pre-existed the proceedings, even if all those involved in them were unaware of, or unwilling earlier to pursue, their rights. A litigation funder, such as Firmstones, does not invent the rights. It merely organises those asserting such rights so that they can secure access to a court of justice that will rule on their entitlements one way or the other, according to law.

203 The appellants' first constitutional argument, that such proceedings are incompatible with the requirements of federal jurisdiction, fails.

204 *No constitutional abuse*: The appellants' second constitutional argument seeks either to derive from the language of Ch III of the Constitution a doctrine of abuse of process that is constitutional in character or to subject the pre-existing common law doctrine on that subject to a constitutional imperative so as to be consistent with the assumptions of Ch III.

205 Whilst I accept that the full ambit of the implications necessary to the operation of the Judicature for which Ch III provides has not yet been explored[284]

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281 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46, (1988) at 8-11 [13]-[20].

282 As I observed in *Abebe v The Commonwealth* (1999) 197 CLR 510 at 582 [203].

283 *Victoria v The Commonwealth* (1971) 122 CLR 353 at 396 per Windeyer J; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 171-173 per Deane J.

284 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 617-618 [154]. See also McHugh, "Does Chapter III of the Constitution protect substantive as well as procedural rights?", (2001) 21 *Australian Bar Review* 235; Lacey, "Inherent Jurisdiction, Judicial Power and Implied Guarantees under Ch III of the Constitution", (2003) 31 *Federal Law Review* 57.

(as may be seen in the many cases that have invoked the "*Kable* doctrine"[285] since it was first explained), I am unconvinced that it is necessary or useful to constitutionalise remedies for abuse of process. Long before the Constitution was written, common law courts in England and in the Australian colonies provided remedies against abuse of a court's processes. Such remedies are flexible. They adapt to new times and new circumstances[286]. Moreover, in particular cases, by particular statutory language, Parliaments can sometimes state where the balance of public interest lies[287].

206 In these circumstances, no convincing necessity has been shown as to why remedies against abuse of process must be given a constitutional status, to repel representative or like proceedings. I accept that such proceedings, including when organised by litigation funders concerned with their own profits, may involve risks of abuse of judicial process[288]. The need for protection of the vulnerable was mentioned by Gleeson CJ in the New South Wales Court of Appeal in *Carnie*[289]. It was also recognised by that Court in these proceedings[290]. However, it has not been demonstrated that the judicial supervision envisaged by the Court of Appeal's orders would be inadequate to prevent abuse of process or injustice in the proceedings initiated by the respondents.

207 This Court was informed by the Attorney-General of the Commonwealth (intervening on the constitutional issue in support of the respondents) that the Standing Committee of Attorneys-General is presently considering the issue of litigation funding[291]. Further legislative regulation may emerge from that consideration. Alternatively, more elaborate provisions in the Rules may be

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285 Following *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

286 See *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 80 ALJR 1100; 227 ALR 425.

287 *Nicholas v The Queen* (1998) 193 CLR 173 at 197-198 [37]-[38] per Brennan CJ.

288 Beisner, Shors and Miller, "Class Action 'Cops': Public Servants or Private Entrepreneurs?", (2005) 57 *Stanford Law Review* 1441.

289 *Esanda Finance Corp Ltd v Carnie* (1992) 29 NSWLR 382 at 388. See above these reasons at [132]-[133].

290 (2005) 63 NSWLR 203 at 258-259 [279].

291 North, "Litigation Funding: Much to be Achieved With the Right Approach" (2005) 43(11) *Law Society Journal (NSW)* 66 at 68-69; cf Aitken, "'Litigation Lending' after *Fostif*: An Advance in Consumer Protection, or a Licence to 'Bottomfeeders'?", (2006) 28 *Sydney Law Review* 171 at 179.

necessary in those jurisdictions that have persisted with abbreviated rules, such as those found in Pt 8 r 13 of the Rules in this case[292]. It has not been demonstrated that it is necessary to stamp on this new practice the rigidities of constitutional norms.

208 Accepting that the common law rules on abuse of process must conform to any applicable constitutional assumptions[293], it does not follow that a constitutional requirement, more restrictive of representative proceedings, demands modification of previous understandings of the common law rules on abuse of process.

209 In the light of recent decisions, it cannot be said that the common law test of abuse of process compromises in any way the institutional integrity of the Supreme Court, as a repository of federal jurisdiction[294]. The capacity of the principles of abuse of process to respond to what was seen as the infliction of injustice on defendants in a particular case was demonstrated recently in *Batistatos v Roads and Traffic Authority of New South Wales*[295]. Although I dissented from the result in that appeal, I fully accepted the availability of the common law remedy, expressed as it was in broad terms[296]. The appellants have not shown any defect in the common law rule on abuse of process, or abuse of jurisdiction, that suggests a need to re-express that law according to more stringent Australian constitutional standards.

210 *Conclusion: no impediment*: It follows that the two arguments that the appellants advanced, on constitutional grounds, to challenge the applicability to federal jurisdiction of Pt 8 r 13 of the Supreme Court Rules (NSW), fail. There is no constitutional defect in those proceedings. Nor is there any need to formulate a new constitutional rule on abuse of process to invalidate the

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292 See (2005) 63 NSWLR 203 at 258 [278] contrasting *Federal Court of Australia Act* 1976 (Cth), Pt 1VA.

293 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 533-535 [63]-[70] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; my reasons in *Roberts v Bass* (2002) 212 CLR 1 at 54-55 [143]-[144].

294 cf *Fardon v Attorney-General (Q)* (2004) 78 ALJR 1519 at 1527-1528 [35] per McHugh J, 1539 [101], 1541-1542 [117] per Gummow J, 1564 [234] per Callinan and Heydon JJ; 210 ALR 50 at 62, 78, 81, 113.

295 (2006) 80 ALJR 1100 at 1141-1142 [223]; 227 ALR 425 at 475-476.

296 See also my reasons in *Island Maritime Ltd v Filipowski* (2006) 80 ALJR 1168 at 1188-1189 [97].

respondents' proceedings or the interest in them of the litigation funder, Firmstones.

Orders

211 All of the challenges mounted by the appellants against the respondents' proceedings have therefore failed. Accordingly, all of the appeals should be dismissed with costs.

212 CALLINAN AND HEYDON JJ. The circumstances are set out in the reasons for judgment of Gummow, Hayne and Crennan JJ.

Part 8 r 13 of the Supreme Court Rules (NSW)

213 There were two key conditions in Pt 8 r 13(1) which the plaintiffs had to satisfy for the proceedings to be commenced as representative proceedings.

214 First, it was not enough that "numerous persons" had "the same interest" in the abstract – they had to have the same interest *in the proceedings*. To use words employed by Toohey and Gaudron JJ (with whom Mason CJ, Deane and Dawson JJ concurred) in *Carnie v Esanda Finance Corporation Ltd*, it had to be the case that there was "a significant question common to all members of the class and they stand to be equally affected by the declaratory relief which the [plaintiffs] seek"[297]. Similarly, to use words employed by Lord Macnaghten[298] and approvingly quoted by Toohey and Gaudron JJ in *Carnie v Esanda Finance Corporation Ltd*, the action lay "if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent"[299].

215 The second condition was that "the same interest" must actually have existed when the proceedings began. It was not enough that it might exist at some future time.

216 Both these conditions were satisfied in *Carnie v Esanda Finance Corporation Ltd*[300]. However, that case is distinguishable from the present one. In that case par 6 of the statement of claim alleged that the plaintiffs had brought proceedings on behalf of themselves and all other persons ("the represented debtors") who had entered certain described contracts. The relief claimed included a declaration that no represented debtor was required to pay any amount on account of credit charges in relation to contracts answering the description in par 6[301]. Because of the claim for a declaration so framed, the allegation in par 6

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297 (1995) 182 CLR 398 at 421; see also at 424.

298 *Duke of Bedford v Ellis* [1901] AC 1 at 8.

299 (1995) 182 CLR 398 at 416.

300 (1995) 182 CLR 398.

301 Four declarations were sought, two of which in terms related to the represented debtors: these two mirrored the language of two declarations relating to the plaintiffs. The declarations were claimed in sub-pars (1), (1A), (1B) and (2) of the claims to relief, which are set out in Gleeson CJ's reasons for judgment in the Court

(Footnote continues on next page)

that the plaintiffs were bringing the proceedings on behalf of themselves and the represented debtors was in one sense true, even though the plaintiffs had no instructions from the represented debtors.

217 There are words in the summonses which initiated the proceedings under consideration in the present appeals corresponding with the allegation in par 6 of the statement of claim of *Carnie v Esanda Finance Corporation Ltd*. However, they are not capable of bringing about the same result in this case.

218 In the proceedings in which Fostif Pty Limited is the only plaintiff, par 1 of Section A of the summons begins: "The plaintiff claims the relief set out in this Summons on behalf of themselves [scil 'itself'] and the class of unnamed persons referred to in paragraph 2" of Section B of the summons. What is that relief? Apart from costs, the only specific order claimed is "Judgment against the defendant in favour of the plaintiff together with interest pursuant to section 94 of the Supreme Court Act (NSW)." What would that judgment be for? The answer is: a sum of money calculated by reference to the allegations in pars 12-20 of Section C of the summons. Paragraphs 19-20 of Section C of the summons allege:

> "19. The plaintiffs are entitled to be paid the amounts referred to in paragraph 15 above.
>
> 20. The plaintiffs are entitled to be paid interest pursuant to section 94 of the Supreme Court Act (NSW) or otherwise."

Paragraph 15 alleges:

> "The plaintiffs paid to the defendant the total amount of the licence fee identified or included in the invoices to the plaintiffs."

That in turn is a reference to pars 12 and 13. Those paragraphs allege:

> "12. During the Relevant Period the defendant sold, in the course of tobacco wholesaling, tobacco products to one or more of the plaintiffs.
>
> 13. The said sales of tobacco products were made pursuant to written invoices issued by the defendant which invoices identified in relation to each sale the total value of tobacco products sold."

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of Appeal: *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382 at 386.

The emphasis given to the plurals appearing in those three quotations has been added.

219 This is an embarrassing and vexatious pleading in view of the fact that there is only one plaintiff – Fostif Pty Limited. The early parts of the summons draw a clear distinction between Fostif Pty Limited as the only plaintiff, and the "class of unnamed persons" on behalf of whom that plaintiff claims to be acting, the members of which were only to "become involved as plaintiff" if they signed and returned the "opt-in notices" described in par 2 of Section A of the summons[302].

220 In the summons the pleader refers sometimes to the "plaintiff" and sometimes to the "plaintiffs". Are these plural forms only clerical errors, or are they something more? In some parts they appear to be only clerical errors, perhaps to be accounted for by the fact that the seven summonses in the proceedings under consideration are in standard form, and in some of the proceedings there is one plaintiff and in some more than one. In other parts, like pars 12-20 of Section C, the part of the summons which is supposed to contain the allegations of material fact, the plural forms may be intentional. Whether intentional or not, pars 12, 13, 15, 19 and 20 of Section C suggest that in fact the "class of unnamed persons" have already become plaintiffs, when that is not the case. Once members of a "class of unnamed persons" become plaintiffs, then the language of pars 12, 13, 15, 19 and 20 is capable of applying appropriately to them. But until such time as members of the "class of unnamed persons" have become plaintiffs, the references to "plaintiffs" in those paragraphs can only be read as references to the single existing plaintiff, namely Fostif Pty Limited.

221 It follows that at the time when the summons was filed and served – which was the crucial time for assessment of whether "numerous persons have the same interest in [the] proceedings" – what the plaintiff, Fostif Pty Limited, was claiming was simply a sum of money to be calculated by reference to its pleaded dealings with the defendant. That sum of money is entirely different from other

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302 A change of plan took place after the proceedings were instituted. By notices of motion returnable on 5 September 2003, the plaintiffs sought discovery of documents identifying "the class of unnamed persons" with a view to inviting them to "opt-in". The notices of motion also sought an order that the proceedings continue as representative proceedings in respect of those members of the class who opted-in, but did not seek an order that they become plaintiffs. The proposed opt-in notice was amended accordingly in the proceedings before Einstein J. But the question whether Pt 8 r 13 is satisfied must be decided as from the time when the proceedings commenced.

sums of money to which other retailers, who were not plaintiffs at that time, might be entitled by reason of their unpleaded dealings with the defendant.

222 Hence it was not true to say, when the summons was filed and served, that in claiming the sum of money to which it may be entitled the plaintiff, Fostif Pty Limited, was acting "on behalf of ... the class of unnamed persons". The true position was that it was acting on its own behalf in seeking to recover the sum of money which it claimed to be entitled to.

223 Nor was it true to say that the plaintiff was acting on behalf of any member of that class in relation to any claim for any other sum of money. That is because the pleading had not alleged any dealings between any particular member of that class and the defendant which would entitle that member to any sum of money, and no sum of money based on any particular member's dealings with the defendant had been claimed.

224 Nor, when and if members of the "class of unnamed persons" become plaintiffs pursuant to the opt-in procedure, would it be true to say that the plaintiff, Fostif Pty Limited, was acting on their behalf when the proceedings began. Rather, the true position will be that, as plaintiffs, they will be acting on their own behalf, although no doubt, at least ostensibly, through the same legal team as the original plaintiff, Fostif Pty Limited.

225 In the light of those circumstances, it can be seen that the declaration claimed in *Carnie v Esanda Finance Corporation Ltd* was a crucial factor in the outcome of that case. Although that was a declaration claimed by the only two plaintiffs who existed, it could be described, as it was in par 6 of the statement of claim, as a claim "on behalf of themselves and all other persons" in the class described. Further, it was a claim which would affect the rights of the non-plaintiffs as well as the plaintiffs because, if acceded to, it would establish that none of them was liable to pay certain monies. And if the claim for a declaration were acceded to, pursuant to Pt 8 r 13(4) the declaration would bind the non-plaintiffs. Those non-plaintiffs thus had an "interest" in the proceedings which was the "same" as that of the plaintiffs, even though no opting-in procedure had been complied with, or even, at that point, devised.

226 The crucial claim in *Carnie v Esanda Finance Corporation Ltd* is not matched by any claim to a declaration in the proceedings under consideration here. The problem in the present appeal cannot be cured by amendment to seek a declaration now, and it could not have been cured had a declaration been sought in the summonses. That is because no declaration could legitimately have been claimed. In particular, taking the proceedings commenced by Fostif Pty Limited as an example, a declaration that the plaintiff and each of the members of the class of unnamed persons were entitled to be paid a particular sum of money could not legitimately have been claimed for two reasons. First, so far as the

plaintiff, Fostif Pty Limited, and any other person who became plaintiff pursuant to the opt-in procedure, are concerned, once the money judgment claimed in order 1 at the start of the summons was made in favour of each plaintiff who had established an entitlement to it, there would have been no utility in granting the declaration; it would have been surplusage. Secondly, so far as any other members of the "class of unnamed persons" are concerned, the summons made no allegation about any entitlement they had to be paid, and any declaration made of their entitlements would have gone beyond the pleadings.

227 Counsel for the respondent in *Mobil Oil Australia Pty Ltd v Trendlen Pty Ltd*[303], which was heard on the same day as, and together with, these appeals, were also counsel for the respondents in the present appeals. Counsel made an attempt to overcome these difficulties by appealing to Pt 8 r 13(4) and Pt 42 r 10(1) of the Supreme Court Rules. It is convenient to deal with that attempt here. Part 8 r 13(4) made a judgment entered in proceedings pursuant to Pt 8 r 13 binding on all the persons as representing whom the plaintiff sued. But it could not justify a judgment in favour of those persons unless facts sufficient to justify recovery in favour of them had been alleged or proved, and it could not be said that those persons had the same interest in the proceedings until the relevant facts were alleged. Here they have not been. Part 42 r 10(1) provided that where in any proceedings an order was made in favour of a person who was not a party, that person might enforce the order. But this does not overcome the difficulty created by the failure to plead facts showing that the members of the "class of unnamed persons" had the same interest in the proceedings.

228 Counsel for the respondent in *Mobil Oil Australia Pty Ltd v Trendlen Pty Ltd* also drew attention to the claim in *Carnie v Esanda Finance Corporation Ltd* for an "order that the defendant repay to the plaintiffs and any represented debtor any amount received by it on account of credit charges as defined by the Credit Act 1984, payable under the contracts from the date of the variation"[304]. Counsel then submitted that "[n]othing of substance can turn on the form of the orders seeking refunds, or on [the] fact that declarations were also sought." On the contrary, the application of Pt 8 r 13(1) must be considered with close attention to the precise formulation of the allegations and claims in the "proceeding" in which "numerous persons" are said to "have the same interest". The differences between the present case and *Carnie v Esanda Finance Corporation Ltd* cannot be brushed aside as turning on questions of form rather than of substance, at least

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303 [2006] HCA 42.

304 This order was claimed in sub-par (4) of the claims to relief, which is set out in Gleeson CJ's reasons for judgment in the Court of Appeal: *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382 at 386.

so far as concerns the stress placed by Toohey and Gaudron JJ, in language quoted above, on the relief being in its nature beneficial to all whom the plaintiff proposes to represent, and on the fact that all those persons stand to be equally affected by the declaratory relief sought.

229 The appellants advanced many arguments for the view that Pt 8 r 13 did not apply. In view of the conclusion that it did not apply for the reasons set out above, it is not necessary to deal with them.

Abuse of process: factual aspects

230 In view of the conclusions just reached, it is not necessary to evaluate the Court of Appeal's rejection of the appellants' case on abuse of process. However, in view of what was said in argument, and what is said on the subject in other judgments, something ought to be added.

231 First, it is desirable to note some uncontroversial factual aspects.

232 *Firmstone & Feil.* Firmstone & Feil is a company, the sole beneficial owner and sole director of which is Mr Firmstone. Mr Firmstone is not a solicitor, but a chartered accountant. None of the company's employees hold practising certificates entitling them to practise law. The business of Firmstone & Feil is providing advice and assistance on indirect taxes. One aspect of that business was assisting retailers to recover from wholesalers amounts referable to the State tobacco licence fees that were held invalid by this Court on 5 August 1997 in *Ha v State of New South Wales*[305] and held liable to be repaid pursuant to this Court's decision in *Roxborough v Rothmans of Pall Mall Australia Ltd*[306]. Both Firmstone & Feil and another litigation funder had enjoyed success in obtaining recoveries from wholesalers in 2002 by means of settling litigation on favourable terms. Firmstone & Feil had never been a tobacco retailer. Before it interested itself in the recovery of amounts referable to the tobacco licence fees, one aspect of which relates to these appeals, it had no connection with the wholesalers, the retailers, or the subject-matter of the litigation.

233 *The Horwath arrangement.* In or about March 2002 Firmstone & Feil entered an arrangement with Horwath GST Pty Ltd ("Horwath"). Under that arrangement, Horwath was responsible for procuring tobacco retailers to

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305 (1997) 189 CLR 465.

306 (2001) 208 CLR 516.

participate in proposed litigation against certain wholesalers who, it was thought, were retaining amounts referable to the licence fees.

234 *The aggressive marketing campaign.* The trial judge found that pursuant to that arrangement Horwath conducted "an aggressive marketing campaign"[307]. It did so by word of mouth, by repeated letters on the letterhead of Firmstone & Feil from 5 March 2002 to 11 July 2003, and by advertisements in trade journals and in numerous regional and metropolitan newspapers.

235 *The engagement of Robert Richards & Associates.* In about mid September 2002 Mr Firmstone and Mr Robert Richards of Robert Richards & Associates orally agreed that Mr Richards would "be the project solicitor on the usual basis". By letter of 27 November 2002 Robert Richards & Associates clarified what that basis was by reference to the terms on which that firm had acted in relation to earlier matters: a letter of 6 April 2001 was referred to.

236 *The institution of non-representative proceedings.* On 11 February 2003, at the instigation of Firmstone & Feil, Robert Richards & Associates initiated proceedings in the Supreme Court of New South Wales on behalf of certain retailers against some of the appellant wholesalers. Those proceedings did not purport to be representative proceedings. It was expected that any further proceedings would be statute-barred unless instituted before July 2003 (six years after the time when the licence fee payments were made)[308].

237 *The institution of representative proceedings.* On 30 June 2003, shortly before the limitation period expired, 17 proceedings against 17 wholesalers were instituted on the instructions of Firmstone & Feil, as representative proceedings. Seven of these 17 proceedings are the subject of these appeals. The Court of Appeal described them as "a last ditch effort for all of their existing and anticipated clients to be able to recover"[309]. Each plaintiff had been approached by Mr Proud, a Firmstone & Feil employee, to act in this way as the "representative party on the summons". By July 2003, at least some hundreds of retailers – the parties disagreed about how many – had sent back to Firmstone & Feil signed forms authorising Firmstone & Feil to act on their behalf to obtain

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307 *Keelhall Pty Ltd t/as "Foodtown Dalmeny" v IGA Distribution Pty Ltd* (2003) 54 ATR 75 at 90 [24].

308 Before Einstein J the retailers said that the limitation period expired on 5 August 2003, while the wholesalers said it expired on 1 July 2003.

309 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 208 [5] and 217 [57] per Mason P (Sheller and Hodgson JJA concurring).

refunds in relation to tobacco licence fees on terms entitling retailers to two-thirds of what was recovered without risk as to costs. It was, however, common ground that despite the marketing campaign many more retailers had not shown any interest in suing wholesalers. Thus Mr Firmstone estimated that the number of potential claimants was 10,000, having claims averaging $4,000 in value. There was no evidence that the retailers who had returned signed forms had made any claim against a wholesaler, or would have done so if Firmstone & Feil, through Horwath, had not approached them.

238 *The discovery motions.* Shortly after the 17 proceedings commenced, Mr Firmstone gave instructions to Robert Richards & Associates to file notices of motion seeking orders that the defendant wholesalers give discovery of documents identifying any represented retailer to whom the relevant defendant had sold tobacco during the relevant period. By this means Mr Firmstone hoped to attract more plaintiffs to the litigation: once more retailers with potential claims were identified, they could be sent "opt-in" notices and thereby given an opportunity either to respond positively to those notices and become plaintiffs, or to elect to cease further participation in the proceedings. For their part, the defendants filed notices of motion seeking orders dismissing or staying the proceedings as an abuse of process, or orders that they not continue as representative proceedings.

239 *The opt-in notice authority and agreement.* The "opt-in" notice which Firmstone & Feil proposed to send, and its covering letter, indicated that if the retailer consented to become a plaintiff, it would be on terms similar to those stipulated in the letters sent out from 5 March 2002 to 11 July 2003. The pro forma "Opt-in Notice Authority and Agreement" relevantly provided for the retailer to:

> "2. authorise Firmstones Pty Ltd trading as Firmstone & Feil ('Firmstone & Feil') to act on my/our/its behalf in relation to:
>
> (i) the conduct of and the giving of instructions in the representative proceedings;
>
> (ii) entering into settlement agreement(s) with the defendant(s) (provided the amount is not less than 75% of the principal amount claimed from the defendant(s));
>
> (iii) to receive on my behalf all monies and any interest received from the defendant(s) as a result of judgment in or settlement of the representative proceedings; and
>
> (iv) to pay the said monies and any costs awarded to the plaintiffs into a trust account and to deduct therefrom the fees and costs referred to in 4(c) and (d).

3. undertake to execute a limited Power of Attorney authorising Adrian Firmstone to execute Deeds of Settlement and Release for the purpose of entering into any settlement agreement referred to in 2(ii); and

4. agree to the terms and conditions set out below:

   (a) Firmstone & Feil will pay all costs associated with the representative proceedings;

   (b) Firmstone & Feil will meet all costs orders made against the plaintiffs (including the represented retailers) in the representative proceedings;

   (c) Firmstone & Feil will receive 33⅓% of any amounts recovered by or on behalf of the plaintiffs (including the represented retailers) from the defendants by way of judgment or settlement of the representative proceedings;

   (d) Firmstone & Feil will retain any amounts awarded to the plaintiffs (including the represented retailers) in the representative proceedings as costs."

240 The principal difference between these terms and those notified to retailers earlier was that in the earlier terms Firmstone & Feil were not authorised to enter a settlement agreement unless the amount was not less than 100% of the principal amount claimed.

241 The Court of Appeal accepted the correctness of the trial judge's view that these terms gave Firmstone & Feil "control over settlement", and that this control "extend[ed] to the right to give instructions as to how the claims [were] to be moulded, what evidence to rely upon and similar matters".

242 *The solicitors' role.* It is implicit in these terms that the plaintiffs were not to be entitled to be represented in the proceedings by solicitors of their own choice. The role of Robert Richards & Associates was not explicitly described, although the retailers were to be invited to "return the completed Opt-In Notice to *our* solicitors, Robert Richards & Associates c/- Mr Peter Gibson at Horwath GST Pty Ltd"[310].

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310 Emphasis added.

243 There was one factual controversy about the solicitors' role. Einstein J found that the retainer between Mr Richards and Firmstone & Feil stipulated that Mr Richards would not directly liaise with the plaintiffs. He did so because, after Mr Firmstone and Mr Richards had orally agreed in September 2002 that Mr Richards would be "the project solicitor on the usual basis", Mr Richards sent the letter of 27 November 2002 from Robert Richards & Associates to Mr Firmstone referring to the letter of 6 April 2001 and stating that the future work "will be undertaken by me on the same terms (subject to the attached updated costs agreement) as those detailed in ... [the 6 April 2001] letter". The "attached updated costs agreement", headed "Terms of Engagement", set out various charges. In the 6 April 2001 letter Mr Richards said: "Whilst you are acting for your client you have engaged me as principal and not as agent for your clients." After describing some responsibilities which did not include client liaison, the letter continued:

> "I understand that you and your staff will provide assistance to me in respect of the matters.
>
> In particular –
>
> - you will be responsible for the day to day carriage of the matters. However you make copies of all documents (in respect of the matters) between yourself and your clients available to me. You will inform me of all material oral communications between yourself and your clients.
>
> - you will liaise with your clients. I will not directly liaise with your clients."

The expression "yourself" meant Firmstone & Feil, the expression "your clients" meant the clients of Firmstone & Feil, and the expression "I" meant Mr Richards.

244 The Court of Appeal disagreed with Einstein J's finding. It said[311]:

> "[t]he letter did not preclude the solicitor from communicating with his clients or those in the classes represented by them. At its highest, it stated an intention that Firmstone would be involved with client liaison. Mr Richards [sic] gave evidence that he never intended to abrogate any right of direct communication with his clients. His employed solicitor [sic] also

311 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 222-223 [81] per Mason P (Sheller and Hodgson JJA concurring).

gave unchallenged evidence to similar effect. I see no reason why this evidence should not be accepted."

This reasoning is erroneous, given the following considerations.

(a) Mr Richards did not give evidence. Mr Firmstone did. He said in that evidence that he did not intend the statement "[Y]ou will liaise with your clients. I will not directly liaise with your clients" to be part of his arrangements with Mr Richards.

(b) No solicitor employed by Mr Richards gave evidence. An employee of Firmstone & Feil, Mr Proud, who was not a solicitor, did. However, he did not give evidence supporting the evidence of Mr Firmstone just mentioned, and he was not challenged on the point. The reason in each case was no doubt that he was not privy to dealings between Mr Firmstone and Mr Richards.

(c) Sections 175 and 177 of the *Legal Profession Act* 1987 (NSW), as they stood in September 2002, required solicitors to make written disclosure to clients of the basis of the costs of legal services to be provided to the clients. This can entail a description of legal services to which the costs relate. Certainly the letter of 6 April 2001, adopted by the letter of 27 November 2002, described the services to which the enclosed "costs agreement" related. The letter of 6 April 2001 recorded that the services of Robert Richards & Associates were engaged by Firmstone & Feil acting as principal, and not as agent for the clients of Firmstone & Feil. The description of the services specifically excluded liaison between Mr Richards and the clients of Firmstone & Feil. The only documents produced in answer to notices to produce directed to the plaintiffs and subpoenas directed to Mr Firmstone requiring production of documents relating to the retainer were the letters of 6 April 2001 and 27 November 2002.

(d) In these circumstances the uncommunicated reservations of Mr Firmstone were inadmissible on the construction of the retainer agreement.

245 Accordingly, the trial judge's conclusion that under the terms of his retainer Mr Richards was not to liaise directly with the plaintiffs is to be preferred.

<u>Abuse of process: background principles</u>

246 In *Mobil Oil Australia Pty Ltd v Victoria*, in which the questions directly arising here did not have to be answered, Callinan J referred to some of the

consequences of group or class proceedings and their conduct on an entrepreneurial basis[312]:

> "The question here is not whether, by their nature, group or class proceedings are oppressive to defendants, give rise to entrepreneurial litigation, in fact proliferate and prolong court proceedings, undesirably substitute private for public law enforcement or are contrary to the public interest, with disadvantages outweighing a public interest in enabling persons who have been damnified but who would not, or could not bring the proceedings themselves, to be compensated for their losses. The question simply is whether the Victorian Act is valid." (footnote omitted)

Because this is entrepreneurial legislation and for the other reasons which we explain these questions do have to be answered here.

247 The expression "litigation funding" is commonly used in the sense of a person organising, and paying the outgoings necessary for, the conduct of litigation on terms that the organiser will receive a share of the proceeds if the litigation succeeds. Among the principles which apply to it are the following.

248 A preliminary point is that under the Supreme Court Rules in force at the material time, a litigation funder was capable of engaging in abuse of process even though the funder was not a party to the proceedings[313].

249 Next, it is desirable to consider the law, so far as it survives and is relevant, of maintenance and champerty. Maintenance was the unlawful "intermeddling with litigation in which the intermeddler has no concern"[314]. Champerty was "maintenance aggravated by an agreement to have a part of the thing in dispute"[315].

250 Although the torts of maintenance and champerty were abolished by s 4 of the *Maintenance, Champerty and Barratry Abolition Act* 1993 (NSW), s 6

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312 (2002) 211 CLR 1 at 73 [172].

313 Part 52 r 4(2) provided that subject to sub-r (5) the court was obliged not to make a costs order against a non-party. Sub-r (5)(d) provided that sub-r (2) did not limit the power to make an order for payment of the costs of a party by a person who had committed an abuse of process.

314 *Neville v London "Express" Newspaper Ltd* [1919] AC 368 at 382 per Lord Finlay LC.

315 *Wild v Simpson* [1919] 2 KB 544 at 562 per Atkin LJ.

provided that that Act "does not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal".

251 The law of maintenance, and hence of champerty, rested on "considerations of public policy"[316]. "Notions of public policy are not fixed but vary according to the state and development of society and conditions of life in a community."[317] The relevant principle of public policy was "designed to protect the purity of justice and the interests of vulnerable litigants".[318] The expression "vulnerable litigants" has a special meaning. Thus according to Atkin LJ, the law of maintenance was "directed primarily, not at the client maintained, but at the other party to the litigation". That party "has the right to be free from litigation conducted by the assistance of persons working for their own interests, and not in order to give lawful professional aid to the opposing litigant"[319].

252 How could the purity of justice be affected by maintenance and champerty? Lord Denning MR gave three examples: "[T]o inflame the damages, to suppress evidence, or even to suborn witnesses"[320]. There is also "a public interest in preventing the development of an unlicensed and unregulated market in litigation for fear of the abuses to which that might lead by attraction of the unscrupulous"[321].

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316 *Stevens v Keogh* (1946) 72 CLR 1 at 28 per Dixon J, citing *Alabaster v Harness* [1895] 1 QB 339 at 342 per Lord Esher MR.

317 *Stevens v Keogh* (1946) 72 CLR 1 at 28 per Dixon J.

318 *Giles v Thompson* [1994] 1 AC 142 at 164 per Lord Mustill. In *Stocznia Gdanska SA v Latvian Shipping Co (No 2)* [1999] 3 All ER 822 at 831 Toulson J construed Lord Mustill's reference to the interests of vulnerable litigants as a reference to those who were in privity with the person responsible for the maintenance or the champertous conduct, since he referred to "a public interest in seeing that vulnerable litigants are protected from opportunistic exploitation". With respect, this is out of accord with traditional principle.

319 *Wild v Simpson* [1919] 2 KB 544 at 563; *Giles v Thompson* [1993] 3 All ER 321 at 336 per Steyn LJ; *Clairs Keeley (a Firm) v Treacy* (2003) 28 WAR 139 at 171 [192] per Pullin J.

320 *In re Trepca Mines Ltd (No 2)* [1963] Ch 199 at 220.

321 *Stocznia Gdanska SA v Latvian Shipping Co (No 2)* [1999] 3 All ER 822 at 831 per Toulson J.

253 There are numerous areas in which the proscriptions effected by the principles of maintenance and champerty do not apply. Among them are statutory exceptions[322]; the provision of assistance out of motives of friendship, family relationships[323], charity or compassion[324]; and the provision of assistance by landlords to tenants[325] and by employers to employees[326]. Others relate to special fields like insurance[327], trade unions[328] and trade associations and persons with a common interest[329].

254 In *Clyne v NSW Bar Association*[330], Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ said, obiter, that a solicitor may act for a client, and spend money in payment of outgoings even though there is no prospect of fees being paid or outgoings repaid unless a judgment against the other party to the proceedings is obtained, on two conditions. The first is that the solicitor has considered the case and believes that the client has a reasonable cause of action or defence[331]. The second is that the solicitor must not bargain with the client for "an interest in the subject-matter of litigation, or (what is in substance the same thing) for remuneration proportionate to the amount which may be recovered" by

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322 For example, *Legal Profession Act* 1987 (NSW), ss 186-187; *Corporations Act* 2001 (Cth), s 477(1)(c).

323 *Bradlaugh v Newdegate* (1883) 11 QBD 1 at 11 per Lord Coleridge CJ.

324 *Harris v Brisco* (1886) 17 QBD 504 at 513 per Lord Esher MR, Bowen and Fry LJJ.

325 *Alabaster v Harness* [1895] 1 QB 339 at 343 per Lord Esher MR.

326 *Bradlaugh v Newdegate* (1883) 11 QBD 1 at 11 per Lord Coleridge CJ.

327 *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101.

328 *Stevens v Keogh* (1946) 72 CLR 1.

329 *Martell v Consett Iron Co Ltd* [1955] Ch 363 at 386-387 per Danckwerts J.

330 (1960) 104 CLR 186 at 203.

331 In *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 204 the Court quoted Lord Russell of Killowen CJ as charging a jury in terms requiring that the solicitor take "pains" and employ "careful inquiry" to determine whether a "bona fide" cause of action existed: *Ladd v London Road Car Co* (1900) 110 LT (NS) 80, approved in *Rich v Cook* (1900) 110 LT (NS) 94.

the client in the proceedings[332]. In debates about this matter, reference is sometimes made to *Giles v Thompson*[333], where Lord Mustill said that the latter aspect was "now in the course of attenuation" and "survives nowadays, so far as it survives at all, largely as a rule of professional conduct". Whether or not that is so in England, no authority of this Court has held it to be so in Australia, and s 6 of the *Maintenance, Champerty and Barratry Abolition Act* preserves the second condition. In any event, Lord Mustill's observations, read in context, were directed to maintenance and champerty considered as crimes and torts rather than from the point of view of public policy. No equivalent to the first condition exists for litigation funders who are not solicitors[334]. An intervener pointed to the High Court's view that a solicitor who complied with the above conditions was behaving in a manner "perfectly consistent with the highest honour"[335]. The intervener suggested an analogy between the position of the solicitor and the position of Firmstone & Feil. If there is, it is fatal to the respondents' position in these appeals because of non-compliance with the second condition.

Abuse of process: aspects of the Court of Appeal's reasoning

255 *"Champertous intermeddling".* First, the Court of Appeal criticised Einstein J for relying on Firmstone & Feil's "champertous intermeddling"[336] in determining whether the proceedings were an abuse of process. This criticism is not sound. Whether or not champertous intermeddling alone is sufficient to justify a conclusion that the proceedings are an abuse of process, the existence of matters of fact which make the conduct champertous intermeddling is a relevant factor.

256 *Relevance of "access to justice".* Secondly, the Court of Appeal said: "The law now looks favourably on funding arrangements that offer access to

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332 *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 203.

333 [1994] 1 AC 142 at 153 (Lords Keith of Kinkel, Ackner, Jauncey of Tullichettle and Lowry agreeing).

334 Although the materials brought to the attention of retailers, as well as Mr Firmstone's affidavits, exuded an air of optimism about the proceedings, he did not state a belief that either he himself or anyone else had carefully considered the case and believed that the client had a reasonable cause of action.

335 *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 204.

336 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 227 [104] per Mason P (Sheller and Hodgson JJA concurring).

justice so long as any tendency to abuse of process is controlled."[337] It would be truer to say that the law prevents litigation funding contracts from being enforced, even though they may offer access to justice, if they have the character of maintenance or champerty, and the law looks neutrally on the prosecution of the proceedings being funded unless they are an abuse of process. Of the four cases cited by the Court of Appeal in support of the proposition stated only one actually supports it. Two of the cases do not support it[338], and one is against it[339]. In the fourth, *Gulf Azov Shipping Co Ltd v Idisi*, the English Court of Appeal stated[340]:

> "Public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation."

But that statement was made in relation to circumstances very different from the present. Any suggestion that the principles of abuse of process have been diminished by a more "relaxed common law attitude to litigation funding"[341] because of a recent recognition of the importance of assisting impecunious plaintiffs to sue is unrealistic. The importance of not preventing "humble men" from receiving "contributions to meet a powerful adversary"[342] has been long recognised, and underlies the exceptions to the common law doctrines of maintenance and champerty. The facilitation of access to justice, however, is not to be treated as having absolute priority over traditional principle.

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337 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 227 [105] per Mason P (Sheller and Hodgson JJA concurring).

338 *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116 at 151 [59] per Morritt and May LJJ and Wall J; *Gore v Justice Corporation Pty Ltd* (2002) 119 FCR 429 at 450 [59] per O'Loughlin, Whitlam and Marshall JJ.

339 *Re William Felton & Co Pty Ltd* (1998) 145 FLR 211 at 220 per Bryson J.

340 [2004] EWCA Civ 292 at [54] per Lord Phillips MR.

341 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 227 [107] per Mason P (Sheller and Hodgson JJA concurring).

342 *Martell v Consett Iron Co Ltd* [1955] Ch 363 at 386 per Danckwerts J.

257 *"Trafficking in litigation"*. Thirdly, the Court of Appeal correctly said that the cases condemn "trafficking in litigation"[343]. It also said, understandably, that the content of that expression is "elusive"[344]. It certainly can be. Sometimes it is used as little more than a term of abuse. Sometimes it is employed in a circular or indeterminate fashion. An example is *Stocznia Gdanska SA v Latreefers Inc (No 2)* where the English Court of Appeal said that the expression connoted "unjustified buying and selling of rights to litigation where the purchaser has no proper reason to be concerned with the litigation"[345]. The Court also said that "'[w]anton and officious intermeddling with the disputes of others in which they [the funders] have no interest and where that assistance is without justification or excuse' may be a form of trafficking in litigation."[346] These propositions lack full definition until one knows what is meant by "unjustified", "proper", "wanton and officious", "interest" and "justification or excuse".

258 But the cases do point to some clear criteria. As between the funder and the party funded, there is "trafficking" in causes of action where they are assigned by the latter to the former in circumstances where there is neither any transfer of any property interest to which the causes of action are ancillary nor any genuine commercial interest which the funder has in taking the assignment of the causes of action and enforcing them for the funder's own benefit. Although the term "genuine commercial interest" calls for further definition, in

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343 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 227 [107] per Mason P (Sheller and Hodgson JJA concurring).

344 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 227 [107] per Mason P (Sheller and Hodgson JJA concurring).

345 [2001] 2 BCLC 116 at 152 [61].

346 The English Court of Appeal attributed these words to Lord Mustill in *Giles v Thompson* [1994] 1 AC 142; in fact in that case Lord Mustill, at 161, quoted similar words used by Fletcher Moulton LJ in *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006 at 1014. Of this passage Millett LJ said in *Thai Trading Co v Taylor* [1998] QB 781 at 786: "The language and the policy which it describes are redolent of the ethos of an earlier age when litigation was regarded as an evil and recourse to law was discouraged. It rings oddly in our ears today when access to justice is regarded as a fundamental human right which ought to be readily available to all." Whether this is so may depend on the kind of litigation, the amount at issue, the extent to which the plaintiff controls the litigation, and the extent to which the plaintiff will benefit from it. These matters are considered below at [267]-[283].

this sense to traffic in litigation is to attempt an invalid assignment of a bare cause of action, or to enter a champertous agreement[347].

259 The Court of Appeal questioned whether in New South Wales there truly existed "any residual category of 'trafficking'"[348]. In the usage just described, the category does exist. It is true, however, that even that kind of usage does leave open the question: "In what circumstances will the presence of 'trafficking in causes of action' entitle the defendant to the litigation brought on those causes of action to a stay of it?"

260 *Assignability of retailers' claims.* Fourthly, the Court of Appeal also offered the tentative view, on an issue not debated before it, although it received some mention before this Court, that "the retailers' causes of action ... for money had and received" were "historically a claim in debt", and that debts are readily assignable "without apparently engaging the principles about trafficking"[349]. There is a serious question about whether the Court of Appeal was right[350].

261 But even if the alleged right of the retailers were otherwise assignable, an assignment of those rights in consideration of the payment by Firmstone & Feil of a proportion of the amount recovered would be champertous and unenforceable[351]. If the transaction between Firmstone & Feil and each retailer had taken the form of an assignment to Firmstone & Feil so that it could sue as plaintiff, the claim would fail because the assignment would be ineffective. Whether in an endeavour to escape that consequence, or for some other reason, the transaction took a different form. But, contrary to the respondents'

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347 See *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 at 703 per Lord Roskill; *Kaukomarkkinat O/Y v "Elbe" Transport-Union GmbH (The "Kelo")* [1985] 2 Lloyd's Rep 85 at 89 per Staughton J.

348 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 232 [122] per Mason P (Sheller and Hodgson JJA concurring).

349 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 232 [123] per Mason P (Sheller and Hodgson JJA concurring).

350 It relied on *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 176 per Brennan J. Compare Mason CJ in the same case at 173, and *Poulton v The Commonwealth* (1953) 89 CLR 540 at 602 per Williams, Webb and Kitto JJ.

351 *Laurent v Sale & Co (a Firm)* [1963] 1 WLR 829 at 831; [1963] 2 All ER 63 at 65; *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 at 695 per Lord Wilberforce.

submissions, the substance is the same. In substance, the contemplated transactions depended on persons having rights to sue giving up those rights in consideration of receiving two-thirds of what Firmstone & Feil were able to recover by verdict from the court or by settlement out of court (provided the settlement exceeded 75% of the face value of the principal claimed, or authority to settle for less were given). Similar transactions were said in *Clairs Keeley (a Firm) v Treacy*[352] to constitute de facto assignment of the plaintiffs' causes of action. It is not necessary to decide whether that is so here. What is clear is that the degree of control which Firmstone & Feil has over the litigation, independently of instructions from the plaintiffs or input from the solicitors for the plaintiffs, reveals that the plaintiffs are close to ciphers. They are not conducting the actions in which they are named as plaintiffs to enforce their rights to sue by means of funding from Firmstone & Feil for a commission of one-third of the amounts recovered; rather Firmstone & Feil is conducting their actions for its own benefit, in consideration of a payment to the plaintiffs of two-thirds of the recovery.

262 *Relevance of maintenance and champerty to stays.* Fifthly, the Court of Appeal considered that maintenance or champerty did not make the proceedings to which they related capable of being stayed. In their view a stay could only be granted if there were an abuse of process. They said[353]:

> "[A] conclusion about abuse of process must stem from a finding directed at the actual or likely conduct of the party in whose name the litigation is brought (or its agents). The court is not concerned with balancing the interests of the funder and its clients. Indeed, it is not concerned with the arrangements, fiduciary or otherwise, between the plaintiff and the funder except so far as they have corrupted or have a tendency to corrupt the processes of the court in the particular litigation. It is only when they have that quality that the defendant has standing to complain about them."

On that basis they criticised the view of the Full Court of the Supreme Court of Western Australia in *Clairs Keeley (a Firm) v Treacy*[354] that an abuse of process arises where litigation is pursued "in such a way that the interests of the plaintiffs are subservient to those of the funder".

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352 (2003) 28 WAR 139 at 163 [134] per Templeman J (Parker, Wheeler and Pullin JJ concurring).

353 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 229 [114] per Mason P (Sheller and Hodgson JJA concurring). See also at 234 [132].

354 (2004) 29 WAR 479 at 493 [71] per Steytler, Templeman and McKechnie JJ.

263 There was perhaps an excessive concentration in the arguments of the appellants, and hence in the minds of those concerned to refute those arguments, with questions about how far the public policy relating to maintenance and champerty survives. It is preferable to consider the matter from the point of view of abuse of process generally. It does not follow that factors relevant to maintenance and champerty are not also relevant to abuse of process.

264 For present purposes, however, it may be assumed that:

(a) any harshness in the terms of dealing between the funder and those being funded does not of itself create an abuse of process[355]; and

(b) the existence of maintenance or champerty does not of itself create an abuse of process sufficient to grant a stay (nor did the appellants so contend)[356].

265 However, it is clear that in particular cases the facts which make an agreement champertous, whether taken by themselves or taken with other facts, may also cause the prosecution of proceedings under the agreement to be an abuse of process.

266 Further, it is not the law that proceedings funded by a litigation funder can only be stayed on the ground of abuse of process if there is an actual corruption, or a tendency to corruption, of the processes of the court. The approach stated by the Court of Appeal is much stricter than, and does not accord with, that which is suggested by the expression "abuse of process". The expression is a wide one, capable of application in very diverse circumstances. But, in general, the aspect

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355 This fits in with the traditional view, discussed above at [251], that the law of maintenance and champerty, and the principles underlying it preserved by s 6 of the Act, are directed not to the client maintained but the other party to the litigation.

356 Some English cases hold that a stay is not to be granted merely on the ground that there is maintenance: *Martell v Consett Iron Co Ltd* [1955] Ch 363 at 388-389 per Danckwerts J; see also at 422 per Jenkins LJ and 429 per Hodson LJ (on appeal); *Abraham v Thompson* [1997] 4 All ER 362 at 374 per Potter LJ. Einstein J himself was of this view in the present case: *Keelhall Pty Ltd t/as "Foodtown Dalmeny" v IGA Distribution Pty Ltd* (2003) 54 ATR 75 at 99 [52]. See also *Roux v Australian Broadcasting Commission* [1992] 2 VR 577 at 608-609 per Byrne J. Some hold that a stay can be granted merely on the ground of maintenance: for example, *Grovewood Holdings plc v James Capel & Co Ltd* [1995] Ch 80 at 87-89 per Lightman J. Some reserve their opinion: *Wild v Simpson* [1919] 2 KB 544 at 564 per Atkin LJ.

of "abuse of process" which is relevant for present purposes is that the process of the court is abused when it is employed for some purpose other than that which it is intended by the law to effect[357]. The justifications for the court's intervention against this kind of abuse of process as exemplified by some forms of litigation funding are diverse. Court process is expensive for the State to supply and for litigants to participate in. It is coercive and otherwise injurious both to litigants and to third parties and should not be employed beyond legitimate necessity. To the extent that people with urgent claims are held out from having them heard by actions in abuse of process, the latter actions should be stayed so that the former may be heard. Normal litigation is fought between parties represented by solicitors and counsel. Solicitors and counsel owe duties of care and to some extent fiduciary duties to their clients, and they owe ethical duties to the courts. They can readily be controlled, not only by professional associations but by the court. The court is in a position to deploy, speedily and decisively, condign and heavy sanctions against practitioners in breach of ethical rules. The appearance of solicitors is recorded on the court file. Institutions like Firmstone & Feil, which are not solicitors and employ no lawyers with a practising certificate, do not owe the same ethical duties. No solicitor could ethically have conducted the advertising campaign which Firmstone & Feil got Horwath to conduct. The basis on which Firmstone & Feil are proposing to charge is not lawfully available to solicitors. Further, organisations like Firmstone & Feil play more shadowy roles than lawyers. Their role is not revealed on the court file. Their appearance is not announced in open court. No doubt sanctions for contempt of court and abuse of process are available against them in the long run, but with much less speed and facility than is the case with legal practitioners. In short, the court is in a position to supervise litigation conducted by persons who are parties to it; it is less easy to supervise litigation, one side of which is conducted by a party, while on the other side there are only nominal parties, the true controller of that side of the case being beyond the court's direct control. Finally, the function of court proceedings is to provide a means of quelling real and active controversies that have arisen between persons who are unfortunate enough to have fallen into disputes with each other and that exist independently of and anterior to the

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357 In *Walton v Gardiner* (1993) 177 CLR 378 at 393, Mason CJ, Deane and Dawson JJ approved the reference of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536 to "the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people". The last expression is indeterminate, but employment of the court's process for some purpose other than that which it is intended to effect would bring the administration of justice into disrepute among right-thinking people.

commencement of the proceedings. The purpose of court proceedings is not to provide a means for third parties to make money by creating, multiplying and stirring up disputes in which those third parties are not involved and which would not otherwise have flared into active controversy but for the efforts of the third parties, by instituting proceedings purportedly to resolve those disputes, by assuming near total control of their conduct, and by manipulating the procedures and orders of the court with the motive, not of resolving the disputes justly, but of making very large profits. Courts are designed to resolve a controversy between two parties who are before the court, dealing directly with each other and with the court: the resolution of a controversy between a party and a non-party is alien to this role. Further, public confidence in, and public perceptions of, the integrity of the legal system are damaged by litigation in which causes of action are treated merely as items to be dealt with commercially.

<u>The factors pointing to abuse of process</u>

267 These proceedings constitute an abuse of process by reason of several factors considered in combination. It is not necessary to decide whether a different result would be produced by the removal of some factors but not others. However, in view of the wide variety of possible funding arrangements, a different conclusion may be reached in other cases.

268 The factors which in combination point to abuse of process are as follows.

269 *Firmstone & Feil's motive of profiting from the litigation of others.* Firmstone & Feil's assistance was not given out of charity or compassion. It was not given on the basis that the poor were being oppressed by the rich[358]. Firmstone & Feil is not, to use a phrase which sprang up in argument, "a generous spirited company who are trying to bring people to justice". It has no public duties, nor is it held to public account, in the same way as an Attorney-General or other public servant[359]. The Court of Appeal found that Firmstone & Feil's "motives were not altruistic"[360]. Mr Firmstone himself agreed that his company's involvement in the proceedings constituted "a speculative investment ... in other persons' litigation". The profit which Firmstone & Feil were seeking was to be derived entirely from the litigation itself. It was not to stem from the

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358 *Harris v Brisco* (1886) 17 QBD 504.

359 See generally Beisner, Shors and Miller, "Class Action 'Cops': Public Servants or Private Entrepreneurs?", (2005) 57 *Stanford Law Review* 1441.

360 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 232 [124] per Mason P (Sheller and Hodgson JJA concurring).

vindication of any pre-existing right of Firmstone & Feil's. Firmstone & Feil had no interest in the proceedings, whether individual or shared with a plaintiff, beyond the chance of winning one-third of the proceeds. The wrongs allegedly done by the wholesalers to the retailers were not done to Firmstone & Feil. Firmstone & Feil had no proprietary or commercial interest in the retailers' businesses. Many of the retailers had been in commercial relations with the wholesalers for years before the critical period in 1997, and those relations have continued since that time. Firmstone & Feil has never been in commercial relations with the wholesalers, and is seeking to intrude into and "meddle" with the relations between the wholesalers and the retailers to which it is not party for reasons of personal profit.

270 *Firmstone & Feil sought out and encouraged persons to sue who would not otherwise have done so.* The retailers did not seek the assistance of Firmstone & Feil to fund the litigation. Instead, Firmstone & Feil sought out the retailers and attempted to persuade them to sue. The key to the persuasion was the intended representation that the plaintiffs who were to join the representative proceedings bore no risk. The explicit language of one item of publicity corresponded with the theme of many others: "WHAT HAVE YOU GOT TO LOSE?????" In conventional litigation some restraint is placed on the desire to start litigation by the risk of having to pay the defendant's costs if the litigation fails. Firmstone & Feil's plan removed that restraint[361]. Although Firmstone & Feil, not being a firm of solicitors, was not able to offer legal advice about the proceedings, the publicity did not provide a balanced description of the nature or consequences of the proposed litigation, which removed further restraints from the retailers agreeing to let Firmstone & Feil go ahead.

271 The respondents hinted at the almost dishonourable stance of the wholesalers in refusing to pay up in the face of cases against them which were so factually and legally simple as to be open and shut, and made submissions about the smallness and poverty of the retailers and about how commencing litigation, retailer by retailer, to recover small sums would be economically impossible. However, there was no evidence that any retailer solicited by Firmstone & Feil had ever made a claim on a wholesaler who is a defendant in the present proceedings, that any such wholesaler had ever refused to pay, that without Firmstone & Feil's intervention any retailer who has sued would have done so, that any retailer to be invited to opt-in would do so without that intervention, or that any retailer had joined the representative proceedings apart from the lead plaintiffs. The respondents argued that many retailers had made claims against other wholesalers as a result of aid from another litigation funder, but they did not submit that these claims were not themselves the result of solicitation by that

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361 See *Clairs Keeley (a Firm) v Treacy* (2003) 28 WAR 139 at 173 [203] per Pullin J.

funder. Rather they submitted that many or most of the retailers were unaware of their claims, and hence were parties "who most need access to justice". There was in fact no evidence of this supposed unawareness either. The only evidence on the willingness of retailers to join any of the 17 proceedings is one letter from a retailer dated 4 June 2003 advising Mr Firmstone that it did not wish to sue. This retailer was described in argument, without contradiction, as a large organisation. In short, this part of the respondents' argument proceeded by slogan rather than evidence, and by allusions to complex forms of "class" proceedings as if they were relevant to the present proceedings, which for some purposes the respondents chose to characterise as being so simple that it was scandalous that they had to be brought at all. On the evidence, it is clear that Firmstone & Feil sought to create a dispute which did not otherwise exist, to make it the subject of litigation, to wrest control of the conduct of the litigation from the nominal plaintiffs, and to extract as the price for this activity a substantial part of each plaintiff's potential proceeds. Thus it may be said to have engaged in "officious intermeddling" with "the disputes of others" which, but for its conduct, would not have existed and in which it had no interest[362].

272 *Nature and smallness of the plaintiffs' "losses".* As has just been noted, the respondents made much of the bona fide nature and validity of the "small but strong" claims of the retailers, of the retailers' ignorance of their claims, of their incapacity, without assistance, to advance their claims because of their smallness balanced against the cost of individual recovery, of the recalcitrance of the wholesalers in not complying with their just obligations, and of the strong incentives for the wholesalers to engage in litigation which would be "nasty, brutish and *long*"[363]. The respondents submitted that the risk of abuse of process had to be weighed against the plaintiffs' interest in the litigation and the fact that they were suing wholesalers who were unwilling to pay them, and who were experienced, determined and well-resourced. The evidentiary hole behind many of these arguments has already been noted, and the respondents resorted to more abstract contentions. It was said that for the court to stay the litigation was "contrary to the traditional respect of the common law for the autonomy of the individual". Other blessed phrases like "access to justice" and "equality of arms" were referred to in their arguments or were adopted by them. The respondents relied on a statement of the Full Federal Court that there was no cause for instant alarm if, in these circumstances, "a business house, openly and reasonably,

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362 See *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006 at 1014 per Fletcher Moulton LJ, adopted in *Giles v Thompson* [1994] 1 AC 142 at 161 per Lord Mustill (Lords Keith of Kinkel, Ackner, Jauncey of Tullichettle and Lowry agreeing).

363 Emphasis in respondents' submissions.

wishes to engage in the business of funding litigation and is prepared to meet the costs of the opposing party"[364]. Additionally, the Court of Appeal described the wholesalers' retention of the relevant monies as a "windfall gain"[365], and the respondents took that description up.

273 That description is a true one. On the other hand, in *Roxborough v Rothmans of Pall Mall Australia Ltd*, five members of this Court pointed out that the retailers who obtained the relevant monies by court order were also making "a windfall gain"[366] in view of the difficulties those smokers who bought from the retailers would have in recovering their share of the monies. Here, as there, it cannot be said that the retailers indicated "the slightest interest in recovering the whole, or any part, of the windfall for the benefit of the consumers. They wanted the windfall for themselves."[367] Although the law may permit retailers falling within the class involved in this appeal which can prove their case to enjoy recovery, and although the recovery of sums paid on a consideration which has failed may seem to involve the recovery of "loss", no loss need be proved, and it is wrong to assume that the recovery by the retailers targeted by Firmstone & Feil necessarily equates to recovery by persons who are truly out of pocket. The persons who are truly out of pocket are those who purchased tobacco products from retailers who passed on the licence fee component, and as the respondents conceded, here that component was passed on in every case. Where retailers who make a claim are claiming a windfall gain from wholesalers who wish to retain what is in their hands a windfall gain, there is nothing in that aspect of the position of the former group which weighs favourably in assessing whether the proceedings should be stayed as an abuse of process.

274 There are other noteworthy aspects of the claims. The sums to be claimed would be claimed, in many cases, by retailers who had been in continuing business relationships with wholesalers and would be likely to wish to remain in them. It is understandable that there is no evidence that any of them wished to make a claim or to sue until Firmstone & Feil persuaded them to do so. Traditionally it has been thought that to provoke litigation to take place which would not otherwise have taken place is undesirable. It is an idea which underlay

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364 *Gore v Justice Corporation Pty Ltd* (2002) 119 FCR 429 at 451 [59] per O'Loughlin, Whitlam and Marshall JJ.

365 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 218 [67] per Mason P (Sheller and Hodgson JJA concurring).

366 (2001) 208 CLR 516 at 522 [5] per Gleeson CJ, Gaudron and Hayne JJ, 559-560 [114]-[116] per Kirby J, 591 [204] per Callinan J.

367 (2001) 208 CLR 516 at 559-560 [114] per Kirby J.

maintenance and champerty[368]. But it is not limited to those fields. It is one thing to fund plaintiffs who wish to sue independently of the persuasion of the funder. It is another thing to fund plaintiffs who, but for the funding, would not have sued at all. This point was made by Pullin J in *Clairs Keeley (a Firm) v Treacy*[369]:

> "Losses suffered by some members of the community might be regarded by those persons as a vicissitude of life. Those persons, left to their own devices, may choose not to sue. It is not a failure of the system that some members of the community choose not to sue, even if there has been a breach of duty by some person or another. Persons suffering injury should not be encouraged to commence proceedings if they would, left to their own devices and based on their own assessment of the risks, not have contemplated litigation. However, such persons are likely to be willing to pursue litigation if they bear no risk of an adverse outcome."

Whether or not, as the Court of Appeal thought, the law now looks favourably on funding arrangements, it is highly questionable whether the law looks favourably on litigation by a plaintiff to cover small sums of the order of rather less or rather more than $4,000[370]. Lawsuits are to be dreaded "beyond almost anything else short of sickness and death"[371]. Ought not at least Supreme Court litigation of

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368 See *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006 at 1020 per Buckley LJ.

369 (2003) 28 WAR 139 at 172 [196].

370 Precisely what sums were claimable is obscure. The figure of $4,000 as being the size of the average claim was one accepted in Mr Firmstone's evidence. That figure is not necessarily falsified by the publicity directed to retailers, which spoke of refunds of at least $10,000 or $11,250 being possible. An advertisement in the *Daily Telegraph* said: "A typical retailer could expect a refund of about $15,000." The point made in the text stands, even for those claiming more than $4,000. In the seven sets of proceedings affected by the present appeals, Fostif Pty Ltd claimed $3,143.20, Mr Berney claimed $2,039.85, Whelan & Hawking Pty Ltd claimed $7,899.04, the two Murrays claimed $657.47, the two Neindorfs claimed $2,563.35, the two Williamsons claimed $8,947.63, and the five plaintiffs in the Gow and Green proceedings claimed a total of $22,939.58. The Court of Appeal mentioned "an average claim of $1,000 or perhaps a little more", but the evidentiary basis for this is unclear: *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 237 [149] per Mason P (Sheller and Hodgson JJA concurring).

371 Judge Learned Hand, "The Deficiencies of Trials to Reach the Heart of the Matter", in Rosenberg, *Lectures on Legal Topics 1921-1922* (1926) 87 at 105.

that kind be discouraged, as a foolish way for a plaintiff to spend time and money and nervous energy? If so, litigation instituted by one such plaintiff representing many others is no more attractive. Plaintiffs may sue if they wish, but it is not easy to see why the courts should decline to characterise proceedings as an abuse of process merely because they permit litigation funders avaricious for large recoveries to foment litigation by numerous parties making claims to small sums of money which, although they may be legally entitled to them, they never in truth lost.

275 *Gains hoped for by Firmstone & Feil.* The gains which Firmstone & Feil might make from the proceedings are potentially enormous. On the assumption that there are 10,000 retailers each with an average claim of $4,000, and on the assumption that interest would by now amount to at least 50% of the principal sum claimed, if all of them opted-in, Firmstone & Feil would be entitled to about $20 million plus costs recovered from the wholesalers less costs expended but not recovered from the wholesalers. Yet another estimate was at least $100 million for "the amounts the subject of the claims in ... all of the proceedings presently before the court", but it was not clear if this included interest. On that basis, if all went well, Firmstone & Feil would get over $30 million.

276 Of course the enterprise was attended by risks. Many retailers might not opt-in. Many claims might be unprovable. But, making all allowances and discounts, the potential recovery is on a scale which no solicitor who dealt with clients on these terms could ethically defend. A solicitor who requested retailers to opt-in on Firmstone & Feil's terms, or charged fees of equivalent economic worth, would not long remain on the roll. The respondents did not explain why litigation funders, untrammelled by ethical rules or supervisory professional bodies, should be able to conduct litigation on terms which no solicitor could.

277 *Firmstone & Feil's control of the litigation.* It is a factor pointing against an abuse of process that the funder of litigation "does not meddle at all"[372] or by its contract is left "very little room to intermeddle"[373]. Conversely, the more room to intermeddle, the more likely is it that the litigation is an abuse of process. To some extent the respondents challenged that proposition, asserting that Firmstone & Feil were better placed to prosecute the litigation than the retailers. But the respondents did not otherwise explain why the proposition was unsound. Here any retailer agreeing to opt-in to the litigation would do so on terms giving Firmstone & Feil total control of it.

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372 *Giles v Thompson* [1994] 1 AC 142 at 161 per Lord Mustill (Lords Keith of Kinkel, Ackner, Jauncey of Tullichettle and Lowry agreeing).

373 *QPSX Ltd v Ericsson Australia Pty Ltd (No 3)* (2005) 219 ALR 1 at 16 [61] per French J.

278 The respondents relied on three matters to negate control: Firmstone & Feil could not settle the litigation for less than 75% of the principal claimed; Firmstone & Feil retained a solicitor; Firmstone & Feil took advice from counsel. The fact is that but for the settlement limit, Firmstone & Feil's power to control was absolute, and it exercised it accordingly. Counsel did no more than settle the form of the summonses. The constricted role of the solicitor is noted elsewhere[374]. Mr Proud, an employee of Firmstone & Feil, drafted the summonses, had them settled by counsel, selected retailers to be approached as "lead plaintiffs", persuaded them to act on that basis, and obtained from them some relevant information. Although the retailers were told, or to be told, that Firmstone & Feil would pay the costs associated with the proceedings, they were not told of their potential liability to costs orders, nor of the precise financial capacity of Firmstone & Feil to meet them. That is the fact, even though Firmstone & Feil sought to overcome the difficulty before Einstein J by offering undertakings to the court to submit to such orders as to costs as the court might make, and to meet any orders as to costs as might be made against the plaintiffs or any represented person, and Mr Firmstone offered an undertaking to the court to underwrite any shortfall in payments by Firmstone & Feil up to a limit of \$1 million. In addition, the retailers were not told that they or their officers might have to give evidence; they were not given any legal advice received by Firmstone & Feil.

279 Further, Mr Firmstone had not instructed Robert Richards & Associates to inform the plaintiffs in the representative proceedings of the defendants' motions to strike them out, and neither he nor, as far as he knew, Robert Richards & Associates had communicated with them on any subject, although Mr Richards did communicate with some of them by means of a standard form letter in relation to a notice to produce. It enclosed some "Notes on Discovery". That letter suggests an absence of any prior contact, since it commences: "We are the solicitors on record engaged on your behalf by Firmstone & Feil in relation to the representative legal proceedings". There is no evidence that anyone provided any plaintiff with a copy of the relevant summons: Mr Proud did not do this, and as far as he knew no-one else had. The same is true of the plaintiffs' notices of motion for discovery.

280 The question is not, as the Court of Appeal seemed to think, whether Mr Richards had conformed with his professional obligations: it is not suggested that he did not. The question is whether the limited role assigned to Mr Richards facilitated Firmstone & Feil's control of the proceedings. That role is relevant, in view of an earlier assumption, not as evidencing some breach of duty or unconscionable conduct on the part of Firmstone & Feil towards the retailers and

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374 Above at [242]-[245]; below at [282].

the plaintiffs, but as a badge of Firmstone & Feil's indifference to them. That indifference to the retailers was understandable, for despite the use of the name of the lead plaintiffs, and the proposed use of the names of other retailers in the event that they opted-in, the real character of the proceedings was as a means of earning Firmstone & Feil large sums and each plaintiff only a very small sum. The real character of the proceedings was that they were started by Firmstone & Feil, not by the lead plaintiffs, and that they would be continued by Firmstone & Feil, not by the lead plaintiffs and any extra plaintiffs who opted-in.

281 *Subservience of the retailers' interests to those of Firmstone & Feil.* The pursuit of the litigation in such a way as to render the interests of the nominal plaintiffs subservient to those of the funder is capable of being an abuse of process[375]. The respondents denied the possibility of conflicts of interest. The point is not that there may be conflicts of interest between funder and plaintiffs. The point is rather that the subserviency reveals the real nature of the proceedings. Here the large share of recoveries to which Firmstone & Feil were entitled accentuated the disparity between the vast sums which Firmstone & Feil might make and the relatively petty sums each retailer might recover. This, coupled with the control given to Firmstone & Feil, reveals that the proceedings were in truth being employed for a purpose alien to their legitimate function – the advantaging of the interests of the funder in its speculative investment rather than those of the retailers. Of course the retailers had to win for the funder to profit, but their success was only the means to a single end – the profit of Firmstone & Feil. The real character of the proceedings was not the vindication of the plaintiffs' rights, but their employment as a means of generating profit for Firmstone & Feil.

282 *Limited role of plaintiffs' solicitor.* The limited role of Robert Richards & Associates, who appeared on the record as solicitors for the retailer plaintiffs, is relevant to the question whether Firmstone & Feil's role created an abuse of process because it is relevant to the issue of control. The authorities have seen as a factor pointing against abuse the fact that the solicitors for plaintiffs are not chosen by the funder, that instructions were given to those solicitors by the plaintiffs and not the funder, and that the retainers of the solicitors were made by the plaintiffs and not the funder[376]. The respondents questioned whether

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375 *Clairs Keeley (a Firm) v Treacy* (2004) 29 WAR 479 at 493 [71] per Steytler, Templeman and McKechnie JJ.

376 *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116 at 152 [62] per Morritt and May LJJ and Wall J; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394 at 419 [85] per Stone J; *QPSX Ltd v Ericsson Australia Pty Ltd (N 3)* (2005) 219 ALR 1 at 16 [61] per French J.

solicitors of this kind lessened the potential for abuse of process, but they did not challenge these authorities. The presence of an independent solicitor dealing directly with the plaintiffs tends to reduce control of the litigation by the funder and leave it in the hands of the plaintiffs. The control given to Firmstone & Feil by reason of the inability of the plaintiffs to make informed decisions and the limited contact which Firmstone & Feil is likely to have had with them could have been alleviated by the presence of solicitors who were independent of the funder, were entitled to advise their clients, and were likely to do so. But Firmstone & Feil had ensured that Robert Richards & Associates were not in that position. The respondents also questioned what level of involvement was appropriate for a solicitor dealing with a $4,000 claim. Perhaps not great; but the ceding of most involvement to a non-solicitor pursuing a one-third share of a multimillion dollar claim arrived at by aggregating many small claims suggests that the proceedings nominally brought for the plaintiffs' benefits are really brought for the non-solicitor's.

283 *Firmstone & Feil's monopoly position.* The failure of Firmstone & Feil to attract more retailers into litigation during the time while the limitation period was running led it to adopt the technique of soliciting lead plaintiffs to start representation proceedings just before the limitation period expired. The result – an unintended one, according to Mr Firmstone, whose evidence on this point Einstein J summarised without criticism – is that any retailer who wishes to recover from wholesalers can only do so on the terms put forward by Firmstone & Feil. The constitution of the proceedings as representative proceedings has given Firmstone & Feil, and only Firmstone & Feil, access to a share of the retailers' rights to litigate. Firmstone & Feil has thus used the court's process to give it the chance of a monopoly profit. The attempts of Firmstone & Feil to enlist the aid of the Supreme Court of New South Wales were attempts to get it to permit and facilitate the buying by the retailers of the product which Firmstone & Feil were seeking to sell, and the selling to Firmstone & Feil of the retailers' causes of action on terms which did not appear to be open to negotiation. In particular, the seeking of an order giving discovery of the names of retailers to whom the opt-in offers could be sent was an attempt to use the compulsory processes of the court to identify people with whom Firmstone & Feil might trade in these claims to its advantage.

284 *Analogy with others who profit from litigation?* The Court of Appeal downplayed the significance of Firmstone & Feil's profit motive by saying that many people seek profit from assisting the processes of litigation – lawyers, expert witnesses, forensic accountants, printers and couriers. There is no analogy. Those classes of people either have no desire to foment litigation which would not otherwise exist, or are ethically barred from doing so. Those classes are suppliers of particular professional or commercial services to many people. One category of the people supplied comprises people who are parties to litigation, who control that litigation, and who exercise their own judgment as to

what services should be supplied. The suppliers do not themselves create disputes out of nothing, decide how those disputes should proceed, and control the proceedings without input from the clients. The price, at least for the professional services supplied, can be hefty, but it is regulated, in part by competitive forces and in part by ethical constraints. Those ethical constraints prevent lawyers stipulating for a share of the fruits of victory. In the circumstances of this case there were in the end no competitive forces, and there are no ethical restraints on litigation funders.

285 *Remaining arguments of the respondents.* Finally, the respondents advanced two linked arguments. First, the court had overall supervision of the proceedings – under Pt 8 r 13, it could "otherwise order"; under Pt 8 r 17 it could give the conduct of the proceedings to any person it thought fit; and any settlement resulting in discontinuance depended on court approval under Pt 21 r 2. Secondly, the burden on those seeking to establish an abuse of process and thereby obtain a permanent stay was heavy. It was necessary for the court to be satisfied that there was no other available means of overcoming the abuse of process.

286 To some extent Firmstone & Feil and the trial judge explored methods of judicial control of the proceedings which could prevent there being an abuse of process, for example the offering of undertakings to the court in relation to costs. The respondents did not suggest any specific regime, using the court's powers under the rules or otherwise, for overcoming the problems described above, and in truth there are none available.

287 *Conclusion.* In short, the proceedings as structured by Firmstone & Feil depended on a harnessing of the alleged wrongs of the plaintiffs and of the curial processes established to remedy alleged wrongs for the primary purpose of generating profits for Firmstone & Feil. That was an abuse of process.

288 That conclusion may justify wider orders than the trial judge made. However, since the appellants do not ask for wider orders, it is not necessary to consider whether or not they should be made.

289 If that conclusion is thought by those who have power to enact parliamentary or delegated legislation to be unsatisfactory on the ground that the type of litigation funding involved in these appeals is beneficial, then it is open to them to exercise that power by establishing a regime permitting it. It would be for them to decide whether some safeguards against abuse should be incorporated in the relevant legislation.

Other issues

290 There is no need to deal with other arguments advanced by the appellants relating to whether the attempt to get discovery for the purpose of identifying members of the class to whom invitations to opt-in could be sent was defective for various reasons, and relating to whether there was a "matter" for the purposes of Ch III of the Constitution.

Orders

291 We agree with the orders formulated by Gummow, Hayne and Crennan JJ.

Litigation funding in Australia

By Scott Butler, partner Hall & Wilcox, Australia.[1]

This short paper provides an overview of the current status of litigation funding in Australia.

Where have we come from?

1 Historically, arrangements whereby an unconnected third-party funded litigation in return for a share of the proceeds were unenforceable as a result of rules against barretry, maintenance and champerty. The law of maintenance, and the subsets of champerty and barretry, has been traced back in England and Wales to the *Statute of Westminster the First* (3 Edw I c 25) of 1275.

2 Maintenance was the unlawful 'intermeddling with litigation in which the intermeddler has no concern' – see *Neville v London Express Newspaper Ltd* [1919] AC 368, at 382. Champerty was 'maintenance aggravated by an agreement to have a part of the thing in dispute' – see *Wild v Simpson* [1919] 2 KB 544, at 562. Barretry (often also spelt barratry) was perpetrated by someone who was 'a common mover or stirrer up or maintainer of suits' – ie a serial maintainer – see *The Case of Barretry* (1588) (30 Eliz) 8 Rep 36; 77 ER 5.

3 Starting in 1958 in the state of Victoria, most Australian states have abolished one or both of the torts or crimes of champerty or maintenance. But the abolition is uniformly said '… not [to] affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal, whether the contract was made before, or is made after, the commencement of this Act.' This follows a similar carve out in the *Criminal Law Act 1967* (UK) which abolished criminal and tortious liability for maintenance and champerty in the UK.

4 This left open the door for arguments about whether litigation funding arrangements, even if not giving rise to champerty or maintenance, could still be unenforceable as contrary to public policy.

5 In the 1996 Federal Court of Australia decision in *Movitor Pty Ltd (receivers and manager appointed) (in liq) v Sims (Re Movitor*) (1996) 136 ALR 643, the court held that litigation funding of claims brought by a liquidator was allowed on the basis that a liquidator had a statutory power to sell or otherwise dispose of the property of the company, and that authorised the liquidator to make an agreement to pay a percentage of litigation recoveries in return for assistance in running the actions.

6 Even more importantly, in 2006 the High Court of Australia (being Australia's highest court) in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 found that third-party litigation funding did not, of itself, constitute an abuse of process and was not against public policy. That was the real catalyst for the start of the expansion of the litigation funding market in Australia.

[1] Scott Butler, B Com (UQ), LLB (UQ), LLM (UQ), Insol Fellow, ARITA Fellow

Where are we now?

7 There are now approximately 30 active funders in the market. They are of varying sizes and balance sheets. Some are global, some are local. Most raise money from investors to fund the cases and have a portfolio of cases within each investment fund.

How is funding obtained?

8 In Australia, lawyers generally tend to approach litigation funders directly. If the funder is willing to fund the claim, and ATE insurance is required (discussed in paragraphs 19 to 21 below), the funder generally will deal directly with the ATE insurer and the ATE insurance premium will be factored into the funding terms provided by the funder - it is often set out as a separate line item cost.

9 That model can be contrasted, for example, with the UK, where lawyers don't usually approach funders directly, but rather use brokers who shop a potential claim around to find insurers who are willing to fund it. On the other hand, in the UK, lawyers may approach ATE insurance providers directly, rather than allowing the funder to do so.

10 In order to fund a claim, the funders usually require a detailed brief and an advice on prospects (often from a senior barrister, ie a King's Counsel) and detailed costs estimates. Premiums charged by litigation funders are generally 25% to 40% of the net proceeds, after costs, of the claim. Funders do not usually advertise their rates, and each funding agreement is negotiated on a bespoke basis.

11 Different funders have different approaches to how much they like to get involved in the case they are funding. Some are very hands off and only require periodic reporting of where things are up to and the costs incurred to date. Others are more hands on, and like to be involved in almost all decisions made on the file. At the very least, the litigation funders generally like to be involved in settlement negotiations and mediations. If the matter goes to trial, sometimes the funder will have a representative attend the hearing.

Fair Entitlements Guarantee Scheme

12 One of the biggest funders of insolvency related claims, for probably the last 10 or so years, has been the Commonwealth (ie Federal) Government of Australia. This has probably been the most important development in the Australian insolvency litigation funding market.

13 In Australia, unpaid employee entitlements in company liquidations are underwritten by the Commonwealth Government up to a certain amount, under what is referred to as the Fair Entitlements Guarantee Scheme (commonly referred to as 'FEG' Scheme, and the Government Department which administers the FEG Scheme is generally referred to as 'FEG' - pronounced like 'keg'). This covers:

(a) up to 13 weeks unpaid wages;

(b) all accrued but unused annual leave;

(c) all accumulated long service leave;

(d) up to 5 weeks pay in lieu of notice; and

(e) up to 4 weeks redundancy pay for each full year of work.

14 Claims are capped by reference to a maximum annual salary. This is $151,892 for the FY26 year and is indexed each year based on CPI.

15 Once FEG pays an employee an amount under the scheme, it subrogates into the employee's rights to make a priority claim in the liquidation.

16 FEG has a department that funds liquidators to take claims in order to recover amounts into liquidations, which can then be used to repay the amounts FEG has funded (along with other creditors). FEG charges commercial rates for their funding, similar to other funders in the market. Generally, that is around 30% of the net recoveries after litigation costs.

17 In Australia, employers must pay superannuation contributions (ie contributions to pension schemes) for employees. These are currently set at 12% of an employee's gross wages (generally excluding overtime). Although the FEG scheme does not pay unpaid superannuation contributions, since 1 July 2024, FEG is able to fund liquidators to also recover unpaid superannuation contributions. This has expanded the number of cases that it makes financial sense for FEG to fund.

Contingency fees

18 Other than in the State of Victoria, where contingency fees are allowed to be charged for class action claims, lawyers are not allowed to charge contingency fees based on a percentage of the amount awarded. They are allowed, however, to charge an uplift of up to 25% of their hourly fees charged when acting in 'speculative matters' = ie where they are only paid if the claim is successful.

Adverse costs orders and ATE insurance

19 Like some other countries whose law is based on UK law, the general position in Australia is that the unsuccessful party in litigation is ordered to pay the legal costs of the successful party (an 'adverse costs order'), After-The-Event (**ATE**) insurance, which insures a party against the risk of an adverse costs order, has emerged as an increasingly important component of Australia's litigation funding ecosystem. Most providers of ATE insurance are from the UK, but some are from Australia.

20 Given the possibility of adverse costs orders, the defendant in Australian litigation can seek that the plaintiff provide security for any possible adverse costs order which may be made if the plaintiff's case fails. Such orders are discretionary but generally require the defendant to show that the plaintiff's financial position is likely insufficient to enable them to meet a costs order if made, or they have no material assets onshore, and so enforcing a costs order will be difficult.

21 Security for costs has traditionally been provided by a payment into court or the provision of a bank guarantee. However, where there is an appropriately worded ATE policy, Australian courts are now prepared to recognise ATE insurance as one of the available options to provide security for costs, alongside more traditional options such as cash deposits and bank guarantees: see, for example, *i-Prosperity Pty Ltd (in liquidation) v Crown Melbourne Ltd* [2025] NSWSC 1525.

Regulation of litigation funders

22 There is currently no specific regulatory regime for litigation funders, however that has been the subject of some historical uncertainty.

23 In 2009, the Full Court of the Federal Court of Australia, in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147 (**Brookfield**), decided litigation funding was a managed investment scheme. Under Australian law, the operator of managed investment schemes must be a public company that holds an Australian Financial Services Licence, the scheme must be registered, and there must be strict compliance with managed investment scheme laws. Making litigation funders comply with these requirements placed a substantial operational burden on them.

24 After push back from the litigation funding industry, laws were introduced in 2012 to exempt litigation funders from these requirements. In 2020, with a change of Federal government, the exemption was removed, again subjecting litigation funders to the managed investment scheme laws.

25 In June 2022, the Full Federal Court of Australia handed down its decision in *LCM Funding Pty Ltd v Stanwell Corporation Limited* [2022] FCAFC 103 (**LCM Funding**), overturning its own decision in Brookfield, holding it was wrongly decided and that litigation funding was not a managed investment scheme. Following on from this, the statutory exemption was reinstated in December 2022 with another change of government.

Can you claim the funding premium as damages?

26 Recently, there had been attempts to claim the costs of litigation funding from the defendants as damages, but in *Hunt Leather Pty Ltd v Transport for NSW* [2025] HCA 53, the High Court of Australia unanimously held that litigation funding premiums were not recoverable as damages from unsuccessful defendants.

17 May 2026

Re MOVITOR PTY LTD (rec & mgr apptd) (in liq), Ex parte SIMS

FEDERAL COURT OF AUSTRALIA — GENERAL DIVISION

DRUMMOND J

15 September 1995 — Melbourne; 15 March 1996 — Brisbane

Corporations — Liquidators — Whether liquidator has power to enter into contract of insurance under which liquidator receives funds to bring actions for benefit of insolvency administration — Whether contract void as constituting champerty or maintenance — Exceptions to champerty and maintenance rules — Necessity for outsider to have genuine interest in litigation — Requirement for liquidator to act bona fide and to obtain fully informed consent of creditors — Relevance of maintainer's refusal to accept liability for whole of adverse party's costs, if assisted litigation fails — Meaning of "property of the company" — Corporations Law ss 477(2)(c), 588M, 588W.

The applicant was the liquidator of M Pty Ltd and sought a direction of the court pursuant to s 479(3) of the Corporations Law, as to whether he had the power to enter into a contract of insurance with Lumley General Insurance Ltd (Lumley) pursuant to a Lumley Debt Agreement (the agreement).

The liquidator sought the opinion of the court as to whether the agreement was void as constituting champerty or maintenance. The liquidator intended to use the funds provided by Lumley to prosecute an action pursuant to ss 588M and 588W of the Corporations Law against former directors of M Pty Ltd and its holding company.

The agreement was described as litigation "insurance" which permitted the applicant to submit proposals from time to time for "insurance". In effect this meant that Lumley would pay the professional costs and disbursements of the applicant's solicitors in prosecuting claims submitted for "insurance" by the applicant. Further, Lumley agreed to indemnify the applicant for any costs, expenses and damages if the defendant to any claim was successful. Control of the funded litigation was vested jointly in Lumley and the insured being the applicant.

The applicant submitted a proposal for "insurance" pursuant to the agreement which was approved by Lumley. Lumley would receive a "premium" in return for the funding. The premium consisted of the reimbursement of all funds advanced by Lumley provided by Lumley in connection with the action and a "risk premium" fixed as a percentage of the net proceeds recouped following the litigation after the reimbursement of advances made by Lumley had been repaid.

There were a number of questions that arose during the hearing including the meaning of "property of the company" in s 477(2)(c) and whether the term included a share in the fruits of an action belonging to an insolvent company, the necessity for an outsider to have a genuine interest in litigation, the relevance of an assignee making a profit as to the determination of the legality of the agreement and the relevance of the maintainers refusal to accept liability for the whole of the adverse party's costs, if the assisted litigation failed.

Held:

(i) It is essential if an interest in litigation is to be sufficient to justify its maintenance by an outsider, including its maintenance in circumstances that involve champerty, that it be an interest in the litigation separate from the benefit the outsider seeks to derive from his support of the litigation.

Giles v Thompson [1994] 1 AC 142; [1993] 3 All ER 321; *Beatty v Brashs Pty Ltd* (1995) 13 ACLC 925, applied

(ii) The agreement between the applicant and Lumley involved both maintenance and champerty as Lumley had no commercial interest (or other) interest of its own in the litigation planned by the applicant other than the opportunity to make a commercial profit. Therefore the agreement would be void and contrary to public policy unless it fell within one of the recognised exceptions which accept that certain kinds of champertous arrangements are lawful.

(iii) A company liquidator's power of sale under s 477(2)(c) of the Corporations Law includes the right to dispose of a bare right of action to a stranger either for cash payment or on terms that a stranger will pay to the company part of the proceeds of the litigation.

Seear v Lawson (1880) 15 Ch D 426; *Guy v Churchill* (1888) 40 Ch D 481; *Ramsay v Hartley* [1977] 1 WLR 686; *Stein v Blake* [1995] 2 WLR 710; *Re Nguyen; Ex parte Official Trustee in Bankruptcy* (1992) 35 FCR 320; 107 ALR 425; *Re Park Gate Waggon Works Co* (1881) 17 Ch D 234, applied.

Grovewood Holdings Plc v James Capel & Co Ltd [1995] 2 WLR 70, not followed.

(iv) There is no reason why s 477(2) should not make lawful any other sale of the insolvent company of the insolvent company's property by a liquidator, including the sale of a share of the proceeds of an action belonging to the company to a person with no interest in the litigation, although that would involve champerty but for the transaction being made under that authority. This will be the position provided only that the subject matter of the sale is "property of the company" within the statutory power.

Re MC Bacon Ltd (No 2) [1990] BCLC 607, distinguished.

(v) The rights created by ss 588M and 588W of the Corporations Law fall within the definition of "property of the company" because they are a "debt" once the conditions for liability have been fulfilled, for the purposes of s 477(c) of the Corporations Law "property of the company" includes a share in the fruits of an action belonging to the insolvent company.

(vi) Unless there is some clear reason apparent from the circumstances of the case for thinking that a person stands to gain a grossly excessive profit from an agreement with a trustee in bankruptcy or a liquidator involving the disposal to that person of an interest in litigation belonging to the insolvent, if the administrator enters into such a transaction with the fully informed consent of the creditors, a sale or other disposition under the statutory power of an interest in litigation belonging to an insolvent is entitled to be treated as a bona fide exercise by the insolvency administrator of the statutory power.

(vii) So long as the maintainer has a legitimate interest in the litigation, that will save it from illegality and it is not an additional condition of the lawfulness of the maintenance of another's action that the maintainer, if the action is unsuccessful, be liable to pay the winner's costs.

Tharros Shipping Co Ltd v Bias Shipping Ltd [1995] 1 Lloyd's Rep 541, applied.

(viii) The fact that a liquidator procures funding from an insurer for an action to be brought for the benefit of his administration in return for payment to the insurer of a share of the proceeds if the action succeeds, on terms that the insurer will not meet the whole or even any part of the costs the liquidator might be ordered to pay to the successful defendants if his action fails, cannot prevent such an arrangement being a disposition of the company's property and so within the statutory power if the disposition on any terms and in any manner the liquidator considers appropriate.

Application

The applicant's application was pursuant to s 479(3) of the Corporations Law seeking certain declarations in relation to the legality of the agreement.

G Bigmore Q C for the applicant

Drummond J. The applicant, who is the liquidator of Movitor Pty Ltd (Movitor), seeks a direction from the court, pursuant to s 479(3) the Corporations Law, as to whether he has power to enter into a contract of insurance with Lumley General Insurance Ltd (Lumley) pursuant to the Lumley debt retrieval agreement.

The purpose of the application is to obtain the court's opinion on whether this arrangement is void as constituting champerty or maintenance: the liquidator intends to use the funds to be provided by Lumley pursuant to this contract to prosecute an action, pursuant to ss 588M and 588W of the Corporations Law, against former directors of Movitor and Movitor's holding company, Ausind Investments Pty Ltd, respectively, for contraventions of the Corporations Law in respect of insolvent trading. He has legal advice that he has good prospects of recovering substantial damages. Movitor has no funds. Some of the creditors are prepared to assist the liquidator. But the total amount offered by them, although substantial, is likely to be insufficient to fund the entire proceeding or to provide the liquidator with an indemnity for any costs he may be ordered to pay to the proposed defendants, if the planned action fails.

The applicant was ordered to give notice of the application to the Australian Securities Commission and the Commission has made helpful submissions. The persons who will be respondents to any action the applicant may bring with assistance from Lumley are not parties to this application. Any direction I give cannot bind them or affect their rights in any way. Such a direction will therefore have no effect, apart from protecting the liquidator, if he has made full and fair disclosure to the court of the material facts, from liability for any alleged breach of duty as liquidator to a creditor, a contributory or the company in respect of anything done by him in accordance with the direction: see *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674 per McLelland J at 679-80 and *Australian Securities Commission v Melbourne Asset Management Nominees Pty Ltd* (1994) 49 FCR 334 at 352; 121 ALR 626.

On 1 March 1995, the firm of chartered accountants of which the applicant is a member, entered into the debt retrieval agreement with Lumley. This agreement is described as a form of litigation insurance; it is being marketed under the name "cover court". The debt retrieval agreement does not oblige Lumley to provide any assistance to the applicant or anyone else in respect of the contemplated action or any other action. Instead, it permits the applicant's firm to submit proposals to Lumley from time to time for "insurance", defined in cl 1.3 to mean "the agreement reached between the insured and Lumley in respect of a particular claim or proceeding". The "insured" means the person controlling a "formal insolvency administration" and includes the organisation or person subject to that administration. The only claims that can be the subject of "insurance" granted by Lumley are claims submitted to Lumley by the applicant's firm and which are claims brought by a person in his capacity as the person controlling a "formal insolvency administration". This is defined in cl 1 to mean:

> 1.1 in the case of a company:
> 1.1.1 Liquidation,
> 1.1.2 Provisional liquidation,
> 1.1.3 Official management,
> 1.1.4 Scheme of arrangement,
> 1.1.5 Receivership, whether court appointed or otherwise,
> 1.1.6 Agency for a mortgagee in possession
> 1 1 7 Voluntary administration, and,

1.2 in the case of an individual:

1.2.1 Bankruptcy,

1.2.2 An administration under Pt X of the Bankruptcy Act 1966 (Cth),

1.2.3 An administration under Pt XI of the Bankruptcy Act 1966 (Cth); and,

1.3 in either or any case shall include any administration now or hereafter sanctioned by any legislation now or hereafter enacted for the administration of the affairs of insolvent persons or corporations;

"Proceeding" is defined to mean a legal proceeding brought with the object of prosecuting a claim against a debtor, ie, a money claim. Pursuant to cl 2.1, Lumley is entitled, in its absolute discretion, to accept or reject any such proposals and is entitled to accept any proposal for "insurance" on such terms and conditions as it sees fit; it will be bound to provide that "insurance" if the insured indicates its desire to proceed with the proposal on the terms on which Lumley is prepared to accept it. So long as an "insurance" agreement exists in a particular case, Lumley is obliged, by cl 3.1, to pay the "expenses", defined to mean the professional costs and disbursements (including costs and disbursements of the applicant's firm and others commissioned by the solicitor approved by Lumley and retained by the applicant's firm to prosecute the claim "on behalf of the insured and Lumley") which are reasonably incurred in conducting a proceeding in relation to a claim, as and when claims for payment of those expenses are submitted to it by the solicitor. Lumley is also obliged to indemnify the insured against all costs, expenses and damages awarded in any judgment and against any financial exposure incurred by the insured in a proceeding. So if an action the subject of an "insurance" provided pursuant to the debt retrieval agreement fails, Lumley will be under an obligation to the applicant's firm to meet the successful defendants' costs, if the member of the applicant's firm who has brought the action is ordered to pay them, at least to the extent (if any) that Lumley binds itself to the applicant's firm by the terms of the particular "insurance" agreement to indemnify that member in respect of those costs. The agreement also contains the following provisions:

6. *Confidentiality*

6.1 Save where required by law, or with the consent of Lumley, the insured shall not disclose the existence of this agreement or any of its contents to any third party including the debtor [ie the person or entity against which the insured wishes to make a claim].

7. *Solicitor's appointment and instructions*

7.1 The solicitor shall be appointed jointly as the solicitor for both the insured and Lumley. Subject to the following provisions in this paragraph, the insured shall be responsible for giving instructions to the solicitor in respect of a proceeding. However, the insured shall ensure that the solicitor keeps Lumley apprised of the progress of the proceeding and, without limiting the generality of the foregoing, the insured shall ensure that the solicitor notifies Lumley immediately he becomes aware of any matter which would or may:

7.1.1 affect the premium which would be set by a reasonable insurer when assessing the insurance; or,

7.1.2 affect a reasonable insurer in making a decision whether or not to terminate the insurance; or,

7.1.3 lead to a settlement of the proceeding.

7.2 . . .

7.3 Lumley may at any time instruct the solicitor to attempt to reach a settlement of a claim provided that [the company or individual the subject of the insolvency administration] is in no worse position than it would have been had the proceeding been ultimately successful. If such a settlement is reached, the premium will be reduced to the surplus remaining after the subject entity receives what it would have received had the proceeding been ultimately successful.

7.4 In the event that any dispute arises between the insured and Lumley as to the instructions which should be given to the solicitor in relation to the settlement or conduct of a proceeding, the parties may refer the matter in dispute for advice from an independent third party to be mutually agreed . . . failing which the matter in dispute shall be referred to an arbitrator to be nominated by the president for the time being of the Law Institute of Victoria.

7.5 . . .

[Control of the funded litigation is thus vested jointly in Lumley and the insured; neither is given power to override the other's instructions to the solicitor.]

9. *Premium Payment*

9.1 At recovery [defined to mean "the point in time or points in time when the insured receives into his control and possession all or part of the moneys to be received by him in relation to a claim whether by way of enforcement of a judgment debt, settlement or otherwise"] the insured will pay any funds received into a credit bank account and remit the premiums to Lumley immediately.

9.2 In the event that only part of the moneys are received at recovery, the insured shall pay to Lumley that proportion of the premium as the amount received bears to the recovery amount [defined to mean "the amount or amounts received or to be received including the claim, interest and costs"].

9.3 . . .

9.4 Notwithstanding anything to the contrary provided herein, the insured shall not be liable to pay to Lumley any amount by way of premium which exceeds the amount actually received in respect of a claim.

On 3 May 1995, Lumley advised the applicant's firm that it would accept the proposal for insurance submitted under the debt retrieval agreement in respect of the proceedings the applicant intends to bring against the former directors of Movitor and Ausind on the following terms:

1. Lumley will cover 50% of the expenses and other claims set forth in cll 3.1.1 and 3.1.2 of the Lumley debt retrieval funding agreement.

2. The risk premium is to be expressed as 12% of the recovery made after reimbursement of all expenses (being the aggregate of the expenses financed by Lumley and the expenses financed by the liquidator).

If the recovery action is *not* successful, Lumley will pay 50% of expenses as set out in cll 3.1.1 and 3.1.2 of the Lumley debt retrieval agreement and also 50% of legal and associated costs of the defendant, should a court award such costs against the plaintiff.

By letter dated 11 May 1995, the applicant informed Lumley of his intention to proceed with the insurance.

The debt retrieval agreement is a standing facility which gives the applicant's firm the opportunity to request funding from Lumley to assist each of the members of the firm who are appointed to control insolvency administrations of companies and individuals to bring actions for the benefit of the relevant administration. If Lumley agrees to provide funding for any such action, the main consideration it will receive in the particular case is called a "premium" in the debt retrieval agreement. That is defined to mean "the amount expressed in any manner and by reference to any calculation whatsoever which is agreed by the parties to be payable by the insured to Lumley at recovery" and includes a premium expressed as a percentage of the recovery amount or as a dollar amount or as a percentage of the recovery amount (excluding costs) after reimbursement of the expenses.

The consideration for the assistance Lumley has agreed to provide to the applicant under the insurance agreement made in the present case has two components: first, reimbursement of all funds advanced by Lumley to or for the benefit of the applicant in connection with the action and, secondly, a "risk premium" fixed as a percentage of the net proceeds recouped in the litigation, ie, after reimbursement of the advances made by Lumley to the applicant and reimbursement of the rest of the applicant's expenses of the action which have been met by the creditors. This percentage share in the proceeds of the litigation is payable to Lumley only in the event that the action is successful and then only in the event that the judgment obtained in the action is satisfied, at least to the extent necessary to pay the premium (or a pro rata part of the agreed premium, if cl 9.2 applies).

It is obviously advantageous in marketing its services for a firm of accountants practising in insolvency to have, by means of an agreement such as the Debt Retrieval Agreement, access to funds to enable members of the firm to run litigation for the benefit of insolvency administrations that they are appointed to control. It can be expected that, if there are no legal obstacles to this sort of arrangement, it will become a widespread practice for insolvency practitioners to enter into this sort of agreement. The provision by strangers to the litigation of funds to insolvency administrators for the purpose of enabling them to pursue worthwhile claims on behalf of the entity under administration when, without that assistance, good claims might not be able to be prosecuted, will often serve a good public purpose. The policy of the legislature, reflected in provisions such as ss 588M and 588W of the Corporations Law and ss 120, 121 and 122 of the Bankruptcy Act 1966 (Cth) will frequently be frustrated because the insolvency administrator will often not have access to the financial resources necessary to pursue, for the benefit of the administration, claims which have reasonable prospects of success.

But the question remains: does such an arrangement involve maintenance or champerty? If so, it will be illegal as contrary to public policy, even in those jurisdictions, including Victoria, in which the criminal offences and the civil torts of maintenance and champerty have been abolished. See *Roux v Australian Broadcasting Commission* [1992] 2 VR 577 at 605. In *Halsbury's Laws of Australia*, vol 6, para 110-7135, maintenance is defined as "assistance or encouragement, by a person who has neither an interest in the litigation nor any other motive recognised as justifying the interference, to a party to litigation". Champerty is defined in para 110-7140 as "a particular form of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action". Over the last century, the courts have adopted "an infinitely more liberal attitude towards the supporting of litigation by a third party than had previously been the case": *Trendtex Trading Corp v Credit Suisse* [1982] AC 679, per Lord Roskill at 702. The result, as has frequently been observed, is that now, much civil litigation is brought or defended by litigants with financial and other assistance from third parties, eg, insurers, trade unions and solicitors, acting on the basis referred to in *Clyne v New South Wales Bar Association* (1960) 104 CLR 186 at 203. The existence of statutory legal aid schemes and the movement in the United

Kingdom and Australia towards accepting that lawyers should be encouraged to assist litigants by being able to act on a true contingency basis, ie, in return for taking not just their ordinary professional fees, but something in addition, out of the proceeds of the litigation, if successful, shows that substantial changes have occurred in the attitudes which shape the public policy that underlies the rules against maintenance and champerty. But those rules still remain in force.

In submitting that the arrangements here in question should not be held to involve maintenance or champerty, counsel for the applicant relied on the statements of Lord Mustill in *Giles v Thompson* [1994] 1 AC 142 at 164; [1993] 3 All ER 321:

> [I] believe that the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants. For this purpose the issue should not be broken down into steps. Rather, all the aspects of the transaction should be taken together for the purpose of considering the single question whether, in the terms expressed by Fletcher Moulton LJ in the passage already quoted from in *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006, 1014, there is wanton and officious intermeddling with the disputes of others in where [sic] the meddler has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse.

and at 165:

> Is it then so wholly outrageous that the law should turn its back on it? I cannot say so. On the contrary, the balance of advantage is overwhelmingly in favour of those who receive professional and financial assistance to recover a valid claim which would otherwise go unsatisfied.

I think it clear from what Lord Mustill said in the first of these passages, and from what he said immediately before that in his judgment at 164, that he was not suggesting that proof of an interest by the outsider in the litigation, which the law will accept as sufficient to justify what could otherwise be maintenance, is no longer necessary. Rather does he say that, in determining whether an interest in litigation of a kind not previously recognised by the law as sufficient to justify the outsider's maintenance of one of the litigants should now be accepted as sufficient for that purpose, the broad approach outlined should be adopted. The existence of such an interest on the part of the outsider remains essential if his participation in litigation between others is not to involve maintenance or champerty: see *Beatty v Brashs Pty Ltd* (1995) 13 ACLC 925 at 937; *Trendtex Trading Corp v Credit Suisse*, and *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499 where Lloyd LJ said at 509:

> I now attempt to summarise in my own words the principles established by the House of Lords in *Trendtex*, as follows. (i) Maintenance is justified, inter alia, if the maintainer has a genuine commercial interest in the result of the litigation. (ii) There is no difference between the interest required to justify maintenance of an action and the interest required to justify the taking of a share in the proceeds, or the interest required to support an out-and-out assignment. (iii) A bare right to litigate, the assignment of which is still prohibited, is a cause of action, whether in tort or contract, in the outcome of which the assignee has no genuine commercial interest. (iv) In judging whether the assignee has a genuine commercial interest for the purpose of (i) to (iii) above, you must look at the transaction as a whole. (v) If an assignee has a genuine commercial interest in enforcing the cause of action it is not fatal that the assignee may make a profit out of the assignment. (vi) It is an open question whether, if the assignee does make such a profit, he is answerable to the assignor for the difference

Old authority, such as *Hutley v Hutley* (1873) LR 8 QB 112, that an interest in litigation which might justify a stranger maintaining one of the litigants can never be sufficient to justify champerty cannot be accepted as correctly stating the law. *Re Bulli Coal Mining Co* (1897) 18 LR (NSW) Eq 146, affirmed in *Bulli Coal Mining Co v Osborne* [1899] AC 351 at 359, is authority to the contrary, as is *Brownton Ltd v Edward Moore Inbucon Ltd*, supra.

It is also essential, if an interest in litigation is to be sufficient to justify its maintenance by an outsider, including its maintenance in circumstances that involve champerty, that it be an interest in the litigation separate from the benefit the outsider seeks to derive from his support for the litigation. If the agreement to assist another's litigation could itself provide an interest by the outsider in the litigation sufficient to take the agreement out of the area of maintenance and champerty, the rule against maintenance and champerty could always be easily circumvented: see *Giles v Thompson* [1994] AC 142 at 163; [1993] 3 All ER 321 at 333 and 347; *Beatty v Brashs Pty Ltd*, supra, at 937.

Lumley agreed to provide funds to the liquidator necessary to enable an action to be brought for the benefit of, inter alia, the company's creditors and also agreed to indemnify the liquidator against part of the costs he may be ordered to pay the defendants in the contemplated litigation if the action fails. In return for providing these funds, Lumley is, if the action succeeds, to be reimbursed and is also to receive 12% of the net proceeds; Lumley is also entitled to involve itself in the conduct of the litigation.

The arrangement between the applicant's firm, the applicant and Lumley, constituted by the debt retrieval agreement and the individual insurance agreements for which it provides, involves both maintenance and champerty: Lumley had no commercial (or other) interest of its own in the litigation planned by the applicant prior to making the insurance agreement with him. It thus has no interest in this (or any of the other) litigation it may fund under the agreement, other than the opportunity to make a commercial profit for itself from supporting the litigation, an interest which it acquires pursuant to the arrangement itself. That involves "trafficking in litigation", ie, one form of champerty: see *Trendtex Trading Corp v Credit Suisse*, supra, at 694 and *Giles v Thompson* [1994] 1 AC 142; [1993] 3 All ER 321 at 347, per Bingham MR. It would be artificial to segregate the debt retrieval agreement from such insurance agreements that may arise under it and hold that the debt retrieval agreement gives Lumley an interest anterior to the interest it acquires in particular litigation by force of the insurance agreement, sufficient to justify its involvement in that litigation. The court must look at the totality of the transaction in determining whether it involves illegal maintenance or champerty: *Trendtex Trading Corp v Credit Suisse*, supra, at 703 and *Giles v Thompson* [1994] 1 AC 142 at 164; [1993] 3 All ER 321.

That Lumley may have identified the provision of funding to enable insolvency administrators to recoup moneys for the benefit of those administrators that would otherwise not be recoverable as providing a beneficial public service, from which it may be able to make a commercial profit, cannot affect the position: the motive of a maintainer is generally irrelevant — *Martell v Consett Iron Co Ltd* [1955] Ch 363 at 399-400 — so that a non-malicious or even a worthy motive will of itself be no defence to an action for maintenance.

Each of the agreements constituting the arrangement is therefore void and contrary to public policy unless it falls within one of the recognised exceptions which accept that certain kinds of champertous arrangements are lawful

One such exception, long established, is the rule that a trustee in bankruptcy may lawfully assign any of the bankrupt's bare causes of action that have vested in the trustee on terms that the trustee is to receive a share of the proceeds of the litigation, if it is successful, although such an assignment is generally unlawful because it is regarded as involving maintenance and champerty. In *Seear v Lawson* (1880) 15 Ch D 426, the trustee in bankruptcy, after commencing proceedings to enforce a right of action of the bankrupt that had vested in the trustee, assigned the suit to a stranger for £2000. The stranger had no interest in the litigation prior to taking it over. The defendant unsuccessfully challenged the assignee's right to continue the proceedings on the ground that the assignment involved conduct in the nature of maintenance and champerty. The Court of Appeal held that the right of action in question was within s 17 of the Bankruptcy Act 1869 (UK), which vested all the bankrupt's property in the trustee, and so fell within s 25 of that Act, which empowered the trustee to sell all of the property of the bankrupt. Jessell MR said, at 433:

> If the trustee gets a right of action, why is he not to realise it? The proper office of the trustee is to realise the property for the sake of distributing the proceeds amongst the creditors. Why should we hold as a matter of policy that it is necessary for him to sue in his own name? He may have no funds, or he may be disinclined to run the risk of having to pay costs, or he may consider it undesirable to delay the winding up of the bankruptcy till the end of the litigation. Considering these things, it seems to me to be a priori probable that he would be entitled to sell it, but I prefer to rest my decision upon the plain words of the statute. The words are, "all the property", and it does not appear to me that we have any right to exclude from the plain provision of the 25th section anything which has passed to the trustee under the 17th section.

In *Guy v Churchill* (1888) 40 Ch D 481, a trustee in bankruptcy's assignment to a creditor of the bankrupt of a right of action of the bankrupt on terms that the creditor should, at his own expense, prosecute the action but would pay to the trustee 25% of any recoveries from the action net of the creditor's costs of prosecuting the proceeding was held to be lawful and not to be a champertous arrangement: see also *Ramsey v Hartley* [1977] 1 WLR 686 (and *Stein v Blake* [1995] 2 WLR 710 at 719). These decisions were followed in *Re Nguyen; Ex parte Official Trustee in Bankruptcy* (1992) 35 FCR 320; 107 ALR 425.

A company liquidator has a power of sale similar to that which a trustee in bankruptcy has under ss 134(1)(a) and 135(1)(a) of the Bankruptcy Act 1966 (Cth); under s 477(2)(c) of the Corporations Law, he can "sell or otherwise dispose of, in any manner, all or any part of the property of the company" in aid of performing his duty of realising the company's assets. There is, in my opinion, no reason for denying to a liquidator exactly the same power as is possessed by a trustee in bankruptcy to dispose of a bare right of action to a stranger either for a cash payment or on terms that the stranger will pay to the company part of the proceeds of the litigation. In *Re Park Gate Waggon Works Co* (1881) 17 Ch D 234, it was held that the statutory power of the liquidator to sell the property of the company included power to sell bare rights of action the company had against directors for misfeasance in office, something which, but for the statutory power, would have conflicted with the rule against maintenance. In *Grovewood Holdings Plc v James Capel & Co Ltd* [1995] 2 WLR 70, Lightman J held that an agreement by a third party to fund and control litigation commenced by a liquidator against a financial adviser to the company for damages for negligence, in return for one half of the damages recovered, was champertous. At p 76, Lightman J accepted, however, that the statutory power of sale possessed by both a trustee in bankruptcy and a liquidator exempted the sale of a bare cause of action by such an administrator in return for a share of recoveries from the rules relating to maintenance and champerty. His Lordship said that the liquidator's counsel correctly did not contend that there had been any sale of the cause of action itself; he referred to *Glegg v Bromley* [1912] 3 KB 474 (a case not involving the exercise of the statutory power of sale conferred on trustees in bankruptcy and liquidators) in which it was held, at 484, 488-9 and 489-91, that, quite apart from the special rules relating to insolvency, anyone can assign the fruits of an action, including an action in tort, as opposed to the cause of action itself, and that such an assignment will only amount to champerty and so infringe public policy if the purchaser is given the right to intervene in the conduct of the action. Lightman J held that, because there was no sale of a cause of action belonging to the company by the liquidator which would have been within the exemption from maintenance and champerty, the fact that the purchaser from the liquidator of a share in the fruits of the litigation was to be involved in the conduct of the litigation made it champertous. His Lordship said, at 76-7:

> there is a critical distinction between a sale of the recoveries, or an interest in the recoveries, and a sale of a bare cause of action. The statutory power of sale of a bare cause of action would be empty of effect if it did not at the same time confer on such a sale immunity from the (otherwise) applicable law of maintenance and this immunity has by judicial decision been recognised as extending to sales on terms providing for a division of recoveries.
>
> I can see no basis in principle or authority for extending the statutory exemption applicable in case of sales of bare causes of action to sales of the fruits of litigation which include provision for the purchaser to finance the litigation.

In my opinion, the reason why the sale of a bare right of action by a trustee in bankruptcy or a liquidator does not involve maintenance and champerty is that, being a sale under statutory authority, to do that which parliament has authorised, either expressly or by necessary implication, cannot involve the doing of anything that is unlawful: cf *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 and *Director of Aboriginal and Islanders' Advancement v Peinkinna* (1978) 17 ALR 129; 52 ALJR 286 particularly at 291. That a power of sale capable of applying to choses in action is conferred by statute, eg, on a mortgagee under a private arrangement with a borrower, will not necessarily mean that that is sufficient authority to do a particular thing that would otherwise be unlawful. But having regard to the statutory context in which s 477(2)(c) of the Corporations Law is found, there is every justification for giving the principle I have referred to the fullest operation. The liquidator acts as an officer of the court, on behalf of the court. He is invested with a range of powers in aid of maximising the funds available for distribution in the liquidation. These include power to undo completed transactions of the company involving preferences and the like and those powers which enable him to take a range of compensatory proceedings against persons who have misconducted themselves in the management of the company. As was indicated by Chitty J in the opening words of his judgment in *Guy v Churchill*, supra, at 485, and by Jessell MR in the passage from his judgment in *Seear v Lawson*, supra, which I have set out above, it is because the power of sale of the property of the insolvent is conferred by statute for this purpose that the transaction is immune from any rule of law otherwise applicable that would make the sale unlawful and open to challenge.

Whether he sells a bare right of action or the fruits of the action, the only authority a liquidator has to make any such sale is this statutory power It has long been accepted that a trustee in bankruptcy can lawfully sell a bare right of action owned by the insolvent to a stranger with no interest in it, although that would involve maintenance or champerty but for the fact that he sells under the statutory authority. A liquidator has the same power. In my opinion, there is no reason why this statutory authority should not make lawful any other sale of the insolvent company's property by a liquidator, including the sale of a share in the proceeds of an action belonging to the company to a person with no interest in the litigation on terms that that person is to have control of the litigation, although that would involve champerty but for the transaction being made under that authority. This will be the position, provided only that the subject matter of the sale is "property of the company" within the statutory power.

The expression in ss 134 and 135 of the Bankruptcy Act 1966 (Cth), "the property of a bankrupt", is defined in s 5(1) of the Act to mean the property divisible among the bankrupt's creditors pursuant to s 116 of the Bankruptcy Act 1966 (Cth) and, in addition, "any rights and powers in relation to that property that would have been exercisable by the bankrupt if he or she had not become a bankrupt". The term "property" is defined in s 5(1) to include "any estate interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property". The term "the property of a bankrupt", which the trustee in bankruptcy is given statutory power to sell, thus has an extremely wide reach. It includes a chose in action, although that term is not expressly referred to in any of the definition sections: cf *Re Nguyen*, supra, at FLR 325. It also includes, by express definition, "any . . . interest or profit, whether present or future, vested or contingent arising out of or incident to any such" chose in action. In my opinion, the expression "the property of a bankrupt", which the trustee has power to sell under of the Bankruptcy Act 1966 (Cth), includes not only a chose in action regarded as the right to litigate, but also the whole or a share of the expected fruits of that chose in action: cf *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306 at 314; 96 ALR 327. In *Grovewood Holdings Plc v James Capel & Co Ltd*, supra, it was, in my respectful opinion, correctly acknowledged at 76 that recoveries from an action are property distinct from the cause of action itself.

The subject matter of the litigation the subject of the funding arrangement between the applicant and Lumley is the statutory causes of action created by ss 588M and 588W of the Corporations Law. In *Re MC Bacon Ltd (No 2)* [1990] BCLC 607, it was held that the liquidator's right to seek an order under the insolvent trading provisions of s 214 of the Insolvency Act 1986 (UK) against a director for such contributions to the company's assets as the court considered to be proper was not itself an "asset of the company" (ie, property of the company) within certain of the rules under that insolvency legislation. Millett J said at 613:

> I do not see how an application for such an order under the section can properly be described as an attempt to realise or get in an asset of the company. This must, in my view, mean an existing asset and, until the order has been made and complied with, there is no such asset.

But given the differences between the insolvent trading provisions of s 214 of the English legislation and those of ss 588M and 588W of the Corporations Law, this decision provides no authority, in my opinion, for contending that the property of the company does not include the expected fruits of an action brought under s 588M or under s 588W. The right of the liquidator to recover damages created by each of these sections is described as a right to recover from the director and the holding company an amount equal to the loss or damage suffered as a result of the company's insolvent trading in which the director and the holding company were implicated "as a debt due to the company". That "debt" arises once the conditions of liability have been fulfilled, something that must occur prior to commencement of any action for recovery under either section. Such a "debt" can properly be regarded as part of the property of the company which the liquidator is empowered to sell. Even if the rights to compensation created by ss 588M and 588W are not regarded as true debts but rights sui generis, *Magor and St Mellons Rural District Council v Newport Corp* [1950] 2 All ER 1226 at 1230-1 is authority for holding that they are still well capable of falling within the definition of "property of a company" in the relevant provisions of the Corporations Law.

For these reasons, I am not prepared to draw the distinction that was drawn in *Grovewood Holdings Plc v James Capel & Co Ltd*, supra, between a sale of the cause of action by a liquidator under the statutory power and a sale by him of the fruits of that cause of action under the same power.

Since a share in the fruits of an action belonging to an insolvent company is "property of the company" for the purposes of s 477(2)(c) of the Corporations Law, that section authorises the liquidator to make an agreement to pay a percentage of such recoveries in return for assistance in running the action, because the section empowers the liquidator not only to sell, but to "otherwise dispose of, in any manner" any part of the property of the company.

It remains to consider, firstly, whether the quantum of the profit which Lumley is to receive — 12% of the net recoveries on top of reimbursement of the funds it provides the liquidator to run the action — is of any relevance to determining whether the applicant is entitled to the direction sought and, secondly, whether the fact that Lumley will indemnify the applicant for only one half of the proposed defendants' costs if the action fails is of any relevance to that either.

It can be accepted that, if the business of providing financial support for litigation by others is conducted by reputable organisations who compete with each other for that business, the fees charged by them for the provision of such assistance are likely to be kept to a level which will truly reflect the risk that the particular litigation being assisted may fail and so will provide for no more than a reasonable commercial profit. The evidence does not indicate whether such competitive forces are already at work and no attempt was made to prove how the 12% premium to be paid to Lumley by the applicant was arrived at. Rather were submissions confined to simply asserting that it was such a small figure that it should be assumed to be reasonable recompense for Lumley's bearing the risk that it might have to fund one half of the costs incurred by the applicant in running the litigation and also to meet one half of the costs he will be ordered to pay to the other parties, if the litigation turns out to be unsuccessful. If the legality of this arrangement depended on proof that the percentage profit that Lumley is to receive, if the action succeeds, is a reasonable one, the applicant would not be entitled to the direction sought. But I do not think the absence of such proof disentitles the applicant to that direction.

In *Brownton Ltd v Edward Moore Inbucon Ltd*, supra, the court was dealing with the general position and not with sales of interests in litigation made by trustees in bankruptcy and liquidators under the statutory power of sale. Lloyd LJ, at 509, concluded that, if the assignee of a cause of action has a genuine commercial interest in enforcing it, it is not fatal that the assignee may make a profit out of the assignment Megaw LJ said, at 506, that if there was a prospect that the assignee of a cause of action in which he prima facie had a sufficient interest to prevent it being regarded as involving champerty might make "an excessive profit", that "might properly be a factor in deciding whether the commercial interest relied on by the assignee was genuine".

But whatever be the position with respect to such arrangements outside insolvency, that the purchaser of an interest in litigation from a trustee in bankruptcy or a liquidator intends to make a profit from the transaction cannot, in my opinion, provide any reason of itself to hold that such a transaction is outside the exception and so will involve champerty. Persons who have no colour of interest in causes of action belonging to an insolvent can buy the cause of action or the fruits of that action and the right to conduct the litigation from the insolvency administrator without there being any infringement of the rules relating to champerty. A profit-making motive may be the only reason such a person is prepared to participate in such a speculative exercise. The question whether an arrangement a liquidator has entered into is within the exception to the rules relating to champerty and maintenance must depend on whether the arrangement is truly an exercise of the liquidator's statutory power of sale. If a liquidator were to dispose of the insolvent's cause of action or the fruits of such an action in circumstances in which the purchaser was likely to make a grossly excessive profit, at the expense of the company, the liquidator's exercise of the power of sale might well not be a bona fide exercise of the power, with the result that the transaction could not be held to be within the exception to the rules relating to maintenance and champerty. But such exceptional cases apart, the policy of the winding up and bankruptcy laws is to confide their administration in relation to individual insolvent entities to suitably qualified registered administrators, over whom the court exercises supervisory power and who are required to pay due regard to the wishes of the creditors. Unless there is some clear reason apparent from the circumstances of the case for thinking that a person stands to gain a grossly excessive profit from an agreement with a trustee in bankruptcy or a liquidator involving the disposal to that person of an interest in litigation belonging to the insolvent, if the administrator enters into such a transaction with the fully informed consent of the creditors, a sale or other disposition under the statutory power of an interest in litigation belonging to an insolvent is, I think, entitled to be treated as a bona fide exercise by the insolvency administrator of the statutory power, given the court's reluctance to interfere with decisions made by such functionaries: cf *McPherson's Law of Company Liquidation*, 3rd ed., p 232 and *Yeomans v Walker* (1986) 5 NSWLR 378 at 383. That will be enough, in my opinion, to ensure that such a transaction will not be regarded as involving maintenance or champerty. Despite the lack of evidence as to the reasonableness of Lumley's profit, in view of the support of the creditors for the arrangement with Lumley that the evidence reveals and the other circumstances of the case, I accept that the arrangement is a bona fide exercise by the applicant of his power to dispose of an interest in Movitor's property.

I agree with the position adopted by the Commission in its submissions that it will be essential, before a trustee in bankruptcy or a liquidator can lawfully enter into an arrangement of the kind here in question without fear that the arrangement will be champertous, for him to fully inform the creditors of the details of the funding arrangement proposed and to obtain their approval to his entering into the arrangement in the manner provided for by the relevant legislation, ie, either at a meeting of creditors or from the committee of inspection

This may sometimes involve provision of those details to a person who is both a creditor and a potential defendant in an action to be brought by the liquidator and that may, in turn, result in challenges to the propriety of the maintainer's assistance. But the need to show that an arrangement by which a liquidator, in return for litigation finance, bargains away what may be a very significant asset of the company is a bona fide exercise of the statutory power, in my opinion, outweighs such inconveniences. Moreover, a trustee in bankruptcy (pursuant to s 177 of the Bankruptcy Act 1966 (Cth)) and a liquidator (pursuant to s 479 of the Corporations Law), is bound to have regard to the creditors' wishes, but is not obliged to give effect to them; so a creditor with dominant voting power who is also a potential defendant in an action the liquidator wishes to bring should not be able to frustrate the liquidator's plan to raise finance to sue that creditor because he is privy to the details of that plan, if the liquidator has the support of the other creditors.

Counsel for the applicant submits that the confidentiality clause in the debt retrieval agreement which the commission criticises was not intended to prohibit the applicant, as liquidator, from disclosing the existence of the arrangements he and his firm have made with Lumley; he points out that the liquidator, at a meeting of creditors held on 15 November 1994, mentioned the availability of cover court insurance and that at the meeting of the committee of inspection held on 17 March 1995, at which a decision was made to pursue actions against the directors of Movitor and against Ausind and at which a number of committee members and other creditors offered financial assistance to run the proposed actions, which was approximately equal to 50% of the anticipated legal costs and liquidator's remuneration, the committee agreed that cover court should be used to fund the other 50%. The letter from Lumley, which the liquidator tabled at this meeting, set out the remuneration that Lumley would require to fund one half of all expenses in relation to the contemplated proceedings. Although it is preferable that the liquidator make a full disclosure to creditors of the details of the arrangements made to show clearly that the liquidator's disposition of an interest in litigation belonging to the company is a bona fide exercise of the statutory power, here, the liquidator has made a substantial disclosure to the creditors of those details. I also think that, because of the potential for ambiguity in the confidentiality clause in this debt retrieval agreement, it is preferable that a liquidator not enter into such an arrangement unless it expressly permits disclosure of the existence of the agreement and its provisions to the creditors in the relevant insolvency administration. But that has largely been done here already by the applicant.

The last question is whether the refusal of a person who funds another's litigation to accept liability for the adverse party's costs, if the assisted litigation fails, is relevant to whether the funding arrangement involves maintenance or champerty or is otherwise unlawful. This has been considered in a number of recent cases: see *McFarlane v EE Caledonia Ltd (No 2)* [1995] 1 WLR 366; *Tharros Shipping Co Ltd v Bias Shipping Ltd* [1995] 1 Lloyd's Rep 541 and *Roux v Australian Broadcasting Commission*, supra, at 606. Despite what Rix J had to say about *McFarlane v EE Caledonia Ltd (No 2)*, supra, I think it is difficult to reconcile his decision in *Tharros Shipping Co Ltd v Bias Shipping Ltd*, supra, with the earlier case. However, in a passage at 557-9 in *Tharros Shipping Co Ltd v Bias Shipping Ltd*, supra, Rix J, in my respectful opinion, gives persuasive reasons for his conclusion that, so long as the maintainer has a legitimate interest in the litigation, that will save it from illegality and it is not an additional condition of the lawfulness of the maintenance of another's action that the maintainer, if the action is unsuccessful, be liable to pay the winner's costs. If injustice might occur in a particular case because a maintainer has refused to accept liability for the adverse party's costs, if that party is successful, the court is not without the means to prevent that injustice: it has wide power to require the applicant (whether a corporation or a natural person) to provide security for the respondent's costs. See *Bell Wholesale Co Pty Ltd v Gates Export Corp* (1984) 2 FCR 1 at 2–3; 52 ALR 176; *Rajski v Computer Manufacture & Design Pty Ltd* [1982] 2 NSWLR 443. And the court has power, in an appropriate case, to order a non-party to pay a party's costs: see *Caboolture Park Shopping Centre Pty Ltd (In liq/) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224; 117 ALR 253.

But even if this approach be incorrect, I think that the fact that Lumley is only prepared to accept liability to meet part of the costs of the proposed defendants, if the applicant's action against them fails, is irrelevant to whether that consideration should be regarded as converting otherwise unobjectionable assistance to the applicant into unlawful maintenance and champerty, for other reasons. The arrangement here in question, for the reasons given, stands entirely outside the area of possible maintenance and champerty. The only relevant question is whether the failure of Lumley to assume liability to meet the entirety of any costs that the applicant might be ordered to pay to the defendants, if his action is unsuccessful, is sufficient to turn what would otherwise be a disposition pursuant to the statutory power into a transaction not authorised by the statutory power. It is only if that is the case that it would then be open to consider whether the arrangement was unlawful as involving maintenance and champerty or illegal for other reasons. In my opinion, the answer is clear: the fact that a liquidator procures funding from an insurer for an action to be brought for the benefit of his administration in return for payment to the insurer of a share of the proceeds if the action succeeds, on terms that the insurer will not meet the whole or even any part of the costs the liquidator might be ordered to pay to the successful defendants if his action fails, cannot prevent such an arrangement being a disposition of the company's property and so within the statutory power of disposition on any terms and in any manner the liquidator considers appropriate. Commercial practicalities are likely, in any event, to make this kind of insurance saleable to liquidators only if it does include an appropriate measure of protection in respect of the liquidator's potential liability to meet the defendant's costs if his action fails; this is especially so since liquidators begin proceedings at their own risk and, if unsuccessful, will generally be personally liable to meet the costs of the successful party subject to the right of indemnity in respect of those costs against the assets of the company, for whatever that may be worth.

There will be a direction in terms of para 1.1 of the application to the effect that the liquidator has the necessary power.

The applicant requests that the confidential exhibits and submissions not be put on the court file, but be returned to the applicant after judgment. That is inappropriate. If confidentiality is justified, this material can be made the subject of an order under s 50 of the Federal Court of Australia Act 1976 (Cth).

But the applicant's stated concern for confidentiality raises the question whether I should give a direction that these reasons are also to be kept confidential since I refer in them to the confidential exhibits. If I do this, I would probably have to produce for publication an edited version of them. I doubt, however, that is justified. See *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 at 316–18, 97 ALR 555, although this case is not perhaps on all fours with the present one in this respect. But the applicant is entitled to an opportunity to demonstrate that I should follow that course. There will therefore be a direction that the confidential exhibits in the material relied upon by the applicant in support of the application and the applicant's written submissions and these reasons be kept confidential until 4 pm on 25 March 1996 and that they not be open to inspection by anyone before then without the leave of a judge. There will also be a direction that the applicant deliver written submissions and copies of any affidavits upon which the applicant may wish to rely to my associate by 22 March 1996, if he wishes to contend that any of this material should be kept confidential and that I should publish only an edited version of these reasons, deleting reference to material taken from confidential exhibits.

Order

(1) The applicant has power under the Corporations Law to enter into a contract of insurance with Lumley General Insurance Ltd (Lumley) pursuant to the Lumley debt retrieval agreement dated 1 March 1995 in respect of the claims that the applicant and Movitor Pty Ltd (receiver and manager appointed) (In liquidation) wish to bring against the directors of Movitor Pty Ltd and against Ausind Investments Pty Ltd.

The court directs that:

(1) The confidential exhibits in the material relied upon by the applicant in support of the application and the applicant's written submissions and these reasons be kept confidential until 4.00 pm on 25 March 1996 and that they not be open to inspection by anyone before then without the leave of a judge.

(2) The applicant deliver written submissions and any affidavits upon which the applicant may wish to rely to the associate to Drummond J by 22 March 1996, if he wishes to contend that any of this material should be kept confidential and that Drummond J should publish only an edited version of his reasons, deleting reference to material taken from confidential exhibits.

Solicitors for the applicant: *Purves Clarke Richards.*

Solicitors for the amicus curiae: *Australian Securities Commission.*

MICHAEL HEATH
BARRISTER

Funding the Fight
A Japanese Perspective

Speaker Outline | Yuri Sugano | Nishimura & Asahi

III 26th Annual International Insolvency Conference, Montreal, June 16, 2026

I. Japan's Litigation Funding Landscape Today

Limited Visibility and Current Use

- Litigation funding exists in Japan, but confirmed examples are very few and barely register statistically.
- One structural reason is invisibility. Japanese procedural law does not require a funded party to disclose funding, so there is no comprehensive survey of funded cases and the true size of the market cannot be measured.
- The most instructive publicly confirmed example is the Toshiba case. It involved damages litigation arising from the 2017 accounting fraud, where a European funder supported the legal costs of an institutional investor group.
- Beyond Toshiba, a small number of Japanese companies are known to have used funding in international arbitration. At present, international arbitration and offshore enforcement are moving ahead of domestic court litigation.

Cultural Perception and Negative Image

- The cultural background is important. Japan has a deeply rooted culture that is reluctant to litigate, and the numbers support that view.
- One commonly cited figure puts Japan at roughly 651 civil cases per 100,000 people. If the focus is ordinary civil first instance suits in district courts, new filings have remained around 140,000 per year for about three decades.
- More than half of those cases end in settlement. In 2024, 57 percent of disposed cases ended in settlement, and that proportion has also been stable for about thirty years.
- Against this background, funding may be seen in Japanese society as greedy, improper, or even unethical, even though Japanese law has no doctrine of champerty.

Changing Demand and Access to Justice

- The picture is gradually changing. Demand for litigation funding is rising, although the market remains nascent.
- The central issue is an asymmetry of power. Large corporations and institutions may stand on one side, while individuals and smaller creditors stand on the other.
- Properly understood, funding can improve access to justice. It can allow a claimant who lacks resources to pursue a meritorious claim that would otherwise be abandoned.

II. The Legal Framework in Japan

Regulatory Vacuum

- Litigation funding in Japan is not strictly regulated. There is no explicit prohibition on litigation funding, and there is no disclosure rule.
- This is better described as a regulatory vacuum rather than a grey zone. The rarity of funding despite this light regulatory environment cannot be explained by culture alone.

Costs and the Absence of Cost Shifting

- Japan has no general loser pays rule. Even a successful party usually cannot recover its attorney fees from the other side.
- This differs from Australia and the UK, where adverse cost exposure is a central risk and after the event insurance developed in response to that exposure.
- The overall scale of litigation cost is also different in Japan. There is no discovery, attorney fees are modest, non economic damages are low, and punitive damages are not available.

Aggregation and Insurance Gap

- Japan has no US style class action mechanism. As a result, aggregated claims do not create economies of scale in the same way.
- Before the event insurance is widespread. A typical example is the attorney fee rider attached to automobile insurance, which covers small individual disputes.
- After the event insurance does not readily fit within the definition of insurance under Japan's Insurance Act. It therefore cannot easily develop as a formal insurance product.
- The result is an institutional gap. Cover for everyday small claims is well developed, but a real cost and risk transfer tool for commercial and cross border disputes is missing.

III. Professional Rules and Ethical Boundaries

Article 72 of the Attorneys Act

- Article 72 of the Attorneys Act prohibits the practice of law by non lawyers.
- The threshold question is whether the activity of a funder amounts to legal services within the meaning of that provision.
- The answer depends on the degree of the funder's involvement. Providing finance alone is very different from controlling the management of the case.
- A funding agreement must therefore be drafted so that the funder does not provide legal advice, representation, settlement services, or other legal services.

Article 73 and Assignment of Claims

- Article 73 of the Attorneys Act provides that no person may, as a business, take an assignment of another person's right and then enforce that right through litigation, mediation, settlement, or other means.
- The agreement should therefore avoid an outright assignment of the claim to the funder.

Fee Sharing and Referral Fee Issues

- Article 12 of the Basic Rules on the Duties of Practicing Attorneys prohibits a lawyer from sharing remuneration with a non lawyer.
- This risk can be managed through careful structuring. The payment to the funder should be characterized as the claimant's payment under the funding arrangement, not as a sharing of attorney remuneration.
- Article 13 of the same Basic Rules prohibits referral fees. This requires caution where a lawyer introduces a funder.

Practical Conclusion

- None of these provisions is an explicit ban on litigation funding.
- They raise issues of interpretation. There is real room to reduce uncertainty through careful design of the funding arrangement.

IV. The Role of Funding in Insolvency and Restructuring

Funding for Trustees and Liquidators

- There is no rule that prohibits a trustee or liquidator from seeking funding, and there are no laws or regulations that deal directly with the point.
- If a Japanese bankruptcy trustee enters into a funding agreement in the future, I would expect the trustee to seek court permission.
- The conclusion of a funding agreement is not explicitly listed in Article 78, paragraph 2 of the Bankruptcy Act as an act that expressly requires permission. If a funding agreement is characterized as a disposition of bankruptcy estate property, court permission may be required under Article 78, paragraph 2 of the Bankruptcy Act. This issue may arise because allocating part of future recoveries to the funder may, in substance, be viewed as a disposition of estate property.
- In practice, however, when a trustee employs outside professionals at substantial cost or takes other unusual steps, the trustee usually applies to the court for permission.
- Hong Kong case law is a useful reference. In Re Cyberworks Audio Video Technology Ltd [2010] 2 HKLRD 1137, the court focused on whether the liquidator would retain control, whether the risk of pressure from the funder was limited, and whether there was no other realistic way to finance the litigation.

Avoidance Actions and Recovery of Estate Assets

- Funding is particularly relevant to avoidance actions. A trustee with no funds may be forced to abandon a meritorious avoidance claim or accept an unfavorable settlement.
- This is especially serious where costly investigation is required, such as forensic work, or where the assets are overseas.
- In one case where I served as trustee, the bankrupt had made a preferential payment to a European creditor. The prospects of litigation were roughly even, but the underlying contract was not governed by Japanese law and dispute resolution was by arbitration in Europe.
- Because the creditor could contest the avoidance claim and the estate could not easily fund the litigation and arbitration costs, the trustee had to make significant concessions in order to settle.

Claims Against Directors and Officers

- Claims against directors and officers may also be an area where funding becomes useful. In large corporate insolvency cases, trustees may consider damages claims based on breaches of the duty of care or the duty of loyalty.
- These claims can involve very substantial losses, including cases involving false financial statements, excessive borrowing, or poor risk management. The trustee may also need to engage financial and accounting experts.
- Litigation funding may therefore be useful where the estate has a valuable claim but lacks the resources to investigate and pursue it properly.

Asset Tracing and Fraud Cases

- Funding can also be valuable for asset tracing and recovery, particularly in fraud cases where management has moved assets offshore or into cryptocurrency.
- A funder's in house asset tracing capability can be valuable. It may be available on a standalone basis, as well as alongside funding.
- In another case where I served as trustee, creditors who were victims of investment fraud petitioned for bankruptcy. There was a real possibility that assets had been moved overseas, but it was difficult to secure the money needed to investigate assets abroad.
- In a case of that kind, if the scale of the assets is large enough, litigation funding could become a realistic option in the future.

Disclosure to Creditors

- Under the Bankruptcy Act, a trustee has a duty to report on the status of the bankruptcy estate at creditors' meetings under Article 135 and the following provisions. However, the trustee has no direct obligation to inform creditors that court permission for a funding agreement has been obtained.
- Even so, to discharge the trustee's duty of care and to secure creditors' understanding, the trustee would usually explain the existence of the funding arrangement at the creditors' meeting.
- It would not be necessary to disclose every commercial term. The trustee may provide only general information, such as the fact that litigation is being pursued with external funding at no cost to the estate, and that the funder will receive a certain return if recoveries are achieved. The level of detail should be left to the trustee's discretion, taking into account confidentiality concerns.

Funding for Creditors

- Japanese insolvencies often involve many foreign creditors with small and dispersed claims, and those creditors may have limited access to legal support.
- Funding can make collective action realistic in that setting. It can also give practical relief to individual creditors and smaller creditors in fraud cases.
- Funding may also be relevant to securities group claims. Japan has no US style class action mechanism, but assignment of claims is permitted.
- As mentioned earlier, enforcing acquired claims through litigation or compulsory execution as a business is constrained by the Attorneys Act.

Costs Incurred by Individual Creditors

- Under the Bankruptcy Act, it is rare in Japan for a creditor who litigates for the benefit of creditors as a whole, and who bears the cost of doing so, to receive priority or compensation in return.
- Judicial costs incurred for the common benefit of bankruptcy creditors can rank as estate claims under Article 148, paragraph 1, item 1 of the Bankruptcy Act.
- In practice, however, expenditure by an individual creditor is seldom recognized in this way. A creditor who files the bankruptcy petition itself may later be reimbursed for filing costs, but its own attorney fees and professional fees are usually paid from its own pocket.
- Unless the creditor is wealthy, that burden is difficult to carry.

V. Litigation Funding in Japan and the Path Forward

- The litigation funding market in Japan is still at an early stage. This should not be understood negatively. Rather, Japan is only beginning to explore how litigation funding can be used in a way that fits its legal system, legal culture, and professional standards.
- Litigation funding can bring real benefits in Japan. It can support individual claimants in fraud cases, smaller creditors, and other parties who have meritorious claims but lack the financial resources to pursue them.
- At the same time, an appropriate balance is necessary. Japan has a long cultural and historical tendency to avoid litigation where possible and to resolve disputes through settlement. This has helped Japan avoid becoming a highly litigious country and has limited abusive or extreme litigation.
- The use of litigation funding should not undermine that balance. In particular, where a trustee or liquidator seeks to use funding in an insolvency case, court oversight should play an important role. The trustee would likely seek court permission, and the court would review whether the arrangement is appropriate in light of the interests of the estate and creditors.
- In short, Japan does not need to reject litigation funding. It should develop litigation funding carefully, in a way that expands access to justice while preserving the balance and moderation that have long characterized Japanese dispute resolution culture.