IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S152 of 2019

BETWEEN:

BMW AUSTRALIA LTD ACN 004 675 129
Appellant

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and

OWEN BREWSTER
First respondent

REGENCY FUNDING PTY LTD ACN 619 012 421
Second respondent

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SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

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PARTS I, II & III: CERTIFICATION AND INTERVENTION

1. These submissions are in a form suitable for publication on the internet.

2. The Attorney-General for the State of Victoria (**Victoria**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the respondents.

PART IV: ARGUMENT

A. SUMMARY

3. The first respondent, Mr Brewster, is the lead plaintiff in a representative proceeding against the appellant (**BMW**) in the Supreme Court of New South Wales. The proceeding is a matter in federal jurisdiction.[1] Section 183 of the *Civil Procedure Act 2005* (NSW) provides that the Supreme Court "may, of its own motion or on application by a party or a group member, make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings". Mr Brewster, on his own behalf and on behalf of other group members, sought a "common fund order" that, in summary, had the following features:

(1) the second respondent, the litigation funder, would:

(a) pay all legal costs in connection with the proceeding;

(b) pay security for costs, if necessary;

(c) pay any adverse costs order made; and

(d) fund the litigation to conclusion, in lieu of an existing right to terminate upon 21 days' notice;

(2) the litigation funder would be paid from any amounts received by the plaintiff and group members by way of judgment or compromise (the **resolution sum**):

(a) an amount equal to its costs incurred in funding the proceeding; and

(b) subject to further order of the Court at the time of settlement or judgment, a further amount calculated as 25% of the resolution sum after payment of the costs referred to above; and

(3) group members would have the opportunity to opt out of the proceeding.

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[1] The proceeding alleges breaches of the *Trade Practices Act 1974* (Cth) and the *Australian Consumer Law*.

4. The Supreme Court referred to the Court of Appeal the question whether it had the power to make the common fund order. The Court of Appeal concluded that the answer to that question was "yes". BMW now appeals from that decision. There are two grounds of appeal, which raise the following three questions:

(1) As a matter of construction, does s 183 of the *Civil Procedure Act* empower the Supreme Court to make the common fund order sought by Mr Brewster?

(2) If the answer to the construction question is "yes", does s 183 infringe Ch III of the Constitution, such that, to the extent that it authorises the making of a common fund order, it is not picked up and applied by s 79 of the *Judiciary Act 1903* (Cth)?

10 (3) If the answer to the construction question is "yes", does s 183 infringe s 51(xxxi) of the Constitution, such that, to the extent that it authorises the making of a common fund order, it is not picked up and applied by s 79 of the *Judiciary Act*?

5. In summary, Victoria makes the following submissions.

6. ***Construction of s 183***: For the reasons given by the first respondent, and by the respondents in *Westpac Banking Corporation Ltd v Lenthall*, on its proper construction s 183 of the *Civil Procedure Act* empowers the Supreme Court to make the common fund order sought.

7. ***Chapter III — judicial power***: The making of a common fund order under s 183 is part of, or incidental to, the Court's exercise of judicial power in the representative proceeding.

8. ***Acquisition of property***: Section 183 is not a law "with respect to … the acquisition of
20 property" within the meaning and scope of s 51(xxxi) of the Constitution. To the extent that a common fund order made under s 183 involves an acquisition of property, that acquisition is incongruous with the provision of just terms. And, in any event, s 183 cannot properly be characterised as a law with respect to the acquisition of property within s 51(xxxi).

9. Thus, s 183 is capable of being picked up and applied by s 79 of the *Judiciary Act* so as to authorise the Court to make a common fund order in a representative proceeding in federal jurisdiction.

B. JUDICIAL POWER

B.1 Section 79 of the *Judiciary Act*

10. Section 183 of the *Civil Procedure Act* confers on the Supreme Court the power, in a proceeding under Part 10 of that Act, to make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceeding. Where the representative proceeding is in State jurisdiction, s 183 operates of its own force to confer that power on the Supreme Court. But where the proceeding is in federal jurisdiction, s 183 cannot do so of its own force: a State law cannot determine the powers that a court has in the exercise of federal jurisdiction.[2] Thus, where the proceeding is in federal jurisdiction, s 79 of the *Judiciary Act* applies the text of s 183 as Commonwealth law.

11. Although a State law can confer on a State court power that is neither judicial power, nor incidental to the exercise of judicial power,[3] a Commonwealth law cannot do so.[4] Thus, where s 79 of the *Judiciary Act* applies the text of s 183 as Commonwealth law to bind the Supreme Court in the exercise of federal jurisdiction, s 183 cannot authorise the Supreme Court to exercise power that is neither judicial power, nor incidental to the exercise of judicial power. To the extent that s 183 has that operation when it operates of its own force, s 79 of the *Judiciary Act* will not apply it as Commonwealth law.[5]

B.2 Section 183 of the *Civil Procedure Act*

12. BMW does not contend that s 183 of the *Civil Procedure Act* necessarily, and in all cases, confers on the Supreme Court a power that is neither part of, nor incidental to, the exercise of judicial power. Instead, BMW contends that the Court exercises a power of that kind when it makes a common fund order under s 183 [AS [46]]. In putting the argument in that

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2 *Rizeq v Western Australia* (2017) 262 CLR 1 at 41 [103] (Bell, Gageler, Keane, Nettle and Gordon JJ).

3 See *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 300 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 67 (Brennan CJ), 77–78 (Dawson J), 142 (Gummow J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 656 [219] (Callinan and Heydon JJ).

4 *British Medical Association v Commonwealth* (1949) 79 CLR 201 at 236 (Latham CJ); *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151–152 (the Court); *Cominos v Cominos* (1972) 127 CLR 588 at 601 (Stephen J); *R v Murphy* (1985) 158 CLR 596 at 614–615 (the Court); *Kable* (1996) 189 CLR 51 at 66 (Brennan CJ), 115–116 (McHugh J).

5 See *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 593 [72]–[73] (Gleeson CJ, Gaudron and Gummow JJ); *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 135 [24], 136 [28] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ); *Momcilovic v The Queen* (2011) 245 CLR 1 at 70 [100] (French CJ).

way, BMW seeks to direct attention to the characteristics of a common fund order, rather than the characteristics of the power under which that order is made. However, in order to understand whether the making of a common fund order under s 183 involves the exercise of judicial power, it is necessary to consider not just the order, but also the power under which it is made.

13. Section 183 is part of the regime established by Part 10 of the *Civil Procedure Act*. Part 10, which commenced in 2011, was "substantially modelled" on Part IVA of the *Federal Court of Australia Act 1976* (Cth),[6] which commenced in 1992. The federal equivalent to s 183, s 33ZF, was introduced to give the Federal Court "the widest possible power"[7] to "make the orders necessary to resolve unforeseen difficulties"[8] arising in connection with the novel procedure for representative proceedings set out in Part IVA of that Act. It may be inferred that s 183 was enacted for the same purpose. To that end, the only express limitation imposed on the exercise of the power is that the Court must think the order "appropriate or necessary to ensure that justice is done in the proceedings".

14. Powers of this kind are not novel. The power in s 183 is analogous to other powers — also "governed by broadly expressed standards" — that the Commonwealth Parliament has conferred on courts to facilitate the exercise of new areas of federal jurisdiction.[9] A particularly relevant example is s 87(1)(l) of the *Matrimonial Causes Act 1959* (Cth), which conferred on a court exercising federal jurisdiction the power, in a proceeding under that Act, to "make any other order … which it thinks is necessary to make to do justice". In *Cominos*, this Court held that the power in s 87(1)(l) was either part of, or incidental to, the exercise of judicial power.[10] For the following reasons, the same can be said of the power in s 183 of the *Civil Procedure Act*.

15. ***First***, the power in s 183 is "ancillary to, and [takes its] colour from, the valid grant of jurisdiction to hear and determine" a proceeding under Part 10 of the *Civil Procedure Act*.[11]

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6 Second Reading Speech for the Courts and Crimes Legislation Further Amendment Bill 2010, New South Wales, *Parliamentary Debates*, Legislative Council, 24 November 2010, 28066 (Mr Hatzistergos).

7 *Westpac Banking Corporation v Lenthall* (2019) 366 ALR 136 at 158 [86]; [2019] FCAFC 34 at [86] (the Court) [*Lenthall* CAB 99].

8 *Lenthall* (2019) 366 ALR 136 at 157–158; [2019] FCAFC 34 at [85] (the Court) [*Lenthall* CAB 99], quoting *McMullin v ICI Australia Operations Pty Ltd (No 6)* (1998) 84 FCR 1 at 4 (Wilcox J).

9 See *Thomas v Mowbray* (2007) 233 CLR 307 at 346 [74] (Gummow and Crennan JJ).

10 (1972) 127 CLR 588 at 591 (McTiernan and Menzies JJ), 595 (Walsh J), 599–600 (Gibbs J), 606 (Stephen J), 608–609 (Mason J).

11 *Cominos* (1972) 127 CLR 588 at 591 (McTiernan and Menzies JJ). See also *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151 (the Court); *Victoria v Australian*

The resolution of such a proceeding plainly involves the exercise of judicial power.[12] The power in s 183 is available only in such a proceeding, and only where it is appropriate or necessary to ensure that justice is done in the proceeding. Because the power in s 183 is "to make only such orders as are ancillary or incidental to proceedings that are incontestably judicial proceedings",[13] and is to be exercised "in the course of, and for better giving effect to, the court's exercise of judicial power",[14] it follows that the power is a part of, or incidental to, the exercise of judicial power in the representative proceeding.

16. ***Second***, that power is conferred on a court. This indicates that the power is intended to be exercised "in accordance with the methods and with a strict adherence to the standards which characterise judicial activities".[15] Nothing in the relevant context indicates that the Court was intended to exercise the power other than judicially.[16] The function that the Court is required to perform under s 183 is not "entirely administrative".[17] To the contrary, it is "difficult to conceive of a function ... more appropriate to the judicial branch of government than considering and deciding (upon application and evidence) what is appropriate or necessary to do justice in a proceeding".[18] This reinforces that the power is a part of, or incidental to, the exercise of judicial power.

17. ***Third***, the words "appropriate or necessary to do justice in the proceedings" do not establish a standard that is "so indefinite as to be insusceptible of strictly judicial application".[19] To the contrary, "necessary ... to do justice" is a "familiar judicial measure".[20] The addition of the word "appropriate" does not affect the validity of a provision of this kind. It is well established that "there is nothing necessarily foreign to the nature of judicial power in the fact that its exercise is conditional upon the formation of an opinion described in broad

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Building Construction Employees' & Builders Labourers' Federation [No 2] (1982) 152 CLR 179 at 186–187 (Brennan J). And see Stellios, *Zines's The High Court and the Constitution* (6th ed, 2015), 263–264.

12 See, generally, *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1.

13 *Cominos* (1972) 127 CLR 588 at 599 (Gibbs J).

14 *Cominos* (1972) 127 CLR 588 at 606 (Stephen J).

15 *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 305 (Kitto J); *Cominos* (1972) 127 CLR 588 at 605 (Stephen J), 606 (Mason J). See also First to Fourth Respondents' Submissions in *Lenthall* at [41].

16 See *R v Commonwealth Industrial Court; Ex parte Amalgamated Engineering Union, Australian Section* (1960) 103 CLR 368 at 383 (Kitto J). Cf *Spicer* (1957) 100 CLR 277 at 305–306 (Kitto J).

17 Cf *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151 (the Court).

18 *Lenthall* (2019) 366 ALR 136 at 162 [100]; [2019] FCAFC 34 at [100] (the Court) [*Lenthall* CAB 104].

19 *Amalgamated Engineering Union* (1960) 103 CLR 368 at 383 (Kitto J).

20 *Thomas v Mowbray* (2007) 233 CLR 307 at 468 [476] (Hayne J).

terms".[21] Where a broad discretion is conferred it is to be expected that the courts will develop criteria regulating the discretion,[22] in accordance with the common law method.

B.3 The making of a common fund order

18. Because the making of an order under s 183 of the *Civil Procedure Act* will ordinarily be part of, or incidental to, the exercise of judicial power in the representative proceeding, the relevant question is whether there is any reason why the exercise of that power to make a common fund order should be regarded as having a different character. That question must be answered on the following two premises:

    (1) first, that, on its proper construction, s 183 is capable of authorising the making of a common fund order; and

    (2) second, that the Court will only make a common fund order if it is satisfied on the basis of evidence and submissions that such an order is appropriate or necessary to do justice in the proceedings.

19. BMW identifies several matters that are said to be sufficient to characterise the making of a common fund order under s 183 as something other than an exercise of judicial power. For the following reasons, BMW's arguments should not be accepted.

20. ***First***, BMW contends that the making of a common fund order does not involve the exercise of judicial power because the order has an "infirm factual foundation" and involves "the provision of an impermissible advisory or predictive judgment" [AS [47]]. It may immediately be observed that a requirement for a "predictive judgment" does not render a power unsuitable for conferral on a court.[23] Further, that contention does not address the fact that the common fund order sought is an interlocutory order, which is ancillary or incidental to, and made in the course of, the determination of the representative proceeding.

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21 *Spicer* (1957) 100 CLR 277 at 305 (Kitto J). See, eg, *Cominos* (1972) 127 CLR 588 at 594 (Walsh J), 599 (Gibbs J), 603–604 (Stephen J), 608 (Mason J); *R v Joske; Ex parte Shop Distributive and Allied Employees' Association* (1976) 135 CLR 194 at 210–211 (Stephen J), 215–216 (Mason and Murphy JJ).

22 *Joske* (1976) 135 CLR 194 at 216 (Mason and Murphy JJ).

23 Courts are not uncommonly called upon to make forward-looking judgments based on a prediction of what may occur in the future: see, eg, *Thomas v Mowbray* (2007) 233 CLR 307 at 334 [28] (Gleeson CJ), 477 [511] (Hayne J), 507–508 [596]–[597] (Callinan J); *Pollentine v Bleije* (2014) 253 CLR 629 at 644 [24]–[25] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

Because it has that character, the common fund order is not hypothetical or divorced from any attempt to administer the law.[24]

21. Nor does the making of a common fund order purport to effect a determination of rights "by applying the law to facts which are neither agreed nor determined by reference to the evidence in the case".[25] It is to be expected that, in deciding whether to make the order, the Court would proceed on the basis of evidence and submissions, as courts are accustomed to do when dealing with applications for interlocutory orders.[26] And, as the Court of Appeal observed,[27] the common fund order sought here would establish an interlocutory regime — it would not effect a final determination of rights.

10 22. ***Second***, BMW contends that the making of a common fund order does not involve the exercise of judicial power because the order creates new rights in the litigation funder, rather than resolving a dispute about existing rights and obligations, or giving effect to rights created by the *Civil Procedure Act* [AS [48]–[51]]. However, a power to create new rights and obligations is not something that is exclusively non-judicial in nature, such that it cannot be conferred on a court.[28] In particular, BMW's contention does not address the fact that the order sought is an interlocutory order, which is ancillary or incidental to, and made in the course of, the determination of the representative proceeding. The fact that an interlocutory order would create new rights and obligations does not have the consequence that the order is not part of, or incidental to, the exercise of judicial power. Indeed, it is a
20 common feature of interlocutory orders that they create new rights and obligations — including rights and obligations in third parties.[29]

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24 Cf *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 612 (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ).

25 Cf *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

26 See *Brewster* (2019) 366 ALR 171 at 192 [97]; [2019] NSWCA 35 at [97] (the Court) [CAB 68]. In *Lenthall* the common fund order was made based on evidence and submissions: (2018) 363 ALR 698 at 704–706 [14]–[24]; [2018] FCA 1422 at [14]–[24] (Lee J) [*Lenthall* CAB 18–21].

27 *Brewster* (2019) 366 ALR 171 at 193 [101]; [2019] NSWCA 35 at [101] [CAB 69].

28 See, eg, *Thomas v Mowbray* (2007) 233 CLR 307 at 327 [15] (Gleeson CJ); *Cominos* (1972) 127 CLR 588 at 600 (Gibbs CJ).

29 See the examples given in *Brewster* (2019) 366 ALR 171 at 192–193 [98]; [2019] NSWCA 35 at [98] [CAB 68–69]. BMW acknowledges that interlocutory orders of these kinds are validly authorised and made: AS [50]. Other examples of interlocutory orders that can create new rights or obligations in third parties include: orders for discovery from a non-party; freezing orders; interlocutory injunctions; and subpoenas.

23. Further, it is not necessary to identify a historical analogue to s 183 in order to characterise the making of a common fund order under s 183 as being part of, or incidental to, the exercise of judicial power.[30] Identifying a historical analogue may assist in characterising a power as judicial or non-judicial,[31] but a lack of a historical analogue does not spell invalidity.[32] It is sufficient in the present case that the common fund order sought is an interlocutory order, which is ancillary or incidental to, and made in the course of, the determination of the representative proceeding.[33] So much is clear from this Court's decision in *Cominos*, holding that the power in s 87(1)(l) of the *Matrimonial Causes Act* was part of, or incidental to, the exercise of judicial power in the substantive proceeding.[34]

10 24. ***Third***, BMW asserts that the making of a common fund order does not involve the exercise of judicial power because it requires the Court to set an "appropriate" or "reasonable" commercial return for the litigation funder [AS [52]]. It is also said, by the appellants in *Lenthall*, that there are no objective criteria to guide the Court in this task.[35] For the reasons given by the courts below,[36] and by the respondents in the two matters,[37] Victoria contends that this does not give the making of a common fund order a character other than an exercise of judicial power. In any event, under the common fund order sought here, the Court will not set a commercial return for the litigation funder [CAB 8, 13] — that will occur only after settlement or judgment, when more information is available.[38]

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30 Cf Appellants' Submissions in *Lenthall* at [38], [41].

31 See *R v Davison* (1954) 90 CLR 353 at 369 (Dixon CJ and McTiernan J); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 373 (Kitto J), 387 (Menzies J), 394 (Windeyer J); *Thomas v Mowbray* (2007) 233 CLR 307 at 329 [16]–[17] (Gleeson CJ), 357 [120]–[121] (Gummow and Crennan JJ).

32 See *Palmer v Ayres* (2017) 259 CLR 478 at 494 [37] (Kiefel, Keane, Nettle and Gordon JJ), 502–506 [61]–[74] (Gageler J). And see Stellios, *Zines's The High Court and the Constitution*, (6th ed, 2015) at 223.

33 See, eg, *Cominos* (1972) 127 CLR 588. See also the cases cited in fn 11 above.

34 No member of the Court in *Cominos* reasoned that s 87(1)(l) of the *Matrimonial Causes Act* was part of, or incidental to, the exercise of judicial power on the basis that it had a historical analogue. By contrast, several members of the Court identified historical analogues to the powers in ss 84 and 86 of that Act: see, eg, (1972) 127 CLR 588 at 600 (Gibbs J), 605 (Stephen J), 608 (Mason J).

35 Appellants' Submissions in *Lenthall* at [42].

36 *Brewster* (2019) 366 ALR 171 at 193 [99]; [2019] NSWCA 35 at [99] (the Court) [CAB 69]; *Lenthall* (2019) 366 ALR 136 at 162 [102]; [2019] FCAFC 34 at [102] (the Court) [*Lenthall* CAB 105].

37 See RS [31]. See also First to Fourth Respondents' Submissions in *Lenthall* at [43]–[45].

38 Westpac accepts that a "funding equalization order" may validly be made at the point of approving a settlement or giving a judgment: Appellants' Submissions in *Lenthall* at [11]. BMW may also accept as much: see AS [40]–[43].

25. ***Finally***, the appellant in *Lenthall* contends that the exercise of the power in s 33ZF of the *Federal Court of Australia Act* to make a common fund order is not ancillary or incidental to the representative proceeding.[39] It is said that the making of the common fund order lacks the "requisite connection" to the Court's core judicial task because it has no connection to the substantive proceeding except that "in a general way it facilitates" the exercise of judicial power in the proceeding.[40] That contention must be rejected. As noted in paragraph 15 above, an order under s 183 must be made in a proceeding that involves the exercise of judicial power. It may only be made if the Court is satisfied that it is appropriate or necessary to do justice in the proceeding. Thus the order must, by definition, have "a sufficient relation to the principal or judicial function or purpose to which it may be thought to be accessory"[41] — otherwise it could not be made. Further, that connection is more than "insubstantial, tenuous and distant" or "remote".[42]

C. ACQUISITION OF PROPERTY

C.1 Section 79 of the *Judiciary Act*

26. As noted in paragraph 10 above, where a proceeding under Part 10 of the *Civil Procedure Act* is in federal jurisdiction, s 79 of the *Judiciary Act* applies the text of s 183 as Commonwealth law.

27. Although a State law may provide for the acquisition of property on other than just terms,[43] a Commonwealth law that answers the description of a law "with respect to … the acquisition of property" within the meaning of s 51(xxxi) of the Constitution will be beyond the power of the Commonwealth Parliament unless the acquisition occurs on just terms. Thus, where s 79 of the *Judiciary Act* applies the text of s 183 of the *Civil Procedure Act* as Commonwealth law to bind the Supreme Court in the exercise of federal jurisdiction, that law so applied will be invalid if it answers the description of a law "with respect to … the acquisition of property" within s 51(xxxi) and does not provide for just terms.

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39 Appellants' Submissions in *Lenthall* at [43]–[44].

40 See *Spence v Queensland* [2019] HCA 15 at [69] (Kiefel CJ, Bell, Gageler and Keane JJ), citing *Gazzo v Comptroller of Stamps (Vic)* (1981) 149 CLR 227 at 240.

41 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 278 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

42 Cf *Spence* [2019] HCA 15 at [82] (Kiefel CJ, Bell, Gageler and Keane JJ).

43 See *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 410 [14] (Gaudron, McHugh, Gummow and Hayne JJ).

C.2 Laws with respect to the acquisition of property

28. The requirements for a law to answer the description of a law with respect to the acquisition of property within s 51(xxxi) were recently summarised by Gageler J in *Cunningham v Commonwealth*.[44] His Honour observed that, in order to answer that description:

(1) the law must authorise or effect an acquisition of property;

(2) that acquisition of property must fit within the conception of an acquisition that can be on just terms — it must be one that is consistent or congruous with the provision of compensation; and

(3) the law must be one that is properly characterised as a law with respect to the acquisition of property.

(1) No acquisition of property

29. Victoria contends that there is no acquisition of property, for two reasons.

30. ***First***, for the reasons given by the first respondent, no property of the group members is acquired by reason of the common fund order.[45]

31. ***Second***, even if this Court considers that property is acquired, in order for there to be an acquisition of property to which s 51(xxxi) applies, the acquisition must be compulsory — a voluntary transfer of property from one person to another person does not constitute a relevant acquisition.[46]

32. As noted in paragraph 3 above, a group member may opt out of the proceeding prior to the approval of settlement or the making of final orders. That is sufficient for the transfer of property not to be properly characterised as compulsory. That is so even though it is possible in a particular case that some group members may not receive notification of their right to opt out. It remains a fundamental feature of the regime that notice must be given to group members of their right to opt out, under the supervision of the Court.[47] Thus, for the

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44 (2016) 259 CLR 536 at 560–561 [58]–[60]. His Honour dissented in part, but his analysis of s 51(xxxi) synthesised the existing caselaw and he should not be regarded as dissenting on the relevant principles.

45 See RS [43]. See also the Fifth Respondent's Submissions in *Lenthall* at [36].

46 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 416–417 (Stephen J); *Paliflex Pty Ltd v Chief Commissioner of State Revenue* (2003) 219 CLR 325 at 349 [41] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

47 See *Civil Procedure Act*, ss 175 and 176.

reasons given by the Court of Appeal,[48] and the respondents in the two matters,[49] Victoria submits that, when the power in s 183 of the *Civil Procedure Act* is exercised to make a common fund order, authorising the payment of a proportion of the resolution sum to the litigation funder, there is no compulsory acquisition of property.

33. However, even if this Court accepts that the making of common fund order sought would involve a relevant acquisition of property from the group members, Victoria submits that s 183 does not answer the description of a law with respect to the acquisition of property within s 51(xxxi) because it does not meet the second or the third requirements identified in paragraph 28 above.

(2) Just terms would be incongruous

34. In order to answer the description of a law with respect to the acquisition of property within s 51(xxxi), the acquisition that the law authorises or effects must fit within the conception of an acquisition that can be on just terms. That is, where an acquisition occurs in circumstances where compensation would be inconsistent or incongruous, s 51(xxxi) has no application.[50] This requirement recognises that "to characterise certain exactions of government (such as levying of taxation, imposition of fines, exaction of penalties or forfeitures, or enforcement of a statutory lien) as an acquisition of property would be incompatible with the very nature of the exaction".[51]

35. In many cases where a law authorises a court to make orders that may have the effect of acquiring property, it will be easy to conclude that the acquisition is incongruous with the provision of just terms. So, for example, a respondent ordered by the Federal Court to pay damages to an applicant could not complain that s 22 or s 23 of the *Federal Court of Australia Act* authorised the acquisition of property on other than just terms.[52]

36. Victoria submits that the same is true where the acquisition is the consequence of the making of a common fund order under s 183 of the *Civil Procedure Act*.

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48 *Brewster* (2019) 366 ALR 171 at 194–195 [109]; [2019] NSWCA 35 at [109] [CAB 71–72].

49 See RS [43]. See also Submissions of the First to Fourth Respondents in *Lenthall* at [53].

50 See *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 219–220 (McHugh J); *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 285 (Deane and Gaudron JJ); *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 250–251 [340]–[342] (McHugh J), 295–296 [486], 298 [494] (Gummow J), 304 [519] (Hayne J); *Theophanous v Commonwealth* (2006) 225 CLR 101 at 115–116 [11]–[14] (Gleeson CJ), 124–127 [55]–[63] (Gummow, Kirby, Hayne, Heydon and Crennan JJ).

51 *Theophanous* (2006) 225 CLR 101 at 126 [60] (Gummow, Kirby, Hayne, Heydon and Crennan JJ).

52 See also the examples given in the Fifth Respondent's Submissions in *Lenthall* at [46].

37. The effect of the common fund order sought here is not only to give the litigation funder the right, on resolution of the proceeding, to receive a proportion of the resolution sum that would otherwise be payable to each group member, but also to impose on the litigation funder the obligation to fund the costs of the proceeding, comply with any order for security for costs, and meet any adverse costs order, as well as to fund the litigation to its conclusion [CAB 12–13]. These obligations confer distinct benefits on the group members. The right to a proportion of the resolution sum is the *quid pro quo* for the obligation. If that were not so — if, for instance, the order merely conferred the right or imposed the obligation — the order would not be appropriate or necessary to do justice in the proceedings.

10 38. In this sense, the making of a common fund order is analogous to the imposition of the statutory liens considered in *Airservices*. The liens were imposed to secure amounts owing to the Civil Aviation Authority as a result of the Authority's prior supply of services to an aircraft operator. Although the imposition of the liens constituted an acquisition of the property of third parties with proprietary interests in the aircraft, it was an acquisition of a nature that was incongruous with the provision of just terms. As McHugh J observed:[53]

> If "fair compensation" were to be paid to those having a proprietary interest in an aircraft upon the imposition of a lien, it would mean that the Authority would have an interest in the aircraft which on sale could be realised to satisfy the operator's previously incurred debt to the Authority, but on the other hand the Authority would incur a liability to pay "fair
> 20 compensation" to those having a proprietary interest in the aircraft. The amount of this liability for "fair compensation" would be at least equal to the amount secured by the lien ... and may be greater than the amount secured by the lien ... Thus, **the entire purpose of the lien would be frustrated as the Authority would be no better off, and indeed may be worse off, in terms of net recovery of the charges levied as a quid pro quo for the provision of the services**. Accordingly, in my opinion, the imposition of a statutory lien in these circumstances is irrelevant to or incongruous with the notion of fair compensation ... **Fair compensation would not be incongruous or irrelevant if there were no services provided. But that is not this case**. (Emphasis added.)

39. Similarly, here, the entire purpose of the common fund order would be frustrated if the
30 group members were to receive compensation for the acquisition of their property. As noted above, the transfer of a proportion of the resolution sum to the litigation funder is the *quid pro quo* for the obligations imposed on the funder for the benefit of the group members. If the group members were to be compensated for the acquisition of their property, they would receive both the full amount of the resolution sum and the benefits of the litigation funders' obligations — and the litigation funder would receive no recompense for incurring those

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53 *Airservices* (1999) 202 CLR 133 at 252–253 [345]. See also 180–181 [99]–[101] (Gleeson CJ and Kirby J), 298 [494], 300 [502]–[503] (Gummow J), 304 [519] (Hayne J).

obligations. Thus, any acquisition is of a nature that is inconsistent or incongruous with the provision of just terms.

(3) Law not properly characterised as a law with respect to the acquisition of property

40. Finally, even where a law authorises or effects an acquisition of property, and that acquisition is not incongruous with the provision of just terms, the law may not answer the description of a law with respect to the acquisition of property within s 51(xxxi). There remains what has been described as an "ultimate question of characterisation".[54]

41. This requirement will often overlap with the second requirement identified in paragraph 28 above:[55] where the acquisition that a law authorises or effects is incongruous with the provision of just terms, it will not be possible to characterise the law as one with respect to the acquisition of property on just terms. But it remains a distinct requirement.[56] That is most evident from this Court's decision in *Nintendo*. In that case, the Court gave two separate reasons for concluding that the law was not subject to the requirement to provide just terms. The first was, in essence, that, to the extent that the creation of a new intellectual property right involves an acquisition of property from those adversely affected by the new right, the acquisition is inconsistent or incongruous with the provision of just terms.[57] The second, independent reason was that:[58]

> [A] law which is not directed towards the acquisition of property as such but which is concerned with the adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity is **unlikely to be susceptible of legitimate characterization as a law with respect to the acquisition of property for the purposes of s 51 of the Constitution**. The Act is a law of that nature. It cannot properly, either in whole or in part, be characterized as a law with respect to the acquisition of property for the purposes of that section. (Emphasis added. Citations omitted.)

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54 *Cunningham* (2016) 259 CLR 536 at 561 [60] (Gageler J).

55 See *Mutual Pools* (1994) 179 CLR 155 at 189 (Deane and Gaudron JJ); *Airservices* (1999) 202 CLR 133 at 194 [148] (Gaudron J). See, eg, *Nintendo Company Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160–161 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Airservices* (1999) 202 CLR 133 at 298–300 [494]–[503] (Gummow J).

56 Cf AS [64]. See *Mutual Pools* (1994) 179 CLR 155 at 172 (Mason CJ), 189–190 (Deane and Gaudron JJ); *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 306–308 (Mason CJ, Deane and Gaudron JJ); *Nintendo* (1994) 181 CLR 134 at 160–161 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Airservices* (1999) 202 CLR 133 at 194 [148] (Gaudron J); *Cunningham* (2016) 259 CLR 536 at 560–561 [58]–[60] (Gageler J).

57 *Nintendo* (1994) 181 CLR 134 at 160–161 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

58 *Nintendo* (1994) 181 CLR 134 at 161 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

42. To say that there is an ultimate question of characterisation is not to suggest that a law will only answer the description of a law with respect to the acquisition of property within s 51(xxxi) if that is its ***sole*** or ***dominant*** characterisation.[59] Rather, the question is whether the law can ***properly*** or ***fairly*** be characterised in that way.[60] That requires reference to the "rights, powers, liabilities, duties and privileges" that the law creates.[61] Where the direct legal operation of a law is not to authorise or effect the acquisition of property, the question whether the law is properly characterised as a law with respect to the acquisition of property within s 51(xxxi) is likely to turn on questions of degree, and may require examination of the purpose of the law.[62]

10 43. Consistently with these general principles, it has been recognised that certain laws may, "as an incident of [their] operation or enforcement, adjust, modify or extinguish rights in a way which involves an 'acquisition of property'" and yet not be laws with respect to the acquisition of property within s 51(xxxi).[63] In such cases, "even though an 'acquisition of property' may be an incident or consequence of the operation of [the] law, it is unlikely that it will constitute an element or aspect which is capable of imparting to it the character of a law with respect to the subject matter of s 51(xxxi)".[64] No clear criterion has yet emerged to identify laws falling within this category.[65] An example is where the acquisition for which the law provides is "no more than incidental to or consequential upon the law's adjustment of competing rights, claims or obligations of persons in a particular relationship
20 or area of activity".[66]

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59 Cf the Appellants' Submissions in *Lenthall* at [46].

60 *Mutual Pools* (1994) 179 CLR 155 at 188 (Deane and Gaudron JJ). See also *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 439 [362] (Crennan J), referring to Deane J in *The Tasmanian Dam Case* (1983) 158 CLR 1 at 283.

61 *New South Wales v Commonwealth* (2006) 229 CLR 1 at 103 [142] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

62 *Spence* [2019] HCA 15 at [59]–[60] (Kiefel CJ, Bell, Gageler and Keane JJ).

63 *Mutual Pools* (1994) 179 CLR 155 at 190 (Deane and Gaudron JJ). See also *Georgiadis* (1994) 179 CLR 297 at 308 (Mason CJ, Deane and Gaudron JJ).

64 *Mutual Pools* (1994) 179 CLR 155 at 190 (Deane and Gaudron JJ).

65 *Cunningham* (2016) 259 CLR 536 at 561 [60] (Gageler J).

66 *Cunningham* (2016) 259 CLR 536 at 561 [60] (Gageler J), citing *Nintendo* (1994) 181 CLR 134 at 161 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). This Court has long recognised that an acquisition that is incidental to the adjustment of competing rights and claims is outside the operation of s 51(xxxi): see, eg, *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 510 (Mason CJ, Brennan, Deane and Gaudron JJ); *Mutual Pools* (1994) 179 CLR 155 at 171–172 (Mason CJ), 177–178 (Brennan J) and 189–190 (Deane and Gaudron JJ); *Georgiadis* (1994) 179 CLR 297 at 307 (Mason CJ, Deane and Gaudron JJ); *Airservices* (1999) 202 CLR 133 at 298–300 [497]–[503] (Gummow J) and 304–305 [517]–[519] (Callinan J).

44. Victoria submits that s 183 of the *Civil Procedure Act* is such a case.

45. The direct legal operation of s 183 is not to authorise or effect an acquisition of property. Instead, it is to authorise the Court to make orders that are appropriate or necessary to do justice in a representative proceeding. An incident or consequence of the operation of s 183 in a particular case may be the adjustment or modification of rights in a way that involves an acquisition of property. This may occur, for example, on the making of a common fund order of the kind sought in this case, or a funding equalisation order made at the end of a representative proceeding. But the mere possibility of s 183 operating in that way is not sufficient to give it the character of a law with respect to the acquisition of property.

10 46. Furthermore, the common fund order itself can be seen to be an adjustment of competing rights, claims and obligations of persons in particular relationships. It does not simply take property from group members and transfer it to the litigation funder — it confers concomitant rights on the group members to have the litigation funder pay the legal costs of the proceeding, pay any security for costs and pay any adverse costs orders, and fund the proceeding to its conclusion. An order of this kind is properly regarded as adjusting the rights and obligations as between the group members themselves (to ensure that the cost of the litigation is borne equally by all) and as between the group members and the litigation funder (to ensure that the litigation funder receives compensation for the risks and costs it undertakes to bear, and the group members receive protection against liability for costs).

20 **PART V: ESTIMATE OF TIME**

47. The Attorney-General for Victoria estimates that she will require approximately 15 minutes for the presentation of her oral submissions.

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