IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S152/2019

BETWEEN:

BMW AUSTRALIA LTD ACN 004 675 129
Appellant

and

OWEN BREWSTER
First Respondent

REGENCY FUNDING PTY LTD 619 012 421
Second Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S154/2019

BETWEEN:

WESTPAC BANKING CORPORATION
Appellant

WESTPAC LIFE INSURANCE SERVICES LIMITED
Second Appellant

and

GREGORY JOHN LENTHALL
First Respondent

SHARMILA LENTHALL
Second Respondent

SHANE THOMAS LYE
Third Respondent

KYLIE LEE LYE
Fourth Respondent

JUSTKAPITAL LITIGATION PTY LIMITED
Fifth Respondent

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

Filed on behalf of the Attorney-General for the State of Queensland (intervening)
Form 27C
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Per Margot Clarkson
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PART I: Certification

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

PART II: Basis of intervention

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

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

PART IV: Submissions

Summary of argument

4. Queensland's written submissions proceed on the assumption that s 33ZF of the *Federal Court of Australia Act 1976* (Cth) and s 183 of the *Civil Procedure Act 2005* (NSW), properly construed, authorise the making of common fund orders. The submissions are limited to:

   (a) first, a submission that the power to make a common fund order is judicial or incidental thereto; and

   (b) second, a submission that because State laws conferring judicial power apply of their own force in federal jurisdiction, s 51(xxxi) is not engaged in the BMW proceedings.

Judicial power

5. It is necessary to begin by recognising the fundamental point that the concepts of judicial and non-judicial power are not 'mutually exclusive'.[1] As has been long recognised, '[t]he legislature may commit some functions to courts falling within

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

Chapter III although much the same function might be performed administratively'.[2] Where a power is conferred on a court, the focus of inquiry is not whether the power falls within the 'core' or 'heart' of judicial power.[3] Instead, the determinative question is whether the power is inherently non-judicial (because it is directed to an ultimate end which is peculiarly legislative or executive), or is otherwise incapable of being exercised judicially.[4] The Full Court was correct to proceed upon this basis.[5]

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6. In contrast, where a power is conferred on a non-court, the determinative question is different. In those cases, the determinative question is whether the power is 'essentially and exclusively judicial'.[6] As Gummow and Crennan JJ explained in *Thomas v Mowbray*, '[c]are is needed in considering the authorities in this field. The vantage point from which the issues were presented is significant.'[7] Those observations show why Westpac's reliance[8] on *Precision Data Holdings Ltd v Wills*[9] and *Attorney-General (Cth) v Alinta*[10] is overstated.

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7. The power to make a common fund order is neither inherently non-judicial nor otherwise incapable of being exercised judicially. Properly characterised, it is at least incidental to the exercise of a judicial power.

The power is not inherently non-judicial

30 8. It may be accepted that the making of a common fund order creates rights and liabilities, by fixing (until further order) an amount to which a litigation funder will be entitled from the proceeds of any judgment or settlement. Of itself, however, the observation

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2 *R v Davison* (1954) 90 CLR 353, 368 (Dixon CJ and McTiernan J). See also *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144, 151 (the Court); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 278 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188-9 (the Court).

40 3 Cf Appellants' submissions in Westpac, 13-4 [36].

4 *Palmer v Ayres* (2017) 259 CLR 478, 497 [47] (Gageler J); *Thomas v Mowbray* (2007) 233 CLR 307, 327 [14] (Gleeson CJ).

5 *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34, [99].

6 *Attorney-General (Cth) v Alinta* (2008) 233 CLR 542, 552 [10] (Gummow J), citing *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, 363-364 [36] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

7 *Thomas v Mowbray* (2007) 233 CLR 307, 350 [88] (Gummow and Crennan JJ).

8 Appellants' submissions in Westpac, 14 [37]. See also Appellant's submissions in BMW, 14 [48].

9 (1991) 173 CLR 167.

10 (2008) 233 CLR 542.

that the order 'creates rights' does not require the conclusion that the power is inherently non-judicial.[11]

9. There are undoubtedly circumstances in which a power to create rights may be appropriate for exercise by a court in federal jurisdiction. As the appellants concede, examples include where the power has some historical analogue, or in which the provision conferring the power performs a 'double function' of creating rights and conferring jurisdiction.[12] Those two classes do not exhaust the circumstances in which a power to create rights may be exercised in federal jurisdiction: they are merely examples of when such a power is *not* directed to an ultimate end which is peculiarly legislative or executive.[13] Moreover, consideration of those examples suggests that the impugned power here is similarly directed to an end which is appropriately achieved through a judicial process.

10. As to history, the analogy with salvage is not exact, but it provides a useful example of the courts rewarding a person who intervenes to assist another by recovering an asset (just as a common fund order may reward a litigation funder who assists group members to fructify a chose in action). The example is relevant because recourse to history in this area is not doctrinal, but functional: it may illuminate the systemic values which underpin the constitutional guarantee of the separation of judicial power.[14] For that reason, even an inexact[15] analogy may show that a power is not inherently non-judicial.

11. As to 'double function' provisions, the appellants take too narrow a view. This Court has long-accepted that a law performing a 'double function' may confer judicial power on a court, notwithstanding that the power is discretionary and to be exercised by reference to broad criteria.[16] So, for example, in *Kable v Director of Public*

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[11] *Palmer v Ayres* (2017) 259 CLR 478, 493 [36] (Keifel, Keane, Nettle and Gordon JJ), 497-8 [48] (Gageler J).
[12] Appellants' submissions in Westpac, 14-5 [38]-[39].
[13] Cf Appellants' submissions in Westpac, 14-6 [38]-[41]; *Palmer v Ayres* (2017) 259 CLR 478, 497 [47] (Gageler J).
[14] *Palmer v Ayres* (2017) 259 CLR 478, 504 [69] (Gageler J); *R v Davison* (1954) 90 CLR 353, 380-2 (Kitto J).
[15] *Thomas v Mowbray* (2007) 233 CLR 307, 329 [17] (Gleeson CJ).
[16] *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 165-8 (Dixon J).

Prosecutions (NSW),[17] Gummow J described the power to detain under the *Community Protection Act 1994* (NSW) as performing a double function 'proleptically, by presenting criteria which require the Supreme Court to decide whether it is more likely than not that the appellant is likely to act in a particular fashion.'[18] McHugh J reasoned similarly in *Fardon v Attorney-General (Qld)* and explained that '[t]he exercise of judicial power often involves the making of orders upon determining that a particular fact or status exists.'[19] In this case, the 'status' determined by the Court to exist is that the establishment of a common fund is 'appropriate or necessary to ensure that justice is done in the proceeding'. For the reasons given below, that is a standard sufficiently precise to engage federal judicial power.

12. In any event, the power to make a common fund order is at least incidental to the admittedly judicial function of quelling the dispute in the representative proceeding. 'Incidental' powers are a third example of a power to create rights, which is directed to an 'ultimate' end which is *not* peculiarly legislative or administrative, and which may therefore be exercised by a court in federal jurisdiction.[20] The power to make common fund orders is, at least, such a power. The submission to the contrary[21] is undermined by a necessary premise of this branch of the argument, which is that a common fund order may be 'appropriate or necessary to ensure that justice is done in the proceeding' under s 33ZF or s 183.[22] Those provisions must be 'construed and applied as provisions conferring powers in aid of the exercise of the jurisdiction to hear and determine'[23] the representative proceedings. Orders within the scope of ss 33ZF and 183 are necessarily incidental to judicial power. Further, for the reasons given by the fifth respondent in the Westpac proceedings,[24] there is a 'sufficient relation'[25] between the making of a

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[17] (1996) 189 CLR 51.

[18] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 130 (Gummow J). See also *New South Wales v Kable* (2013) 252 CLR 118, 146 [75] (Gageler J). The power was judicial notwithstanding that it was invalid.

[19] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 596-7 (McHugh J).

[20] *Palmer v Ayres* (2017) 259 CLR 478, 498 [49] (Gageler J). See also *R v Davison* (1954) 90 CLR 353, 369 (Dixon CJ and McTiernan J) (discussion of the example of making rules of court).

[21] Appellants' submissions in Westpac, 16-7 [43]-[44].

[22] Cf Appellants' submissions in Westpac, 13 [35]; Appellant's submissions in BMW, 13 [46].

[23] *Cominos v Cominos* (1972) 127 CLR 588, 593 (Walsh J). See also at 591 (McTiernan and Menzies JJ), 600 (Gibbs J), 606 (Stephen J), 608-9 (Mason J).

[24] Submissions of the fifth respondent in Westpac, 8-9 [30]-[34].

common fund order and the judicial function of quelling the controversy in the matter between the parties.

The power is not otherwise incapable of being exercised judicially

13. The submission that the power is *incapable* of being exercised judicially (notwithstanding it has been conferred on a court[26]) distils to a complaint that it sets the commercial return for an investor and is unbounded by legal criteria.[27]

14. There are a number of reasons that submission must fail. The first is that there is no reason why, in this context, it is impermissible to rely upon the well-recognised technique of giving a broadly expressed standard 'content and more detailed meaning on a case-by-case basis'.[28] Indeed, words which permit the making of orders which 'the Court thinks appropriate' (which appear in s 33ZF and s 183) 'point[] to the requirement to develop principles governing the exercise of the power'.[29] In *R v Joske; Ex parte Shop Distributive & Allied Employees' Association*, Mason and Murphy JJ said:[30]

> It is no objection that the function entrusted to the Court is novel and that the Court cannot in exercising its discretion call in aid standards elaborated and refined in past decision; it is for the Court to develop and elaborate criteria regulating the discretion, having regard to the benefits which may be expected to flow from the making of an order ... and the impact which such an order will have on the interests of persons who may be affected.

15. The second reason the submission must fail is that it is undermined by the example of salvage. As the Full Court pointed out,[31] a court fixes the reward for a salvor by the exercise of a broad discretion, guided by indeterminate criteria. It is true that the criteria for an award of salvage are now set out in the International Convention on Salvage.[32]

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

[26] *Palmer v Ayres* (2017) 259 CLR 478, 497-8 [48] (Gageler J).

[27] *Brewster v BMW Australia Ltd* [2019] NSWCA 35, [51]-[52]; *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34, [42].

[28] James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th edition, 2015) 258. See also *Thomas v Mowbray* (2007) 233 CLR 307, 351 [91] (Gummow and Crennan JJ).

[29] *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, 394 (Gaudron, McHugh, Gummow and Callinan JJ).

[30] (1976) 135 CLR 194, 216.

[31] *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34, [102]

[32] *International Convention on Salvage*, opened for signature 28 April 1989, 1953 UNTS 165 (entered into force 14 July 1996) art 13. Cf Appellant's submissions in BMW, 15-6 [53].

Yet those criteria are an adoption of considerations established over time through case law, and which did not confine the discretion.[33] Although some circumstances, 'ascertained by experience', were 'always material for consideration',[34] it was also true that '[t]he amount of salvage reward due [was] not to be determined by any rules; it is a matter of discretion, and probably in this, or in any other case, no two tribunals would agree'.[35] Moreover, the considerations that were to be taken into account extended 10 'beyond the circumstances of the particular case', and included 'the general interests of the navigation and commerce of the country'.[36] Also relevant was 'the danger from which one ship has been saved, and the danger to which the other ship has been exposed', including 'the skill and courage of the salvors, and the risk of life and death as well to the saved as to their rescuers'.[37] The submission that 'where courts do fix remuneration ... that is based on established market rates' is therefore overstated.

20 ***Issues particular to the BMW proceeding***

16. If the appellants succeed on either of the above points, the BMW proceeding presents a further question: Are State laws which confer powers on courts properly characterised as laws which 'command the court as to the manner of exercise of federal jurisdiction'? That question appears to remain open after *Rizeq v Western Australia*,[38] because the 'issue was not argued and did not need to be decided in *Rizeq*'.[39] Similarly, the point 30 was not argued and did not need to be decided in *Masson v Parsons*.[40] For the following reasons, it is submitted that the answer to the question is 'no'.

17. *First*, the incapacity of a State Parliament to 'command a court as to the manner of exercise of federal jurisdiction' arises from the 'exclusory operation of Ch III',[41] not

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[33] See *Mount Isa Mines Ltd v The Ship Thor Commander* (2018) 263 FCR 181, 259 [339] (Rares J).
[34] *City of Chester* (1884) 9 PD 182, 202 (Lindley LJ).
[35] *The Cuba* (1860) Lush 14, 15; 167 ER 8, 8 (Dr Lushington). See also *Brown v The Ship Honolulu Maru* 40 (1924) 24 SR (NSW) 309, 312-3 (Street CJ in Eq).
[36] *North Coast Steam Navigation Co v The Ship Eugene* (1909) 9 SR (NSW) 246, 250 (Street J).
[37] *Brown v The Ship Honolulu Maru* (1924) 24 SR (NSW) 309, 312-3 (Street CJ in Eq).
[38] Cf *Rizeq v Western Australia* (2017) 262 CLR 1, 13-4 [13], [15] (Kiefel CJ), 39-40 [100], 41 [103] (Bell, Gageler, Keane, Nettle and Gordon JJ), 43 [111] (Edelman J).
[39] *Masson v Parsons* (2019) 93 ALJR 848, 865 [60] (Edelman J). Similar observations may be made about the statement in *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339, 346 [12] (French CJ, Kiefel, Bell and Keane JJ). Cf Appellant's submissions in BMW, 13 [46].
[40] *Masson v Parsons* (2019) 93 ALJR 848, 865 [60] (Edelman J).
[41] *Rizeq v Western Australia* (2017) 262 CLR 1, 25 [60] (Bell, Gageler, Keane, Nettle and Gordon JJ).

from any *a priori* exclusivity of Commonwealth legislative power.[42] Hence, to reason from the scope of Commonwealth legislative power with respect to 'the conferral and exercise of federal jurisdiction',[43] to a correlative restriction on State legislative power, invites error. That form of reasoning divorces the inquiry from its constitutional basis. Instead, analysis of the scope of any implied limitation on State legislative power must be undertaken in a manner which 'cleaves to the reasons'[44] the limitation exists. Accordingly, the extent of the relevant restriction on State legislative power must be determined by identifying precisely the 'exclusory operation of Ch III'.

18. *Second*, the exclusory operation of Ch III denies the application, in federal jurisdiction, of State laws conferring non-judicial power on State courts.[45] That is because 'adjudicative authority in respect of the matters listed in ss 75 and 76 of the *Constitution* may be exercised only as Ch III contemplates and not otherwise'.[46] Chapter III contemplates that matters in federal jurisdiction will be adjudicated in courts and by the exercise of judicial power.[47]

19. *Third*, there is no secure basis[48] from which to draw from Ch III a negative implication of broader effect, which would deny the operation, in federal jurisdiction, of State laws conferring *judicial* powers on State courts. So much follows from the concepts of 'jurisdiction' and 'power'. It is necessary briefly to elaborate that point.

a) 'Jurisdiction' means 'authority to decide'. It is related to, but distinct from, 'power'.[49] A conferral of jurisdiction *per se* does not confer power: it presupposes

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[42] In particular, it may be doubted that the power in s 51(xxxix) is exclusive to any extent but for the operation of Ch III: 'In marked contradistinction to the conferrals of power in s 51 of the Constitution, the conferrals of power in s 51 are concurrent with the State legislative power referred to in s 107': *Spence v Queensland* (2019) 93 ALJR 643, 662 [46] (Kiefel CJ, Bell, Gageler and Keane JJ).

[43] Cf *Rizeq v Western Australia* (2017) 262 CLR 1, 26 [61] (Bell, Gageler, Keane, Nettle and Gordon JJ).

[44] *McCloy v New South Wales* (2015) 257 CLR 178, 238 [150] (Gageler J).

[45] This exclusory operation extends only to the limits of the 'matter' which is to be determined in federal jurisdiction: cf *Momcilovic v The Queen* (2011) 245 CLR 1, 70 [101] (French CJ); *New South Wales v Kable* (2013) 252 CLR 118, 147 [76]-[77] (Gageler J).

[46] *Burns v Corbett* (2018) 92 ALJR 423, 435 [43] (Kiefel CJ, Bell and Keane JJ).

[47] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 272 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Burns v Corbett* (2018) 92 ALJR 423, 435-6 [44] (Kiefel CJ, Bell and Keane JJ).

[48] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 134 (Mason CJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 453 [389] (Hayne J).

[49] *Rizeq v Western Australia* (2017) 262 CLR 1, 45-6 [121] (Edelman J); *Palmer v Ayres* (2017) 259 CLR 478, 490 [24] (Kiefel, Keane, Nettle, Gordon JJ); *CGU Insurance Ltd v Blakely* (2016) 259 CLR 339, 349-50 [24]-[25] (French CJ, Kiefel, Bell and Keane JJ).

the court has either inherent or statutory power to make orders which quell the controversies within its jurisdiction.

b) 'Federal jurisdiction' means 'the authority to adjudicate derived from the Commonwealth Constitution and laws'[50] and 'denotes power to act as the judicial agent of the Commonwealth.[51] Hence, a court acts as the 'judicial agent of the Commonwealth' where it exercises federal jurisdiction: the character of judicial power (as 'federal' or 'State') is derived from the source of the authority to exercise it, not from the source of the power. So much is demonstrated by the existence of inherent powers[52] to grant relief, which may be exercised in State as well as federal jurisdiction.[53]

c) The last point underscores why State laws conferring non-judicial powers do not operate in federal jurisdiction – as the 'judicial agent of the Commonwealth,' a State court cannot exercise non-judicial power. Conversely, it also demonstrates why no conceptual or constitutional difficulty arises where a State court exercises a judicial power conferred by State law in federal jurisdiction.

20. *Fourth*, far from being 'logically or practically necessary' for the preservation of the constitutional structure,[54] a broader negative implication (that State laws conferring judicial power are incapable of applying in federal jurisdiction) would give rise to a range of difficulties.[55] One such difficulty arises because the Commonwealth Parliament 'has no power, express or implied, to impose liabilities or confer rights on persons who are parties to a justiciable controversy merely because the adjudication of that controversy is or has come within the purview of Ch III.'[56] The Commonwealth Parliament could not overcome that limit by legislating in a single provision, for both

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50 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1142 (Isaacs J).

51 *Lorenzo v Carey* (1921) 29 CLR 243, 251 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

52 *PT Bayan Resources v BCBC Singapore* (2015) 258 CLR 1, 17-8 [38] (French CJ, Kiefel, Bell, Gageler and Gordon JJ).

53 Ibid 10 [2] (French CJ, Kiefel, Bell, Gageler and Gordon JJ).

54 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140, 169 (Brennan CJ); *Burns v Corbett* (2018) 92 ALJR 423, 446 [94] (Gageler J), 462 [175] (Gordon J).

55 As to which, see *Masson v Parsons* (2019) 93 ALJR 848, 865-7 [61]-[68] (Edelman J); *Rizeq v Western Australia* (2017) 262 CLR 1, 69-72 [192]-[197] (Edelman J); James Stellios, 'Choice of law in federal jurisdiction after *Rizeq v Western Australia*' (2018) 46 *Australian Bar Review* 187.

56 *Rizeq v Western Australia* (2017) 262 CLR 1, 21 [46] (Bell, Gageler, Keane, Nettle and Gordon JJ).

the right or liability and the power of a State court to create it. For the same reasons, s 79(1) of the *Judiciary Act* will be incapable of picking up and applying all State laws which have a dual operation of that kind.[57]

21. *Fifth*, the above understanding of the constitutional context is consistent with the scheme established by ss 39 and 79 of the *Judiciary Act.* As noted above, a conferral of jurisdiction *per se* does not confer power, but assumes the conferral of power from another source. So much is reflected in well-established legislative drafting practices.[58] Section 39(2) of the *Judiciary Act* proceeds on that basis: it is a bare investment of jurisdiction which presupposes that the powers used in exercise of that jurisdiction will have another source. Hence, while s 109 of the Constitution renders inoperative State laws conferring jurisdiction over the matters mentioned in s 39(2), it does not render inoperative State laws conferring powers.

22. *Sixth*, as explained by Edelman J in *Masson*, it is a premise of s 79(1) that the court not only has, but is 'exercising' federal jurisdiction. An *exercise* of jurisdiction not only connotes, but denotes, an exercise of power.[59] Jurisdiction is 'authority to exercise ... power.'[60] Hence, like s 39(2), s 79(1) 'assumes that the court has existing powers to make substantive orders'.[61] It is directed to laws which govern or regulate the exercise of federal jurisdiction; including, as it suggests, laws relating to procedure, evidence and the competency of witnesses. It is not designed to fill a 'gap'[62] which extends to power, because there is no such gap.

23. *Seventh*, none of the above denies that, more generally, the exclusory operation of Ch III results in the 'incapacity of a State law to affect the exercise of federal

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[57] Cf *Rizeq v Western Australia* (2017) 262 CLR 1, 33-4 [83], 39-40 [100] (Bell, Gageler, Keane, Nettle and Gordon JJ); *Masson v Parsons* (2019) 93 ALJR 848, 860 [38] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), 866-7 [68] (Edelman J).

[58] See, eg, *Family Law Act 1975* (Cth) ss 31, 33; *Native Title Act 1993* (Cth) s 81; *Judiciary Act 1903* (Cth) s 30; *Constitution of Queensland 2001* (Qld) s 58.

[59] *Rizeq v Western Australia* (2017) 262 CLR 1, 49 [131] (Edelman J).

[60] Ibid 47 [127] (Edelman J).

[61] *Masson v Parsons* (2019) 93 ALJR 848, 865 [61] (Edelman J).

[62] *Rizeq v Western Australia* (2017) 262 CLR 1, 14 [16] (Kiefel CJ), 26 [63] (Bell, Gageler, Keane and Gordon JJ); *Masson v Parsons* (2019) 93 ALJR 848, 858 [30] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

jurisdiction'.[63] Instead, the above analysis demonstrates that the category of laws which 'regulate the exercise of federal jurisdiction'[64] or 'command a court as to the manner of exercise of federal jurisdiction'[65] does not include laws conferring powers.

24. The consequence for the BMW proceedings is that the appellant's attack on the making of a common fund order as an acquisition of property contrary to the just terms requirement in s 51(xxxi) must fail. In federal jurisdiction, s 183 applies directly and of its own force as a State law. State laws acquiring property are not subject to any 'just terms' requirement.[66]

PART VI: Estimate of hours

25. Queensland estimates that no more than 15 minutes will be required for the presentation of oral argument.

Dated: 29 July 2019.

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[63] *Rizeq v Western Australia* (2017) 262 CLR 1, 24-5[58] (Bell, Gageler, Keane, Nettle and Gordon JJ).
[64] *Masson v Parsons* (2019) 93 ALJR 848, 865 [59] (Edelman J).
[65] *Rizeq v Western Australia* (2017) 262 CLR 1, 26 [61]-[62] (Bell, Gageler, Keane, Nettle and Gordon JJ).
[66] *Pye v Renshaw* (1951) 84 CLR 58, 78-80 (Dixon, Williams, Webb, Fullagar and Kitto JJ); *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 408 [7] (Gaudron, McHugh, Gummow and Hayne JJ).