IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **NO S152 OF 2019**

ON APPEAL FROM THE NEW SOUTH WALES COURT OF APPEAL

BETWEEN: **BMW AUSTRALIA LTD ACN 004 675 129**

Appellant

AND **OWEN BREWSTER**

First Respondent

REGENCY FUNDING PTY LTD ACN 619 012 421

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Second Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

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Filed on behalf of the Attorney-General of the Commonwealth (Intervening) by:

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PART I CERTIFICATION

1. It is certified that these submissions are suitable for publication on the internet.

PART II BASIS OF INTERVENTION

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

PART III SUBMISSIONS

Introduction

3. These submissions supplement those filed by the Commonwealth in the appeal in S154/2019 (**the Westpac appeal**), which is to be heard with the present appeal (**the BMW appeal**). The bulk of the Commonwealth's argument across both appeals has been advanced in its submissions in the Westpac appeal. The effect of the impugned orders in the present case is relevantly the same as the effect of the impugned orders in the Westpac appeal; and the legislative scheme in Pt IVA of the *Federal Court of Australia Act 1976* (Cth) is relevantly the same as the legislative scheme in Pt 10 of the *Civil Procedure Act 2005* (NSW) (**CPA**), which was "substantially modelled" on Pt IVA.[1]

4. Subject to one exception, the submissions made in the Westpac appeal in respect of Justice Lee's order in that proceeding apply equally to the proposed order in the BMW proceedings: see, in particular, CAB 8, 12, 13. The exception is that, by reason of the procedure by which the proposed BMW order has come before the Court, there are no findings of fact by the trial judge (or the Court of Appeal) as to whether such an order ought to be made. This proceeding must therefore be resolved solely at the level of power, for if power exists it must be assumed that it would not be exercised unless the trial judge makes factual findings that properly call for its exercise.[2]

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1 Courts and Crimes Legislation Further Amendment Bill 2010 (NSW) Second Reading Speech, New South Wales, *Parliamentary Debates*, Legislative Council, 24 November 2010, 28066 (John Hatzistergos, Attorney General).

2 For that reason, BMW's argument that the Court of Appeal did not address why making a Common Fund Order (**CFO**) is to ensure that justice is done in the proceedings (BS [27]-[29]) is premature.

5. These submissions address a discrete issue which arises only in the BMW appeal, namely, the role of s 79 of the Judiciary Act in relation to the two constitutional arguments: that is, whether s 183 confers a non-judicial power and whether s 183 is a law with respect to the acquisition of property other than on just terms. That issue arises because, while the BMW proceedings have been brought in the New South Wales Supreme Court, in determining those proceedings that Court will be exercising federal jurisdiction because the proceeding involves allegations of contraventions of the *Trade Practices Act 1974* (Cth).

6. In summary, for the reasons set out below, the Commonwealth submits that the intermediation of s 79 of the Judiciary Act does not lead to a different outcome in the BMW appeal than the Westpac appeal.

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Section 79: general principles

7. Section 79(1) of the Judiciary Act provides:

> The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

8. The operation of s 79 has recently been explained by this Court in *Rizeq v Western Australia* (2017) 262 CLR 1 and *Masson v Parsons* (2019) 93 ALJR 848. The following general principles emerge.

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9. *First*, "the purpose of s 79(1) of the *Judiciary Act* is to fill a gap in the laws which regulate matters coming before courts exercising federal jurisdiction by providing those courts with powers necessary for the hearing and determination of those matters".[3] The "gap" arises because of "[t]he incapacity of a State Parliament to enact a law which governs the exercise of federal jurisdiction by a court".[4] Section 79 "fills that gap by picking up the text of a State law governing the exercise of State jurisdiction and applying that text as a

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3 *Masson v Parsons* (2019) 93 ALJR 848 at 14 [30] (Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ) (***Masson***); see also *Rizeq v Western Australia* (2017) 262 CLR 1 at 14 [15]-[16], 18 [32] (Kiefel CJ); 36 [90], 41 [103] (Bell, Gageler, Keane, Nettle and Gordon JJ) (***Rizeq***).

4 *Rizeq* at 26 [63] (Bell, Gageler, Keane, Nettle and Gordon JJ).

Commonwealth law to govern the manner of exercise of federal jurisdiction"[5] or to "regulate [its] exercise".[6] The "section has no broader operation".[7]

10. *Secondly,* s 79(1) does not pick up State "laws which are determinative of the rights and duties of persons as opposed to the manner of exercise of jurisdiction".[8] Where a State law determines rights, rather than simply regulates the exercise of jurisdiction, Ch III has no relevant preclusive operation and there is no gap to be filled.

11. *Thirdly*, as the terms of s 79 expressly state, "the laws of each State and Territory ... [shall be binding] except as otherwise provided by the Constitution". For that reason, the section does not pick up laws imposing functions which are "insusceptible of exercise as part of the judicial power of the Commonwealth".[9] Section 79 will, however, pick up State law to the extent that the State law (as picked up and applied as Commonwealth law) is not inconsistent with the Constitution.[10] In practical terms, the words "except as otherwise provided by the Constitution" produce the same legal effect as would result if s 79 operated without those words (ie to pick up as Commonwealth law the entire State law as drafted, irrespective of constitutional limits), but the resultant Commonwealth law was then read down or severed in accordance with s 15A of the *Acts Interpretation Act 1901* (Cth) so as to confine it to its valid operations.[11]

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5 *Rizeq* at 26 [63] (Bell, Gageler, Keane, Nettle and Gordon JJ).

6 *Masson* at 1 [1] (Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ).

7 *Rizeq* at 26 [63] (Bell, Gageler, Keane, Nettle and Gordon JJ).

8 *Masson* at 14 [30] (Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ); see also at 18 [39].

9 *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 593 [73] (Gleeson CJ, Gaudron and Gummow JJ); see also at 612 [137] (McHugh J); see also *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 134-135 [24] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ); *Momcilovic v The Queen* (2011) 245 CLR 1 at 69 [100] (French CJ).

10 *Cheatle v The Queen* (1993) 177 CLR 541 at 563; *Brown v The Queen* (1986) 160 CLR 171 at 200-201 (Brennan J), 206-207 (Deane J), 218 (Dawson J). In *Commonwealth v Mewett* (1997) 191 CLR 471, Gummow and Kirby JJ at 556 cautioned that s 79 "could not operate to pick up some but not all of the otherwise applicable terms" of a State law, but that caution was limited to where to do so "would be to give an altered meaning to the State legislation".

11 Cf *Solomons v District Court of NSW* (2002) 211 CLR 119 at 135 [24] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ); *Commonwealth v Mewett* (1997) 191 CLR 471 at 556 (Gummow and Kirby JJ).

12. Given that s 79 is intended to facilitate the exercise of federal jurisdiction by the application of a coherent body of law,[12] there is no basis to attribute to the Commonwealth Parliament an intention that s 79 would not pick up a State law at all simply because one of its possible operations would render it invalid as a law of the Commonwealth, for that would leave a gap unfilled in the regulation of federal jurisdiction. To acknowledge the possibility that a State law may not be picked up and applied as Commonwealth law in all of its operations is not to purport to give the State law a new meaning,[13] any more than it would be to apply the valid part of a State law when part of that law is rendered invalid by reason of s 109 inconsistency, or where the State law needs to be read down under State interpretation legislation to avoid inconsistency with the Commonwealth Constitution.

Section 79 of the *Judiciary Act* and s 183 of the *Civil Procedure Act*

13. Section 183 is a law that provides powers to a court for the hearing and determination of matters (see paragraph 9 above). As such, it is a law of a kind that can apply in federal jurisdiction only to the extent that it is picked up by s 79.

14. For the purposes of assessing whether the Constitution "otherwise provides", so as to prevent s 79 from picking up s 183, the question is whether a law bearing the legal meaning of s 183 would be valid if enacted by the Commonwealth Parliament. That is the appropriate question because, if the Commonwealth Parliament could not have enacted such a law directly, it must follow that it cannot achieve that same legal effect indirectly by applying State law through the medium of s 79 of the Judiciary Act.[14] Here, the answer to the above question is that the Commonwealth could have directly enacted s 183, for the reasons given in the Commonwealth's submissions in the Westpac appeal with respect to s 33ZF (which is materially indistinguishable).

15. If, contrary to the Commonwealth's primary submission, s 183 purports to authorise the making of a CFO but a provision having that operation could not validly be enacted by

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12 See *Masson* at 20 [43] (Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ).

13 Cf *Pedersen v Young* (1964) 110 CLR 162 at 165 (Kitto J).

14 *Solomons v District Court of NSW* (2002) 211 CLR 119 at 136 [28] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

the Commonwealth Parliament (whether because it confers non-judicial power, or because it purports to acquire property other than on just terms), then s 183 is still capable of being picked up by s 79, albeit only to the extent the Constitution permits. That is, s 183 is picked up by s 79 in its distributive operation[15] or as partially disapplied.[16]

PART IV ESTIMATE

16. It is estimated that 45 minutes will be required for the presentation of the intervener's oral argument across both this appeal and the appeal in S154 of 2019.

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15 See *Clubb v Edwards* (2019) 93 ALJR 448 at 480 [141], 482 [151], 494 [220] (Gageler J) (***Clubb***).

16 *Clubb* at 534-7 [416]-[425] (Edelman J).