IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **NO S154 OF 2019**

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **WESTPAC BANKING CORPORATION**

First Appellant

WESTPAC LIFE INSURANCE SERVICES LIMITED

Second Appellant

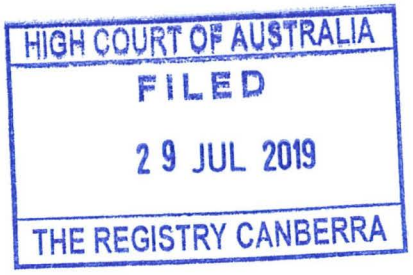
GREGORY JOHN LENTHALL

AND

First Respondent

SHARMILA LENTHALL

Second Respondent



SHANE THOMAS LYE

Third Respondent

KYLIE LEE LYE

Fourth Respondent

JUSTKAPITAL LITIGATION PTY LIMITED

Fifth Respondent

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

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 intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**), in support of the respondents.

PART III SUBMISSIONS

A. Introduction

3. This appeal and the appeal in *BMW* concern the scope of the powers given by s 33ZF of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and s 183 of the *Civil Procedure Act 2005* (NSW) respectively.[1] For the reasons below, the powers, and the orders here made under them are valid.

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B. Effect of the order

4. Although the appellants' submissions refer generally to "common fund orders" (**CFOs**), the focus of the analysis should be on (i) the power to enact s 33ZF; and (ii) the specific CFOs in question. Four points should be made at the outset about those orders.

5. ***First***, each of the orders is an interlocutory order and is subject to variation.

6. ***Secondly***, the CFOs are part of a broader regime concerning the realisation of group members' rights (FCAFC at [28]). They bind all group members to the funding terms.[2] In doing so, they make clear that the costs of funding are to be shared as a "common responsibility" of the applicants and group members (FCAFC at [23], [25]), whereas previously the costs of funding for the entire group were effectively borne solely by those who were parties to an agreement with the funder. CFOs are not fundamentally different from orders of a familiar kind with respect to common costs. Legal representatives have traditionally had a right or interest in the fruits of an action and, in the Pt IVA context, orders have been made for payment from the common fund for the time and expenses of the representative party,[3] which are not based on any contractual obligation and confer a right that did not otherwise exist.

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7. ***Thirdly***, the orders are made on the undertaking of the representative party, the solicitors and the funder to each other and to the court to comply with the funding

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1 In these submissions, reference is generally made to the legislative provisions in Pt IVA of the FCA Act. However, the provisions in Pt 10 of the *Civil Procedure Act* are generally in relevantly the same terms and bear the same meaning. The submissions below concerning the meaning and validity of s 33ZF apply equally to s 183, save for the intermediating operation of s 79 of the Judiciary Act , which the Commonwealth addresses in the separate BMW submissions.

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2 Westpac order 1 (CAB 36); BMW order 1 (CAB 8).

3 See, eg, *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 at [104] and the cases there cited.

terms.[4] Accordingly, the funder is bound to provide funding in accordance with the Funding Terms,[5] which can only be terminated by the court.[6] By contrast, under the previous arrangements, the funder could (with notice) withdraw funding.[7] Seen in that context, the effect of the orders is to place the action "on a known and stable foundation, and reduce or eliminate the risk of the action not proceeding" (FCAFC at [91]). They thereby ensure that the time and resources of the parties and the court are not wasted, by substantially eliminating the risk that the funder may withdraw prior to the resolution of the dispute (unless permitted to do so by order of the court).

8. ***Fourthly***, so far as the distribution of proceeds to the funder is concerned, the court's supervision of the funder's commission is part of its protective function with respect to the interests of group members.[8] Further, any distribution to the funder is contingent on a number of events. *First,* the funding terms are subject to opt-out by group members under s 33J. *Secondly,* any obligation to pay is triggered only if and when there is both resolution and a resolution sum in the hands of group members.[9] So too any right in the funder does not arise until those conditions are satisfied.[10] *Thirdly,* the amount that might be paid to the funder will depend on the size of the net resolution sum as well as the funding commission rate (which is subject to court approval).

C. Section 33ZF confers power to make a common fund order

9. Section 33ZF(1) provides that, in a representative proceeding, the Court may on its own motion or on application "make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding". Section 183(1) is relevantly identical.

10. The appellants' attempt to limit the broad terms of s 33ZF is contrary to the settled interpretive principle that provisions granting power to the court should not be interpreted as subject to limitations that are not found in the express words.[11] This reflects the fact that "[p]owers conferred on a court are powers which must be exercised judicially and in accordance with legal principle [which] tends in favour of the most liberal construction, for it denies the validity of considerations which might limit a grant of power to some different body".[12] That principle is at its zenith in the case of superior

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4 Westpac order 2 (CAB 36); BMW order 1 (CAB 8).
5 Westpac cl 2 (CAB 45); BMW cl 6 (CAB 12-13). The funder's obligations extend to legal costs, adverse costs orders as well as security for costs.
6 Westpac cl 20 (CAB 52); BMW cl 24 (CAB 16).
7 Westpac cl 21.1 (Appellants' Book of Further Materials at 54); BMW see NSWCA at [22(1)]
8 See *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 at 208 [72] (***Money Max***).
9 Westpac cl 1 (CAB 36); BMW cl 8 (CAB 13).
10 Westpac cl 7 (CAB 36); BMW cl 6 (CAB 13).
11 *Owners of the Ship, "Shin Kobe Maru" v Empire Shipping Company Inc* (1994) 181 CLR 404, 421 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
12 *Knight v FP Assets Special Assets Ltd* (1992) 174 CLR 178 at 205 (Gaudron J) and 185 (Mason CJ and Deane J); *Mansfield v DPP (WA)* (2006) 226 CLR 486 at 492 [10] (Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ); *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 223 [40] (French CJ).

courts like the Federal Court and Supreme Court.[13] This Court has applied the principle in respect of similarly-worded powers,[14] and in the specific context of Pt IVA.[15]

11. Despite the interpretive principle just described, Westpac and BMW seek to impose an absolute limitation on the relevant powers, being that they cannot authorise at an early stage of proceedings the creation of interests in third parties that are calculated to facilitate the provision of legal services. That limitation, which is said to arise even where the trial judge thinks that such an order is necessary or appropriate to ensure justice in the proceedings, should not be accepted.

12. ***Principle of legality***: Recourse to the principle of legality does not lead to any different conclusion: cf WS [16]-[22]; BS [36]-[39]. Indeed, that principle is unlikely to assist when interpreting powers given to a court, for in that context it will often be in tension with the more specific principle identified in paragraph 10 above. Parliament, in choosing to confer power under s 33ZF on a court, must be taken to have done so on the basis that the court will exercise that power appropriately, including by acting in accordance with the judicial process (which will include the opportunity to take into consideration any effect of its orders on property rights). Consistently with that submission, legislative provisions expressed in wide and general terms commonly authorise courts to make orders that have the effect of "altering", "modifying" or "curtailing" proprietary rights (cf WS [16]), including by making freezing orders, discovery orders, and *Anton Piller* orders.[16] Yet the power to make orders of those kinds is not denied because of an atextual presumption of the kind relied on by Westpac and BMW. Such a presumption would be inappropriate, as Parliament is taken to have concluded that rights are sufficiently protected by conferring power on a court.

13. To the extent that it is relevant, the principle of legality is but one contextual factor,[17] and it does not displace the need to give a meaning to s 33ZF that coheres with text, context and purpose.[18] Textually, the breadth of the language suggests "the widest possible power" (FCAFC at [86]). So too does context: the power is given to the court for the purpose of ensuring justice. Further, it is given in aid of representative

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13 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 560 [38] (Gummow, Hayne, Heydon and Kiefel JJ).

14 See *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270, which concerned the power in s 447A(1) of the *Corporations Law* for a court "to make such order as it thinks appropriate about how this Part is to operate in relation to a particular company".

15 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 260-261 [11] (the Court).

16 See, eg, *Cardile v LED Builders* (1999) 198 CLR 380 (***Cardile***).

17 See *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 328-329 [19] (Gleeson CJ), *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 309-310 [312] (Gageler and Keane JJ) (observing that the assistance to be gained from the principle of legality "will vary with the context in which it is applied").

18 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71] (McHugh, Gummow, Kirby and Hayne JJ).

proceedings, in which the court has a central supervisory role,[19] and in which court-facilitated adjustments of rights are inherent – for example, through court approval of settlements and variations to the class. Furthermore, the principle of legality does not cut all one way here: the principle also protects access to the courts,[20] the securing of which is a primary object of ss 33ZF. Its purpose is to enable the Court to make orders necessary to resolve unforeseen difficulties with the novel procedure in Pt IVA, without the need for frequent resort to Parliament.[21] The principle of legality should not operate to render the attainment of justice unduly difficult.[22]

14. Finally, even if it is engaged, the principle of legality does not contradict the scheme established in Part IVA. That scheme evinces a clear intention to adjust the parties' rights (NSWCA at [58]-[61]). It is inherent in that scheme that group members' rights may be affected in various ways, and it is for that reason that the court has an enhanced supervisory role to protect their interests. Further, the asserted interference with property rights that is said to engage the principle of legality incorrectly assumes that CFOs in fact involves a compulsory acquisition of property: see paragraph 49 below.

15. ***Anthony Hordern principle:*** Contrary to Westpac and BMW's submissions, the general provision in s 33ZF should not be read down by reference to other provisions in Pt IVA. That would be warranted only if it were "possible to say that the statute in question confers only one power to take the relevant action".[23] But the FCAFC and NSWCA were correct to find that the disparate provisions relied on by Westpac and BMW do not reveal that there is only "one power" to make orders addressed to the funding of representative proceedings. That conclusion is strongly supported by the fact that a CFO does not circumvent any restriction or condition on any power, or undermine or make redundant any power (FCAFC at [95]-[96]; NSWCA at [65]-[67]).

16. Turning to the specific provisions, s 33V provides that a court must approve the settlement or discontinuation of proceedings. Its purpose is protective, ensuring that the court has a role in protecting the interests of group members in settlement or discontinuation.[24] It has nothing to say about the power of courts to make other orders at other times. Section 33Z sets out the powers of the court in determining a matter. The

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19 *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 at 408 (Brennan J), cited in *Mobil Oil Australia Ltd v Victoria* (2002) 211 CLR 1 at 27 [21] by Gleeson CJ (***Mobil Oil***).

20 See, eg, *Reg. v. Secretary of State for the Home Department. Ex parte Pierson* [1998] A.C. 539, 575 (Lord Browne-Wilkinson).

21 FCAFC at [85], citing *McMullin v ICI Australia Operations Pty Ltd (No 6)* (1998) 84 FCR 1 at 4. As to the wide range of matters for which s 33ZF has been relied on, see Legg and McInnes, *Annotated Class Actions Legislation* (2nd ed, 2018) at [32.10].

22 *Femcare v Bright* (2000) 100 FCR 331 at 346 [65].

23 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 589 [59] (Gummow and Hayne JJ) (emphasis added).

24 See, eg, *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [7]-[8] (Jacobson, Middleton and Gordon JJ).

powers conferred on the court are facultative, not restrictive. If the Court makes an order for the constitution of a fund, then the order must specify certain matters relating to the operation of the fund (s 33ZA(3)). That the provisions refer to the "entitlement" of group members to damages (BS [33]) does not address the separate question of payments from those damages. Section 33ZJ confers on the court power to make an order for payment of the representative party's costs that have been reasonably incurred (s 33ZJ(2)). That provision may be one method by which the legislation gives statutory force to traditional equitable principles (cf WS [30]), but there is nothing to suggest that it is the only means by which the court may do so. In this regard, it is significant that s 33ZJ(3) provides that the Court may make any other order it thinks just.

17. ***Legislative history:*** Litigation funding was not known at the time that Part IVA was introduced.[25] However, in *Fostif*,[26] this Court accepted that litigation funding was not contrary to public policy. In *Moneymax*,[27] the Full Federal Court accepted that a funding commission may be considered a cost of prosecuting representative proceedings in the same way as the cost of legal fees. In circumstances where Part IVA is "always speaking",[28] there is no reason why orders with respect to the shared costs of litigation funding cannot be considered "appropriate or necessary" for the interests of justice in the proceedings (cf WS [34]). Content should be given to those words in light of decisions of this Court, not in disregard of them.

18. ***Whether CFOs appropriate or necessary:*** Westpac and BMW's key complaint with respect to whether the CFOs made in these matters are "appropriate or necessary" appears to be that those orders do not directly assist in resolution of matters in controversy between the parties. That misses the point. The only express limitation on the terms of s 33ZF is that the Court must think the order appropriate or necessary to ensure that justice is done in the proceeding. As with the similar power in s 23 of the FCA Act, while any orders made under s 33ZF "must be capable of properly being seen as" appropriate or necessary to ensure that justice is done in the proceeding, no narrow view should be taken of that power.[29] That is particularly true as addressing practical cost barriers to litigation is the very concern that Pt IVA was intended to address.[30] Those provisions should be not be interpreted "so rigidly as to produce the consequence … that the representative action is simply rendered impracticable in the very case in

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25 The position is different in relation to Part 10 of the CPA: see NSWCA at [71]-[74].
26 *Campbells Cash and Carry Pty Limited v Fostif Pty Limited* (2006) 229 CLR 386.
27 *Money Max* at 207-208 [71], [75].
28 *Aubrey v The Queen* (2017) 260 CLR 305 at 322 [30] (Kiefel CJ, Keane, Nettle and Edelman JJ).
29 See *Cardile* (1999) 198 CLR 380 at 405 [56] (Gaudron, McHugh, Gummow and Callinan JJ).
30 See Hansard, House of Representatives, 14 November 1991, at 3174; *Campbells Cash and Carry Pty Limited v Fostif Pty Limited* (2006) 229 CLR 386 at 448-449 [137] (Kirby J)

which it is needed".[31] In any event, an order may be necessary or appropriate to ensure justice in a proceeding even if it is not directly related to resolving the matters in controversy in the proceeding. For example, the bail order contemplated in *United Mexican States v Cabal*[32] was justified on the basis that it rendered effective a stay order that, itself, was calculated to render effective the court's appellate jurisdiction. Further, the relationship between the final resolution of a controversy and many orders justified by the inherent jurisdiction to facilitate the administration of justice in a proceeding is not "direct". That includes orders relating to legal representation, such as the power to permit an unqualified person to conduct a case on behalf of a party[33] and the power to restrain a solicitor from acting in a particular case.[34]

19. The manner in which the purpose of the CFO is achieved does not stray beyond the bounds of that power (cf WS [24]). There is no analogy with *Jackson v Sterling*,[35] where the impugned order was held to fall outside the Federal Court's general power in s 23 by creating and enforcing new rights that went beyond the relief that could be granted in the proceedings. Here, by contrast, the obligations imposed on group members by the order with respect to the distribution of any proceeds are obligations that it appears the appellants accept could be validly imposed at the time of, or as part of settlement or judgment (unless they contend that cost equalisation orders are also beyond power).

20. Many of Westpac and BMW's complaints are properly directed to the exercise of the power in a particular case.[36] These include their arguments that an early CFO is inherently infirm because matters relevant to the setting of the commission rate may yet change (BS [40]-[43]); and that s 33ZF should not be construed as if it applies to all representative proceedings, regardless of whether they would be uneconomic to vindicate (WS [22]). These matters may be relevant to whether an order is necessary or appropriate in a particular case, but they do not go to the scope of the power itself.

D. Judicial power

21. There is no dispute as to the jurisdiction of the Federal Court and the Supreme Court to determine the class actions between the plaintiffs and defendants manifested in the originating processes.[37] Nor is there any debate that, in exercising that jurisdiction to

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31 *Femcare v Bright* (2000) 100 FCR 331 at 349 [75].
32 (2001) 209 CLR 165 at 180-181 [37]-[38].
33 As to which, see *Hudson v Director-General, Department of Environment Climate Change and Water* (2012) 187 LGERA 207 at 223-224 [63]-[66] (Bathurst CJ) (Whealy JA and McClellan CJ at CL agreeing). See also *McKenzie v McKenzie* [1971] P 33; *Smith v The Queen* (1985) 159 CLR 532.
34 As to which, see *Tecnicas Reunidas SA v Andrew* [2018] NSWCA 192 at [71]-[72] (Leeming JA) (Bathurst CJ agreeing at [1]; White JA agreeing at [86]).
35 (1987) 162 CLR 612.
36 cf *Blairgowrie Trading Ltd v Allco Finance Group Ltd* (2015) 325 ALR 539 at 558 [100] (Wigney J).
37 The jurisdiction to do so is invested by ss 39 (BMW) and 39B (Westpac) of the *Judiciary Act 1903* (Cth).

finally resolve the controversies, those courts will exercise judicial power.[38] Instead, Westpac and BMW seek to focus attention solely on the power to make a CFO and, viewing that power in isolation, to contend that it is not judicial power.

22. The essential error in that argument is that the exercise of judicial power is not confined to the grant of final relief. Instead, "[t]he judicial power … extends to every authority or capacity which is necessary or proper to render it effective".[39] It therefore encompasses the many kinds of interlocutory orders which are necessary or proper to render effective the Court's power to quell a controversy. Further, the "judicial power of which s 71 speaks is not to be defined or limited in any narrow or pedantic manner",[40] the "final and paramount purpose of the exercise of federal judicial power [being] 'to do justice'".[41] The essential question on this limb of the appeals is therefore whether s 33ZF empowers the making of interlocutory orders – in the form of CFOs – if the Court thinks that such orders are necessary or appropriate to do justice in the class actions. It is not whether a CFO finally resolves a dispute about pre-existing rights, or lacks some particular characteristic attribute of an exercise of judicial power.

23. Section 33ZF is a statutory codification of that which would otherwise be implicit from the vesting of jurisdiction to determine a matter. It furnishes an express statutory basis for the exercise of such powers as are necessary or appropriate to effectuate the courts' ultimate quelling of the controversies before them. Like the closely analogous provision that this Court unanimously and emphatically held to confer judicial power in *Cominos v Cominos*,[42] being a provision that conferred power to make any order the court thought "necessary … to do justice",[43] s 33ZF confers "powers in aid of the exercise of the jurisdiction to hear and determine proceedings"[44] that are "ancillary to" and "take their colour from, the valid grant of jurisdiction to hear and determine" the matter in the proceedings.[45] In saying that, the Court did not characterise the power as incidental to the exercise of judicial power (cf 1st-4th R [37]): to the contrary, at least a majority held that the power conferred by this section was "a recognized part of judicial power"[46] that

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38 See, eg, *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 (Griffith CJ).
39 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 278 (***Boilermakers***).
40 *Boilermakers* at 278.
41 *Alqudsi v R* (2016) 258 CLR 203 at 207-208 [1] (French CJ); see also *Hogan v Hinch* (2011) 243 CLR 506 at 552 [87] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).
42 (1972) 127 CLR 588 (***Cominos***) at 591 (McTiernan and Menzies JJ), 593-595 (Walsh J), 599-600 (Gibbs J), 604-606 (Stephen J), 608-609 (Mason J).
43 Section 87 of the *Matrimonial Causes Act 1959-1966* (Cth), which is set out in *Cominos* at 596-597.
44 *Cominos* at 593 (Walsh J).
45 *Cominos* at 591 (McTiernan and Menzies JJ).
46 *Cominos* at 591 (McTiernan and Menzies JJ, emphasis added), 600 (Gibbs J, holding that "all the sections in question confer judicial powers"), 606 (Stephen J, characterising s 87(1) as conferring "additional powers to be exercised in the course of, and for better giving effect to, the court's exercise of judicial power"). At 595, Walsh J said that the power conferred by s 87(1) was "incidental to the powers conferred by [the] other

was validly invested pursuant to s 77 of the Constitution. The Court could not find that s 33ZF does not confer judicial power without either overruling *Cominos*, or distinguishing it despite the substantial identity between the text of s 33ZF and the text of one of the powers upheld in *Cominos*.

24. Axiomatically, it may be necessary or appropriate to the effectuation of the Commonwealth judicial power for a court to make various interlocutory orders, including orders calculated to ensure that a party has legal representation, for "[t]he effective exercise of judicial power, and the maintenance of the rule of law, depend upon the providing of professional legal services".[47] It may also be necessary or appropriate that courts make interlocutory orders calculated to facilitate the commencement and maintenance of proceedings in which Commonwealth judicial power is invoked. Courts do so regularly, for example, through orders for preliminary discovery, referral for pro bono legal assistance[48] and protective costs orders.[49] CFOs are of the same general character, being orders calculated to facilitate the maintenance of proceedings by placing the proceedings on a stable footing: see [6] to [7] above.

25. Westpac and BMW contend that the power to make CFOs is not judicial by focusing on particular indicia identified in authorities from widely different contexts. That approach is, to an extent, understandable, given that this Court has frequently observed that no exhaustive statement of the nature of judicial power is possible.[50] However, the technique requires caution, because in assessing the authorities it is critical to bear in mind that "any treatment today of Ch III must allow for what has become a significant category of legislation where a power or function takes its character as judicial or administrative from the nature of the body in which the Parliament has located it".[51] For that reason, it is important in assessing the character of the power conferred by s 33ZF to keep firmly in mind that it is a power conferred on a court, to be exercised judicially. By contrast, the principle authorities relied on by Westpac at WS [37] – *Precision Data* and *Alinta* – were cases where the powers in question (which were very different to s 33ZF) were characterised as non-judicial in part because they were vested

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provisions", but did not say it was incidental to judicial power. Cf at 609 (Mason J, referring to the power being "incidental to, or incidents of, the exercise of judicial power").

47 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 [30] (Gleeson CJ and Heydon J) (***APLA***).

48 Eg *Uniform Civil Procedure Rules 2005* (NSW) r 7.36.

49 See, eg, *Smith v NRMA Insurance Limited* [2016] NSWCA 250; *Michos v Eastbrooke Medical Centre Pty Ltd* [2019] VSCA 140.

50 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189 (per curiam); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 267 (Deane, Dawson, Gaudron and McHugh JJ); *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 577 [93]-[94] (Hayne J), 592 [151] (Crennan and Kiefel JJ); *Palmer v Ayres* (2017) 259 CLR 478 at 496 [43] (Gageler J) (***Palmer***).

51 *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 595 [48] (Gummow, Hayne and Crennan JJ); see also *Palmer* at 497 [47] (Gageler J); see also eg *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 178 (Isaacs J) and *ACMA v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at 379 [59].

in non-judicial bodies. The Court did not decide whether the same powers would have been characterised as non-judicial even if they had been vested in a Ch III court (which does not automatically follow, having regard to the chameleon doctrine).

26. As it happens, in this case the chameleon doctrine may not be critical, because the terms of s 33ZF support an argument not just that the power it confers is judicial, but that it is exclusively judicial. It is a power to "make orders" thought to be appropriate or necessary to ensure that "justice is done" in a "proceeding" in a superior court. For the executive to exercise such a power would very likely impermissibly interfere with Commonwealth judicial power. It is not, however, necessary to determine this point, because even if the power in question is not exclusively judicial, there is no reason to doubt its judicial character when conferred upon a court. The appellants' various arguments to the contrary should be rejected.

10 27. ***First***, a power does not cease to be judicial merely because it authorises the creation of rights: cf WS [36]-[37], BS [48]-[49].[52] Examples of powers which have been held to be judicial (when conferred on a court) though they involve the creation of new rights and liabilities abound, including powers to make orders relating to the maintenance and guardianship of infants,[53] orders for the winding up of companies and the grant of letters of administration,[54] and to vary the terms of a contract.[55] The power to create rights and impose obligations is even more commonplace in respect of interlocutory orders: orders for compulsory document production, freezing orders and orders for joinder are just some examples. All of those powers are judicial.

28. ***Secondly***, a power does not cease to be judicial because it has no precise historical analogue:[56] cf WS [38], [40]. As French CJ observed in *Momcilovic*, "[n]ovelty is no
20 objection to the characterisation of a statutory power conferred upon a court as judicial".[57] In any event, there is a historical analogue, because a CFO is similar to the solicitors' lien developed by courts of equity. Pursuant to that equitable lien, legal representatives have a right or interest in the fruits of an action which have been obtained by the representatives' industry and skill, up to the value of the

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52 See, eg, *Momcilovic v R* (2011) 245 CLR 1 at 61 [81] (French CJ) (***Momcilovic***) ("courts have long exercised powers to make orders, declaratory in form, which do not merely declare legal rights and obligations but create new legal relationships"); *Masson v Parsons* [2019] HCA 21 at [58] (Edelman J) ("on some occasions, the court's substantive orders will themselves define new rights"). See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 596 [34] (McHugh J); *Cominos* at 600 (Gibbs J), 604 (Stephen J).

53 *R v Davison* (1954) 90 CLR 353 at 368 (Dixon CJ and McTiernan J) (***Davison***).

54 *Davison* at 368 (Dixon CJ and McTiernan J).

55 *Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Ltd* (1943) 67 CLR 25.

30 56 *Palmer* at 494 [37]-[38] (Kiefel CJ, Keane, Nettle and Gordon JJ). See also *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 556 [35] (French CJ and Gageler J). It is within the bounds of judicial power to "adopt any existing method of judicial procedure or invent a new one": *In re Judiciary and Navigation Acts* (1921) 29 CLR 259 at 266.

57 (2011) 245 CLR 1 at 63 [84].

representatives' reasonable costs.[58] The solicitor's right is "analogous to the right which would be created by an equitable assignment of a corresponding part of the money by the client to the solicitor".[59] The rationales for the lien include that "when a solicitor has expended his brains and time and resources in working for a client, he should be paid out of the produce of his industry and skill"[60] and "it is not just that the client should get the benefit of the solicitor's labour without paying for it".[61] As such, the lien can only encourage lawyers more readily to agree to act for clients, thereby facilitating access to justice and the efficient operation of the justice system. Indeed, the modern justifications for the lien have been said to include the right of access to courts and to legal representation.[62] As mentioned above, the role of litigation funding in providing access to the court and to legal representation has also been recognised by this Court.

29. A solicitor with the benefit of a fruits of action lien may "ask for the intervention of the Court for his protection, when, having obtained judgment for his client, he finds there is a probability of the client depriving him of his costs".[63] As such, the primary difference between a fruits of action lien and a CFO is the identity of the beneficiary: the person with the benefit of the former is the legal representative who has provided legal services, whereas the person (relevantly) with the benefit of the latter is the person who funded those services. There are otherwise substantial similarities between the two. A solicitor's lien over "reasonable" costs reflects the solicitor's interest in obtaining a reasonable commercial return for the provision of services, much as a funder may, through a CFO, obtain a reasonable return. In both cases, there is a carve out from the fruits of action to compensate for the provision (directly or indirectly) of legal services. Further, in both cases, the third party's right to the fruits is justified by the benefit obtained by the party who received the legal services and the systemic interest in access to justice. Where there is a funder who pays the legal fees of the class and a CFO is made, the solicitors can have no claim on the fruits because they will have been paid by the funder. In such a case, the solicitors' lien over the fruits of the action is effectively replaced with a similar lien for the benefit of the funder.

30. ***Thirdly***, the power conferred by s 33ZF is not non-judicial because it is expressed in imprecise terms or involves considerations of policy: cf WS [42]. As the plurality said

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58 See, eg, *Ex parte Patience; Makinson v Minister* (1940) 40 SR (NSW) 96 at 100-101 (Jordan CJ); *Firth v Centrelink* (2002) 55 NSWLR 451 at 463-66 [35]-[41]; *Commissioner of Taxation v GIO of New South Wales* (1992) 36 FCR 314 at 327 (Wilcox J); *Groom v Cheesewright* [1895] 1 Ch 730 at 732 (Kekewich J).

59 *Ex parte Patience; Makinson v Minister* (1940) 40 SR (NSW) 96 at 100 (Jordan CJ).

60 *Groom v Cheesewright* [1895] 1 Ch 730 at 732 (Kekewich J).

61 *Guy v Churchill* (1887) 35 Ch 489 at 491 (Cotton LJ); see also at 492 (Lindley J) ("It is right that they who get the benefit of the recovery of money should bear the expense of recovering it").

62 See *Re H & W Wallace Ltd (in liq)* [1994] 1 NZLR 235 at 240-241 (Thomas J).

63 *Mercer v Graves* (1872) LR 7 QB 499 at 503 (Cockburn CJ).

in *Baker*, "[t]here are numerous authorities rejecting submissions that the conferral of powers and discretions for exercise by imprecisely expressed criteria do deny the character of judicial power and involve the exercise of authority by recourse to non-legal norms".[64] To the contrary, "[b]roadly stated standards are commonplace in statutes and in the common law" and "[g]iven a broad standard, the technique of judicial interpretation is to give it content and more detailed meaning on a case by case basis".[65] Further, "matters of policy may enter permissibly (and necessarily) into the exercise of judicial power in various ways".[66] In any case, s 33ZF is not unduly vague. It is no more imprecise than the similar provision upheld in *Cominos*,[67] or other powers conferred by the FCA Act,[68] and the Judiciary Act.[69]

31. ***Fourthly***, it is not a necessary characteristic of judicial power that exercise of the power always conclusively and finally determines rights: cf WS [36]-[37]. A power may be judicial if it is exercised "as an integral part of the process of determining the rights and obligations of the parties" or is "an important and influential ... step in the judicial determination of ... rights and liabilities in issue in the litigation".[70] Indeed, the vast array of interlocutory orders made by courts are (ordinarily)[71] not conclusive, but the power to make them plainly is not foreign to the judicial power.

32. ***Fifthly***, an order does not cease to be judicial because it involves a degree of prediction: cf BS [47]. In both *Thomas v Mowbray*[72] and *Fardon v Attorney-General (Qld)*,[73] this Court rejected challenges to laws empowering the courts to make orders based on predictions as to future behaviour. Further, courts regularly make interlocutory orders in aid of future events and on the basis of facts that might change – that potential often

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64 (2005) 223 CLR 513 at 532 [42]. See also *Cominos* at 593-4 (Walsh J), 599 (Gibbs J), 603-4 (Stephen J), 608 (Mason J).

65 *Condon v Pompano* (2013) 252 CLR 38 at 54 [23]-[24] (French CJ) (***Condon***), quoting from Zines, *The High Court and the Constitution* (1997, 4th ed) at 195. The same passage was quoted by Gummow and Crennan JJ in *Thomas v Mowbray* (2007) 233 CLR 307 at 351 [91]. See also *Wainohu v NSW* (2011) 243 CLR 181 at 230 [111] (Gummow, Hayne, Crennan and Bell JJ); *Hogan v Hinch* (2011) 243 CLR 506 at 551 [80]

66 *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 553 [14] (Gummow J) (***Alinta***); *Thomas v Mowbray* (2007) 233 CLR 307 at 348-350 [81], [88] (Gummow and Crennan JJ). See also *Precision Data* at 198-199 (the "making of value judgments" is a "common ingredient[] in the exercise of judicial power").

67 Section 87 of the *Matrimonial Causes Act 1959-1966* (Cth), which is set out in *Cominos* at 596-597

68 See s 23 ("The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds as the Court thinks appropriate"). and s 28(1)(b) ("Subject to any other Act, the Court may, in the exercise of its appellate jurisdiction ... (b) give such judgment, or make such order, as, in all the circumstances, it thinks fit, or refuse to make an order")

69 See s 31 ("The High Court in the exercise of its original jurisdiction may make and pronounce all such judgments as are necessary for doing complete justice in any cause or matter pending before it ...") and s 35 ("In considering whether to grant an application for special leave to appeal to the High Court under this Act or any other Act, the High Court may have regard to any matters that it considers relevant ...").

70 *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 303 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ); see also *Momcilovic* at 64 [87] (French CJ).

71 See, eg, *Harris v Caladine* (1991) 172 CLR 84 at 107-108 (Brennan J).

72 (2007) 233 CLR 307, particularly at 327-329 [15]-[17].

73 (2004) 223 CLR 575.

being acknowledged in the phrase "until further order". For example, in determining the quantum of security for costs, courts must assess the defendant's potential costs (which, of course, often change over the course of the litigation).

33. ***Finally***, Westpac contends that the making of a CFO is not judicial because, in making the order, the Court may determine an amount which is appropriate for the funder to receive as consideration for funding the proceedings: cf WS [42], BS [52]. Implicit in that contention is that there is some constitutional vice in a court either creating rights or applying a broad and normative standard. For reasons addressed above, that is not so. Considerations of commerce are likewise not denied to the Commonwealth judicial power. For example, courts may fix the rate of interest accruing on a cause of action prior to judgment[74] and the date from which interest accrues on a judgment.[75] In doing so, they are not prohibited from having regard to "commercial reality".[76] When a restitutionary claim is successful, courts can fix remuneration for non-monetary benefits in an amount considered to be just[77] or such amount as the claimant "reasonably deserved to have".[78] State Supreme Courts have an inherent (and wide) jurisdiction to allow for and fix a trustee's remuneration, even at a rate above that permitted by the trust instrument.[79] In land acquisition, courts have (and, prior to federation, had) power to determine the value of land,[80] including its "special value" to the owner over and above its market value (contra BS [52]).[81] Indeed, the framers' inclusion of ss 51(xxxi) and s 76(i) in the Constitution, shows that they had no antipathy to courts determining what was "just" compensation in a particular case. Given this, it cannot be said that determining an appropriate commercial return is inherently foreign to the judicial power. Nor can it be said that courts can play no role in fixing value not based on "established market rates" or where there is no market: cf BS [52]. For example, under the *Native Title Act 1993* (Cth) courts can determine whether the quantum of compensation for impairment of native title rights is "just", including a component for spiritual loss,[82] notwithstanding the absence of any "market value". Consistently with the above, but contrary to WS[10] and [12], the US common fund is not limited to existing expenses: attorney's fees are within the judge's discretion and may be

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74 See, eg, s 51A of the *Federal Court of Australia Act 1976* (Cth), empowering the fixing of interest "at such rate as the Court or the Judge, as the case may be, thinks fit".

75 See, eg, s 52 of the *Federal Court of Australia Act 1976* (Cth), empowering rules of court fixing a default interest rate and also empower a court to apply a lower rate if the Court "thinks that justice so requires".

76 *Heydon v NRMA (No 2)* (2001) 53 NSWLR 600 at 619 [30]-[31] (Mason P) (see also at 623 [57]-[58]).

77 See *Hoenig v Isaacs* [1952] 2 All ER 176 at 182.

78 See *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 251 (Deane J).

79 See *Application of Sutherland* (2004) 50 ACSR 297 at [11]-[16] (Campbell J).

80 See *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at [29]-[33], [45] (referring to UK statutes using the term "value").

81 See, eg, *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) s 57.

82 See eg *Northern Territory v Griffiths* (2019) 93 ALJR 327.

calculated by reference to matters unrelated to the attorney's contracted-for hourly rate (such as the size of the recovery, and the performance of the attorney).[83]

34. ***Incidental to judicial power***: Westpac also submits that the power to make a CFO is not incidental to judicial power: WS [43]-[44]. It is unnecessary to reach this argument because, for the reasons addressed above, the power in question is judicial. In the alternative, however, Westpac's analysis is misconceived. It asks whether the power to make a CFO in the abstract is incidental to judicial power, and then answers that question "no" because it contends that such an order does not enable, support or facilitate the judicial function. But the question Westpac poses is not the correct one. It fails to focus sufficiently on the power conferred by s 33ZF. That section must be at least incidental to the exercise of judicial power, given its express terms, which align the power with the contours of what is necessary and appropriate to ensure justice in the proceeding. If that is correct, then provided an order was within the scope of s 33ZF it, too, must be incidental to the exercise of judicial power.

35. Finally, in concluding with respect to the judicial power argument, it should be noted that the appellants' contention means that the Constitution requires that, if a CFO is to be made, it must be made by the executive. One can readily see reasons of policy (and principle) why orders like CFOs should be made in open court and with procedural fairness by the court with carriage of the relevant proceedings.

E. Section 51(xxxi)

36. Section 33ZF is not a law with respect to the acquisition of property otherwise than on just terms. Further, so far as it is relevant, the order made by the primary judge under that section is not an order which acquired property otherwise than on just terms.

Section 33ZF is not a law with respect to the acquisition of property

37. The submissions of Westpac and BMW to an extent focus on the orders in this case (or CFOs in general), as opposed to the law pursuant to which those orders have been or might be made. That is not the correct approach. Section 51(xxxi) is "primarily a grant of legislative power",[84] as opposed to a constitutional guarantee. As Dixon CJ (with whom all other members of the Court agreed) said in *Attorney-General v Schmidt*, "s 51(xxxi) confers a legislative power and it is that power only which is subject to the condition that the acquisitions provided for must be on just terms ... before the restriction involved in the words 'on just terms' applies, there must be a law with

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[83] See, eg, *Fresno County Employees Retirement Association* v *Isaacson/Weaver Family Trust* 925 F.3d 63 (2d Cir. 2019); Federal Judicial Center, *Awarding Attorneys' Fees and Managing Litigation* (2015, 3rd ed), 80-95 (and see also 25-26 for a definition of the 'Lodestar' method of calculating fees, which method is discussed further in pp.80-95).

respect to the acquisition of property".[85] That is why it has repeatedly been emphasised that "whether a law falls within s 51(xxxi) ... ultimately depends upon the characterization of the law".[86]

38. It is necessary to ask the "ultimate question of characterisation"[87] identified above because, while it is well-settled that s 51(xxxi) of the Constitution impliedly "abstracts" from other heads of Commonwealth legislative power, it does so only "with respect to the ground actually covered" by s 51(xxxi).[88] Accordingly, unless the impugned law can be characterised as a law "with respect to" the acquisition of property, s 51(xxxi) cannot abstract from any other head of power that may have supported that law. In other words, a law that is not a law "with respect to ... the acquisition of property" sits entirely outside the ambit of power conferred by s 51(xxxi), and is valid without any need to consider whether just terms are provided, or whether it can be read down,[89] even if that law in some of its operations acquires property.[90] For that reason, as Dixon CJ emphasised in *Schmidt*, s 51(xxxi) "does not mean that property can never pass...except under a law made in pursuance of s 51(xxxi)".[91] Instead, "it is necessary to take care against an application of this doctrine [ie that s 51(xxxi) abstracts from the other heads of power] in a too sweeping and undiscriminating way",[92] because Commonwealth legislative power would be reduced to an extent exceeding any legitimate view of the constitutional design "[i]f every such law which incidentally altered, modified or extinguished proprietary rights or interests in a way which constituted such an 'acquisition of property' were invalid unless it provided a *quid pro quo* of just terms".[93]

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84 *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 34 [75] (Gaudron J) (***WMC***); see also *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270, 284 (Deane and Gaudron JJ) (***Lawler***); *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155, 168-169 (Mason CJ), 187 (Deane and Gaudron JJ) (***Mutual Pools***).

85 (1961) 105 CLR 361 at 372 (***Schmidt***). See also *JT International SA v Commonwealth* (2012) 250 CLR 1 at 67 [166]-[167] (Hayne and Bell JJ) (***JT International***).

86 *Mutual Pools* at 172 (Mason CJ); see also *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 304, 306-307 (Mason CJ, Deane and Gaudron JJ) (***Georgiadis***); *Smith v ANL Ltd* (2000) 204 CLR 493 at 533 [120] (Hayne J) (dissenting, but not on this issue) (***Smith***).

87 *Cunningham v Commonwealth* (2016) 259 CLR 536 at 561 [60] (Gageler J). See also *Mutual Pools* at 172 (Mason CJ), 188 (Deane and Gaudron JJ); *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 246-247 [331]–[332] (McHugh J).

88 *Schmidt* at 371–372 (Dixon CJ, with whom all other members of the Court agreed), affirmed in *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) (***Nintendo***). See also *Lawler* at 283–284 (Deane and Gaudron JJ), quoted with approval in *Theophanous v Commonwealth* (2006) 225 CLR 101 at 124 [55] (Gummow, Kirby, Hayne, Heydon and Crennan JJ).

89 *Wotton v Queensland* (2012) 246 CLR 1 at 14 [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

30 90 *Mutual Pools* (1994) 179 CLR 155 at 171 (Mason CJ), 178 (Brennan J). See also at 188–189 (Deane and Gaudron JJ); *Georgiadis* (1994) 179 CLR 297 at 306–307 (Mason CJ, Deane and Gaudron JJ).

91 *Schmidt* at 372.

92 *Schmidt* at 372.

93 *Mutual Pools* (1994) 179 CLR 155 at 189 (Deane and Gaudron JJ). See also 180 (Brennan J), 219 (McHugh J).

More recently, Gageler J observed in *Attorney-General (NT) v Emmerson*,[94] it is settled that "not all laws which acquire property are laws with respect to the acquisition of property within the meaning of s 51(xxxi)".

39. Whether a law can be characterised as a law with respect to the acquisition of property is determined in accordance with the well-settled principles described in *Grain Pool of Western Australia v Commonwealth*.[95] Applying those principles, a law does not assume its constitutional character from each of its many operations: cf BS [57].[96] For example, a law is not a law with respect to interstate trade and commerce simply because one of its operations applies to interstate trade and commerce. It is not sufficient to attract the operation of s 51(xxxi) to establish that one of the effects of the law, or of orders made pursuant to the law, is to acquire property, and on that basis to assert that the law is a law with respect to the acquisition of property to that extent.

10 40. For the following three reasons, s 33ZF cannot properly be characterised as a law with respect to the acquisition of property. ***First***, s 33ZF is a generally expressed power authorising all kinds of orders, the vast majority of which have nothing to do with property (let alone the acquisition of property). It is evidently directed to empowering the court to achieve justice in a particular proceeding. Having regard to the criteria for the exercise of power, and to the rights, powers, liabilities, duties and privileges that it creates, s 33ZF cannot plausibly be characterised as a law with respect to the acquisition of property. Instead, its "whole subject is altogether outside the scope of s 51(xxxi)".[97] To the extent that s 33ZF authorises orders that may bring about an acquisition of property, it does so only as a necessary or characteristic feature of the means selected to achieve an objective that is within power (that end being what is required to do justice
20 in a particular proceeding).[98] Further, an acquisition would result from an order made by a court on the basis it was necessary or appropriate to that end, and as such would clearly be appropriate and adapted to achieving that objective.

41. In light of the above, s 33ZF is a paradigm example of a law that, to the extent that it authorises orders that acquire property, does so in a way that does not affect its

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94 (2014) 253 CLR 393 at 446 [110] (***Emmerson***). See also *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 304 [517] (Hayne J).

95 (2000) 202 CLR 479 at 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also *Work Choices Case* (2006) 229 CLR 1 at [142] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

96 Nothing in *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 (***Bourke***) is to the contrary: compare BS [57]. In *Bourke*, the High Court made it clear that it was necessary for the law to bear the relevant constitutional character: see at 288-289.

30 97 *Schmidt* at 373.

98 *Emmerson* at 448-449 [118]-[119] (Gageler J); see also *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 at 180 [98] (Gleeson CJ and Kirby J); *Cunningham v Commonwealth* (2016) 259 CLR 536 at 560-561 [58]-[60] (Gageler J); *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 439 [361] (Crennan J) (***Wurridjal***); *Mutual Pools* at 179-181 (Brennan J).

character.[99] That is not to suggest that a law has only a single constitutional character. It is simply to recognise that a law cannot necessarily be characterised by each of its several effects. While there will inevitably be "borderline cases" in which the question whether a law is one with respect to the acquisition of property is finely balanced,[100] s 33ZF is not such a borderline case.

42. The line of authority discussed above cannot be sequestered to *Nintendo* (cf WS [48]). Nor can it be confined to cases where the provision of just terms would be "incongruous" or the relevant rights are "inherently susceptible of variation": cf BS [64]. While those cases overlap to some extent with the principle identified above, the authorities establish the more general point that a law that is directed to an end within power, and that acquires property only as a necessary or characteristic feature of the means selected to achieve an objective that is within power, will ordinarily not bear the character of being a law with respect to the acquisition of property.

43. ***Secondly***, and relatedly, s 33ZF is a law "directed to resolving competing claims or providing for 'the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means for enforcing some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest'".[101] There is no basis for restricting this line of jurisprudence to *existing* rights of persons in a *pre-existing* relationship: cf BS [65]. This line of authority is really a specific application of the more general point summarised in the previous paragraph.

44. Section 33ZF is directed to providing (inter alia) for the modification of rights and liabilities as an incident of the general regulation of class action litigation in pursuit of the interests of justice. Within that area, it empowers the Court to make all kinds of interlocutory (and final) orders adjusting rights and liabilities of persons directly or indirectly involved in litigation of that kind. It is no more a law with respect to the acquisition of property than, for example, this court's power to "make such order as is necessary to effectuate the grant of original or appellate jurisdiction in the Court": see *High Court Rules 2004* (Cth) r 8.07(1).

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99 *Georgiadis* at 308 (Mason CJ, Deane and Gaudron JJ); *Mutual Pools* at 190 (Deane and Gaudron JJ); see also *Schmidt* at 362-363 (Taylor J).

100 *Georgiadis* at 308 (Mason CJ, Deane and Gaudron JJ).

101 *Georgiadis* at 306 (Mason CJ, Deane and Gaudron JJ), quoting from *Mutual Pools*; see also *Nintendo* at 161 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Australian Tape Manufacturers Association Limited v The Commonwealth* (1993) 176 CLR 480 at 510 (Mason CJ, Brennan, Deane and Gaudron JJ) (***Australian Tape Manufacturers***); *WMC* at 38-39 [87] (Gaudron J); *JT International* at 122 [335] (Kiefel J); *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 283 (Deane J) (***Tasmanian Dam Case***); *Wurridjal* at 361 [91] (French CJ), 439 [362] (Crennan J); *Mutual Pools* at 171-172 (Mason CJ), 189-190 (Deane and Gaudron JJ); *Trade Practices Commission v Tooth & Co Limited* (1979) 142 CLR 397 at 418 (Stephen J) (***Tooth***); *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 236-237 (Mason CJ, Deane and Gaudron JJ) (***Peverill***).

45. There is no basis for departing from the lines of authority addressed above, which have been repeatedly applied in this Court and lower courts:[102] cf BS [66].

46. ***Thirdly***, s 51(xxxi) does not abstract from all of the Commonwealth's legislative powers,[103] and the better view is that it has no operation in respect of legislative powers to confer power on a court. The enactment of s 33ZF was supported by s 77(i)[104] of the Constitution, and/or ss 71 and 77 read with s 51(xxxix).[105] Yet s 51(xxxi) does not abstract from the legislative powers in Ch III because "[t]he various legislative powers for which the Constitution provides [including s 51(xxxi)] are expressed as being 'subject to' the Constitution and thus to the operation of Ch III".[106] Ch III provides its own safeguards as to the exercise of judicial power, and there is no need for s 51(xxxi) to provide further safeguards. Indeed, it would be "incongruous" for s 51(xxxi) to limit the powers that can be conferred on a court, for the exercise of judicial power commonly involves the transfer of property rights without compensation.

47. Section 33ZF confers power on a court to do what is necessary or appropriate to achieve justice in proceedings before it. As a matter of principle, where a court has formed the view that an acquisition of property without compensation is necessary or appropriate to ensure justice in the proceeding, it would be "incongruous" to require the provision of compensation,[107] for that would necessarily re-draw the balance the court has determined should be drawn in order to ensure justice in the proceeding. That would obviously be true when, for example, a court orders that security be paid into court, or when it makes a compulsory production order that results in confidential information becoming available to other parties. Of course, if compensation is required in order to do justice in the proceeding, then any order of the court is likely to reflect that (either by refraining from making the order, or by requiring the payment of compensation).

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102 For example, *Qureshi v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 142 FCR 444, 469-470 [91]-[93] (Kenny J); *Quickenden v O'Connor* (1999) 91 FCR 597, 611-612 [74], [76] (Lee J).

103 *Schmidt* at 372 (Dixon CJ).

104 Section 77(i) carries with it "everything which is incidental to the main purpose of [the] power" (*APLA* at 405 [228] (Gummow J). That power is ample to authorise a law empowering the Federal Court to make such orders as are necessary or appropriate to ensure justice in a proceeding. Section 77(i) must be read (relevantly) with s 76. Section 51(xxxix) is not the exclusive source of the Commonwealth's power to enact laws providing for the making of orders calculated to enhance the exercise of federal jurisdiction: cf WS [46]. No argument to the contrary was put in *Rizeq v Western Australia* (2017) 262 CLR 1 (***Rizeq***).

105 See *Rizeq* at 20-21 [45]-[46] and *ASIC v Edensor Nominees* (2001) 204 CLR 559 at 587 [57] (Gleeson CJ, Gaudron and Gummow JJ) in relation to s 79 of the Judiciary Act.

106 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 355 [87] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); see also *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602 at 632 (Gaudron and Gummow JJ); *APLA* at 407 [233] (Gummow J); see also *Georgiadis* at 326 (McHugh J) (referring to s 78).

107 See *Emmerson* at 436 [77] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

Even to the extent that s 33ZF authorises the court to make CFOs, it is not a law with respect to the acquisition of property otherwise than on just terms

48. For the reasons advanced above, it is erroneous to ask if the particular exercise of power under a law acquires property otherwise than on just terms. However, in so far as the question is whether s 33ZF, to the extent that it authorises the making of a CFO, can be characterised as a law with respect to the acquisition of property otherwise than on just terms, for the following reasons s 33ZF cannot be so characterised.

49. **Non-compulsion/fee for service:** Section 51(xxxi) does not apply to non-compulsory takings.[108] While the capacity of a person to avoid a taking raises questions of degree,[109] on the facts Lee J made the CFO in question on the basis that, without it, group members were unlikely to have their claims advanced in the action: CAB 32 [63]. Further, he was satisfied that the return to the funders was reasonable consideration for the service provided by the funder: CAB 32 [62]. At least to the extent that s 33ZF authorises the making of a CFO in circumstances of the above kind, it authorises something analogous to the levying of a fee for service, which may fall outside s 51(xxxi) even where the service is provided without consent.[110] Furthermore, it authorises such an order in circumstances where Pt IVA provides procedures for giving notice of various matters to group members (ss 33X and 33Y), and which allow group members to opt out if they consider that to be in their best interests (s 33J). In this context, s 33ZF is properly read as proceeding on the basis that (at least in the ordinary course) persons who do not opt out after a CFO is made can fairly be treated as having decided that the CFO is the reasonable price of achieving the fruits of the litigation, in circumstances where they would not achieve those fruits without the CFO. That is all the more so if they do not seek to opt out at a later stage if unsatisfied as to the settlement, at a stage prior to any obligation under the CFO crystallising (NSWCA at [109]). For that reason, even in so far as it authorises the making of CFOs, s 33ZF cannot be characterised as law with respect to the "compulsory" acquisition of property.

50. **Funder does not acquire property**: Further, s 51(xxxi) is not engaged on the making of a CFO because any right that is acquired by the funder is not in the nature of property: it lacks permanence and stability (because it arises from an interlocutory order (with is always susceptible of subsequent variation or revocation) and is also subject to

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108 *BMA v Commonwealth* (1949) 79 CLR 201, 270-271 (Dixon J); *John Cooke and Co Pty Ltd v Commonwealth* (1924) 34 CLR 269, 282 (PC); *Peverill* at 235 (Mason CJ, Deane and Gaudron JJ), 250 (Dawson J); *Tooth* at 416-417 (Stephen J); *Smith* at 535 [128] (Hayne J); *Paliflex Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2003) 219 CLR 325 at 348-349 [41] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

109 See *Smith* at 504-506 [22]-[23] (Gaudron and Gummow JJ) and 535-536 [128]-[130] (Hayne J; McHugh agreeing: at 515 [56]).

110 *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 180-181 [98]-[101] (Gleeson CJ and Kirby J), 252-253 [345] (McHugh J), 300 [501]-[503] (Gummow J), 304 [519] (Hayne J).

compliance with order 2[111]), is personal to the funder (ie it is not assignable) and does not attach to any particular liquidated sum (ie its subject matter is not identifiable).[112] It is irrelevant that on the making of the CFO the funder has obtained something of possible value (cf WS [45]), for that is not the applicable constitutional criterion. The absence of s 51(xxxi) property in the hands of the funder can be tested in this way: self-evidently, if Justice Lee's order were later varied, the *funder* could not complain that its property had been acquired. While the funder will acquire property if and when paid an amount out of the Resolution Sum, that will occur not by reason of the CFO, but of any final orders made by the court pursuant to s 33V(2) or 33Z(1)(g). Any acquisition will not be the result of the CFO, as it particularly clear where (as in this case) the CFO itself makes it clear that any payment to the funder subject to a determination by the Court that the amount does not exceed what is fair and reasonable. Even if there were to be an acquisition of property as a result of final orders of the Court (being orders made after the property has crystallised), that is irrelevant to the validity of the CFO.

51. **Adjustment of rights in the common interest:** Further, so far as the line of authority referred to in paragraph 43 above can be applied to an exercise of judicial power, Lee J's orders falls within it. The order is directed to resolving competing claims by adjusting rights in an existing relationship and for the common interest. The four applicants have potential rights to monetary relief, existing obligations to the funder under the funding agreement and the right to apply for a funding equalisation order. The class members have potential rights to monetary relief and a liability to a solicitor's lien and/or funding equalisation order. The legal representatives have a potential fruits of action lien and obligations to provide legal services. The funder has existing obligations to the applicants under the funding agreement. By reason of Lee J's order: (i) the applicants will no longer need to pursue any funding equalisation order; (ii) the class members obtain legal representation that otherwise may not be provided without any need for payment unless and until there is a resolution sum; (iii) the legal representatives effectively relinquish their fruits of action lien, and gain funding from the funder; and (iv) the funder assumes an obligation to fund the proceedings, while

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111 Moreover, the amounts payable under the CFO are subject to the further determination of the Court (see cl 6 of the funding terms: "but not exceeding any such amounts as the Court determines to be fair and reasonable"). The result of these multiple contingencies is to render the 'right' created by the Westpac CFO even more unstable than the contingent interest in potential future income which was the subject of consideration by the High Court in *Norman v Federal Commissioner of Taxation* (1962) 109 CLR 9 at 16 (Dixon CJ: 'the future interest was the merest expectancy or possibility, having no existence in contemplation of law'), 21 (Menzies J: 'the character of a right to come into existence rather than a right already in existence'), 41 (Owen J, agreeing with Menzies J). Cf at 18 (McTiernan J) and 26 (Windeyer J).

112 *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342-343 (Mason J), approving *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1248 (Lord Wilberforce). See also *ACTV Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 165-166 (Brennan J); *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 528 (Dawson and Toohey JJ); *Peverill* at 242 (Brennan J).

gaining a potential interest in any resolution sum. This adjustment of rights is effected because it is thought to be necessary and appropriate for doing justice in the proceeding. It is not properly characterised as involving an acquisition of property.

52. **Just terms:** Just terms are terms which amount to "a true attempt to provide fair and just standards of compensating or rehabilitating the individual".[113] The constitutional requirement of "just terms" should not be replaced with glosses like "full compensation": cf WS [49]. The Commonwealth is to be given a "measure of latitude";[114] just terms may "assume a variety of forms".[115] In deciding whether just terms have been provided, the capacity to opt out[116] and the degree of impairment of the property right[117] are relevant. These principles warrant the conclusion that just terms are provided by Lee J's order. By reason of the order, group members receive legal representation without any other need for payment unless and until there is a resolution sum, on a stable and equitable basis. As with the fruits of action lien, the CFO recognises that it is not just that the client should get the benefit of the solicitor's labour (or here, the risks borne by the funder in funding the proceedings) without paying for it. The amount taken from each group member is not to exceed what is "fair and reasonable": CAB 32 [62]. Absent the order, it is unlikely group members' claims would be advanced and any property would be worthless: CAB 32 [63]. Group members can opt out. The order can be varied. The order is appropriate to ensure that justice is done in the proceeding; that evidences fair dealing: CAB 32 [63].

PART IV ESTIMATE OF TIME

53. 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 S152 of 2019.

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113 *Grace Bros Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290 (Dixon J); *Smith* at 512-513 [48] (Gaudron and Gummow JJ). See also *Emmerson* at 446 [109] (Gageler J).

114 *Smith* at 512-513 [48] (Gaudron and Gummow JJ); see also *Tasmanian Dam Case* at 289-290 (Deane J) ("[i]t is implicit in s. 51(xxxi) that it is for the Parliament to determine what is the appropriate compensation in respect of an acquisition").

115 *Tasmanian Dam Case* at 289 (Deane J).

116 *Smith* at 414-415 [8], [10] (Gleeson CJ).

117 *Phonographic Performance Company of Australia Limited v Commonwealth of Australia* (2012) 246 CLR 561 at 594-595 [111] (Crennan and Kiefel JJ).