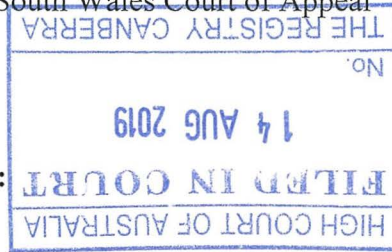


**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

NO S152 OF 2019

On Appeal from the New South Wales Court of Appeal

BETWEEN:



BMW AUSTRALIA LIMITED

Appellant

AND

OWEN BREWSTER & ANOR

Respondents

**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 & ANOR

Appellants

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AND

GREGORY JOHN LENTHALL & ORS

Respondents

**OUTLINE OF ORAL ARGUMENT OF THE ATTORNEY-GENERAL OF THE
COMMONWEALTH (INTERVENING)**

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

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Date of this document: 14 August 2019

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PART I CERTIFICATION

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

PART II OUTLINE OF ORAL SUBMISSIONS

Section 51(xxxi): CS¹ [36]-[52]

2. Section 51(xxxi) is primarily a grant of legislative power: *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at [75]; CS [37]. Whether a law falls within s 51(xxxi) turns on the characterisation of the law, in accordance with the ordinary principles: CS [37]. A law does not assume its constitutional character from each of its many operations, no matter how insubstantial: CS [39]. A law that is not a law with respect to the acquisition of property sits outside s 51(xxxi).
3. Sections 33ZF and 183 are generally operating laws authorising all kinds of orders, the vast majority of which have nothing to do with acquisition of property: CS [40].
4. Sections 33ZF and 183 are laws directed to resolving competing claims or providing for the creation, modification, extinguishment or transfer of rights and liabilities as an incident of a general regulation in the common interest: *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 171 CLR 134 at 161; CS [43]-[45].
5. Section 51(xxxi) does not abstract from s 77(i): CS [46]-[47]. Chapter III provides its own safeguards to ensure that judicial power is exercised justly. It would be incongruous to require just terms for acquisitions of property effected by a court: to do so would redraw the balance the court has determined should be drawn to ensure justice.

Judicial power: CS [21]-[35]

6. Sections 33ZF and 183 confer judicial power. In the alternative, they confer power that is at least incidental to judicial power.
7. The exercise of judicial power is not confined to the grant of final relief: *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266; CS [22]. Parliament may adopt an

¹ Submissions of the Commonwealth Attorney-General (intervening) in *Westpac Banking Corporation v Lenthall* (S154/2019).

existing method of legal procedure or invent a new one. Part IVA of the *Federal Court of Australia Act 1976* (Cth) is such a new method.

8. The judicial power of the Commonwealth extends to every authority or capacity necessary or proper to render it effective: *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 278; CS [24]. Nor is it to be construed narrowly: *Boilermakers'* at 278. The judicial power encompasses interlocutory orders necessary or proper to render effective the power to quell controversies.
9. Sections 33ZF and 183 are closely analogous to s 87 of the *Matrimonial Causes Act 1959-1966* (Cth) which the Court held to confer judicial power in *Cominos v Cominos* (1972) 127 CLR 588; CS [23].
10. Judicial power encompasses orders calculated to facilitate the commencement or maintenance of proceedings in which Commonwealth judicial power is invoked: CS [24]. For example, orders for preliminary discovery, referral for pro bono legal assistance and protective and maximum costs orders.
11. Further, judicial power encompasses orders affecting parties' proprietary interests in the subject matter of litigation. For example, security for costs and payment of money into court.
12. In making a CFO, a court does not act as a "market-setter" unhinged from fact or legal principle: CS [33]. It is not uncommon for courts to assess what is a "reasonable" return for the provision of services based on the evidence before it.

Statutory construction

13. The appellants are not assisted by the principle of legality: CS [12]-[14]. Provisions granting powers to courts should generally not be interpreted as subject to limitations not found in the express words: *Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421; CS [12]. This principle is at its strongest in the case of superior courts: CS [12]. Further, the principle applies even when it displaces a general precept of the common law: *PMT Partners Pty Ltd v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 316; *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at [11]. Courts will develop principles governing the exercise of broadly-framed powers to ensure that the jurisdiction is not exercised in such a way as to give rise

to abuse: *Knight v FP Special Assets Pty Ltd* (1992) 174 CLR 178 at 185, 205; CS [10].
The cases relied on at BRS² fn 8 are distinguishable.

10 14. In order for sections 33ZF and 183 to be engaged, it is not necessary that the order *directly* assist in resolution of the matters in controversy between the parties: CS [18]. That reads an implicit limitation into the statutory provisions. Sections 33ZF and 183 should be read in the context of the objectives of the class action provisions, which include addressing cost barriers to litigation and thereby improving access to justice. An order may be necessary or appropriate to ensure justice in a proceeding even if it is not directly related to resolving matters in controversy: for example, bail (*United Mexican States v Cabal* (2001) 209 CLR 165 at [37]-[38]), orders permitting an unqualified person to conduct a case (CS fn 33), orders restraining a solicitor from acting in a particular case (CS fn 34) and orders fixing maximum recoverable costs (CS fn 49).

15. *Jackson v Sterling* (1987) 162 CLR 612 does not support the appellants: CS [19]. The orders in *Jackson* gave the plaintiff a better outcome than it could obtain in final proceedings: they gave the plaintiff security and also exposed the defendant to contempt. In contrast, a CFO does not give the plaintiff a better outcome than could be achieved without it. Further, many interlocutory orders create new rights eg orders for discovery.

20 16. A number of the appellants' complaints go to whether an order is appropriate or necessary in an individual case, rather than the existence of the power: cf *Jackson* at 616; *PT Bayan TBK v BCBC Singapore Pty Ltd* (2015) 258 CLR 1 at [50].

Section 79 of the *Judiciary Act 1903* (Cth)

17. Queensland's argument at QS³ [16]-[24] is inconsistent with *Rizeq v Western Australia* (2017) 262 CLR 1 and *Masson v Parsons* (2019) 93 ALJR 848 and no leave to re-open has been sought or granted.

Dated: 14 August 2019

S Lloyd SC

D Hume

K Pham

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² Submissions in reply of BMW Australia Ltd dated 5 August 2019.

³ Submissions of the Attorney-General of Queensland dated 29 July 2019.