IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S154 of 2019**

BETWEEN:

WESTPAC BANKING CORPORATION
First Appellant

WESTPAC LIFE INSURANCE SERVICES LIMITED
Second Appellant

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AND

GREGORYJOHNLENTHALL
First Defendant

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SHARMILA LENTHALL
Second Defendant

SHANE THOMAS LYE
Third Respondent

KYLIE LEE LYE
Fourth Respondent

JUSTKAPITAL LITIGATION PTY LIMITED
Fifth Respondent

30 **ANNOTATED WRITTEN SUBMISSIONS ON BEHALF OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)**

[The issues raised in S152 and S154 of 2019 are essentially identical. The submissions of the Attorney General of Western Australia filed in each appeal are materially the same. Joint references to legislative provisions are provided in each set of submissions. References to Part 10 of the Civil Procedure Act 2005 (NSW) precede references to Part IVA of the Federal Court of Australia Act 1976 (Cth), eg Pt 10/Pt IVA.]

PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

Date of Document: 29 July 2019

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2. The Attorney General for Western Australia (**Western Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Respondents.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: SUBMISSIONS

4. The legislation which is the subject of the appeals is effectively the same as the proposed legislation presently before the WA Parliament in the *Civil Procedure (Representative Proceedings) Bill 2019*.

5. Western Australia makes the submissions below in respect of those grounds of appeal which raise constitutional issues concerning the exercise of judicial power and s 51(xxxi): BMW Notice of Appeal, [2]; Westpac Notice of Appeal, [3](d)-(f).

6. Western Australia submits that the making of an interlocutory common fund order or "**CFO**" is, in effect, a form of pre-emptive costs order which sets a price for the cost of group members avoiding the litigation risk of adverse costs orders. As a form of costs order, it is an exercise of judicial power; and this exercise of judicial power does not result in any compulsory acquisition of property, or an acquisition of property other than on just terms.

The nature of legitimate costs in representative proceedings

7. Under Pt 10/Pt IVA, the ability to litigate the causes of action of all members of a common group is vested in a lead representative of that group without the need for consent of each member of the group. The lead representative is responsible for pursuing the litigation, and is therefore personally liable for paying the costs of the proceedings for the whole group. Adverse costs orders may generally only be made against the lead representative (s 181/43(1A)).

8. Until a specified opt-out date, a group member may choose not to participate in representative proceedings (see s 162/33J). At the passing of the opt-out date, a non-representative or "silent" group member is deemed to have accepted that the determination of her or his cause of action will be in the representative proceeding. From that date, the lead representative is able to bind other members of the group to the manner in which that representative chooses to conduct the proceedings (subject to court supervision). As explained, a substantial benefit to the silent group member is that they will not be subject to an adverse costs order (s 181/43(1A)), or any "book

building" costs that would otherwise have been required to commence opt-in representative proceedings. If the claim is successful, the silent group member receives the benefit of their right of action. On the other hand, if the claim is unsuccessful, a silent group member has simply lost a right, which (as a result of the litigation) has ultimately proved to be practically valueless, without having taken on any risk. Hence, in relation to costs, a silent group member has everything to gain and nothing to lose from their membership of such a group.

9. The passing of the opt-out date is important. On this date, all silent group members are deemed to have accepted the determination of their cause of action in the representative proceedings. From that date, and subject to the power of the court to discontinue the proceedings (s 166/33N), the lead representative is able to bind other groups members in the conduct of the proceedings. If the CFO is made *before* the opt-out date, the group members will know of its particular terms. If it is made *after* the opt-out date, the group members will still know that there is a statutory procedure in place which permits a CFO to be made.

10. The lead representative does not acquire any property when representative proceedings are commenced. The lead representative is permitted, pursuant to a statutory process, to act on behalf of other group members. The constitution of a group does not involve any acquisition of property: ***Bright v Femcare*** [1999] FCA 1377; (1999) 166 ALR 743 at [29]. (This finding was not addressed or overturned in the successful appeal: ***Bright v Femcare Ltd*** [2002] FCAFC 243; (2002) 195 ALR 574.)

11. The present appeals do not involve any challenge to the validity of the statutory procedure for conducting representative proceedings contained in Pt 10/Pt IVA. Consequently, the lead representative in each case has a statutory entitlement to conduct the proceedings on behalf of all group members, subject to any of them opting out. That means that the lead representative has the responsibility of paying the costs of conducting the proceedings, and bears the risk of paying an adverse costs order if the proceedings are unsuccessful. Subject to making an application under s 184/33ZJ, even if the proceedings are successful, the lead representative also bears the risk of actual legal costs for pursuing the representative proceedings exceeding the costs recoverable from the defendant.

12. In principle, all group members should bear the actual costs of the proceedings out of the proceeds of any successful recovery, at least to the extent that these costs are reasonable. That is the reason why a lead representative may make an application under s 184/33ZJ. That is also the reason why "fund equalisation orders" are made in

representative proceedings, as the appellants acknowledge (BMW Submissions, [14]; Westpac Submissions, [11]).

13. However, silent group members who do not opt out, and who will not be liable for an adverse costs order, are also being provided with at least two economic benefits. First, the silent group member is not required to contribute to litigation costs unless and until the litigation is successful. The silent group member avoids the risk of having to make an outlay of capital to pay litigation costs, without knowing whether their cause of action has any value and whether the litigation will succeed. Secondly, the group member is free of the risk of any adverse costs order if the litigation is unsuccessful.

14. The economic value received by a silent group member by avoiding the risk of an adverse costs order has a definite economic value, to which markets attribute a price. A person financing litigation may take out "adverse costs order insurance". If incurred, the costs of such insurance may be recovered as costs properly incurred for litigation purposes: ***Smith v Australian Executor Trustees Limited; Creighton v Australian Executor Trustees Limited (No. 4)*** [2018] NSWSC 1584 at [58].

15. Another person has to bear the risks which the silent group member is able to avoid. The person bearing those risks should be entitled to a payment for the value which they provide by accepting the risks avoided by the silent group member. That payment may be called a variety of names, such as "remuneration" (BMW CAB p 13), a "commission" (WCAB p 15), "consideration for the funding" (WCAB p 46), or a "premium". All of these names relate to the value provided by the person assuming the risks which are avoided by the silent group member (see WCAB p 28 [49]). In these submissions, the payment will be referred to as a "risk premium", which reflects that the payment is an additional premium over and above actual legal costs, but on account of the risk which is laid off to the person accepting the risk by the silent group member (see WCAB p 28 [49], 29 [52]). Payment of the risk premium is, in effect, a further cost of the silent group member being able to have their claim litigated in a more economical way than was otherwise available to them alone or as part of an opt-in group.

16. The existence of a risk premium as a litigation cost for silent group members is a direct consequence of a novel statutory process which permits representative proceedings. It does not exist in traditional forms of litigation, as the parties to that litigation themselves bear the risk of outlaying capital to pay for litigation costs as they occur, and they also traditionally bear the risk of an adverse costs order. Further, it does not exist in opt-in representative proceedings because each party (identified through "book

building") either contributes to the outlay or is party to the agreement for funding. Where the cost is assessed retrospectively, rather than prospectively, a deduction for these types of funding costs would not be out of the ordinary in opt-in proceedings (see WCAB pp 27-28 [47]).

The operation of common fund orders to pay a risk premium

17. A CFO which permits recovery of a risk premium cost from all successful silent group members, to an extent that reflects the tangible economic value of the risks deferred to a person financing the litigation, simply involves the silent group members paying a further litigation cost, similar to a premium for adverse costs order insurance. That risk premium (as with any litigation expense) should only be allowed to be recovered to the extent that it is reasonable or proper to permit the litigation to proceed, and where there is a finding to that effect (see WCAB p 32 [63]).

18. The risk premium may differ, for example, depending upon whether the person financing the litigation themselves accepts all of the risks described above, or whether that person obtains insurance against those risks. For example, where the person financing litigation obtains adverse costs order insurance, the costs of the premium for that insurance should be allowed as a reasonable litigation cost, but no payment on account of the person accepting that risk should be permitted as that would duplicate the risk premium. The risk of an adverse costs order has been laid off through the insurance.

19. In the context of opt-out representative proceedings, a litigation funder advances the costs of litigation to a group's representative who is otherwise unlikely to be able to meet those costs, for a fee. Litigation being what it is, the advancement of those costs does not guarantee their return. Indeed, there is a risk that the claim is lost, and adverse costs orders are made against the representative party. Alternatively, there is the risk that the representative will not recover all of the costs of litigation from the defendant, even if successful. The service which the funder provides is to accept the risk of an adverse result (including an adverse costs order), thereby foregoing the need to engage in an expensive "book-build" in order to defray the costs of the action. In any event, the outlay itself, which will be required for a period of potentially years, is in itself a cost. Their fee is for the funding services rendered, and for accepting associated litigation risks.

20. The litigation funder, on whose behalf the CFO is obtained, bears the expense necessary to ensure the proceedings are viable at the outset of the proceedings. One of the benefits

of a CFO is that it brings the details of that outlay before the court. This is crucial for the exercise of a supervisory role, so that the Court can be satisfied that the litigation is being conducted for proper purposes to produce an appropriate recovery for group members.

21. A CFO can also be used to bind the funder to the duration of the proceedings, regardless of any notice provisions in their contract with the representative party (as was the case here). A failure to comply with the terms of the order could have adverse consequences for the proceedings, including the termination of the proceedings. A CFO subjects the funder to the supervision of the court for the duration of proceedings, rather than leaving the representative to rely upon a fund equalisation order at the end of the proceedings or upon the funder's contractual ability to recover sufficient funds from the realised proceeds of the litigation.

22. In effect, a CFO is a species of pre-emptive costs order which sets the level of payment for the risk premium for a litigation funder in advance, subject to later modification by a court at the conclusion of proceedings, if necessary. A pre-emptive costs order is well-known to the law, even if exceptional: ***Australian Securities and Investments Commission v GDK Financial Solutions Pty Ltd (No 4) (in liq)*** [2008] FCA 858; (2008) 169 FCR 497, [21]. As well, costs orders in relation to non-parties are also known to the law: ***Aiden Shipping Company Ltd v Interbulk Ltd*** [1986] AC 965, 979-980; ***Knight v FP Special Assets Ltd*** [1992] HCA 28; (1992) 174 CLR 178.

23. Essentially, a CFO may be regarded as an example of a pre-emptive costs order made in favour of a non-party who funds litigation and bears the adverse risks of litigating. The necessity of such an order arises from the existence of a statutory regime permitting opt-out representative proceedings. It is therefore something which squarely falls within the description of an order in representative proceedings which a Court thinks appropriate or necessary to ensure that justice is done in the proceedings.

24. Setting the risk premium in advance is an important point. This is consistent with assessing the risk at the time when it exists, without the benefit of hindsight when the risks have crystallised one way or another.

25. An unstated premise of the cases advanced by the appellants is that the appropriation valuation methodology of the group members' rights is a "top-down" methodology. That is, that the group members start with a right with a particular gross value, and a CFO subtracts from that right. This mischaracterises the right and the nature of a CFO. The group members' rights should properly be understood from the "bottom up". The

net value of the right is always properly understood to be subject to the costs of realising the right. The existence of an opt-out representative proceedings is dependent upon the cost being less than it would be in any other type of proceeding. A cost of realising any value from the right in such proceedings will almost always include the expense of a "risk premium" to secure litigation funding.

26. The statutory schemes enacted by Pt 10 and Pt IVA also have an important purpose of providing a court with the power to make orders supervising the conduct of representative proceedings. A CFO made on an interlocutory basis permits the Court to better supervise the course of proceedings, instead of leaving the question of costs to the end of proceedings, when the representative party might have incurred costs in good faith which that party is not able to recover (s 184/33ZJ). For example, such an order ensures that all costs of realisation are properly taken into account throughout the proceedings (eg, for purposes of assessing an application to discontinue under s 166/33N). An interlocutory CFO also ensures that silent group members are provided with information to understand the full costs of proceedings (eg, by notices required under s 175/33X), including before the relevant opt-out date.

27. A further imperative for a pre-emptive costs order is that the nature of the litigation expense sought to be addressed is one that relates to risk. An interlocutory CFO addresses fund equalisation prospectively to ensure all group members bear the costs of litigation risk equally. As the appellants acknowledge (BMW Submissions, [14]; Westpac Submissions, [11]), fund equalisation already occurs retrospectively, by virtue of fund equalisation orders involving the review of the actual expenses accrued in the course of litigation.

28. In summary, the particular necessity for the pre-emptive nature of a CFO is at least threefold: the value of a risk premium cannot be accurately assessed in hindsight once the risk no longer exists; a CFO gives disclosure to the silent group members of the costs being incurred, which might be deducted as a fund equalisation order in any event; and a CFO permits the ongoing supervision and scrutiny of opt-out representative proceedings (s 166/33N), to ensure that litigation is conducted for the benefit of group members rather than funders.

Legislative basis for common fund orders

29. As explained, an interlocutory CFO should be regarded as a pre-emptive costs order, which prescribes the risk premium which a litigation funder may recover from group members in a representative action, as the consideration for the funder taking the

litigation risk of funding the action. So understood, an interlocutory CFO is an order which sets a risk premium at the minimum level to ensure that the representative action proceeds.

30. An interlocutory CFO is both authorised and limited by the express in terms of s 183/33ZF. Such an order could *only* be made if it was appropriate or necessary to ensure that justice is done. As well, these provisions limit the level of risk premium which may be set.

31. There is no constitutional reason why legislation which authorises and limits a CFO is not valid. In particular, such an order is within judicial power, and is not contrary to s 51(xxxi) of the *Commonwealth Constitution*, for the reasons set out below.

Judicial power

32. The parties proceed upon the basis that there is no relevant difference between a CFO made by a State court *exercising* federal jurisdiction (as opposed to *being capable of being invested* with federal jurisdiction) and a Federal court. That is a consequence of s 79 of the *Judiciary Act 1903* (Cth): ***Rizeq v State Western Australia*** [2017] HCA 23; (2017) 262 CLR 1 at [20], [89].

33. The matter also proceeds on the basis that courts actually exercising federal jurisdiction are only able to exercise judicial power within the meaning of Ch III of the Commonwealth *Constitution* in that exercise, whether they are State or Federal courts: see ***R v Kirby; Ex parte Boilermakers' Society of Australia*** [1956] HCA 10; (1956) 94 CLR 254 at 270; ***Rizeq*** at [32], [57]-[59], [63]-[64], [87], [103].

34. As explained, a pre-emptive costs order should be understood as setting the reasonable price to a silent group member payable for avoiding the costs risks and other risks of representative litigation. It follows that a CFO is an exercise of judicial power to make a costs order for payment of a new form of litigation expense which arises by virtue of the statutory regime for representative proceedings, ie payment of a risk premium by successful silent group members. The risk premium is a *sui generis* order, albeit one which is analogous to other well-known judicial orders, adapted to the particular circumstances in which the court is called upon to do justice.

35. There is nothing inimical to the judicial process about the making of the CFOs in the present cases. Such an order involves a court exercising federal jurisdiction to make routine interlocutory case management orders and costs orders. Three particular examples illustrate that such orders are exercises of judicial power.

36. First, an analogy might be drawn with an order that there be paid into court security for costs, which like a CFO relates to the financial status of a party. There is no question that such an order involves the exercise of judicial power, as part of managing the litigation. Like a CFO, an order for security for costs is not final. It is subject to adjustment after the proceedings are concluded. Ultimately, the party paying security may have no adverse costs order made against it.

37. Secondly, as explained above, a CFO can be understood as a form of pre-emptive costs order. Its effect is to go beyond the ordinary party-party costs awarded at the conclusion of proceedings, and ensure that the successful silent group members in effect pay the litigation funder an adequate amount for the risks which the funder has incurred in realising each members' claim. This is another particular consideration of unique relevance in an opt-out representative proceeding and is consistent with the provision (s184/33ZJ) that a representative party may apply to recover from the ultimate fund, their legal costs that exceed any costs orders made against the defendant.

38. As explained, the risk premium can be equated with an ordinary disbursement. It is somewhat equivalent to the amount of an insurance premium, eg for adverse costs order insurance, for risk laid off to a third party. There is nothing unjudicial about an order that reasonable disbursements properly incurred are to be paid. The propriety of the payment of the disbursement in the case of a CFO is inherent, because its existence relies upon the approval of the court at an earlier stage in proceedings, subject to revision against actual expenses incurred in the end.

39. It appears to be accepted by the appellants (BMW Submissions, [14]; Westpac Submissions, [11])) that a fund equalisation order is an incident of judicial power. If that be the case, there is no reason why a pre-emptive order for the same purpose should not be capable of being made at an interlocutory stage of proceedings. Whether the representative or a third-party is the ultimate beneficiary of the costs order is for present purpose irrelevant. The relevant consideration is whether the expense associated with the transfer of risk is required and reasonable in the circumstances of the specific proceedings.

40. Thirdly, a CFO is similar to an injunction, like a ***Mareva*** or ***Anton Piller*** order. Such an order preserves property which is the subject of the proceedings, and in doing so preserves the value of the cause of action. Similarly, a CFO preserves the value of the causes of action held by the group members by allowing them to be litigated, where this might well not occur without a CFO. The individual causes of action by themselves

may be economically small. The making of a CFO preserves their value, and thus preserves the utility of opt-out representative proceedings.

41. It may be suggested that, in making a CFO, the court is engaged in a task which is not analogous to the approval of a liquidator's funding arrangement because the making of a CFO requires the court to "set" what is "fair and reasonable" in the circumstances (BMW Submissions, [52]). This misconceives the nature of an application for a CFO. The application is made by the representative party. The application includes evidence which goes to why the proposed funding is given on the terms it is. The Court has a discretion to make or not make the order based on the available evidence. If the Court proceeds to exercise its discretion to make an interlocutory CFO, it makes an evaluative judgment about the appropriate risk premium, based upon the evidence before it. Such a decision is routine and at the core of the judicial task.

42. It is accepted by the appellants that fund equalisation orders are an exercise of judicial power, because they seek to allocate rights and liabilities between a class of people whose rights have been vindicated. Whether this is premised on a need to avoid unjust enrichment, or upon historical equitable doctrines is beside the point. If a fund equalisation order, which is also not provided for explicitly in Pt 10/Pt IVA, can be made having regard to the justice of the case without specific criteria (and necessarily in reliance on s 183/33ZF), so too must a CFO be capable of being characterised as an exercise of judicial power.

No Compulsory Acquisition of Property

43. There is no acquisition of property within the meaning of s 51(xxxi) of the Commonwealth *Constitution* for at least two reasons. First, there is no acquisition. Secondly, any acquisition is not compulsory.

No Acquisition

44. It may be acknowledged that a right of action for damages vested in a plaintiff is "property" within the meaning of s 51(xxxi): ***Georgiadis v Australian and Overseas Telecommunications Corporation*** [1994] HCA 6; (1994) 179 CLR 297. It may also be acknowledged that a law which extinguishes such a right is one which "acquires" that property: ***Georgiadis*** at 305; ***Smith v ANL Ltd*** [2000] HCA 58; (2000) 204 CLR 493 at [3]. Further, the modification of a right to bring an action in circumstances where a corresponding advantage accrues to the putative defendant ordinarily involves an acquisition of property: ***Smith*** at [7].

45. However, if a CFO is regarded essentially as a pre-emptive costs order, there is no question about the acquisition of any property. The group members are required to pay (from any proceedings of recovery) a reasonable and proper litigation cost in a context in which they have alleviated the risks of paying costs to run the litigation and of paying costs if the litigation is unsuccessful.

46. Funding arrangements between a funder and litigants in closed (or "opt-in") proceedings do not effect an acquisition of property by the funder: ***QPSX Ltd v Ericsson Australia Pty Ltd (No 3)*** [2005] FCA 933 at [51]. In a similar way, there is no assignment or transfer of the chose in action to a lead representative belonging to each group member effected by a CFO: see ***Bright v Femcare*** [1999] FCA 1377; (1999) 166 ALR 743 at [29]. The only effect of a CFO is to create an enforceable obligation that a portion of the realised proceeds of each group member's cause of action will be paid to the litigation funder as a cost or disbursement of the litigation. This is in much the same way as an order that money be paid into court as security for costs does not effect an acquisition of property.

Any Acquisition is not Compulsory

47. To the extent that any property is acquired under Pt 10/Pt IVA, that occurs when the representative commences proceedings on behalf of the group. When the writ is issued, the representative takes control of all the causes of action which are to that point exercisable by the group members. The group members thereby have their own causes of action subject to the scheme of Pt 10/Pt IVA. For example, a group member may opt-out: s 162/33J. There are also mechanisms that allow questions to be separated from the main claim: ss 168/33Q and 169/33R. At the end of the proceedings, the representative will be entitled to her or his costs from the resolution funds: The conditions on the exercise of the group members' rights are therefore a consequence of the representative action provisions, rather than the making of a CFO.

48. If a group member wishes to opt-out and avoid paying the risk premium, they are entitled to do so within the dates set out in the representative action scheme. If an interlocutory CFO has been made, this is a decision that will be better informed. Due to the ability for a silent group member to opt-out, there is nothing compulsory about the requirement to pay the risk premium as a reasonable and proper expense of litigation.

Just terms

49. As explained above, the basic commercial premise of a CFO is the assumption of risk by the funder in exchange for remuneration for that risk. The fact that the group members do not explicitly consent to the transaction does not alone render it other than on just terms. There is a clear *quid pro quo*. In exchange for group members immunising themselves from *any* costs risk, the group members are informed that they will be required to pay over *hypothetical* money from funds which may be realised in circumstances where they may otherwise never be realisable. Understood in this way, a group member only exchanges the possibility of future benefits for a portion of those possible benefits in the event they are realised.

50. The "justness" of the terms of this transaction is required, by the terms of the legislation. The relevant provisions (s 183/33ZF) requires an order to be appropriate or necessary "to ensure that justice is done in the proceedings". A CFO can only be made upon a judicially considered application. This curial control is sufficient to ensure just terms.

PART V: LENGTH OF ORAL ARGUMENT

51. It is estimated that the oral argument for the Attorney General for Western Australia will take 15 minutes.

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