IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

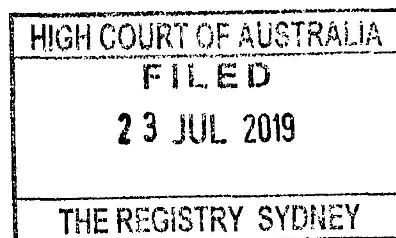
No. S154 of 2019

WESTPAC BANKING CORPORATION LIMITED
First Appellant
WESTPAC LIFE INSURANCE SERVICES LIMITED
Second Appellant

10 and

GREGORY JOHN LENTHALL
First Respondent
SHARMILA LENTHALL
Second Respondent
SHANE THOMAS LYE
Third Respondent
KYLIE LEE LYE
Fourth Respondent
JUSTKAPITAL LITIGATION PTY LIMITED

20 Fifth Respondent



FIFTH RESPONDENT'S SUBMISSIONS

Filed on behalf of the Fifth Respondent by:

Date of this document: 23 July 2019

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I Internet Publication

1. These submissions on behalf of the fifth respondent, JustKapital Litigation Pty Limited (**JKL**), are in a form suitable for publication on the Internet.

II Issues

2. JKL agrees with the statement of the issues in paragraph [2] of the appellants' submissions (**AS**).

III Notice of constitutional matter

3. No further notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) is required.

IV Contested facts

10 4. The appellants are incorrect to submit that the impugned common fund order (**CFO**) rendered the group members' choses in action "immediately less valuable" {AS [7]}. There are two main reasons why this characterisation is factually inaccurate.

5. *First*, the CFO was an interlocutory order. It was inherently capable of being revisited. It would not operate after final judgment (including final orders approving any settlement) and would therefore need to be confirmed or varied (or not) as part of any final orders. CFOs can be seen to stand in a familiar class of interlocutory orders directed to the practicalities of managing litigation in an effective and efficient way in aid of the ultimate quelling of controversies; any novelty in the precise contours of the CFO is an unremarkable reflection of the reality that litigation evolves and presents
20 circumstantial novelties to which courts are amply equipped to respond.

6. *Second*, the primary judge found that "[w]ithout an appropriate common fund order being made, a particular injustice would result, being the likely inability, absent funding, of the group members to have their claims advanced in this class action" {CAB 32 [63]}. The appellants' suggestion that the CFO rendered the group members' property *less* rather than *more* valuable rests on unstated assumptions, contrary to the facts as found, about the realisable value of that property.

V Argument

7. The factually inaccurate characterisation is no minor quibble. It exposes two central weaknesses of principle that pervade the appellants' argument.

8. ***Interlocutory character of CFO***: In all three of its manifestations—statutory construction, judicial power, and acquisition of property—the argument pays scant regard to the significance of the interlocutory character of the order.

9. ***Realisable value of property***: And in all three of those manifestations, the argument pivots on a stylised, even idealised, notion of group members' "property", which does not take account of the fact that a chose in action has no value independent of its capacity to be realised in an action invoking the exercise of judicial power. Realising that value, in the context of modern litigation, comes at substantial cost and with substantial risk. As the Full Court said, "funding costs and commission can be seen, in appropriate circumstances, as legitimate expenses (properly controlled) of the venture under Pt IVA" {CAB 106 [104]}.

10. CFOs are a means of lowering and controlling the costs of commencing and carrying on class actions supported by litigation funders, and doing so with an open class in a way that facilitates access to justice for all group members. Of particular note in this case are the costs of a "bookbuild" (where a funder contracts individually with each group member). Those costs can be high, both because of the high marginal costs of seeking to transact with many thousands of group members, and because of the informational asymmetry where the identities of group members are known to the defendants but not the plaintiffs or funder (which can necessitate yet further transaction costs, such as publicity campaigns, in seeking to identify the group members). Those costs are also inefficient or, as the primary judge observed, "wasted costs" {CAB 24 [34]}. In some cases, the costs of a bookbuild would be so high as to be likely to be uneconomic.

11. JKL's submissions will focus on these two points, in each of the ***construction***, ***judicial power*** and ***acquisition of property*** aspects of the case. The first to fourth respondents (whom JKL supports) are the primary contradictors to the appeal, and so JKL has chosen to take this selective approach to its own submissions to minimise duplication of argument.

CONSTRUCTION OF SECTION 33ZF

Facilitative construction

12. An empowering provision such as s 33ZF of the *Federal Court of Australia Act 1976* (Cth) (**Act**) should be construed broadly and without artificial limitations that are not found in the words themselves: *Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; see also *Weinstock v Beck* (2013) 251 CLR 396 at [55] (Hayne, Crennan and Kiefel JJ). In the light of that constructional principle, s 33ZF "confer[s] on the Court the widest possible power to do whatever is appropriate or necessary in the interests of justice being achieved in a representative proceeding": *McMullin v ICI Australia Operations Pty Ltd (No 6)* (1998) 84 FCR 1 at 4 (Wilcox J) {CAB 99 [85]}.

13. The appellants accept that other provisions of the Act (especially ss 33V and 33Z) empower the court to make orders in the nature of CFO on a *final* basis when dealing with the distribution of a settlement sum or judgment sum {AS [29]-[31]}. These provisions do not support an *Anthony Hordern* argument limiting s 33ZF; rather, they indicate that it would be wholly surprising if s 33ZF were limited in way that prevented the Court from doing on an *interlocutory basis* what it can do on a *final* basis. The distinction between interlocutory and final orders points to the fact that there is not, as *Anthony Hordern* reasoning requires, in truth only "one power" hedged by limitations that should not be avoided by use of a more general power, but rather different powers directed to different stages of the litigation.

Dynamic construction

14. Section 33ZF, as an aspect of Pt IVA, was intended to create a "new representative action procedure": Commonwealth of Australia, House of Representatives, Hansard, 14 November 1991 at p 3174 (Minister's Second Reading Speech), quoted in *Perera v GetSwift Ltd* (2018) 127 ACSR 1 at [22] (Lee J). Parliament should be taken to have intended that the Federal Court, applying Pt IVA in individual cases, would over time develop the precise contours of that new procedure to respond to the practical and economic circumstances in which the procedure had to work. A wide and flexible construction is consistent with the inherently dynamic character of s 33ZF that allows for that practical working out over time of the available and appropriate procedures.

15. As the Full Court accepted {CAB 100 [88]}, the provision instantiates the kind of legislation whose meaning is "informed by the experience of the courts in the process of application of the law to the facts in ... individual cases" and "reinformed by the accumulated experience of courts in the application of the law to the facts in a succession of cases": S Gageler, "Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process" (2011) 37(2) *Monash University Law Review* 1 at 1. Its meaning is informed not only by the practical experience of the courts over time, but also by the immanent and evolving values of the law as perceived by the courts to be relevant to the normative standard of "appropriate or necessary to ensure that justice is done in the proceeding". That is reinforced by the historical origins of the representative proceedings in the equity jurisdiction. The task involved in translating legal values into procedural norms by application of Pt IVA is analogous to the task described by the Full Court in *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at [296] (Allsop CJ, Besanko and Middleton JJ): "It does not involve personal intuitive assertion. It is an evaluation which must be reasoned and enunciated by reference to the values and norms recognised by the text, structure and context of the legislation, and made against an assessment of all connected circumstances."

16. The task of developing the new representative procedure to respond to practical and economic circumstances from time to time, would be unduly confined by a narrow construction. A broader construction would accommodate the true contemplation of Pt IVA and s 33ZF in particular, which is to provide the Federal Court with a wide discretion to shape the procedures applicable to representative actions "against an assessment of all connected circumstances". Those connected circumstances include the commercial realities of funding litigation, the need for litigation funders to have some comfort that funding open class actions through to a determination will not be a commercial futility, and the access to justice that a funded action enables group members or potential group members to enjoy (not to mention the expertise that a commercially sophisticated funder brings to assist the representative party (who may be unsophisticated) and their lawyers, in efficiently managing and driving forward the litigation to a just outcome). The Court should not, as Westpac would have it, construe s 33ZF in a narrow way that would prevent the Court in an appropriate case from moulding its own procedures to such circumstances by the making of a CFO.

17. The appellants appear to accept that s 33ZF would authorise a funding equalization order **(FEO)** {AS [11]}. The inability of the same broadly worded power to authorise a CFO in an appropriate case is said to follow from the "fundamentally different" character and "extraordinary" features of a CFO. But CFOs and FEOs help to achieve in different ways, in different circumstances, the ultimate end of doing justice in a proceeding. There is nothing in the language of s 33ZF that accommodates the appellants' attempt to distinguish between the two kinds of order that have been developed to respond to the practical economics of class action funding.

Principle of legality not engaged

10 18. The appellants are incorrect, in particular, to commence the constructional task looking through a lens of *limiting* principles, especially the principle of legality {AS [16]-[22]}, which would detract from the facilitative and dynamic construction that is called for when regard is had to the text and context in the first instance.

19. In any event, the principle of legality is not engaged. Only upon the idealised conception of the group members' property, divorced from its practical realisable value, is it possible for the appellants to argue that the CFO diminished group members' proprietary rights. As the Full Court held, however, the CFO "not so much takes away from, as supports and fructifies, rights of persons that would otherwise be uneconomic to vindicate" {CAB 102 [94]}.

20 20. This is relevant to the principle of legality because it exposes the unjustified *extension* of that principle which the appellants seek to have the Court make.

21. The concepts of "alteration", "modification" or "curtailment" of rights {AS [16]}, or "infringement" (*Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J)), "encroachment" (*Minogue v Victoria* (2018) 92 ALJR 668, [55] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ)), and "abrogation" (*Coco v The Queen* (1994) 179 CLR 427, 437-438 (Mason CJ, Brennan, Gaudron and McHugh JJ)) are very broad. Their breadth reflects the variety of situations to which the principle of legality might legitimately respond. But it would be an error to apply the principle to *every* enactment that could answer these broad descriptions. Application of the principle of legality
30 requires not only attention to the question of *which rights*, but also *which infringements* of rights, engage the principle. Closer attention is required to the *kinds* of infringement that properly engage the principle.

22. The appellants seek to apply the principle of legality to legislation that "infringes" property rights, even though that "infringement" is incidental (indeed, instrumental) to the realisation of the practical value of the property right. That is a kind of infringement to which the principle of legality has not previously been applied. Such an extension of the principle is not justified by the principle's rationale. It would subvert the principle's traditional solicitude for fundamental common law rights by treating as *destructive* of those rights legislation that is in truth *in aid of* them.

23. Put another way, there is no reason to presume that Parliament would not intend to interfere with a proprietary right when the interference is the very means by which Parliament "supports and fructifies" the right {CAB 102 [94]}. Put another way still, the traditional recognition of "property rights" as fundamental common law rights rests on an unstated assumption that property rights are *valuable* to the holder of those rights (hence the occasional emphasis on *vested* interests: see *Clissold v Perry* (1904) 1 CLR 363 at 373 (Griffith CJ). Where the practical economic value of a property right is reduced by the costs of realising that value, legislation that seeks to lower or otherwise regulate those costs is not legislation that relevantly interferes with or infringes the right so as to attract the principle of legality.

24. Contrary to AS [17], this does not involve a "balancing test". It simply involves attention to the nature and character of the alleged "infringement" of rights which is said not to be authorised by general statutory words. The appellants cannot focus on the "infringing" aspect of the legislation alone, without bringing to account the benefits to the rights-holder, when characterising the legislation as a relevant "infringement" or not.

25. Contrary to AS [22], these submissions do not treat the rights of group members as a "degraded" form of property unworthy of protection. Rather, it recognises the practical economic reality that the value of a chose in action cannot be divorced from the ability of the chose to be realised and that there will, in a modern litigious context, be substantial realisation costs and financial risk. In this particular case, the primary judge found that:

   a. the legal costs are likely to very considerable – likely total legal costs disclosed in the applicants' solicitors retainer agreement are between $6.5 million and $9 million {CAB 18 [14(d)] and CAB 32 [62]};

b. there are many group members – perhaps in excess of 80,000 although it is difficult to be precise {CAB 18 [14(f)]};

c. without litigation funding it is likely that the proceedings would not advance to resolution at a mediation or on the merits {CAB 32 [62]}; and

d. without an appropriate CFO being made, a particular injustice would result, being the likely inability, absent funding, of the group members to have their claims advanced in the class action {CAB 32 [63]}.

Further, the claims of individual group members are relatively modest, such that one can easily conclude the individual prosecution of the claims would be uneconomic
10 {CAB 76 [6] and CAB 80 [19]}.

26. In other cases, the circumstances might vary. But s 33ZF is broad enough to respond to these economic considerations and should not be limited by reference to an artificial and idealistic conception of the group members' rights.

JUDICIAL POWER

27. An appreciation of the interlocutory character of a CFO, and an appreciation of the role played by a CFO in enabling the aggregated determination of group members' claims similarly answer the appellants' Ch III arguments.

28. There is no doubt that the impugned power is in fact conferred upon a Ch III court and is therefore required to be exercised in accordance with the judicial process. The burden
20 of the appellants' argument is therefore to show either that the power is *incapable* of being exercised through the application of a judicial process or otherwise that the power is directed to an end that is "divorced from" the quelling of a controversy: *Palmer v Ayres* (2017) 259 CLR 478 at [36] (Kiefel, Keane, Nettle and Gordon JJ), [48] (Gageler J). Neither burden can be discharged.

29. The ability for a CFO to be made pursuant to s 33ZF consistent with judicial process is amply demonstrated by the history of this very proceeding. As the Full Court held: "it is difficult to conceive of a function or standard more appropriate to the judicial branch of government than considering and deciding (upon application and evidence) what is appropriate or necessary to do justice in a proceeding" {CAB 104 [100]}. The
30 appellants' submission that s 33ZF lacks objective criteria {AS [42]} gives insufficient weight to the role of the Court in building out the contours of broad evaluative standards

over time: "Given a broad standard, the technique of judicial interpretation is to give it content and more detailed meaning on a case to case basis. Rules and principles emerge which guide or direct courts in the application of the standard": *Thomas v Mowbray* (2007) 233 CLR 307 at [91] (Gummow and Crennan JJ), citing L Zines, *The High Court and the Constitution* (4th ed, 1997) at 195.

30. As to the relationship between the impugned order and the quelling of a controversy, there are two important points.

31. *First*, a litigation funder is by no means a stranger to the controversy. At least since the decision in *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386, the funding of litigation has "legitimately be[en] seen as part of a facilitation of access to justice" {CAB 80 [17]}. There is a real, economic sense in which a funder of aggregated proceedings brought under Part IVA of the Act is a "real party interested in the outcome of the suit", in the sense that the authorities have long recognised brings a non-party within aspects of the courts' jurisdiction and power, including the power to award costs: *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 186-190 (Mason CJ and Deane J).

32. It is common for courts on an interlocutory basis to make provision for the allocation of costs in a way that is inherently provisional and necessarily susceptible to ongoing revision up to final orders. For example, when a court orders that a non-party be joined or given leave to intervene in a proceeding, it can be done on various conditions as to costs: that the person pay their own costs, that they not be liable for costs, etc: see, eg, r 9.12 of the *Federal Court Rules 2011* (Cth). These sorts of orders do not immutably set the rule that must prevail until final judgment. The course of the litigation might show the condition to have been inappropriate or no longer appropriate, with the consequence that some different order will later be made. It could not be suggested that the initial interlocutory order lacked the characteristics of judicial power or power incidental to judicial power. Rather, such orders are judicial or incidental thereto *because* they set a regime which enables the orderly progression of the litigation in service of the ultimate quelling of the controversy.

33. There are other examples: asset preservation orders against third parties: *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [25]-[26] (Gaudron, McHugh, Gummow and Callinan JJ); search orders: *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1

Ch 55; orders that, in the first instance, the parties pay the costs of mediation or a joint expert in equal shares: see eg *Subway Systems Australia Pty Ltd v Ireland (No 2)* [2013] VSC 693 at [27]-[28]; and orders like that made by the primary judge in this case that, in the first instance, one party or person pays the costs of a referee {CAB 38 [8]}.

34. *Secondly*, there is a constitutionally sufficient relationship between a CFO and the justiciable controversy by reason of the practical connection between the realisation of the group members' claims and the funding regime given effect by the CFO.

35. The appellants' concession as to the validity of an FEO is again significant: Ch III does not finely distinguish between an FEO and a CFO in terms of the relationship that they bear to the quelling of the controversy. CFOs are not novel when understood at a level of abstraction appropriate to reflecting the *values* that inhere in Ch III. Contrary to AS [38], the Court does not need to find a precise analogy from the time of Federation; it needs only to accept that the judicial supervision of the allocation of costs and risks of representative actions is sufficiently related to the quelling of controversies as to be within the conception of judicial power, or at least incidental thereto: *Palmer v Ayres* (2017) 259 CLR 478 at [69] (Gageler J).

ACQUISITION OF PROPERTY

36. The interlocutory character of the CFO is a complete answer to the allegations based on acquisition of property: there is simply no acquisition. Certainly, there is no acquisition of any chose in action, which remains the property of the group member and any realised value of which remains to be dealt with by the Court on a final basis.

37. But even if the CFO does effect an acquisition of property, s 33ZF is not invalid by reason of s 51(xxxi). The character of a chose in action as property the value of which is dependent upon its capacity to be realised in a proceeding informs the assessment of validity. JKL makes two points in relation to this theme. *First*, the relevant legislative power (to make laws with respect to the exercise of judicial power) is inherently inconsistent or incongruent with a requirement to provide just terms for an "acquisition" of a chose in action by the exercise of judicial powers directed to the supervision and management of the proceeding in which the chose is to be realised. *Secondly*, assessment of whether any acquisition has occurred otherwise than on "just terms" must take account of the practical worthlessness of a chose in action that cannot be realised economically.

Inherent incongruity

38. Section 33ZF is supported by the legislative power conferred by ss 71, 76(ii) and 77(i) {CAB 107 [113]} and additionally by s 51(xxxix) of the Constitution.

39. A law may bear more than one character and "[i]t suffices for constitutional validity if any one or more of those characters is within a head of Commonwealth legislative power": *Re F; Ex parte F* (1986) 161 CLR 376 at 387-388 (Mason and Deane JJ); *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 192-194 (Stephen J). Only by an "indirect operation" does s 51(xxxi) "reduce the content of other grants of legislative power" so that they do not authorise laws that have the character of acquiring property otherwise than on just terms: *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160. That indirect operation, which arises by the application of a "rule of construction", is "subject to a contrary intention either expressed or made manifest in [the] other grants" of legislative power. "[S]ome of the other grants of legislative power clearly encompass the making of laws providing for the acquisition of property unaccompanied by any quid pro quo of just terms" and in such cases "the other grant of legislative power manifests a contrary intention which precludes the abstraction from it of the legislative power to make such a law": *Nintendo* (1994) 181 CLR 134 at 160 and the cases cited at fn 43.

40. In *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371, Dixon CJ said that the principle by which s 51(xxxi) reduces the content of other heads of power cannot be applied in a "too sweeping and undiscriminating way" because it "cannot have much to do with some of the subject matters of power upon the very terms in which they are conferred". "[Q]uestions of degree and judgment" are involved in "[m]arking the boundary of 'just terms', by reference to the application of a requirement that an exaction is 'inconsistent' or 'incongruous' with them": *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [77].

41. The powers supporting taxation or bankruptcy laws or penalties and forfeiture laws are well-recognised categories of power from which s 51(xxxi) does not abstract. The categories are not, however, closed and novel circumstances may well reveal new categories of legislative power that are not on their proper construction confined by s 51(xxxi). Thus, in *Nintendo*, it was recognised that the power to make laws with respect to the kinds of intellectual property identified in s 51(xviii) was inherently

concerned with "confer[ring] ... rights" on some and "conversely limit[ing] and detract[ing] from the proprietary rights" of others and in that sense unrestricted by s 51(xxxi): *Nintendo* (1994) 181 CLR 134 at 160-161.

42. Similarly, the legislative power to create federal courts endowed with the judicial power of the Commonwealth, to define the jurisdiction of those courts to quell controversies in the exercise of the judicial power, and to confer on those courts such powers as are necessary, convenient or incidental to the exercise of the judicial power are inherently concerned with the terms on which the contested legal rights, duties and liabilities in a matter are to be determined and enforced. They are inherently incompatible with any
10 requirement to make provision for "just terms" in relation to the choses in action that embody those contested legal rights, duties and liabilities. Precisely because the power is "judicial" in the constitutional sense, it is not constrained by the just terms requirement in s 51(xxxi).

43. This is not to say that s 51(xxxi) is avoided merely by mediating an acquisition of property through a judicial procedure. Rather, it is to recognise that where the property in issue is a chose in action dependent for its realisation on the process of a court and the exercise of judicial power, the legislature is not confined by the just terms requirement in making laws with respect to that exercise of judicial power or those processes of the court in connection with giving effect to that realisation of the
20 contingent property interest. The relevant limits on the power are those derived from Ch III and the conception of judicial power, and not from s 51(xxxi).

44. Where jurisdiction and power are conferred on a court in respect of a matter, it has powers to manage the procedural course of the litigation in order to determine the matter in the exercise of judicial power. Those powers will, of their nature, be apt to affect the rights of litigants in respect of the disputed chose in action and, in that sense, apt to work an "acquisition" of that property within the broad sense that concept is used in the Constitution. That kind of power—a supervisory, managerial judicial power to control proceedings—is inherently incompatible with the provision of compensation, and so the legislative power to confer such power on courts is, at least in that aspect,
30 inherently inconsistent or incongruent with the just terms guarantee.

45. If that particular head of legislative power were abstracted from by the just terms guarantee, such that value had to be given as a *quid pro quo* for the exercise of powers

of this kind, then the ability of Chapter III courts to do justice would be stultified. That indicates that the Constitution itself manifests a contrary intention to confer sufficient legislative power, undiminished by s 51(xxxi), to empower courts to deal in this managerial and supervisory way with the just adjudication of proceedings in which a disputed chose of action is in issue.

46. Courts have many powers which impact on causes of action and have the effect of limiting, modifying or extinguishing a person's rights. For example, courts have power to: stay proceedings; strike-out an action for want of prosecution; dismiss proceedings for failure to comply with a direction of the Court (s 37P(6) of the Act); give summary judgment where there is no reasonable prospect of success, but even if the proceeding is not hopeless or bound to fail (s 31A of the Act). There are many powers of a similar nature under the *Federal Court Rules 2011* (Cth) and, by way of further example in light of the *BMW* proceeding, the *Uniform Civil Procedure Rules 2005* (NSW):

Power	**Federal Court Rules 2011**	**Uniform Civil Procedure Rules 2005 (NSW)**
Refusal to accept a document for filing	2.26	4.10
Self-executing orders	5.21	
Orders on default	5.23	16.3
Extension of time to file a cross-claim	15.05	(1.12)
Security for costs	19.01	42.21
Deemed admissions / judgment on admissions	22.05ff	17.3, 17.7
Summary judgment	26.01	13.1
Stay of proceedings until costs paid	26.15	12.10
Dismissal for want of prosecution		12.7

47. Legislation that extinguishes a chose in action to the benefit of the defendant has been held to attract the operation of s 51(xxxi): *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305 (Mason CJ, Deane and

Gaudron JJ), 312 (Brennan J), cf 325 (McHugh J). Despite that, it has never been thought that the managerial or supervisory powers of a court which are apt to extinguish a chose in action to the benefit of a defendant attract the operation of s 51(xxxi).

48. The decision of the Full Court of the Federal Court in *Davis v Insolvency and Trustee Service Australia* [2010] FCAFC 141 (Keane CJ, Besanko and Perram JJ) is an instructive illustration. The Full Court described as "without merit" the argument that "the enforcement and execution provisions of statutes governing the civil process of courts involves an acquisition of property to which the language of s 51(xxxi) is directed" (at [20]). Such provisions were to be seen as a means of "resolving or
10 adjusting competing claims, obligations or property rights of individuals as an incident of the regulation of their relationship": see also *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 171, 187.

49. Contrary to AS [46], this argument does not involve permitting the legislature to do indirectly what it cannot do directly. Rather, it involves recognising that once a court exercising judicial power is seized of a matter in which the realisation of a disputed chose in action will be adjudicated, the imperative that the court carry out its task judicially and according to the justice of the case is inherently inconsistent or incongruent with a requirement that there be just terms for any "acquisition" of the chose in action.

20 **"Just terms"**

50. The appellants' idealised conception of group members' property also underpins their assumption that any acquisition of property effected by a CFO is effected otherwise than on "just terms", as would be required by s 51(xxxi) if that provision were engaged.

51. The appellants have not made good that assumption. In many cases in which a CFO would appropriately be made, such as those in which a bookbuild would be uneconomic, the choses in action of individual group members may be practically worthless once the realisation costs are brought to account. The legal rights of the group members, which cannot realistically be realised without aggregation, might not be realised even in the aggregate if a litigation funder were required to contract
30 individually with each of the very many rights-holders. In such cases, a commercial litigation funder might not rationally commit to supporting the litigation – unless it has

some comfort that the litigation, if successful, will likely provide it with a commercial return.

52. If a CFO effects an acquisition of part of the chose in action, then it effects an acquisition of part of an otherwise practically valueless chose. Similarly, if a CFO effects an acquisition of part of the fruits of a chose in action, then it effects an acquisition of part of the fruits that may never be realised without the CFO. It therefore cannot be said that CFOs necessarily operate on unjust terms.

53. Contrary to AS [49], "just terms" in s 51(xxxi) does not require the pecuniary equivalent of the property acquired. That submission is founded upon a statement of Starke J in *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 300. In turn, Starke J relied upon a statement of Williams J equating s 51(xxxi) with the US Constitution's requirement for just "compensation": *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 85; and statements of Latham CJ, Rich J and Starke J also to the effect of what would constitute full and adequate "compensation": *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v Commonwealth* (1943) 67 CLR 314 at 323, 324 and 327.

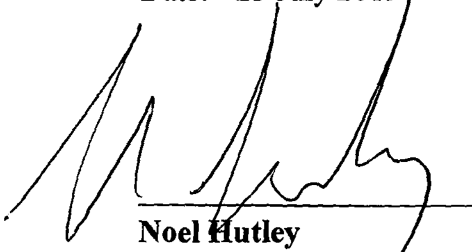
54. The better view is that of Dixon J, who in *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495 at 569 distinguished the Australian language of "just terms" from the American language of "just compensation": "the somewhat general and indefinite conception of just terms ... appears to refer to what is fair and just between the community and the owner of the thing taken ... Unlike 'compensation', which connotes full money equivalence, 'just terms' are concerned with fairness" (see also at 600 per Kitto J). That construction of "just terms" accords better with contemporary caselaw, which holds that just terms can be satisfied by making provision for adequate *procedures* to determine reasonable compensation: *Wurridjal v Commonwealth* (2009) 237 CLR 309.

55. In any event, the appellants' submission that group members receive less than the pecuniary equivalent of the property acquired is based on the erroneous factual assumption at the heart of their case: that the property acquired (if property be acquired) *had* substantial pecuniary value even though it was likely unrealisable in the absence of a CFO.

VI Estimate of Time

56. JKL seeks 45 minutes for the presentation of its oral argument.

Date: 23 July 2019



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