

**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

and

GREGORY JOHN LENTHALL
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 FOR THE STATE OF
VICTORIA (INTERVENING)**

PARTS I, II & III: CERTIFICATION AND INTERVENTION

1. These submissions are in a form suitable for publication on the internet.
2. The Attorney-General for the State of Victoria (**Victoria**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the respondents.

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Dated: 29 July 2019
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PART IV: ARGUMENT

3. This proceeding concerns the making of a “common fund order” pursuant to s 33ZF of the *Federal Court of Australia Act 1976* (Cth). It raises three distinct questions:

- (1) As a matter of construction, does s 33ZF empower the Federal Court of Australia to make the common fund order sought by the First to Fourth Respondents?
- (2) If the answer to the construction question is “yes”, does s 33ZF infringe Ch III of the Constitution, by conferring on a federal court a power that is neither judicial in nature nor incidental to the exercise of judicial power?
- (3) If the answer to the construction question is “yes”, does s 33ZF infringe s 51(xxxi) of the Constitution by authorising an acquisition of property other than on just terms?

4. In substance this proceeding raises the same issues as the appeal in *BMW Australia Ltd v Brewster* (No. S152 of 2019), in which Victoria also intervenes. In *Brewster* the representative proceeding was brought in the Supreme Court of New South Wales, and a common fund order was sought under s 183 of the *Civil Procedure Act 2005* (NSW). Because the representative proceeding in *Brewster* is a matter in federal jurisdiction, s 183 cannot operate of its own force in that proceeding; it is necessary for the text of s 183 to be applied as Commonwealth law by s 79 of the *Judiciary Act 1903* (Cth). The appellant’s argument in that case is that s 183 is not capable of being applied as Commonwealth law by s 79 because it infringes one or both of Ch III and s 51(xxxi).

5. In this proceeding Victoria adopts the submissions put in *Brewster*, save for those submissions directed to the operation and effect of s 79 of the *Judiciary Act*.

PART V: ESTIMATE OF TIME

6. The Attorney-General for Victoria estimates that she will require no additional time (beyond her estimate of 15 minutes for *BMW v Brewster*) for the presentation of her oral submissions.

Dated: 29 July 2019



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