



Common Fund Orders in Australian Class Actions Permitted in "Super" Appeal

IN SHORT

The Situation: Litigation funding is a major driver of Australian class actions. Challenges to common fund orders were mounted in the Federal Court and Supreme Court of New South Wales by defendants.

The Decision: After a joint hearing, but in separate judgments, the Full Federal Court of Australia and the New South Wales Court of Appeal held that the class action legislation provided courts with power to make a common fund order. The Courts dismissed challenges based on the order not being an appropriate exercise of judicial power and giving rise to a contravention of Australian Constitution s 51 (xxxii).

Looking Ahead: The confirmation of the availability of common fund orders now means that attention must turn to ensuring that such orders, consistent with the terms of the legislative provisions relied upon, "ensure that justice is done in the proceedings" and the fee paid to the funder is fair, reasonable and proportionate.

Background

The common fund is a court order that requires all group members to contribute to the litigation funder's fee, regardless of whether they have signed a funding agreement, in return for the funder financing a class action. In *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* (2016) 245 FCR 191, the Full Federal Court of Australia made common fund orders at the request of the applicant.

In *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34, class action proceedings under Part IVA of the *Federal Court of Australia Act 1976* (Cth) were commenced in relation to allegations of the misselling of policies of insurance. The judge at first instance made a common fund order at the request of the applicant. The respondent, Westpac, appealed against the order to the Full Federal Court of Australia.

In *Brewster v BMW Australia Ltd* [2019] NSWCA 35, the plaintiff commenced a class action pursuant to Part 10 of the *Civil Procedure Act 2005* (NSW) for loss allegedly caused by the installation of faulty airbags in BMW vehicles. The plaintiff sought a common fund order and the defendant opposed it. The judge at first instance referred to the New South Wales Court of Appeal a separate question as to whether the court had power to make a common fund order.



The historic nature of the joint sitting of two Australian appellate courts saw the hearing referred to as the 'super' appeal.



The "Super" Appeal

Pursuant to the agreement between the Chief Justice of the Federal Court of Australia, the Chief Justice of New South Wales and the President of the Court of Appeal of New South Wales, it was agreed that both matters would be heard at the same time in the same courtroom due to the considerable overlap in issues. The historic nature of the joint sitting of two Australian appellate courts saw the hearing referred to as the "super" appeal.

Both Courts heard the oral argument of all counsel and received all written submissions. Counsel were not obligated to answer questions from the judges not sitting on the matter in which they appeared, but nonetheless did so. No discussion or sharing of draft judgments between the judges from the two Courts took place. Each Court decided the matter before it according to the views of the judges constituting the Court.

The questions raised for decision were:

1. On the proper construction of s 23 or s 33ZF of the *Federal Court of Australia Act 1976* (Cth), s 183 of the *Civil Procedure Act 2005* (NSW) or s 23 of the *Supreme Court Act 1970* (NSW), whether the Court was empowered to make a common fund order (the "construction argument");
2. Whether the making of a common fund order was consistent with the exercise of judicial power (the "judicial power argument");
3. Whether, to the extent that the making of a common fund order is an exercise of judicial power authorised by the legislative provisions set out in question one, such provisions are a law with respect to the acquisition of property for the purposes of s 51(xxxi) of the Australian Constitution which does not provide "just terms" (the "acquisition argument"); and
4. In the Federal proceedings where an order had been made, provided there was power to make the order, whether the exercise of the power by the primary judge miscarried (the "discretion argument").

The questions were answered as follows:

1. Section 33ZF of the *Federal Court of Australia Act 1976* (Cth) and s 183 of the *Civil Procedure Act 2005* (NSW) authorised the making of a common fund order. The text of both provisions permit the making of "any order the Court thinks appropriate or necessary to ensure that justice is done in the proceedings" and a common fund order is permitted if the criteria in the legislation is met.
2. The making of a common fund order under s 33ZF and s 183 is a valid exercise of judicial power.
3. Neither of the provisions at issue could be characterised as an acquisition of property. Rather they are concerned with the terms on which contested legal rights and liabilities in a matter are to be determined and enforced.
4. The Federal Court rejected the argument that the primary judge's discretion had miscarried.

THREE KEY TAKEAWAYS

1. The availability of common fund orders has been confirmed, subject to an appeal to the High Court of Australia.
2. However, whether such orders will be made in a particular class action, and on what terms, is a matter for the discretion of the judge. The moving party will need to demonstrate, and the judge affirmatively find, that the order sought is "appropriate or necessary to ensure that justice is done in the proceedings".
3. Attention will need to be given to determining the evidence—lay and expert—that will be necessary to support and inform the terms of a common fund order.



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