HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

ANTHONY BOGAN
First Applicant

MICHAEL THOMAS WALTON
Second Applicant

and

THE ESTATE OF PETER JOHN SMEDLEY (DECEASED)
First Respondent

ANDREW GERARD ROBERTS
Second Respondent

PETER GRAEME NANKERVIS
Third Respondent

JEREMY CHARLES ROY MAYCOCK
Fourth Respondent

KPMG (A FIRM) ABN 51 194 660 183
Fifth Respondent

FIFTH RESPONDENT'S WRITTEN SUBMISSIONS

PART I: CERTIFICATION

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

PART II: STATEMENT OF ISSUES

2. In deciding whether to transfer proceedings to another court under s 1337H(2) of the *Corporations Act 2001* (Cth), is a group costs order (**GCO**) made under s 33ZDA of the *Supreme Court Act 1986* (Vic) relevant?

3. Where a proceeding is transferred pursuant to s 1337H of the *Corporations Act* after orders were made in the transferor court that the transferee court would not have been empowered to make, does s 1337P of the *Corporations Act* permit the transferee court to proceed "as if" those orders had been made in the transferee court?

PART III: NOTICE OF CONSTITUTIONAL MATTER

4. The applicants issued a notice under s 78B of the *Judiciary Act 1903* (Cth) (**78B**) on 4 April 2024 (Cause Removed Book (**CRB**) 467). The fifth respondent (**KPMG**) does not consider that any further notice is required.

PART IV: DECISIONS OF THE COURTS BELOW

5. The reasons of the Victorian Court of Appeal are not reported; the medium neutral citation is *Bogan v The Estate of Peter John Smedley (Deceased)* [2023] VSCA 256 (**CA**) (**CRB 21**).

PART V: FACTUAL BACKGROUND

6. On 1 July 2020, Victoria legalised contingency fees in representative proceedings. The uniquely Victorian regime allows the Supreme Court of that State to order that, in a representative proceeding, the plaintiff's lawyers will receive a pre-determined percentage of any judgment or settlement (a GCO). Contingency fees are otherwise prohibited throughout Australia.[1]

7. As the Court of Appeal below acknowledged, the GCO regime provides a "magnet to Victoria, leading to actions being brought in this Court that are more appropriately litigated

[1] *Legal Profession Uniform Law* (NSW), s 183; *Legal Profession Uniform Law* (Vic), s 183; *Legal Profession Uniform Law* (WA), s 183; *Legal Practitioners Act 1981* (SA), Sch 3 cl 27; *Legal Profession Act 2007* (Qld), s 325; *Legal Profession Act 2007* (Tas), s 309; *Legal Profession Act 2006* (ACT), s 285; *Legal Profession Act 2006* (NT), s 320.

elsewhere" (**CA [6]**; **CRB 24**). Indeed, of the 168 representative proceedings commenced in Victoria since 2000, 65 were filed since the GCO regime came into force in July 2020.[2] Before 2020, the Supreme Court of NSW received roughly 20-30% of class action filings; in 2023, only one class action was filed in that Court, with the Federal Court attracting two-thirds of filings and the Supreme Court of Victoria attracting the balance.[3]

8. In this case, the GCO has been both a magnet and an anchor to Victoria. The reason the proceedings were instituted in Victoria was to obtain a GCO and the Court of Appeal held that, but for the GCO which had been made, the Supreme Court of NSW was the more appropriate forum (**CA [170]**; **CRB 55**). Yet, in answering three questions that had been reserved for it by a trial judge, the Court of Appeal held that, because a GCO had been made, because the litigation funder involved would probably not continue to fund the proceedings without the GCO, and because the GCO could not "travel" to NSW, the GCO "tied" the proceeding to Victoria and no transfer should be ordered (**CA [171], [174]**; **CRB 55**).

9. The applicants commenced representative proceedings in the Supreme Court of Victoria on 14 August 2020 alleging, among other things, misleading or deceptive conduct by the respondents contrary to the *Corporations Act* (**CA [10]**; **CRB 25**). The class comprises persons who acquired an interest Arrium Ltd in shares between 19 August 2014 and 4 April 2016 (**CA [9]**; **CRB 25**).

10. Originating documents were served on the respondents on 2 November 2020. On 23 November 2020, KPMG wrote to the applicants that NSW was the more appropriate forum (**CA [24]**; **CRB 28**). On 2 February 2021, the applicants applied for a GCO (**CA [25]**; **CRB 28**). On 26 February 2021, KPMG applied to transfer the proceedings to the Supreme Court of NSW under s 1337H of the *Corporations Act*[4] (**CA [27]**; **CRB 28**). It submitted

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[2] Professor Vince Morabito, *Group Costs Orders and Funding Commissions* (January 2024) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4699815) (**Morabito Report**) at pp 9-10. Professor Morabito also observed that "the most striking feature of the data" on the categories of class actions that are being filed "is that in the current GCO era shareholder class actions dominate in Victoria" (p 11). Further, "almost 80% of the law firms that represented lead plaintiffs in the post-GCO stage had no involvement in Victorian class actions before the introduction of such a regime" (p 22).

[3] Allens, "2023 in Review", *Class Action Risk 2024* (available at https://www.allens.com.au/insights-news/explore/2024/class-action-risk-2024/2023-in-review/) (and noting that "one obvious reason for this trend is the availability of contingency fees in class actions in that court").

[4] That provision, rather than the equivalent provision of the *Jurisdiction of Courts (Cross-vesting Act) 1987* (Vic), applies because the proceeding is "with respect to a civil matter arising under the Corporations legislation": *Rushleigh Services Pty Ltd v Forges Group Ltd (in liq)* [2016] FCA 1471 at [73] (Foster J).

that the transfer application should be determined before the GCO application. The applicants submitted to the contrary.

11. On 31 March 2021, Nichols J directed that the GCO application be determined first (**CA [30(b)]**; **CRB 28**). On 3 May 2022, John Dixon J ordered that the legal costs payable to the applicants' solicitors (who were supported by a litigation funder) be 40% of the amount of any award or settlement that may be recovered in the proceedings (subject to further order).[5] His Honour found that without a GCO "there is a considerable risk, indeed a probability, that the Funder … will not continue to fund the proceedings" (**CA [35], [59]**; **CRB 29, 34**).

12. On 7 March 2023, the Supreme Court of Victoria reserved three questions for the consideration of the Victorian Court of Appeal under s 17B(2) of the *Supreme Court Act 1986* (Vic).[6] The questions were:

> 1. In exercising the discretion to transfer proceedings to another court under s 1337H(2) of the *Corporations Act*, is the fact that the Supreme Court of Victoria has made a GCO under s 33ZDA of the *Supreme Court Act* relevant?
> 2. If the proceedings are transferred to the Supreme Court of NSW: (a) will the GCO remain in force and be capable of being enforced by the Supreme Court of NSW subject to any order of that Court; and (b) if the GCO will remain in force, does the Supreme Court of NSW have power to vary or revoke the GCO?
> 3. Should this proceeding (S ECI 2020 03281) be transferred to the Supreme Court of NSW pursuant to s 1337H of the *Corporations Act*?

13. On 26 October 2023, the Court of Appeal granted leave to argue these questions and answered them: (1) "Yes"; (2)(a): "No"; (2)(b): "Does not arise"; and (3): "No" (**CRB 24-25**).

14. KPMG challenges the correctness of each of the Court of Appeal's conclusions. Having removed the proceeding, this Court "may do whatever is necessary for the complete adjudication of the cause".[7] The Court may give answers to the reserved questions that are different from those that the Court of Appeal gave, even though an order embodying those answers may not have been appealable by reason of s 1337R(a) of the *Corporations Act*.[8]

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[5] The GCO is subject to the applicants' compliance with certain conditions relating to their litigation funding agreements within 14 days after determination of KPMG's transfer application (**ASOF [103], [115]**; **CRB 80**, **81**).

[6] *Bogan v The Estate of Peter John Smedley (Deceased) (No 3)* [2023] VSC 103 (**CRB 7**).

[7] *Felton v Mulligan* (1971) 124 CLR 367 at 399 (Walsh J).

[8] *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232.

PART VI: ARGUMENT

The transfer provisions

15. Section 1337H(2) of the *Corporations Act* relevantly provides that "if it appears to the transferor court that, having regard to the interests of justice, it is more appropriate for … the relevant proceeding … to be determined by another court … the transferor court may transfer the relevant proceeding … to that other court". Section 1337L sets out a non-exhaustive list of mandatory considerations relevant to a transfer decision, namely: the principal place of business of any body corporate concerned in the proceeding, the place(s) the events the subject of the proceeding occurred, and the other courts that have jurisdiction to deal with the proceeding.

16. The question posed by s 1337H(2) is whether the Supreme Court of NSW is the ***more*** appropriate court. As Gleeson CJ, McHugh and Heydon JJ explained in relation to the cross-vesting legislation, in terms that are equally applicable to s 1337H(2):[9]

> It is not necessary that it should appear that the first court is a "clearly inappropriate" forum. It is both necessary and sufficient that, in the interests of justice, the second court is more appropriate.

17. It has rightly been said in the cross-vesting context that "if one is more appropriate than the other, however so slightly, a transfer to the more appropriate court is mandatory".[10]

18. The "more appropriate" court is determined by reference to the "connecting factors" between the proceeding and the possible fora.[11] In addition to the s 1337L mandatory considerations, relevant connecting factors include matters of convenience and expense such as availability of witnesses, the places where the parties respectively reside or carry on business, and the law covering the relevant transaction.[12] "In many cases [of which KPMG submits this is one], there will be such a preponderance of connecting factors with one forum that it can readily be identified as the most appropriate, or natural, forum".[13] The "more appropriate

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9 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at [14], see also [42], [69] (Gummow J, Hayne J agreeing at [177]); see also *Irwin v Queensland* [2011] VSC 291 at [14(b)].

10 *Valceski v Valceski* (2007) 70 NSWLR 36 at [70] (Brereton J).

11 *Schultz* (2004) 221 CLR 400 at [18] (Gleeson CJ, McHugh and Heydon JJ); *Dwyer v Hindal Corporate P/L* (2005) 52 ACSR 335; [2005] SASC 24 at [13].

12 *Irwin v Queensland* [2011] VSC 291 at [14(i)]. See also *Re HIH Insurance Ltd (in liq)* (2014) 104 ACSR 240; [2014] NSWSC 545 at [8] (Brereton J).

13 *Schultz* (2004) 221 CLR 400 at [19] (Gleeson CJ, McHugh and Heydon JJ).

forum" is the forum "in which objectively judged it might be expected that the dispute would fall to be resolved".[14]

19. It is "inapt to speak of the applicant for an order for transfer as bearing a burden of persuasion analogous to an onus of proof".[15] At most, KPMG has a persuasive onus in relation to the application.[16]

20. The court must approach the transfer question without any presumption as to where the interests of justice lie. The plaintiff's choice of forum is not given weight, being an essentially neutral factor.[17] Procedural or evidential advantages offered to ***all*** parties in a different forum may be a relevant consideration but, as explained further below, not those which favour one party over another.[18]

21. The policy behind provisions such as s 1337H is that the legislature regards "forum shopping" as an "evil".[19] The extrinsic material for the cross-vesting legislation, upon which the transfer provisions in the *Corporations Act* were modelled, said that "Courts will need to be ruthless in the exercise of their transferral powers to ensure that litigants do not engage in 'forum-shopping' by commencing proceedings in inappropriate courts."[20] The same policy motivated the enactment of the *Corporations Act* provisions. The extrinsic material relevantly said that the "national character" of the relevant Bill was to be "further achieved by the conferment on each court of a power to transfer proceedings to another court having

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[14] *Valceski v Valceski* (2007) 70 NSWLR 36 at [69] (Brereton J).

[15] *Schultz* (2004) 221 CLR 400 at [71] (Gummow J, Hayne J agreeing). See also *Irwin v Queensland* [2011] VSC 291 at [14(f)]; *Creighton v Australian Executor Trustees Ltd* [2015] FCA 1137 at [6] (Middleton J); *Valceski v Valceski* (2007) 70 NSWLR 36 at [70] (Brereton J).

[16] *Irwin v Queensland* [2011] VSC 291 at [14(f)]; *Creighton v Australian Executor Trustees Ltd* [2015] FCA 1137 at [6] (Middleton J); see also *SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2011] VSC 213 at [25]-[26] (Vickery J). In the cross-vesting context, Mason P (Spigelman CJ and Priestley JA agreeing) said that the applicant has "at least the persuasive onus", but that onus "will seldom if ever be determinative at the end of the day": *James Hardie & Coy Pty Ltd v Barry* (2000) 50 NSWLR 357 at [100]. See also *Resource Equities Ltd v Carr* [2007] WASC 246 at [10] (Martin CJ) ("[i]t would … be an unusual case in which the question of onus would predicate the outcome").

[17] *Schultz* (2004) 221 CLR 400 at [25] (Gleeson CJ, McHugh and Heydon JJ), [77] (Gummow J) and [168] (Kirby J); *Yara Pilbara Fertilisers Pty Ltd v Oswal (No 8)* [2015] FCA 49 at [25] (McKerracher J).

[18] *Schultz* (2004) 221 CLR 400 at [27] (Gleeson CJ, McHugh and Heydon JJ).

[19] *Schultz* (2004) 221 CLR 400 at [217] (Callinan J), referring to the Explanatory Note to the *Jurisdiction of Courts (Cross-vesting) Act*, see also [17] (Gleeson CJ, McHugh and Heydon JJ), [72] (Gummow J). See also *Re Samwise Holdings Pty Ltd* [2016] NSWSC 1610 at [7] (Brereton J) ("… one function of s 1337J [which enables transfers from federal and State family courts] is to encourage plaintiffs to institute proceedings in the most appropriate court and to discourage them from opportunistic forum shopping").

[20] *Schultz* (2004) 221 CLR 400 at [217] (Callinan J), citing from the Explanatory Note to the *Jurisdiction of Courts (Cross-vesting) Act*.

jurisdiction where it is in the interests of justice to do so", and that "[p]roceedings concerning matters which, apart from the cross-vesting provisions, would be entirely or substantially within the jurisdiction of a particular Court should be instituted and determined in that Court as far as practicable".[21] That the Commonwealth Parliament would seek to discourage forum shopping is unsurprising; it is a practice that has been disapproved by members of this Court in other contexts.[22]

22. If a proceeding is transferred or removed to another court, s 1337P(2) provides that the transferee court:

> must deal with the proceeding as if, subject to any order of the transferee court, the steps that had been taken for the purposes of the proceeding in the transferor court (including the making of an order), or similar steps, had been taken in the transferee court.

Connecting factors

23. As noted above, the Court of Appeal concluded that, but for the GCO, NSW was the more appropriate forum. That is plainly so. The connecting factors are overwhelming.

24. ***Arrium***: Arrium was headquartered in Sydney, as were the CFO, Company Secretary, the Group Finance, Treasury and Internal Audit teams, and the Share Registry. The relevant board meetings, committee meetings and financial statement signings occurred in Sydney, and the relevant locations in respect of the capital raising (including the underwriter) were all in Sydney (**ASOF [11]-[17]**; **CRB 69-70**). Mr Bakewell (formerly CFO) and Mr Brooks (formerly Group Financial Controller), both likely key witnesses, reside in NSW (**ASOF [31]**; **CRB 72**).

25. ***KPMG***: The relevant KPMG partners and team were based in Sydney, conducted the relevant meetings and work between KPMG's Sydney offices and Arrium's Sydney offices, and continue to reside in Sydney (**ASOF [18]-[22], [32]-[33]**; **CRB 71-72**).

26. ***The parties***: The applicants reside in NSW (**ASOF [23]-[24]**; **CRB 71**). The surviving directors live elsewhere (**ASOF [26]-[28]**; **CRB 71**) but consider NSW the appropriate

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[21] Explanatory Memorandum to the Corporations Legislation Amendment Bill 1990 (Cth) at [57], [173].

[22] See *Stevens v Head* (1993) 176 CLR 433 at 442, 452 (Mason CJ), 462 (Deane J), 466 (Gaudron J); *Breavington v Godleman* (1988) 169 CLR 41 at 76 (Mason CJ), 88, 91 (Wilson and Gaudron JJ),113 (Brennan J), 161 (Toohey J); *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [128]-[130] (Kirby J). See also *Boys v Chaplin* [1971] AC 356 at 378 (Lord Hodson), 401 and 406 (Lord Pearce) (expressing the view that it was in the interests of public policy to discourage forum shopping).

forum (**ASOF [45]**; **CRB 73**). KPMG's address for service in the proceedings is its Sydney office (**ASOF [29]**; **CRB 71**). More "signed up" group members are from NSW than any other location (**ASOF [34]-[35]**; **CRB 72**).

27. ***The liquidators***: The liquidators and company books and records are in Sydney (**ASOF [52]**; **CRB 74**). Liquidator examinations occurred in the Supreme Court of NSW in 2018 (**ASOF [54]-[65]**; **CRB 74-75**). In 2019 the applicants obtained orders for examination and access to documents in the Supreme Court of NSW. In 2022, this Court affirmed their entitlement to such orders, and the applicants have indicated an intention to renew the orders for access in the Supreme Court of NSW but are yet to do so (**ASOF [66]-[73]**; **CRB 75-76**).

28. ***Related proceedings***: Two related proceedings concerning similar facts were heard to conclusion across 38 concurrent hearing days in the Supreme Court of NSW in 2021 (a third settled). Appeals were heard in August 2022 in Sydney (**ASOF [74]-[81]**; **CRB 76-77**).[23]

29. ***The legal representatives***: The legal representatives of all parties are primarily based in Sydney, the majority of whom have been instructed since the liquidator examinations (and, for the directors, the three related proceedings) in the Supreme Court of NSW (**ASOF [36], [39]-[40], [42]-[44], [46]-[48]**; **CRB 72-73**). The costs agreements issued by the applicants' representatives were all made in accordance with the *Legal Profession Uniform Law* (NSW) and were governed by NSW law (**ASOF [36]**; **CRB 72**). The retainers up to January 2021 anticipated that the proceeding would be commenced in NSW (**ASOF [38], [97]**; **CRB 73**, **79**).

30. ***The funder***: The litigation funding agreement provides that it is to be construed in accordance with and governed by the laws of NSW, and the address for service of the funder is C/- Banton Group, L12, 60 Martin Place NSW 2000 (cl 21.6) (**ASOF [50]**; **CRB 74**).

31. ***Commencement in Victoria***: The only reason the applicants commenced in Victoria was to seek a GCO (**ASOF [97]-[98]**; **CRB 79**).

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[23] Determined after the ASOF was filed: *Anchorage Capital Master Offshore Ltd v Sparkes* [2023] NSWCA 88. A special leave application was dismissed: *Anchorage Capital Master Offshore Ltd v Bakewell* [2023] HCATrans 164.

Question 1: Making of a GCO not relevant

Procedural advantages are irrelevant

32. Contrary to the Court of Appeal's answer to question 1, the fact that a GCO has been made is irrelevant to determining whether the proceedings should be transferred. The simplest reason is that, as set out in relation to Question 2 below, the GCO will "travel" to NSW; any procedural advantage to the applicants is not in jeopardy. But there are more fundamental reasons that apply even if the GCO did not "travel" in this way.

33. Where a party enjoys a procedural advantage by instituting proceedings in one forum, and the other party suffers a corresponding disadvantage, that advantage is irrelevant to assessment of the "interests of justice" for the purposes of provisions such as 1337H. So much was held in *BHP Billiton Ltd v Schultz*.[24] This Court unanimously held that, in exercising power under the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW), the Supreme Court of NSW erred in taking into account the plaintiff's choice of forum as a matter not to be "lightly overridden", as well as the advantages conferred on the plaintiff by s 11A of the *Dust Diseases Tribunal Act 1989* (NSW). Section 11A allowed the Tribunal to award damages on the assumption that the injured person would not develop another dust-related condition but to award further damages at a future date if they did.

34. Gleeson CJ, McHugh and Heydon JJ said:[25]

> If, in a particular respect, the first respondent's assumed advantage and the appellant's assumed disadvantage are commensurate, the one simply being the converse of the other, then that does not advance the matter. … [T]he problem would be compounded if a judge were to become involved in comparing the respective merits of New South Wales and South Australian legislation. From whose point of view would those merits be judged? How could a judge form a preference between the public policy reflected in an Act of the Parliament of New South Wales and the public policy reflected in an Act of the Parliament of South Australia? If it came to that point, the appropriate course would be for the judge to draw back, and to consider the interests of justice by reference to more neutral factors.

[24] (2004) 221 CLR 400.

[25] *Schultz* (2004) 221 CLR 400 at [26]; see also [15]-[16].

35. Their Honours distinguished an earlier decision of the NSW Court of Appeal, which held that the unique procedural powers of the Tribunal ***were*** relevant to the interests of justice:[26]

> The Court of Appeal pointed out that these were not merely forensic advantages to one party that represented a corresponding disadvantage to the other party, but were factors relevant to a decision under s 5 because they have the capacity to assist ***both*** plaintiffs and defendants in the efficient and economical resolution of disputes, ***and therefore serve the public interest***. [emphasis added]

36. Their Honours also cited the discussion of "legitimate personal or juridical advantage" by Lord Goff in *Spiliada Maritime Corporation v Cansulex Ltd*[27] as showing "the kinds of consideration [related to the interests of one party] that might sometimes be relevant to a judgment as to the appropriateness of a forum".[28] One example given by Lord Goff is if a claim would now be time-barred if the plaintiff had to begin again in a different jurisdiction but the plaintiff would have been within time had they originally commenced in that jurisdiction. However, his Lordship said that where a plaintiff commenced in the forum ***after*** the limitation period in the appropriate jurisdiction had expired — that is, if the procedural advantage could not have been obtained by the plaintiff in the appropriate jurisdiction at the time the plaintiff commenced in the forum — the court should not hesitate to stay the proceedings "even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction".[29] In other words, a "procedural advantage" will be irrelevant to the assessment of the "interests of justice" even if its non-enjoyment would lead to the claim not being able to be pursued, if it was ***only*** available by reason of commencing in an inappropriate forum.

37. Gummow J (Hayne J agreeing) said that the "interests of justice" are "even-handed".[30] "Section 5 does not manifest a legislative policy in favour of any species of 'forum shopping', or of what in the United States has been called a 'venue privilege' of plaintiffs".[31] "To fix upon the advantages s 11A conferred upon Mr Schultz, without any consideration of

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[26] *Schultz* (2004) 221 CLR 400 at [21].
[27] [1987] AC 460 at 483.
[28] *Schultz* (2004) 221 CLR 400 at [27].
[29] *Spiliada* [1987] AC 460 at 483.
[30] *Schultz* (2004) 221 CLR 400 at [100].
[31] *Schultz* (2004) 221 CLR 400 at [72].

the operation of s 30B upon the interests of both parties, was to give further effect to the false notion of Mr Schultz's 'venue privilege'".[32]

38. Finally, Callinan J said:[33]

> … ***one person's legitimate advantage is another person's disadvantage.*** There should be no presumption in litigation in favour of any party. Courts are required to do equal justice. It is wrong to say that proceedings should be conducted in the, or indeed any Tribunal because a plaintiff, or for that matter a defendant, is likely to have a better chance of winning or more easily winning there. [emphasis added]

39. Applying *Schultz* (and *Spiliada*) to the present case, even if a transfer away from the Supreme Court of Victoria would entail termination of the GCO, and even if this meant the proceeding might not continue (**ASOF [121]-[123]**; **CRB 82**), that is irrelevant to the question posed by s 1337H(2). That would simply be the loss of an advantage otherwise conferred on the applicants by reason of their having instituted a proceeding in the Supreme Court of Victoria, which operates to the disadvantage of the respondents in that proceeding. That is, by reason of the GCO, the respondents are required to defend a proceeding of such limited merit that it may not otherwise attract speculative funding (and to do so in the otherwise less suitable forum), which they otherwise would not have to defend in any other jurisdiction. That advantage is irrelevant to the question of whether the Supreme Court of NSW is "more appropriate" to hear the proceeding "having regard to the interests of justice". This conclusion applies with all the greater force when it is recognised that the advantage is, first and foremost, not to the applicants but to their solicitors and the funder.

<u>The Court of Appeal's decision is inconsistent with *Schultz*</u>

40. In the present case, the Court of Appeal while considering that there was "no reason to depart from the approach taken in *Schultz*" (**CA [105]**; **CRB 44**), held that it was distinguishable. This case joined a line of first instance decisions which have held, contrary to *Schultz*, that the "forensic advantage or disadvantage conferred by procedural law" ***is*** relevant to the assessment of the "interests of justice".[34] In doing so, the Court of Appeal made six errors.

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[32] *Schultz* (2004) 221 CLR 400 at [80].

[33] *Schultz* (2004) 221 CLR 400 at [258].

[34] *Dwyer v Hindal Corporate Pty Ltd* (2005) 52 ACSR 335 at [18]-[19] (Debelle J), citing *Dawson v Baker* (1994) 120 ACTR 11 at 25 (Higgins J, Gallop J agreeing). See also *Rushleigh Services Pty Ltd v Forge Group Ltd (in liq)* [2016] FCA 1471 at [77] (Foster J); *President's Club Ltd v Palmer Coolum Resort Pty Ltd* [2019] QSC 209 at [154]-[157] (Wilson J), citing *World Firefighters Games Brisbane v World Firefighters Games Western Australia Inc* (2001) 161 FLR 355 at [32] (Philippides J).

41. *First*, its characterisation of a GCO as "neutral" or having "no impact on the other party" is wrong (**CA [110]**; **CRB 45**). When used as an "anchor" to a less appropriate court — as here — the GCO adds to the costs, time and inconvenience to respondents, lawyers and witnesses. It compels the continued defence of a claim which lacks sufficient prospects of success to attract legal representation or funding anywhere else, or for less than 40% of any award (being the highest rate for any GCO ordered as at January 2024).[35] In this regard, the Court of Appeal frankly acknowledged that the GCO was "funding of last resort" (**CA [5]**; **CRB 24**). The GCO does not merely thwart "the desire of the defendant to avoid being sued" (**CA [123]**; **CRB 48**). It forces the respondents to litigate a proceeding of such speculative merit that it would likely ***not*** have been commenced in the appropriate forum.

42. *Secondly*, far from being "ruthless" in ensuring litigants do not engage in forum shopping, the Court of Appeal endorsed it. As noted above, the Court acknowledged that the GCO regime provides a magnet to Victoria, leading to actions being brought there that are more appropriately litigated elsewhere. The plaintiffs in such cases are forum shoppers on Professor Nygh's "strict" definition of the term: "a person who resorts to a jurisdiction other than the natural forum for the purpose of gaining a procedural or substantive advantage under the law or practice of that jurisdiction".[36] The Court asserted that "the concept of forum shopping has much less potency" given the *Corporations Act* confers jurisdiction on each Court directly (**CA [125]**; **CRB 48**). However, that is directly contrary to the purpose of s 1337H. It ignores that, as in this case, such actions, like all others, involve facts and parties which will often have a greater connection to one jurisdiction than others.

43. *Thirdly*, the Court of Appeal made the very "invidious policy choice" proscribed by *Schultz* (cf. **CA [119], [125]**; **CRB 47, 48**). It weighed, against transferring the proceeding, that (**CA [113]**; **CRB 46**):

> Part 4A of the *Supreme Court Act* is a manifestation of legislative policy that group proceedings may be an efficient means of resolving claims without the need for multiplicity of proceedings and thereby aid access to justice. Section 33ZDA is a reflection that justice in the proceeding can be served by a particular costs model and, as reflected in the extrinsic material, is also seen as facilitating access to justice.

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[35] Morabito Report at p 22.

[36] Nygh, "Choice-of-Law Rules and Forum Shopping in Australia" (1995) 46 *South Carolina Law Review* 899 at 901.

44. The Court did not counterbalance this with the policy considerations informing the refusal of other Australian jurisdictions to countenance contingency fees (see e.g. **CA [3]**; **CRB 23**). Contingency fees have long been prohibited, at common law and by statute, because permitting lawyers to hold a direct financial interest in the outcome of their client's case is perceived to pose significant risks to their ethical obligations to the court and clients.[37] Giving weight to the fact that the GCO was made "in the interests of justice" as defined by Victorian legislative policy (**CA** [**124**]; **CRB 48**) prefers the policy of Victoria over, relevantly, NSW. In this way, the Court of Appeal decided that, even if the GCO regime encouraged forum shopping, Victoria was simply "a good place to shop in".[38]

45. *Fourthly*, the Court conferred venue privilege on the applicants, contrary to *Schultz*. While purporting to accept that the "plaintiff does not get to load the dice in its favour by its choice of venue", it found that, having done so, the "history of the litigation … will often, in a practical sense, [tie it] to the original court" (**CA [105]**; **CRB 44**). It then weighed against transfer that the "plaintiff and the law practice may have ordered their affairs" by reference to the GCO (**CA [124**]; **CRB 48**). This was erroneous bootstraps reasoning. Of course the applicants' affairs were so ordered; the GCO was the reason they instituted in Victoria. Giving this fact weight conferred patent venue privilege on the applicants.

46. *Fifthly*, the Court of Appeal repeatedly conflated the factors relevant to s 33ZDA of the *Supreme Court Act* with those relevant to s 1337H of the *Corporations Act*. This error is most acute in the Court's observation that *BMW Australia Ltd v Brewster*[39] did not assist KPMG because it "was not directed to [s 33ZDA]" (**CA [121]**; **CRB 47**). KPMG submitted that the "interests of justice" ***in s 1337H(2)*** is informed by the reasoning in *Brewster*. That case concerned the statutory power in representative proceedings to "make any order [that] the Court thinks appropriate or necessary to ensure justice is done in the proceedings". The majority held that it cannot be said to be "appropriate or necessary to ensure that justice is done" for a court to promote the prosecution of the proceeding "in order to enable it to be

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[37] See, eg, *Wallerstiner v Moir (No 2)* [1975] QB 373 at 402 (Buckley LJ); *Trendtex Trading Corp v Credit Suisse* [1980] QB 629 at 663 (Oliver LJ); *Re Robb* (1996) 134 FLR 294 at 315 (Miles CJ, Gallop and Higgins JJ). In *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 203, this Court said that, at common law, a solicitor may act on a speculative basis subject to the condition that "he must not in any case bargain with his client for an interest in the subject-matter of the litigation, or (what is in substance the same thing) for remuneration proportionate to the amount which may be recovered by his client in a proceeding".

[38] *The Atlantic Star* [1973] QB 364 at 382 (Lord Denning MR).

[39] (2019) 269 CLR 574.

heard and determined by that court".[40] The provision empowered the making of orders as to ***how*** an action should proceed in order to do justice; it was not concerned with the radically different question as to ***whether*** an action can proceed at all. Similarly, s 1337H(2) is concerned with ***where***, in the interests of justice, the proceedings should be determined and is not concerned with ***whether*** they should proceed at all. Where a transfer to the more appropriate court is refused because the applicants may lose their funding and so withdraw, the Court is plainly concerning itself with ***whether*** the action should proceed at all, which is not a concern of s 1337H. It was no answer for the Court of Appeal to say that "unlike" the provisions in *Brewster*, "s 33ZDA specifically empowers the Supreme Court to make a GCO" (**CA [121]**; **CRB 47**). The power to make a GCO is not in issue.

47. Similarly, it was irrelevant that the Court of Appeal considered the making of a GCO under s 33ZDA "gives no imprimatur of the court that the group proceedings should be brought",[41] or (conversely) that "there is no reason why a judge should ignore the consequences for the litigation in the event that a GCO is not made or in deciding the terms on which [a GCO] order might be made" (**CA [123]**; **CRB 48**). Again, construction of s 33ZDA, and ***its*** statutory context, is not in issue. Finally, that a State Parliament uses a test of "justice" cannot retrospectively change the operation of a similarly worded test in a federal law (cf. **CA [124]**; **CRB 48**).

48. *Sixthly*, and on one view most basically, KPMG's transfer application should have been determined before the GCO. It subverts the policy of the transfer provisions to determine a GCO first and thereby provide an "anchor" against the transfer. The Court of Appeal erred in placing weight on there having "already been an assessment by the Court that justice in the proceeding would be served by a GCO" as an "additional factor" (**CA [114]**; **CRB 46**). Had the transfer application been determined first, the GCO would not exist. The fact of the GCO and findings made on the GCO application are irrelevant to transfer. Neither of the reasons given by the Court for rejecting this submission address its substance. *First*, the absence of any appeal by KPMG from the decision to grant the GCO is irrelevant (**CA [127]**; **CRB 48**). If the transfer had been determined first (and granted), there would have been no

[40] *Brewster* (2019) 269 CLR 574 at [3] and see [47] (Kiefel CJ, Bell and Keane JJ, Nettle and Gordon JJ agreeing).

[41] Also, cf. **CA [53] (CRB 32)**, "s 33ZDA embodies a legislative judgment that, in some cases, it may be in the interests of justice for the matter to be funded... because without such an order the matter may not be able to proceed and the benefits of a group proceeding to the interests of justice would be unattainable."

GCO to appeal. The correctness of the procedural course adopted is relevant now.[42] *Secondly*, KPMG does not urge that the decision to transfer be made on the "false premise" no GCO exists but on the basis it only exists ***because*** the applicants forum shopped ***and*** the applications were determined out of their proper order (**CA [128]**; **CRB 48**).

49. For completeness, no different approach is warranted by the fact that s 1337H(2) uses the words "may transfer", while "shall transfer" is used in the otherwise comparable s 5 of the *Jurisdiction of Courts (Cross-vesting) Act* considered in *Schultz*. The view has been expressed at first instance that the word "may" confers a "residual discretion".[43] While that might be supported by the contrasting use of "must" in s 1337H(3) and 1337J, it is difficult to suppose that the court could possess a "residual discretion" to decline a transfer it otherwise determined is in the interests of justice. As Yates J suggested in *Hancock Prospecting Pty Ltd v 150 Investments Pty Ltd*,[44] "any relevant circumstance tending against the exercise of the discretion in favour of transfer [falls] into the mix of factors to be taken into account in determining where the interests of justice lie, rather than standing outside those factors". These matters tend in favour of "may" being understood not to confer a "residual discretion" but, rather, to confer a power which falls to be exercised when the conditions for its exercise are fulfilled.[45] But even if s 1337H did confer a "residual discretion", it would be internally incoherent and inconsistent with the policy of the provision to take into account procedural advantages to one party in the exercise of that residual discretion.

50. Finally, it should be noted that John Dixon J did not find that the proceeding could not be continued ***at all*** if a GCO was not made (**ASOF [121]**; **CRB 82**). It is not the case that funding is impossible in NSW; to the contrary, it is evident that until the GCO regime

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[42] The position is not unlike that where the correctness of an interlocutory decision which was not the subject of appeal bears on a final order which is the subject of appeal. The correctness of the interlocutory decision thus falls to be considered on appeal from the final order. See, eg, *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at [78] (Gummow ACJ, Hayne, Crennan and Bell JJ).

[43] *Re Westgate Wool Co Pty Ltd (in liq)* (2006) 206 FLR 190; [2006] SASC 372 at [31] (Debelle J); *Re Rectron Electronics Pty Ltd* [2013] NSWSC 610 at [29] (Black J); *Re HIH Insurance Ltd (in liq)* (2014) 104 ACSR 240; [2014] NSWSC 545 at [6] (Brereton J); *Fletcher v Fortress Credit Corporation (Australia) II Pty Ltd* [2012] QSC 359 at [22] (Fryberg J). It has been said that the circumstances in which the discretion would be exercised is "not easy to conceive" or "rare": see *Re Quirky Mama Productions Pty Ltd* [2021] VSC 514 at [8] (Connock J); *Resource Equities Ltd v Carr* [2007] WASC 246 at [5] (Martin CJ).

[44] (2018) 120 ACSR 495; [2017] FCA 520 at [65].

[45] See similarly, eg, *Leach v The Queen* (2007) 230 CLR 1 at [38]; *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [32]-[33]. See generally *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214.

commenced in Victoria, the funder had intended the proceeding to occur in NSW. That the Victorian regime has, since July 2020, permitted funding that will keep a commercially high-risk matter on foot more easily than the funding regime available in any other jurisdiction provides no basis to conclude that the even-handed "interests of justice" preclude a transfer to NSW. The identification of the more appropriate forum should not be influenced by a funder's preference to avoid a jurisdiction where there may be uncertainty as to whether common fund orders can be made. If the proceedings are terminated after they are transferred, they will not be terminated ***by*** the transfer, nor even by loss of the GCO. On the applicants' case, termination would occur as a result of the claim's lack of merit, as judged by the funder.

Question 2: Even if a GCO is relevant, it is a neutral factor

51. Even if relevant to the assessment of the "interests of justice", in practical terms the GCO is immaterial. Section 1337P(2) causes the GCO to "travel" with the transferred proceedings. The Supreme Court of NSW must proceed "as if" the GCO had been made there, unless it makes a contrary order (which it is empowered to do).

Question 2(a)

52. In answering Question 2, the Court of Appeal held – contrary to first instance Federal Court authority it did not consider[46] – that s 1337P(2) does not apply to any order the transferee court would not have power to make, and therefore would not apply to a GCO (**CA [156]**; **CRB 53**). That construction is inconsistent with the text and context. It reads words of qualification into the provision, limiting its plain meaning.

53. Contrary to **CA [142]** (**CRB 50**), the use of the words "similar steps" does not "strongly suggest that the transferee court has the capacity to make an order or take a step in the same terms or in similar terms that had been made in the transferor court". Rather, the words "similar steps" ensure that, if subsequent steps in the transferee court are dependent upon specific steps having been taken, the transferee court may treat similar steps taken in the transferor court as satisfying that criterion. For example, in NSW, interlocutory applications are made by notice of motion and certain steps follow from filing a notice of motion. If a

[46] *Adbrook v Paterson* (1995) 58 FCR 293 at 296 (Branson J). See also *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 3)* [2003] VSC 244 at [37] (Gillard J).

proceeding is transferred from a jurisdiction where such applications are made by summons, a party who has made such an application need not refile their application by notice of motion following transfer.[47] In this way, the words "similar steps" facilitate smooth transition to the new court. Conversely, if the Court of Appeal's construction is correct, that would inevitably lead to disputes in the transferee court about which "steps" taken in the transferor court are to be recognised, leading to further expense and delay, rather than simply deeming all steps to have been taken in the transferee court subject to any order of the transferee court.

54. That s 1337P is a deeming provision which creates a "statutory fiction" ***supports*** that the transferee court need not have a source of power to have made comparable orders (contra. **CA [143]**; **CRB 51**). As a fiction, it is equally capable of operating upon orders the transferor court could, and could not, have made. The statutory fiction avoids any problem of variation between the steps taken in or powers of different States' courts.

55. The Court of Appeal's construction is also inconsistent with the purpose of the provision. "The concept behind the legislation is that, as nearly as is possible, the position be the same as if the proceeding was instituted in the transferee court."[48] The transferee court "in effect, steps into the shoes of the court from which the proceeding has been transferred".[49] The provision ensures that "the benefit of the procedural steps and interlocutory orders already made … will enure … if the proceedings are transferred".[50] That purpose is not "best achieved"[51] if only ***some*** steps taken in the transferor court are deemed to have been taken in the transferee court. The intended purpose is also clear when s 1337P is read in context, as the surrounding provisions are directed to facilitating the smooth transition to the more appropriate court (see ss 1337P(1), 1337N, 1337Q).

56. There is no support in the extrinsic material for the Court of Appeal's construction. In relation to the predecessor to s 1337P(2), the relevant Explanatory Memorandum said that "[w]here a proceeding is transferred from another court, the accepting court must give reciprocal recognition to the steps that had been taken for the purposes of the proceeding in

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47 See *Wigmans v AMP Ltd* [2019] NSWSC 603 at [329] (Ward CJ in Eq) ("Komlotex notes that it validly commenced its proceeding in the Federal Court by concise statement (a procedural step deemed by s 1337P of the *Corporations Act 2001* (Cth) to have taken place in this Court) … ").

48 *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217, 220.

49 *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 3)* [2012] VSC 399, [20].

50 *Lengyel v Rasad* (1989) 99 FLR 130, 133.

51 *Acts Interpretation Act 1901* (Cth), s 15AA.

the transferring court".[52] That is, it was all of "the steps" that must be "recognised", and not merely those steps that the transferee court itself would have had power to take if the proceedings had been instituted in that court.

57. The Court of Appeal's assertion that "significant complications" would arise on KPMG's construction cannot be supported (contra **CA [146]**; **CRB 51**). *First*, the absence of a provision like s 33ZDA(3) displacing the prohibition on contingency fees in s 183 of the *Legal Profession Uniform Law* (NSW) is immaterial. Section 183 does not "outlaw" a contingency fee imposed by order of a court (cf **CA [152]**; **CRB 52**). Even if there were conflict between s 183 and s 1337P(2), the latter would prevail by force of s 109 of the Constitution. *Secondly*, the fact that an undetermined GCO application would "fall on barren ground" if transferred is irrelevant (**CA [148]**; **CRB 51**). The transferor court would have transferred the proceeding in that knowledge. There is nothing "anomalous" about an undetermined GCO application being overtaken by a transfer (contra **CA [149]**; **CRB 51**). *Thirdly*, that the Supreme Court of NSW cannot ***make*** a GCO is irrelevant (**CA [146]**; **CRB 51**). It does not need power to make a GCO; it just needs power to deal with a GCO where one has been made before transfer. *Finally*, KPMG's construction is not inconsistent with s 79 of the *Judiciary Act* (contra **CA [155]**; **CRB 52**). Section 1337P(2) is a specific provision addressing transfer and existing orders, while s 79 is a general provision addressing the court's powers going forward. Moreover, even if they overlapped, s 79 is expressly subject to Commonwealth laws that "otherwise provide".

Question 2(b)

58. Contrary to **CA [152]-[153]** (**CRB 52**) (and the Notice of Contention (**NoC**) **[3]**; **CRB 474)**, s 1337P(2) confers a power on the transferee court to make "any order" modifying the "deemed orders" travelling with the proceeding. The Court of Appeal's contrary view is inconsistent with the principle that the conferral of powers on courts should not be read narrowly.[53] In any event, an order varying a GCO "overrides the effect of the provision" and "prevents the automatic operation of the section", and thus falls within the types of orders the Court of Appeal accepted were within the scope of s 1337P (**CA [152]-[153]**; **CRB 52**).

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[52] Explanatory Memorandum to the Corporations Legislation Amendment Act 1990 (Cth) at [179].

[53] *Owners of Ship Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421.

59. In addition, or in the alternative, there are two other sources of power to vary a GCO. These arguments were advanced below but not addressed by the Court of Appeal. *First*, the Supreme Court of NSW could vary a GCO under s 183 of the *Civil Procedure Act 2005* (NSW). The provision confers power on the Court to make any order that it "thinks appropriate or necessary to ensure that justice is done in the proceeding". In this regard, the Court would be discharging or varying, not ***making***, orders of the kind eschewed in *Brewster*. If the Court does not have power under s 1337P(2), s 183 would perform its "gap-filling" function[54] and empower the Court to deal with all of the orders that were made in the transferred proceeding. *Secondly*, the Supreme Court would retain its inherent power to discharge any extant interlocutory order.[55] The fact that the interlocutory order was made by the Supreme Court of Victoria in no way stymies the inherent power, given the power exists so that the Supreme Court of NSW can "regulate ***its*** own practice and procedures".[56]

Applicants' constitutional arguments

60. The applicants have foreshadowed an argument that s 1337P(2) would be unconstitutional if it were construed as "imposing a mandatory duty on a transferee Court in one State to 'deal with the proceeding as if' the transferee Court had exercised a kind of judicial power not conferred upon it by any State or Federal law, when the transferee Court otherwise has no power to make, vary or implement such an order" (**78B [19]** (**CRB 471**)**; NoC [2]** (**CRB 476**)). KPMG will address this submission more fully in reply, but at this stage makes the following points.

61. To the extent that s 1337P(2) regulates the exercise of federal jurisdiction, it is empowered by s 51(xxxix) of the Constitution.[57] To the extent it is not, it is empowered by s 51(xxxvii): s 1337P(2) was, in terms, in the text of the Corporations Bill 2001 referred by the Parliaments of the States to the Commonwealth. The applicants' submission that s 1337P(2) is beyond power involves the absurd proposition that no Australian Parliament had power to enact it.

62. As for Ch III, it is difficult to see why, starting from the premise that the GCO regime enacted by Victoria does not itself offend Ch III of the Constitution, the recognition of a GCO made

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[54] *Brewster* (2019) 269 CLR 574 at [69]-[70] (Kiefel CJ, Bell and Keane JJ), [145], [147] (Gordon J).

[55] *Torrac Nominees Pty Ltd v Karraby* (2007) 69 NSWLR 699 at [50]. See also *Short v Crawley (No 42)* [2009] NSWSC 1110 at [48]; *President Torney v Victoria Legal Aid* [2010] VSC 631 at [12].

[56] *Wilkshire v The Commonwealth* (1976) 9 ALR 325 at 330 (Muirhead J) (emphasis added).

[57] *Rizeq v Western Australia* (2017) 262 CLR 1 at [21], [59], [88]-[89].

by another State's court in accordance with s 1337P(2), subject to any contrary order, would do so. There is no "enlistment" of the transferee court, which retains the power to discharge (and indeed vary) the order. There is no departure from the processes that characterise the exercise of judicial power for there to be a statutory deeming, subject to any contrary order. In these respects, s 1337P(2) has a direct analogue in provisions of the *Judiciary Act* as made in 1903 concerning removal of proceedings into this Court.[58]

Question 3: The proceedings should be transferred

63. The Court of Appeal held that the GCO was determinative, having found that "putting to one side the GCO" the Supreme Court of NSW is the more appropriate forum (**CA [170]**; **CRB 55**). It follows that if the GCO is irrelevant or neutral, the proceedings should be transferred.

64. The applicants' foreshadowed challenge to the Court of Appeal's finding (**NoC [4]**; **CRB 476**) should be rejected. Indeed, the Court of Appeal's view that NSW was only "just" the more appropriate forum (**CA [170]**; **CRB 55**) and that "the factors do not strongly point in favour of NSW" (**CA [164]**; **CRB 54**) understated the position. The Court identified a number of factors that were "neutral" as between NSW and Victoria (**CA [165]**; **CRB 54**). But none provided a connection between the proceedings ***and Victoria***. It could only be factors connecting the proceeding ***to Victoria*** that could counterbalance the factors the Court accepted were connected to NSW. The error is revealed in the Court's statement that, having regard to various "neutral" factors, "the Supreme Court of Victoria is ***no less*** an appropriate forum for the litigation" (**CA [166]**; **CRB 54**, emphasis added).

NoC paragraph 1: The meaning of "jurisdiction" in s 1337H(2)

65. For completeness, the applicants foreshadow a "threshold" argument that was rejected by the Court of Appeal (**NoC [1]**; **CRB 475**). In summary, the applicants submitted below that the word "jurisdiction" in s 1337H(2) means both authority to decide ***and*** the powers that are available to the court in the exercise of the jurisdiction (**CA [73]**; **CRB 38**). On that basis, they submitted that a court does not have "jurisdiction", and therefore cannot be a court to which proceedings can be transferred under s 1337H(2), unless it has power to deal with a GCO (being a "matter for determination").

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[58] *Judiciary Act 1903* (Cth), ss 41, 44.

66. The Court of Appeal was correct to reject the submission for the reasons it gave (**CA [99]-[101]**; **CRB 44**). Other provisions in Pt 9.6A of the *Corporations Act*, and in particular ss 1337A and 1337B, clearly use the word "jurisdiction" in the sense of "authority to decide". They are not concerned with the conferral of powers on courts. The word "jurisdiction" should be construed consistently in the various provisions in Part 9.6A. The presumption that the word "jurisdiction" has the same meaning in that Part is strong, given the other sections are adjacent, serve the same general purposes and have the same legislative history.[59] In addition, if the applicants' construction were correct, the transfer provisions in the *Corporations Act* could be readily stymied by one State giving its courts unique powers that other State Courts do not have, arrogating to that State any and all matters in which such a power were exercised.

PART VII: ORDERS SOUGHT

67. The reserved questions should be answered as sought by KPMG. The applicants should pay KPMG's costs of the proceedings in this Court, including costs of the removal application. The matter should otherwise be remitted to the Court of Appeal to be dealt with in accordance with the reasons of this Court.

PART VIII: ESTIMATED TIME

68. KPMG estimates that up to 2.25 hours will be required for oral argument, including reply.

Dated: 18 April 2024

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[59] *Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2015) 257 CLR 544 at [27] (French CJ and Kiefel J). Part 9.6A was contained in the Corporations Bill 2001 (Cth). The relevant Explanatory Memorandum said that "Part 9.6A is intended to produce substantially the same outcomes as Part 9 of the *Corporations Act 1989*, entitled 'Jurisdiction and procedure of Courts' and the corresponding provisions of the State Corporations Acts before the decision in *Wakim*" (at [5.34]).

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

ANTHONY BOGAN
First Applicant

MICHAEL THOMAS WALTON
Second Applicant

and

THE ESTATE OF PETER JOHN SMEDLEY (DECEASED)
First Respondent

ANDREW GERARD ROBERTS
Second Respondent

PETER GRAEME NANKERVIS
Third Respondent

JEREMY CHARLES ROY MAYCOCK
Fourth Respondent

KPMG (A FIRM) ABN 51 194 660 183
Fifth Respondent

ANNEXURE TO THE FIFTH RESPONDENT'S SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, KPMG sets out below a list of the constitutional provisions and statutes referred to in its submissions.

No	Description	Version	Provision(s)
1.	*Acts Interpretation Act 1901* (Cth)	Current	s 15AA
2.	*Civil Procedure Act 2005* (NSW)	Current	s 183
3.	*Corporations Act 2001* (Cth)	Current	ss 1337H, 1337J, 1337L, 1337N, 1337P, 1337Q, 1337R
4.	*Judiciary Act 1903* (Cth)	Current	s 79
5.	*Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW)	15 July 2001 to	s 5

		23 November 2005	
6.	*Legal Practitioners Act 1981* (SA)	Current	Sch 3 cl 27
7.	*Legal Profession Act 2006* (ACT)	Current	s 285
8.	*Legal Profession Act 2006* (NT)	Current	s 320
9.	*Legal Profession Act 2007* (Qld)	Current	s 325
10.	*Legal Profession Act 2007* (Tas)	Current	s 309
11.	*Legal Profession Uniform Law* (WA)	Current	s 183
12.	*Legal Profession Uniform Law* (NSW)	Current	s 183
13.	*Legal Profession Uniform Law* (Vic)	Current	s 183
14.	*Supreme Court Act 1986* (Vic)	Version 109 (effective 29 March 2022)	s 33ZDA