HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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

FIRST TO FOURTH RESPONDENTS' SUBMISSIONS

Part I: Certification

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

Part II: Statement of Issues

2. The issues presented by the cause removed are as stated by the fifth respondent (**KPMG**).

Part III: Notice of Constitutional Matter

3. The first to fourth respondents (**Director Defendants**) do not consider that any further notice is required by s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Factual Background

4. The material facts are as set out by KPMG. As outlined there, the Supreme Court of Victoria (Nichols J) reserved three questions for the consideration of the Court of Appeal under s 17B(2) of the *Supreme Court Act 1986* (Vic): *Bogan v The Estate of Peter John Smedley (Deceased) (No 3)* [2023] VSC 103 (**CRB 6–19**). The Court of Appeal (Ferguson CJ, Niall and Macaulay JJA) indicated how they would answer the questions

but have not made orders reflecting their reasons: *Bogan v The Estate of Peter John Smedley (Deceased)* [2023] VSCA 256 (**CRB 21–59**) (**CA**).

Part V: Argument

5. The questions reserved should be answered (1) "no", (2)(a) "yes", (2)(b) "yes", and (3) "yes" for the reasons given by KPMG, and as to (1) for the further reasons below. These further reasons focus on four propositions. *First*, while this Court now has the benefit of the reasons of the Court of Appeal, the questions reserved are to be reconsidered *de novo* (see [6]–[7] below). *Secondly*, although contingency fees may become payable in group proceedings under a group costs order (**GCO**) in Victoria, they are otherwise generally perceived as contrary to the interests of justice throughout Australia (see [8]–[11] below). *Thirdly*, assessment of the "more appropriate" forum in a federal context cannot take account of advantages to one side in a court of one State which are generally perceived as contrary to the interests of justice in other States (see [12]–[15] below). *Fourthly*, that is equally so in a matter in federal jurisdiction (see [16]–[18] below).

Reconsideration de novo

6. Since the Court of Appeal indicated answers to the three questions reserved without making orders, the "whole of the cause pending" in that court has been removed into this Court by order under s 40(2) of the *Judiciary Act 1903* (Cth) (**CRB 465**). The order for removal had the effect of simultaneously divesting the State court of federal jurisdiction and enlivening this Court's jurisdiction with respect to that cause,[1] which consists of the three questions reserved. The cause so removed comes to this Court "for determination in its original jurisdiction".[2] It does not involve the exercise of any appellate jurisdiction, which is concerned with the correction of "error".[3] Rather, the Court is to consider the questions for itself, albeit with the benefit of the Court of Appeal's reasons, and make any directions it thinks fit binding the court to which the matter is remitted under ss 41, 42 and 44 of the *Judiciary Act*.

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1 *Re Young* (2020) 94 ALJR 448 at [18] per Gageler J.

2 *Attorney-General (NSW) v Commonwealth Savings Bank of Australia* (1986) 160 CLR 315 at 324 per Mason, Wilson, Brennan, Deane and Dawson JJ.

3 See *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 674 at [107]–[108] per Gleeson J.

7. Thus, in *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232, all members of this Court proceeded on the basis that error was not required where a cause pending was removed after the court below answered questions without formal orders. The removal procedure, which is "designed to ensure that constitutional questions and other questions of public importance are determined by this Court", enables the Court to "reconsider" questions decided below.[4] What was sought in that case was a reconsideration *de novo* of the answers given by the Full Federal Court, as to which Brennan J stated that it was "open to this Court to address the same questions and to answer them for the purposes of the proceedings in whatever manner this Court determines to be correct".[5] "[N]either this Court nor the parties" are "bound" by answers given by the court below.[6] This Court's "directions" will simply "prevail" if they are "inconsistent with the answers given" by the Court of Appeal.[7]

Legislative policy in issue

8. The propriety of success fees for lawyers has long been a topic of debate in Australia and overseas. In *Awwad v Geraghty & Co* [2001] QB 570, Schiemann LJ (with whom Lord Bingham of Cornhill CJ agreed) observed at 575–576:

> The background to the debate has been, on the one side, a historically widespread perception that if the lawyer has too much at stake in the success of the litigation then he may yield to the temptation to prolong litigation which could have settled or to a temptation to act improperly in order to secure success, and on the other side, a conviction that it aids access to justice if clients can litigate without the fear of having to pay both sides' costs if they lose.

9. Despite any benefits in terms of access to justice, Australian courts and legislatures have generally treated contingency fees based on the sum recovered as contrary to the interests of justice. This position was traditionally expressed in connection with the law against champerty.[8] While some legislatures have abolished the crime and/or tort of champerty,[9]

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4 *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 247 per Mason CJ.

5 Ibid at 256, 269.

6 Ibid at 280 per Deane, Gaudron and McHugh JJ.

7 Ibid at 303 per Dawson J (with whom Toohey J generally agreed).

8 *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 203 per Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ. See also *Wild v Simpson* [1919] 2 KB 544 at 562–563 per Atkin LJ.

9 *Civil Law (Wrongs) Act 2002* (ACT), s 221 (tort); *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW), ss 3, 4, transferred to *Civil Liability Act 2002* (NSW), Sch 2 cl 2 (tort) and *Crimes Act 1900* (NSW), Sch 3 cl 5; *Statutes Amendment and Repeal (Public Offences) Act 1992* (SA), Sch 11 cl 1(3) (crime); *Civil Liability Act 2002* (Tas), s 28E(bb) (tort); *Abolition of Obsolete Offences Act 1969* (Vic), ss 2, 4, now in *Wrongs Act 1958* (Vic), s 32 (tort) and *Crimes Act 1958* (Vic), s 322A (crime); *Civil Procedure (Representative Proceedings) Act 2022* (WA), s 36 (tort). As to Queensland, see *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd* (1997) 72 FCR 261 at 268 per Lockhart, Cooper and Kiefel JJ.

and conditional costs agreements are now allowed but regulated,[10] *all* States and Territories have retained an express prohibition on contingency fees.[11] In New South Wales, this was justified by reference to "the temptation to deceive the courts and pervert the legal system, the incentive to increase spurious litigation, and potential conflicts between lawyer and client".[12] More broadly, cases where a lawyer has "some direct pecuniary interest in the outcome" have been considered the "most obvious" cases for restraining the lawyer from acting so as to protect the integrity of the court process.[13] This reflects a view—consistent with professional rules[14]—that the adversarial system requires a "purity of interest in the adversaries" that is "absent" where lawyers have such an interest.[15]

10. The availability of a GCO in Victoria under s 33ZDA of the *Supreme Court Act* involves a departure from this position by *one* Australian polity limited to *certain* proceedings. Acknowledging the debate over contingency fees as a "national issue" and the reasons for the existing prohibition, the Victorian Law Reform Commission recommended in 2018 that the Attorney-General of Victoria propose national reform to permit such fees, subject to exceptions and regulation, and that the Supreme Court of Victoria be empowered to order a common fund for a contingent "litigation services fee".[16] While no national or general reform to contingency fees has followed over the last six years, the Supreme Court was empowered in 2020 to make a GCO in any "*group proceeding*" where "satisfied that it is appropriate or necessary to ensure that justice is done".[17] Hence, the

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[10] *Legal Profession Act 2006* (ACT), s 283; *Legal Profession Uniform Law* (NSW, Vic and WA) s 181; *Legal Profession Act 2006* (NT), s 318; *Legal Profession Act 2007* (Qld), s 323; *Legal Practitioners Act 1981* (SA), Sch 3 cl 25; *Legal Profession Act 2007* (Tas), s 307.

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

[12] New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 28 October 1993 at 4629 (the Hon Dr Kirkby speaking in support of the *Legal Profession Reform Bill (No 2)* and *Maintenance and Champerty Abolition Bill (No 2)*); see also 16 September 1993 at 3277, 3279 (Second Reading Speech for *Legal Profession Reform Bill* and *Maintenance and Champerty Abolition Bill*).

[13] *Bowen v Stott* [2004] WASC 94 at [52]–[53] per Hasluck J. See also, eg, *Mitchell v Burrell* [2008] NSWSC 772 at [20] per Brereton J; *Eden Energy Ltd v Drivetrain USA Inc* (2012) 90 ACSR 191 at [116(a)–(b)] per Corboy J; *Bolitho v Banksia Securities Ltd [No 4]* [2014] VSC 582 at [50] per Ferguson JA.

[14] See Wheelahan, "'Not Just a Business': The Debate Around Contingency Fees" (2016) 137 *Precedent* 46 at 48.

[15] *Clairs Keeley (a firm) v Treacy* (2003) 28 WAR 139 at [170] per Templeman J (Parker, Wheeler and Pullin JJ agreeing), where the firm had agreed for an uplifted portion of fees to be payable from a funder's commission.

[16] Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings: Report* (2018) especially at [1.56], [3.3], [3.40], [3.47], [3.50]–[3.65], [3.66]–[3.76], [3.94]–[3.98].

[17] *Justice Legislation Miscellaneous Amendments Act 2020* (Vic), s 5, inserting s 33ZDA.

policy currently reflected in Victorian statute law is one that still regards contingency fees as generally contrary to the interests of justice overall, except in *some* proceedings conducted by representative plaintiffs.

11. As well as qualifying the prohibition on contingency fees for lawyers, this policy departs from the approach to class actions in other Australian jurisdictions, including New South Wales. This Court has held that provisions conferring general powers to "make any order that the Court thinks appropriate or necessary to ensure that justice is done" in group proceedings, such as s 183 of the *Civil Procedure Act 2005* (NSW), do not include power to make a common fund order in favour of a litigation funder.[18] That rested on a view that, "[i]f a representative proceeding is uneconomic to litigate, the answer provided by the statute is for the proceeding to cease to be a representative proceeding".[19] The process of "attempting to fix, even provisionally, a rate of remuneration at the outset of the proceeding" was also described as "a speculative exercise".[20] And investing "the court charged with responsibility for the determination of the merits of the claims" with power to make "arrangements to allow the proceeding to be pursued" was said to be "a large step in terms of policy".[21] The New South Wales Parliament has not taken that step (and nor has any other State Parliament, other than Victoria's).

Federal context of transfer provisions

12. By its terms, s 1337H of the *Corporations Act 2001* (Cth) directs attention to whether it is "more appropriate" for a proceeding or application to be determined by another court having regard to "the interests of justice", not the legislative policy of any particular State. Transfer provisions of this kind were enacted in the context of disquiet about principles of private international law treating other States in the Australian federation as "foreign countries" and attaching weight to the law of the forum.[22] An appeal to such principles was "decisively rejected"[23] in an early case applying s 5(2) of the *Jurisdiction of Courts*

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[18] *BMW Australia Ltd v Brewster* (2019) 269 CLR 574.

[19] Ibid at [139] per Gordon J; see also at [52], [63], [65] per Kiefel CJ, Bell and Keane JJ, [126] per Nettle J.

[20] Ibid at [67] per Kiefel CJ, Bell and Keane JJ.

[21] Ibid at [83] per Kiefel CJ, Bell and Keane JJ.

[22] See, eg, *Borg Warner (Australia) Ltd v Zupan* [1982] VR 437 at 460–461 per Marks J; *Beecham (Australia) Pty Ltd v Roque Pty Ltd* (1987) 11 NSWLR 1 at 3 per Kirby P; *Breavington v Godleman* (1988) 169 CLR 41 at 124–125 per Deane J.

[23] Griffith, Rose and Gageler, "Further Aspects of the Cross-vesting Scheme" (1988) 62 *Australian Law Journal* 1016 at 1019.

(Cross-vesting) Act 1987 (NSW).[24] Following that decision, the precursor to s 1337H[25] was enacted as part of a scheme to "bring together the eight State and Territory Supreme Courts and the Federal Court into a common jurisdictional framework".[26] Within that framework, a court is not permitted or required to prefer the policy of the State where the proceedings were instituted, or to evaluate the competing policies of different States.

13. The need for policy neutrality in the application of transfer provisions was recognised by all members of this Court in *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400. Gleeson CJ, McHugh and Heydon JJ stated at [26] that there was "no warrant" for regarding the New South Wales law at issue as "a more just dispensation" than the South Australian law. Gummow J (with whom Hayne J generally agreed) stated at [80] that to "fix upon" advantages conferred upon one party by the former law "without any consideration of the operation" of the latter was to give effect to the "false notion" of that party's "venue privilege". Kirby J stated at [171] that the transfer provision there was to be "read to achieve its purpose as one harmonious with the federal Constitution"[27] and that the loss of substantive benefits under the law of a State or Territory was "not a reason to withhold … the neutral application of the policy" of the transfer provision. And Callinan J stated at [241] that it was "one thing" for New South Wales to establish "a very special and largely unique regime" and "altogether a different matter to seek to impose it upon other States".

14. A court engaged in neutrally assessing the "more appropriate" forum cannot have regard to the availability of "a particular cost model" for class actions which is "seen as facilitating access to justice" in one State, but seen as contrary to the interests of justice overall in other States (cf **CA [113]**). The point is brought into sharp relief by considering the position of a group proceeding commenced in New South Wales which a funder becomes unwilling to continue supporting in the absence of a GCO. Faced with an application to transfer the proceeding to Victoria, the Supreme Court of New South Wales could not be expected to prefer the policy of the Victoria legislature allowing that "costs

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[24] *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711, especially at 713–714 per Street CJ, 715–716 per Kirby P, 723–726 per Rogers A-JA.

[25] *Corporations Act 1989* (Cth), s 53.

[26] Australia, House of Representatives, Corporations Legislation Amendment Bill 1990, *Explanatory Memorandum* at [163].

[27] By which his Honour meant that State courts should exercise their powers, vis-à-vis each other, in a way that fulfils the implication of the Constitution that the national judiciary is integrated and unified under this Court: at [151]-[152], [157], [160]. See also Callinan J at [200] to similar effect.

model" over the policy against contingency fees in New South Wales. As the plaintiffs' choice of venue is not privileged in applying the transfer provisions, the Supreme Court of Victoria equally cannot prefer the policy of its State in proceedings commenced there. As s 1337H is a federal statute, its meaning and the outcome of any application made under it should be the same, regardless of which court in the federation determines it.

15. From the point of view of where the interests of justice lie, State courts must treat the laws of one jurisdiction as being as good as those of another.[28] Unique legislative provisions of one State permitting conduct considered contrary to public policy in others cannot be factored into the consideration of what is in the interests of justice. Doing so necessarily involves making an impermissible choice, preferencing the law of the enacting State.

Matters in federal jurisdiction

16. By reason of s 1337H(1)(a) read with s 1337B(3) of the *Corporations Act*, the transfer provision in issue here only applies in matters in federal jurisdiction. In all such matters, laws regulating the exercise of jurisdiction by a State court—such as the law conferring power to make a GCO in Victoria—can only be applicable under s 79(1) of the *Judiciary Act*.[29] That provision recognises that the procedures applying in the administration of federal law may differ depending on the State in which federal jurisdiction is being exercised.[30] But it says nothing about whether it is "more appropriate" for a proceeding or application to be determined in a court of one State or another.

17. In that assessment, the need for policy neutrality is no less important where the matter is in federal jurisdiction (cf **CA [125]**). In the context of an appeal from a matter in federal jurisdiction, this Court has previously questioned how the courts of one State or Territory could "consider whether a rule enacted by the statute of another integer of the federation should be given effect" or "say of the laws of another State or Territory in the same federal nation that those laws violate fundamental principles of justice or the like".[31] And, in applying its power to remit matters in federal jurisdiction to State courts, this

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[28] *Opes Prime Stockbroking Ltd (in liq) v Stevens* [2014] NSWSC 659 at [25] per Ball J.

[29] *Rizeq v Western Australia* (2017) 262 CLR 1.

[30] See *R v Gee* (2003) 212 CLR 230 at [63]–[64] per McHugh and Gummow JJ as to s 68(2) of the *Judiciary Act*.

[31] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [91] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ. See also *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at [59] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; Gageler, "Private Intra-National Law: Choice or Conflict, Common Law or Constitution" (2003) 23 *Australian Bar Review* 184 at 184–185.

Court has sought to adopt neutral principles where laws of the competing jurisdictions materially differ.[32]

18. A neutral application of s 1337H of the *Corporations Act* requires transfer of this proceeding to the Supreme Court of New South Wales, for the reasons given above and by KPMG.

Part VI: Notice of Contention or Cross-Appeal

19. The Director Defendants have not filed a notice of contention or notice of cross-appeal.

Part VII: Estimated Time

20. The Director Defendants estimate that up to 15 minutes will be required for oral argument.

Dated: 24 April 2024

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[32] *Pozniak v Smith* (1982) 151 CLR 38 at 47 per Gibbs CJ, Wilson and Brennan JJ, 51 per Mason J, quoted in *Schultz* at [100] per Gummow J.

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ANNEXURE TO THE FIRST TO FOURTH RESPONDENTS' SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Director Defendants set out below a list of the constitutional provisions and statutes referred to in their submissions.

No	Description	Version	Provision(s)
1.	*Abolition of Obsolete Offences Act 1969* (Vic)	As at 2 December 1969	ss 2, 4
2.	*Civil Law (Wrongs) Act 2002* (ACT)	Current	s 221
3.	*Civil Liability Act 2002* (NSW)	Current	Sch 2 cl 2
4.	*Civil Liability Act 2002* (Tas)	Current	s 28E(bb)
5.	*Civil Procedure Act 2005* (NSW)	Current	s 183
6.	*Civil Procedure (Representative Proceedings) Act 2022* (WA)	Current	s 36
7.	*Corporations Act 1989* (Cth)	As at 18 December 1990	s 53
8.	*Corporations Act 2001* (Cth)	Current	ss 1337B(3), 1337H

9.	*Crimes Act 1958* (Vic)	Current	s 322A
10.	*Judiciary Act 1903* (Cth)	Current	ss 40(2), 41, 42, 44, 79(1)
11.	*Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW)	Current	s 5(2)
12.	*Justice Legislation Miscellaneous Amendments Act 2020* (Vic)	As at 31 June 2020	s 5
13.	*Legal Practitioners Act 1981* (SA)	Current	Sch 3 cll 25, 27(1)
14.	*Legal Profession Act 2006* (ACT)	Current	ss 283, 285(1)
15.	*Legal Profession Act 2006* (NT)	Current	ss 318, 320(1)
16.	*Legal Profession Act 2007* (Qld)	Current	ss 323, 325(1)
17.	*Legal Profession Act 2007* (Tas)	Current	ss 307, 309(1)
18.	*Legal Profession Uniform Law* (NSW)	Current	ss 181, 183(1)
19.	*Legal Profession Uniform Law* (Vic)	Current	ss 181, 183(1)
20.	*Legal Profession Uniform Law* (WA)	Current	ss 181, 183(1)
21.	*Maintenance, Champerty and Barratry Abolition Act 1993* (NSW)	As at 12 May 1995	ss 3, 4
22.	*Statutes Amendment and Repeal (Public Offences) Act 1992* (SA)	Current	Sch 11 cl 1(3)
23.	*Supreme Court Act 1986* (Vic)	Current	s 33ZDA
24.	*Wrongs Act 1958* (Vic)	Current	s 32