HIGH COURT OF AUSTRALIA

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### Details of Filing

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| File Number: | M21/2024 |
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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

# OUTLINE OF ORAL SUBMISSIONS OF THE FIFTH RESPONDENT

## PART I: CERTIFICATION

This outline of oral submissions is in a form suitable for publication on the internet.

## PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

### Connection of proceedings to New South Wales

1. The connection between the proceedings and New South Wales is overwhelming (**KPMG [23]-[31]** and **CRB 68-82**) (cf **CA [170]; CRB 55**). Relevant provisions to notice are: s 1337A, s 1337H, s 1337L, s 1337N, s 1337P(2), s 1337Q and s 1337R(a).

2. The reason the proceedings were commenced in Victoria was to take advantage of the GCO regime available in Victoria and nowhere else (**ASOF [39], [82]-[83], [97], [98]; CRB 73, 77, 79**). The regime was a "magnet", leading to an action being brought in Victoria that was more appropriately litigated in New South Wales (**CA [6]; CRB 24**).

### Question 1: Making of a GCO not relevant

3. When considering a transfer application under s 1337H(2), the fact that a GCO has been made, and the prospect that it might not continue if the proceeding is transferred, are irrelevant: *Schultz* (2004) 221 CLR 400 at [7]-[27], [100], [217], [258] (**JBA Vol 4, Tab 44**); *Spiliada* [1987] AC 460 at 482-484 (**JBA Vol 10, Tab 104**).

4. What was said in *Schultz* applies equally to s 1337H(2). The transfer regime in the *Corporations Act* is modelled on the Cross-Vesting Scheme, and deals with the same issue: *Acton Engineering* (1991) 31 FCR 1 at 16-17 (**JBA Vol 10, Tab 91**).

5. The decision of the Court of Appeal is wrong:

   (1) To keep the proceeding in Victoria, because of Victoria's GCO regime, involves preferring Victoria's highly contestable policy choice — as to whether to permit class action solicitors to take a percentage of a judgment or settlement — over that of New South Wales (cf **CA [53], [113]; CRB 32, 46** and **A Reply [2]-[7]**).

   (2) Assuming transfer leads to the loss of the GCO and the prospect that the proceeding ends, that would be the loss of an advantage conferred on the applicants by reason of their having instituted in Victoria, which operates correspondingly to the disadvantage of the respondents (contra **CA [110]; CRB 45** and **AS [12]**).

(3) Far from being "ruthless" in ensuring litigants do not engage in forum shopping, the Court gave weight to the applicant's choice to commence in Victoria (**CA [124], [125]; CRB 44, 48**); EM to the Corporations Legislation Amendment Bill 1990 (Cth) at 4363 [173] (**JBA Vol 12, Tab 118**).

(4) The applicants are not assisted by the fact that, when determining the GCO application, Dixon J found that it was necessary to do justice in the proceeding within the meaning of s 33ZDA (**CRB 344, 346, 377, 381 at [7], [12], [92], [105(e)]**) (**KPMG [46]-[47]**).

(5) The difficulties in this case should have been avoided by determining the transfer application ***before*** the GCO application (**CA [114]; CRB 46**). To avoid subversion of the policy of the transfer provisions, the GCO which ought never to have been made should be put aside (contra **CA [127]-[128]; CRB 48**).

6. Section 1337H(2) is relevantly indistinguishable from s 5 of the *Cross-vesting Act*:

(1) That s 1337H(2) uses the words "may" transfer is not a relevant difference.

(2) The purpose of s 1337H(2) is fundamentally the same: see EM to the Corporations Legislation Amendment Bill 1991 (Cth) at 4388 (**JBA Vol 12, Tab 119**); recitals to the *Cross-vesting Act* (Cth) (**JBA Vol 2, Tab 17**).

7. Contrary to the notice of contention, the word "jurisdiction" in s 1337H means "authority to decide", and does not include the powers of the relevant court (**CA [73]-[75], [99]-[101]; CRB 38, 44**) (**KPMG [66]**).

**Question 2(a): GCO will remain in force**

8. Irrespective of the answer to Question 1, the fact that a GCO has been made is immaterial, because s 1337P(2) permits the GCO which has been made to "travel" with the proceeding to NSW. See s 1337P(2) (**JBA Vol 1 Tab 3**).

9. The Court of Appeal was wrong to read a qualification into s 1337P(2) as if the provision concluded "provided that the transferee court has the power to take those steps or similar steps":

(1) It reads a limitation into the words of s 1337P(2) which is not there.

(2) It is not a limitation supported by any aspect of the terms of s 1337P(2).

(3) The evident purpose of s 1337P is to ensure that, if there is a transfer, previously taken procedural steps will enure for the benefit of the parties in the transferee court. That purpose is supported by the context: see ss 1337N, 1337Q.

(4) There is no support in the extrinsic material for the Court of Appeal's construction: see *Corporations Act 1989* (Cth), s 54(2) (**JBA Vol 2, Tab 10**); EM to the 1990 Bill at 4366 [179] (**JBA Vol 12, Tab 118**).

(5) The suggestion of complications by the Court of Appeal if a plain approach is adopted is overstated (**CA [146]-[148], [155]; CRB 51-52**).

10. Contrary to the notice of contention, there is no constitutional difficulty if s 1337P(2) is read on its terms (**KPMG [60]-[62]; Cth [40]-[58]**).

**Question 2(b): Power to vary or revoke the GCO**

11. There are three sources of power to vary or revoke a GCO:

(1) Section 1337P(2): see *Australian Building and Construction Commissioner v CFMEU* (2018) 262 CLR 157 at [40], [52], [114]-[115], [118] (**KPMG [58]**).

(2) Section 183 of the *Civil Procedure Act* (**JBA Vol 2, Tab 18**) (**KPMG [59]; KPMG reply [25]**); *Brewster* (2019) 269 CLR 572 at [69]-[70], [145], [147] (**JBA Vol 4, Tab 45**).

(3) The power to revisit previously made interlocutory orders (**KPMG [59]; KPMG reply [25]**).

**Question 3: Proceedings should be transferred**

12. Given the preponderance of connecting factors to NSW, if the GCO is irrelevant or neutral, the proceedings should be transferred (**KPMG [63]-[64]; KPMG reply [26]**).

Dated: 12 November 2024

Perry Herzfeld Julia Roy Jackson Wherrett