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

CAUSE REMOVED FROM THE COURT OF APPEAL

OF THE SUPREME COURT OF VICTORIA

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

APPLICANTS' SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES

2. Where a Court is deciding whether or not to transfer the proceedings to a different Court under s 1337H(2) of the *Corporations Act 2001* (Cth) (**Corporations Act**), is it permissible for the Court to take into account a Group Costs Order (**GCO**) made under s 33ZDA of the *Supreme Court Act 1986* (Vic) (**VSC Act**) and the impact of the transfer upon access to justice?

3. What is the proper construction and operation of s 1337P(2) of Corporations Act in circumstances where the transferor court has made an order which the transferee court lacks power to make, and lacks any domestic apparatus to administer?

PART III: NOTICE OF CONSTITUTIONAL MATTER

4. By notice filed on 4 April 2024, the Applicants have given sufficient notice under s 78B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).

PART IV: FACTS

5. ***Facts***. The material facts are set out in the Amended Statement of Facts (**ASOF**) agreed by the parties: see Cause Removed Book (**CRB**), 68-463 and not KPMG's procedural chronology (and internet searches); cf KS[6]-[14]; DS[4].

6. For present purposes, only four points need be emphasised. ***First,*** there should be no doubt that the claims in this proceeding are bona fide and properly brought. None of the Defendants have sought to strike out the Statement of Claim.[1] KPMG's gratuitous aspersions that the proceedings are of "limited" or "speculative merit" (KS [39], [41], [50]) should be ignored. The agreed facts are that the proceeding is "*complex, difficult and likely to consume time and resources*" and attended by risks including as to the "*recovery of any judgment that might be won*" (ASOF [120]). For obvious reasons, recoverability risks will adversely impact funding availability – this does not undermine the merit of the proceeding.

7. ***Second***, there is no proper evidentiary basis to find that the Applicants commenced this proceeding in the Victorian Supreme Court (**VSC**) *only* to obtain a GCO under

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[1] While the summons KPMG filed seeking transfer included an application for strike out, the "heart" of that application was an application for particulars (Transcript, VSC, 21 April 2021, 11.17-25 (Applicants Book of Further Materials (**AFM**), 205).

s 33ZDA of the VSC Act: cf KS [8], [31], [42], [45] and [48]. This claim was advanced to both the VSC[2] and the Victorian Court of Appeal (**VCA**) (J[161]) and not accepted by either court.

8. ***Third***, it should be noted that this Court initially refused a removal application filed by KPMG on 10 May 2022 (ASOF [105], [114]). An important (and intended – see CRB 454) advantage of doing so is that the parties and the Court now have the benefit of the VCA's careful reasons, delivered after full argument on the same questions. In accordance with authority,[3] removal to this Court was sought for the express purpose of challenging the correctness of the VCA's conclusions (KS [14]). If the Director Defendants' submission that this is a hearing *de novo* (DS[6]-[7]) is meant as an invitation to disregard those reasons, it should be rejected. This Court should not depart from the VCA's answers unless persuaded of error.

9. ***Fourth***, there is no evidentiary basis to support the accuracy or relevance of statistics derived by KPMG from a law firm publication and an unpublished "report": cf KS [7]. The logic of the submission is also flawed: correlation does not establish causation.

10. ***Jurisdictional context of the National Corporations Legislation.*** The Applicants sue the Director Defendants and KPMG, pursuant to the federal causes of action in s 1041I of the Corporations Act and s 12GF of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), for loss or damage suffered by the Applicants and Group Members from conduct alleged to contravene the norms concerning misleading or deceptive conduct and false or misleading statements in ss 1041H and 1041E of the Corporations Act and s 12DA(1) of the ASIC Act.[4]

11. The Corporations Act is "*single federal law of national application*".[5] Along with the ASIC Act, it establishes uniform norms of conduct throughout Australia (J[81]). Pursuant to s 76(ii) and s 77(i) and (iii) of the Constitution, Part 9.6A, Div. 1, Subdivision B of the Corporations Act invests federal jurisdiction in the Federal Court of Australia (**FCA**) and each State or Territory Supreme Court with respect to civil matters arising under the Corporations legislation.[6] Subdivision B requires these

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2 *Bogan v Smedley (Deceased)* [2022] VSC 201 (Dixon J) (CRB 341-385) (**GCO Judgment**), [104].

3 See *O'Toole v Charles David Proprietary Limited* (1991) 171 CLR 232, 253 (Mason CJ), 281 (Deane, Gaudron and McHugh JJ), 309 (Dawson J), 309 (Toohey J) and 310 (Mason CJ).

4 Statement of Claim (CRB 201-202). The Applicants also sue pursuant to s 236 of the Australian Consumer Law for misleading or deceptive conduct in contravention of s 18 of the ACL.

5 Explanatory Memorandum (**EM**) to the *Corporations Bill 2001* (Cth), [4.8].

6 See s 1337A(1)(a) and s 1337B(1) and (2) of the Corporations Act. Jurisdiction is also conferred on other courts by ss 1337C and 1337E of the Corporations Act. As Division 1 of Part 9.6A does not limit the operation of s 39(2) of the Judiciary Act, the specific conferral of jurisdiction on State

Courts to act in aid of each other (s 1337G). This a distinctly national jurisdictional context. Jurisdiction in civil matters arising under the Corporations legislation "*is concurrent and no Court is given primacy*".[7] As was observed of the embryonic version of this arrangement under the Corporations Law, "*although there is not one court but a number of courts*", the appropriate analogy is to a single court "*having jurisdiction throughout Australia*".[8]

12. In relation to the law governing federal jurisdiction, by providing in s 1337A(3) that the Division does not limit the operation of the Judiciary Act, Part 9.6A "*recognises the concurrent operation of s 79 of the Judiciary Act*.[9] Part 9.6A thereby embraces procedural heterogeneity within the different courts exercising federal jurisdiction in civil matters arising under the Corporations legislation. As this Court has observed, the Commonwealth Parliament's legislative choice[10] was not to impose "*a universal, federal procedural regime*";[11] "*[r]ather, s 79 of the Judiciary Act is left to operate according to its terms in the particular State or Territory concerned*".[12]

13. ***Section 33ZDA as a Surrogate Federal Law:*** Section 33ZDA of the VSC Act permits the granting of a GCO, as a percentage of the award (determined by the Court and "*set out in the order*"), to the law practice representing the plaintiff and group members (s 33ZDA(1)(a)). It permits solicitors to charge fees on a wholly contingent basis in representative proceedings. It affords the Applicants and group members access to justice (ie to have their claim resolved on the merits), and caps costs at a set share of any resolution sum.[13] As a law regulating the exercise of federal jurisdiction,[14] s 33ZDA is picked up and applied in Victoria by s 79 of the Judiciary Act (J[84]).

14. Section 33ZDA of the VSC Act was "*an important access to justice reform*".[15] It exemplifies the "*fresh thinking about representative or 'grouped' proceedings*", which

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Supreme Courts is in addition to the general federal jurisdiction conferred on State Courts by s 39(2): *Gordon v Tolcher* (2006) 231 CLR 334 (***Gordon***), [29].

7 *Sihota v Pacific Sands Motel Pty Ltd* (2003) 56 NSWLR 721, [16] (Austin J). See also *Acton Engineering Pty Limited v Campbell* (1991) 31 FCR 1 (***Acton***), 4 (Davies J) and 17 (Lockhart J).

8 *Acton*, 17 (Lockhart J).

9 *Gordon*, [29] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

10 This being federal jurisdiction, the Commonwealth Parliament "*alone*" has power to regulate the exercise of it: *Rizeq v Western Australia* (2017) 262 CLR 1 (***Rizeq***), [59] (Bell, Gageler, Keane, Nettle and Gordon JJ).

11 *Grant Samuel Corporate Finance Pty Ltd v Fletcher* (2015) 254 CLR 477, [7] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ). See also *Gordon*, [32] and [40].

12 *Gordon*, [40].

13 See also the benefits for group members set out at [105](l) of the GCO Judgment (CRB 382-383).

14 See eg *Masson v Parsons* (2019) 266 CLR 554 (***Masson***), [38] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); cf *Masson*, [60]-[68] (Edelman J); *Rizeq*, [103].

15 Second Reading of the *Justice Legislation Miscellaneous Amendments Bill 2019* (Vic).

has been stimulated by the "*importance of access to justice, as a fundamental human right which ought to be readily available to all*".[16] Section 33ZDA modifies the long-held common law precept,[17] now reflected in s 183 of the *Legal Profession Uniform Law*, that lawyers (as fiduciaries and officers of the court) should not be placed in the position of conflict that may arise if they were permitted to bargain for or otherwise share in the proceeds of proceedings: J[3]. But access to justice through a GCO is balanced conception, sensitive to the legitimate interests of defendants. In return for the contingency fee, the law practice must also assume the risk of adverse costs in the proceedings (s 33ZDA(2)(a)) and give any Court ordered security for costs (s 33ZDA(2)(b)). The defendant is thereby protected for its costs if ultimately successful, whilst the fiduciary performance of the plaintiff's solicitors otherwise remains under express statutory control: s 33ZDA(4).

15. An essential and protective aspect of s 33ZDA is the Court's power under s 33ZDA(3) to amend a GCO (J[145]), including by amending any percentage ordered under s 33ZDA(1).[18] It enables the Court to review, including at judgment or settlement, the percentage fixed at an earlier time "*to ensure that the percentage ... remains appropriate*".[19] It is an "*important*" power because changes during the life of the litigation may affect "*the proper consideration of where the interests of justice vis-à-vis the plaintiff, group members and the law practice properly lie*".[20]

16. A GCO regulates the relationship between the plaintiffs, their law practice and group members and does not change the basis on which the issues between the parties will be determined: J[119], [51].[21] A GCO has no juridical impact on defendants: it does not change their rights or obligations in any way.[22]

17. ***A Stalking Horse:*** KPMG's submission that the GCO is "not in jeopardy" because it will "travel" (KS [32]) is a purely rhetorical posture. There is no doubt that KPMG's real interest is to abolish the GCO, thereby denying to the Applicants the access to justice which the GCO affords to them in the Victoria. This is apparent: ***first,*** because KPMG and the Director Defendants have declined to offer any undertaking that they

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16 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, [145] (Kirby J) and *Thai Trading Co v Taylor* [1998] QB 781, 786 (Millett LJ).

17 See *Clyne v NSW Bar Association* (1960) 104 CLR 186, 203.

18 Contrary to KS [6], under a GCO, a plaintiff's lawyer does not "receive a pre-determined percentage of any judgment or settlement".

19 *Gehrke v Noumi Limited* [2022] VSC 672, [53](e) (Nichols J).

20 See GCO Judgment, [12](k) (CRB 349).

21 See also *Fox v Westpac* [2021] VSC 573, [15] (Nichols J).

22 It "*involves the defendant*" (J[52]) only by reason of the *positive* impact of s 33ZDA(2): [14] above.

will not seek to discharge or vary the GCO after any transfer;[23] ***second,*** from KPMG's oral submission to the VCA that it is "*quite possible that a relevant consideration in deciding whether to revoke the [GCO] would be that [NSW] doesn't have an equivalent regime*";[24] and ***third***, from KPMG's strident complaints (eg KS[41]) that it is only the GCO which "forces the respondents to litigate". The Defendants' real issue is not (per se) with litigating in Victoria - indeed, there is "*little to distinguish between Victoria and NSW*" (J[167]). Instead, their real issue is with the existence of the GCO. In the absence of a GCO, the agreed facts establish this proceeding would in all likelihood not be able to be prosecuted: see ASOF [120]-[125].[25] Bringing the proceeding to an end is the *schwerpunkt* of the transfer application.

PARTS V & VI: ARGUMENT

Question 1 – Relevance of the GCO

18. Question 1 is a question of statutory construction, as to what is "relevant" (or irrelevant) to the exercise of the discretion under s 1337H(2) of the Corporations Act. It is therefore strange that KPMG does not attempt an orthodox textual or contextual defence of its submission that a GCO is irrelevant under s 1337H(2). Instead, the submissions of KPMG and the Directors are advanced on the basis of an *a priori* assimilation of s 1337H(2) with s 5 of the Jurisdiction of Courts (Cross-vesting) Acts passed by the Commonwealth, the States and the Northern Territory in 1987 and the ACT in 1993 (**Cross-vesting Acts**).[26]

19. This approach is in error. Question 1 is correctly answered by reference to the text, purpose and context of s 1337H(2). For reasons developed below, the Applicants submit that the GCO is relevant at multiple stages of the transferor court's enquiry under s 1337H(2): **(a)** in the assessment of the "*interests of justice*"; **(b)** as one of the "*matters for determination in the relevant proceeding or application*", for which an eligible transferee court must have "*jurisdiction*"; **(c)** as part of the mandatory consideration in s 1337L(c); and **(d)** as part of the Court's residual discretion. For any of those reasons, Question 1 should be answered "yes".

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23 The Applicants sought such an undertaking: see Applicants' Written Case, [19](b) (AFM, 31).
24 Transcript, VCA, 27 July 2023 (AFM 50-193) (**T),** T59.4-7 (AFM, 109).
25 CRB 82. See also GCO Judgment, [105](a)-(e) (CRB 380-381).
26 See eg KS [16], [17], [18], [19], [20], [21], [33], [34], [35], [37], [38], [39], [40], [42], [43], [44], [45], [52], [55]; DS [12], [13], [15].

1.1 Text, context and purpose of s 1337H(2)

20. ***The "interests of justice" include access to justice.*** The criterion of operation of s 1337H(2) is that it must appear to the transferor court that: "*having regard to the interests of justice, it is more appropriate*" for the proceeding to be determined by the transferee court. The words, interests of justice, "*could scarcely be of wider judicial remit*".[27] They are necessarily broad and permit a "*wide range of considerations to be taken into account*" enabling the Court to consider "*all relevant factors*" (see J[104], [106], [115], [124]).[28] The "*interests of justice*" must necessarily include access to justice, which is described properly as a "*fundamental human right*": [14] above. To hold otherwise would require the transferor court to ignore the risk that a bona fide proceeding alleging corporate wrongdoing, in which the defendant is protected for its costs if ultimately successful, would be brought to an end without adjudication on the merits as a consequence of a transfer. Moreover, a GCO aids the "*interests of justice*" not only by benefiting the plaintiff: it simultaneously protects the defendants by ensuring that they have recourse for their costs in the event they succeed in defending the proceedings: [14] above.

21. A GCO is an order that will only have been made by the VSC if it is "*appropriate or necessary to ensure that justice is done in a proceeding*" (s 33ZDA(1), emphasis added). GCOs are therefore, necessarily, focused on the VSC's views about ensuring access to justice. As the VCA correctly recognised, there is a natural and obvious harmony between the criteria of operation of s 1337H(2) and s 33ZDA(1) (J[53], [114], [124]); "*[i]t would be a striking construction of s 1337H, which is expressed in very broad terms, to require the court to ignore an order that it had made pursuant to a power conditioned on the interests of justice*" (J[124]). KPMG criticizes the VCA for treating s 33ZDA as somehow "*retrospectively chang[ing] the operation of federal law*": cf KS [47]. It did not do so. KPMG's criticism overlooks that it is access to justice *through* the balanced mechanism of the GCO, rather than s 33ZDA itself, which is relevant to the interests of justice.

22. "*[S]ome lessening of procedural and substantive rights*" is a recognised consideration militating against transfer under s 1337H(2).[29] A GCO satisfies that description. Proceedings have correctly been transferred from the FCA *to the VSC* in anticipation

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27 *Herron v Attorney-General for NSW* (1987) 8 NSWLR 601, 613 (Kirby J).
28 *Acton*, 3 (Black CJ) and 5 (Davies J); see also *Acton*, 16 (Lockhart J).
29 *Wileypark Pty Ltd v AMP Limited* (2018) 265 FCR 1 (***Wileypark***), [52] (Allsop CJ, Middleton and Beach JJ agreeing).

of GCO applications:[30] cf DS [14]. Such an approach is not in error (cf KS [40]) – it simply coheres with the Commonwealth Parliament's choice not to impose a "*a universal, federal procedural regime*":[31] see [12] above. Taking into account the GCO does not involve any "invidious policy choice" or preference for Victorian policy (cf KS [43]-[44]); it merely reflects that the proceedings are being heard in Victoria and, as VCA observed, "[*t]he Commonwealth Parliament has determined that, unless it otherwise provides, the local provisions will be adopted. That does not permit any assessment that one is better than another*" (J[125]).

23. ***Context of s 1337H(2).*** Section 1337H(2) appears in Part 9.6A, Div. 1, of the Corporations Act, which relevantly does ***three*** things. ***First,*** Subdivision B invests federal jurisdiction in superior and inferior courts throughout the country, which are required to act in aid of each other: see [11] above. ***Second***, by the adoption of s 79 of the *Judiciary Act*, Part 9.6A embraces procedural heterogeneity within those diverse courts exercising federal jurisdiction: see [12] above. ***Third***, Subdivision C permits transfers between the different Courts invested with jurisdiction and contains s 1337H(2). In light of the three things being simultaneously achieved by Part 9.6A, it would be perverse if the transfer power were to be exercised without any regard to the impacts on the interests of justice of a change between the different procedural regimes of the transferor and transferee courts. The statutory context supports and indeed requires the transferor court to have regard to any impact upon the interests of justice which a transfer to a distinct procedural milieu would entail.

24. Any other approach would render s 1337H(2) an instrument of chaos, with the "need for policy neutrality" (DS[17])) blinding the transferor court to procedural differences between the courts and their potential impact. In grappling with the Defendants' approach, it should not be overlooked that there is a still "*unfolding story*"[32] of legislative evolution of the procedures enabling Australian courts to deal with representative actions. On the Defendants' construction, s 1337H(2) would have required the transfer of a representative proceeding to a marginally "more appropriate" court even if the transferee court (eg QLD prior to 2016)[33] lacked any legislation modelled on Pt IVA of the *Federal Court of Australia Act 1976* (Cth). On the

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30 See *Kajula Pty Ltd v Downer EDI Ltd; Jowene Pty Ltd v Downer EDI Ltd; Teoh v Downer EDI Ltd* [2023] VSC 574, [30] (Delany J); *Jowene Pty Limited atf Biro Citer Souvenirs Pty Limited Pension Fund v Downer EDI Limited* [2023] FCA 924 [14] (Halley J).

31 *Grant Samuel Corporate Finance Pty Ltd v Fletcher* (2015) 254 CLR 477, [7].

32 See *BMW Australia Limited v Brewster* (2019) 269 CLR 574, [102] (Gageler J).

33 See *BMW Australia Limited v Brewster* (2019) 269 CLR 574, [102] (Gageler J).

Defendants' construction, the transferor court would have been required to disregard that difference and the manifold difficulties it would create.

25. ***Discretionary power***. The transfer of proceedings under s 1337H(2) is discretionary: if the statutory criteria are satisfied, the transferor court "*may transfer the relevant proceeding or application*". The use of the word "*may*" in s 1337H(2) indicates that the transfer of the proceedings may be ordered "*at the discretion*" of the court: cf KS [17]. The discretionary quality of the power cannot be explained away by pretending that "may" means "shall" or "must".[34] This is supported by the comparison with the use of "must" in ss 1337H(3), and 1337J(2)-(4). See further [30] below.

26. ***Mandatory Considerations.*** Section 1337L(c) requires the transferor court to have regard to: "*the other courts that have jurisdiction to deal with the proceeding or application*". The phrase "*jurisdiction to deal with*" in s 1337L(c) does not only mean authority to decide. If that were all it meant, s 1337L(c) would be an intentional redundancy because s 1337H(2) authorises a transfer *only* to a court that "*has jurisdiction in the matters for determination*" (which at least includes authority to decide). Given that the only courts eligible to be transferee courts are those with authority to decide, s 1337L(c) must be directed to something additional. The true meaning of the phrase "*jurisdiction to deal with*" in s 1337L(c) is apparent from the repetition of the idiom "*deal with*" across s 1337L(c) and s 1337P(2). After transfer, the statutory fiction in s 1337P(2) will require the transferee court to "*deal with the proceeding as if*" it had taken the same or similar steps. Prior to making a transfer, s 1337(c) requires the transferor court to consider whether the statutory fiction is going to have a sensible operation, ie whether the transferee court will have "*jurisdiction to deal with the proceeding*" on that basis. In other words, s 1337(c) requires the transferor court to consider whether the transferee court would have the appropriate apparatus to "*deal with*" the proceeding in the manner that s 1337P(2) contemplates. The GCO is relevant at this stage: see [15] above.

27. ***Purpose of Subdivision C***. The purpose of Subdivision C is to "*enable proceedings to be transferred from one court to another where the interests of justice so require*".[35] Reflecting its different juridical context, the extrinsic material for Part 9.6A (like its predecessor Part 9 of the *Corporations Act 1989* (Cth)), and unlike the Cross-vesting

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34 See s 33(2A) of the *Acts Interpretation Act 1901* (Cth).

35 EM to the *Corporations Legislation Amendment Bill 1990* (Cth), [163].

Acts,[36] is understandably devoid of pejorative reference to "forum shopping": cf KS [21], [42].[37] Instead, as explained in *Acton*, "*it recognises that Australia is one nation with a federal system of government in which each of the Federal Court and the State and Territory Supreme Courts may exercise the jurisdiction ... in a sensible and orderly fashion*".[38] Consistently with that objective purpose, s 1337H(2) should be construed as a broad facultative power to transfer proceedings where the interests of justice (broadly construed) mean that it is "*more appropriate*" for another court vested with the same jurisdiction to hear and determine the proceedings, and the transferor court is persuaded that transfer should occur.

1.2 False Analogy with Cross-Vesting Legislation

28. KPMG's arguments to the contrary depend upon an assimilation of s 1337H(2) to s 5(1)-(6) of the Cross-vesting Acts. That is wrong for at least three reasons. ***First***, s 1337A(2)(a) provides that Part 9.6A operates to the exclusion of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth). Likewise, the State and NT Cross-vesting Acts do not apply to the jurisdiction with which the Division 1 deals.[39] On KPMG's approach, s 1337A(2)(a) was unnecessary because s 1337H operates the same way.

29. ***Second***, the Cross-vesting Acts have a very different "juridical context"[40] compared to civil matters arising under the Corporations legislation. The "*primary objective*" of the Cross-vesting Acts was to overcome the "*occasionally experienced inconvenience and ... unnecessary expense*" arising from "*uncertainties*" as to jurisdictional limits.[41] The Cross-vesting Acts were structured to ensure that matters which, apart from the Cross-vesting Acts, "*would be entirely or substantially within the jurisdiction*" of a federal, State or Territory court "*are instituted and determined in that court*".[42] They sought to keep federal and State courts "*by and large ... within their 'proper' jurisdictional fields*".[43] These concepts are completely inapposite to the investment of

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36 See EM to the *Jurisdiction of Courts (Cross-vesting) Bill 1986* (Cth), [6].

37 The observations extracted at KS [21] from the EM for *Corporations Legislation Amendment Bill 1990* (Cth) are not to the contrary. They reflect only that the Corporations Law was effected through an applied law regime, whereby each jurisdiction passed their own statutes applying the Corporations Law as a law of the State or Territory and that that jurisdiction was cross-vested to enable the courts to "*exercise civil jurisdiction under the Corporations Law of its own or any other jurisdiction*" to "*permit relatively simple administration and enforcement of the Corporations Laws*": see the EM, [6], [56]-[57], [163]. See eg s 42(1) and 45 of the *Corporations (New South Wales) Act 1990* (NSW).

38 *Acton*, 17 (Lockhart J).

39 See eg s 3A of the *Jurisdiction of Courts (Cross-vesting Act) 1987* (Vic).

40 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400, [12] (Gleeson CJ, McHugh and Heydon JJ).

41 EM to the *Jurisdiction of Courts (Cross-vesting) Bill 1986* (Cth), [4]-[5].

42 Recitals (a) and (b) to the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth).

43 EM to the *Jurisdiction of Courts (Cross-vesting) Bill 1986* (Cth), [6].

federal jurisdiction in civil matters arising under the Corporations legislation on multiple courts throughout Australia (see [10]-[12], [23], [27] above).

30. ***Third***, there are important textual distinctions between s 1337H(2) and the Cross-vesting legislation. Under s 5 of the Cross-vesting Acts, if the various statutory criteria are satisfied (which extend significantly beyond the "interests of justice"), the transferor court "*shall transfer the relevant proceeding*". Transfer is mandatory. That mandatory quality was critical to the reasoning in *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 (***Schultz***)[44] (discussed further below). Section 5 was apt to "*ensure that proceedings begun in an inappropriate court, will be transferred to an appropriate court*".[45] By contrast, s 1337H(2) is a discretionary power: see [25] above. Even if access to justice through a GCO is somehow irrelevant to the "*interests of justice*" (as KPMG would have it), it would remain relevant for a court to consider, at the residual discretion stage,[46] whether or not the transfer might risk bringing a bona fide proceeding to an end without adjudication on the merits. There is nothing "internally incoherent and inconsistent" in so concluding (cf KS [49]).

31. ***Schultz:*** It follows from the foregoing that the interpretation of s 1337H(2) of the Corporations Act is not greatly advanced by reference to this Court's decision in *Schultz*. The principal question in *Schultz* was the "construction and application" of s 5(2) of the Cross-vesting Act,[47] which arose in the context of application to transfer a tortious claim commenced in NSW to SA, which was the lex loci delicti and the law of the cause.[48] The concept of a "*natural forum*" was described in *Schultz* as the place where the *lex fori* "*coincide[s]*" with the *lex causae* or *lex loci delicti*.[49] Again, that concept is inapposite to the exercise of federal jurisdiction in a civil matter arising under the Corporations legislation (cf KS [18], [42]), where, for the reasons explained, the substantive law is uniform throughout Australia.[50]

32. In any event, *Schultz* has nothing to say about a situation where a court procedure, practice or entitlement "*favours one party but is neutral or has no impact on the other*"

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44 See *Schultz*, [14] (Gleeson CJ, McHugh and Heydon JJ), [62]-[63], [72] (Gummow J), [222] (Callinan J).

45 EM to the *Jurisdiction of Courts (Cross-vesting) Bill 1986* (Cth), [6] (emphasis added).

46 See *In the matter of Sol Sana Pty Ltd* [2018] NSWSC 570, [2]-[4] (Leeming JA).

47 *Schultz*, [41], [59] and [69] (Gummow J). See also [12], [14] and [25] (Gleeson CJ, McHugh and Heydon JJ).

48 See *Schultz*, [4] (Gleeson CJ, McHugh and Heydon JJ), [57] and [99] (Gummow J).

49 *Schultz*, [99] (Gummow J). See also [18] (Gleeson CJ, McHugh and Heydon JJ) and [259] (Callinan J).

50 See eg *In the matter of Samwise Holdings Pty Limited* [2016] NSWSC 1610, [7] (Brereton J).

(J[110], [106]-[107]). As KPMG accepts at KS[33]-[35], *Schultz* held that procedural or substantive advantages may fall outside the ambit of the interests of justice where the advantage to one party is "*matched by a corresponding and commensurate disadvantage*" to another party.[51] A GCO is not an order of this this kind: see [16] above; J[119], [51]. Unlike the provision considered in *Schultz* (which potentially increased the defendant's exposure to damages), the rights, duties and liabilities of the defendants are not impacted by the GCO. The only impact on defendants is that they are forced to litigate – but in circumstances where they are protected by the plaintiff's law firm in relation to their costs. The plurality also emphasized that the interests of each party (whether common or conflicting) may bear upon the larger interests of justice because "*[t]he justice referred to … is not disembodied, or divorced from practical reality*".[52] Their Honours' example of the terminally ill plaintiff[53] demonstrates that access to justice may properly prevail over whatever "interest" a defendant may have in not having to face a bona fide claim: see J[111]-[113], [122]-[123]; cf KS [41].

1.3 Other Irrelevant Submissions

33. KPMG is not assisted by *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 (***Spiliada***) (cf KS [36], [39]). Section 1337H(2) is even more remote from *forum non conveniens*. KPMG's reliance on *Spiliada* at KS [36] also overlooks that Lord Goff, emphasising the need for "*practical justice*", held that, if the stay would mean that the Plaintiff was out of time to pursue the claim in another jurisdiction, then it might be a condition of the stay that the defendant waive the time bar.[54]

34. Nor is the VCA's interpretation of s 1337H(2) inconsistent with *BMW Australia Limited v Brewster* (2019) 269 CLR 574 (***Brewster***): cf KS[46]. The VCA understood that this part of KPMG's argument was about the construction of s 1337H: see J[68]; cf KS [46]-[47]. As the VCA recognised (see J[95]-[96], [120]-[121]), the analysis in *Brewster* concerned the statutory construction of a power which was held to be "*essentially supplementary*" or "*gap-filling*" in nature.[55] Section 1337H(2) is different. It may fall for consideration in any matter arising under the Corporations

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51 See *Schultz*, [16], [21] and [27] (Gleeson CJ, McHugh and Heydon JJ), [100] (Gummow J).
52 *Schultz*, [15] (Gleeson CJ, McHugh and Heydon JJ).
53 See *Schultz*, [15] and [27] (Gleeson CJ, McHugh and Heydon JJ).
54 See *Spiliada,* 483-484.
55 See *Brewster*, [46], [60], [69], [70] (Kiefel CJ, Bell and Keane JJ), [124] (Nettle J), [145] and [147] (Gordon J).

legislation, at any stage of the proceedings, and requires the Court to have regard to the "*interests of justice*". Further, while *Brewster* did not accept that s 183 of the *Civil Procedure Act 2005* (NSW) (**CPA**) conferred a power to promote the prosecution of a proceeding by making a CFO, it does not support the proposition that in exercising a power (here the power to transfer) a Court may, or must, ignore whether the exercise will affect whether the litigants will be able to access justice.

35. Finally, the Court should not countenance KPMG's complaint that its transfer application, made later in time, should have been determined before the GCO: see KS [11], [48]. KPMG did not seek reasons for the order made by the VSC (following the exchange of written submissions) as to the sequencing of the applications, and did not seek leave to appeal that order: cf KS [11].[56] The VCA rightly rejected KPMG's submission (J[126]-[128]); "*[t]he decision to transfer should not be made on the false premise that no GCO exists*": J[128]. In any event, the VSC's order does not form part of the cause removed.[57] This routine and unchallenged case-management decision by the VSC cannot be "relevant now": cf KS [48].

Question 2(a) – whether the GCO will remain in force after any transfer

36. Question 2(a) asks whether, if the proceedings are transferred, the GCO "*will remain in force and be capable of being enforced*" by the NSWSC. There are two sub-parts to the question: (i) whether the order remains "*in force*"; (ii) whether the order is "*capable of being enforced*".

37. ***The "Travel" euphemism.*** KPMG submits that s 1337P(2) of the Corporations Act causes the GCO to "travel" (KS [32], [51], and [58]). The "travel" euphemism provides no analytical assistance in answering either sub-part to Question 2(a). What may be of more significance, however, is something that KPMG now does *not* say. Whereas KPMG had submitted to the VCA that s 1337P operated so that the GCO "*would remain in force and be able to be enforce*d",[58] thus directly addressing Question 2(a) (J[131] and [141]), it makes no such submission in this Court. Instead, KPMG now speaks of s 1337P as a "*deeming provision which creates a 'statutory fiction'*" (KS [54]), describes the orders "*travelling with the proceeding*" under

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56 See J [28]-[31]; ASOF [86]-[90], [93]-[94] (CRB 78 and 339).

57 The "*originating process*" for the cause removed into this Court is the reservation of questions pursuant to s 17B of the VSC Act (see CRB 21; CRB 18-19). Cause S ECI 2020 03281, being the substantive representative proceedings, has not been removed into this Court.

58 T3.11 (AFM 53). See also T22.29-23.1, 23.12-23.17, 47.22-24, 48.11-12, 48.24-26, 52.29-53.2 (AFM, 72, 73, 97, 98, 102-103); KPMG's written case, [48] (AFM, 17).

s 1337P(2) as "*deemed orders*" (KS[58]), and seeks to reframe Question 2(a) in terms of whether s 1337P(2) permits the transferee court to proceed "as if" those orders had been made in the transferee court (KS[3]).

38. ***GCO does not operate of its own force after transfer.*** It is common ground (see J[132]) that the GCO would not continue to operate of *its own force* upon the parties or the NSWSC following transfer. This is because s 33ZDA is a power conferred in terms upon "the Court" (which means the Supreme Court of Victoria), and only in relation to a "proceeding" (which means a matter in "the Court"): s 3 of the VSC Act. Once the matter ceases to be a "matter" in "the Court", the GCO will cease to bind the parties. "*It is clear both from the form of the order and the legislative context in which it was made that the GCO is only expressed to operate in respect of the proceeding in the [VSC]*": J[60]. Absent some further legislative or judicial process, the GCO would not remain "in force" or be "capable of being enforced" following transfer.

39. ***The Statutory Fiction.*** Section 1337P(2) is completely different to s 43(d) of the Judiciary Act, which provides that "*all… orders and other proceedings granted, made or taken …* ***remain in full force and effect***" (cf KS [62]). Instead, s 1337P(2) requires a transferee court to "*deal with the proceeding as if*" the relevant steps "*had been taken in the transferee court*". As to the first sub-part of Question 2(a), s 1337P(2) does not in terms provide that GCO remains "in force" – and KPMG no longer seems to contend that it has that operation: [37] above. Instead, the conjunction "*as if*" acknowledges that the GCO does *not* remain in force as an order of the VSC. Nor is it transmuted into an order of the NSWSC. Instead, the transferee court is required to "*deal with the proceeding*" on the false footing (ie the fiction) that the transferee court had taken that step itself. It is a true fiction, because the transferee court will not have actually taken any such "step" and there will be no equivalent order.

40. The fiction presents no difficulty in quotidian scenarios such as where a Chambers Summons has been filed instead of a Notice of Motion (KS [53]). In those scenarios, there is a "similar step" and the fiction can be said to facilitate "smooth transition": KS [55]. But where the transferee court could never lawfully have taken the same or similar step, such as in the case of a GCO, the operation of the fiction is radically different. In that scenario, on KPMG's construction (KS[54]), the transferee court is being required to "*deal with the proceeding as if*" it had taken a "*step*" which it has not taken, had no power to take, and has no apparatus to administer: see [46] below.

41. For the following reasons, the Applicants submit that the correct construction of s 1337P(2) is that it only operates where the transferee court would have had the power to take or make the same or similar step.

42. ***Text of s 1337P(2).*** The text of s 1337P(2) "*strongly suggests 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*" (J[142]). In using the language of "*the steps ... or similar steps, had been taken in the transferee court*", s 1337P(2) necessarily assumes that the same or similar steps are *capable* of being taken in the transferee court (cf KS[53]). As the VCA recognised at J[142], the words "*or similar steps*" would have no work to do if it did not matter whether or not the same steps could have been taken in the transferee court.[59] Moreover, the language "*had been taken*" necessarily assumes that it is something that the transferee court *could* have done. KS [53] ignores the un-displaced presumption as to the consistency of meaning of a "step" in s 1337P(2).[60]

43. ***Context of s 1337P(2)***. Context supports the Applicants' submission that s 1337P(2) is confined to steps that the transferee court has the same or similar power to take or make. As the VCA acknowledged (J[155]), KPMG's construction of s 1337P(2) creates a tension with s 79 of the Judiciary Act. On one hand, s 79 requires the transferee court to look to the local laws regulating the exercise of jurisdiction in the State or Territory; but on the other hand, s 1337P(2) (on KPMG's construction) requires the transferee court to "*deal with the proceeding*" by reference to an order made under the law of another jurisdiction. Given Parliament's choice (see [12] above), it would readily be expected to make any intended departure from s 79 clear (see eg ss 1337P(1) and (3)). The Applicants' confined interpretation of s 1337P(2) is also supported by the presumption that a legislature conferring jurisdiction on a court takes the court "*as it finds it with all its incidents*";[61] without express or reasonably plain intendment, s 1337P(2) would not be construed as requiring the transferee court to "*deal with the proceedings as if*" it had made an order which it lacks power to make and has no apparatus to administer.

44. KPMG's submission that there is "no support in the extrinsic material" for this construction (KS[56]) exposes a serious misunderstanding of the legislative history.

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59 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [71].
60 See *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456, [21].
61 *Electric Light and Power Supply Corporation Ltd v Electricity Commission* (1956) 94 CLR 554, 560.

When the predecessor provision to s 1337P(2) was inserted into the *Corporations Act 1989* (Cth) (s 54(2)), by reason of the broader definition of "relevant proceeding" in s 54(1) and (3), in a case involving cross-vested jurisdiction (under the applied law regime – see fn 37 above), the transferee court had the "*freedom to choose the rules of any superior court in Australia or an external Territory, whichever the court considers appropriate*".[62] A court could give "*reciprocal recognition*"[63] to steps in the transferor court under s 54(2) because it could apply, if considered appropriate, the procedural law of the transferor state under s 54(1): cf KS [56]. The power in s 54(1), informed by the obligation imposed by s 54(2), meant that a transferee court would never be compelled to operate on the statutory fiction contended for by KPMG. Consistently with the Commonwealth Parliament's choice to leave the procedural regime to the State or Territory in which jurisdiction was to be exercised (see [12] above), with the enactment of the Corporations Act, Parliament has deprived State transferee courts of the power and freedom to apply the procedural law of the transferor court.[64] It is hardly to be supposed that Parliament, in depriving State transferee courts of the power in s 1337P(1), intended to expand the statutory fiction in s 1337P(2).

45. ***Purpose of s 1337P(2)****:* The "*evident purpose*" of s 1337P is to "*preserve steps taken in one court so they do not have to be duplicated in the transferee court*" (J[151]). Its purpose is not to "*extend the powers of the transferee court or to require it to proceed on the fiction that it had made an order that it has no power to make*" (J[151]). No sensible object is served by treating s 1337P(2) as applying to steps that the transferee court has no power to make. While the fiction may be capable of operating upon orders the transferee court could not have made (KS [54], [57]), for the reasons identified at [46] below, the fiction would be radically different in respect of such orders.

46. ***Avoiding Absurd Outcomes.*** KPMG does not grapple with the practical effect of the statutory fiction (on its construction) where the "step" is one which the transferee court had no power to make. ***First****,* because of the "*critical distinction between a superior court and an inferior court concerning the authority belonging to a judicial order that is made without jurisdiction*",[65] the practical effect would differ according to the

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62 EM to the *Corporations Legislation Amendment Bill 1990* (Cth), [177].

63 EM to the *Corporations Legislation Amendment Bill 1990* (Cth), [179].

64 The power in s 1337P(1) is granted to State transferee courts only in matters arising under the *Administrative Decisions (Judicial Review) Act 1977* (Cth): s 1337P(3), see J[43] and fn 12. This is further point of distinction with the Cross-vesting Acts, which, by s 11(1)(c), enable a Court exercising cross-vested jurisdiction to apply the "appropriate" rules of evidence and procedure.

65 *New South Wales v Kable* (2013) 252 CLR 118 (***Kable***), [56] (Gageler J).

identity of the court. In an inferior court, the statutory fiction nonsensically directs the court to "*deal with the proceeding as if*" it has taken a "*step*" which has no legal force at all. The inferior court probably simply ignores the statutory fiction. But in a superior court, an order of a superior court is valid until set aside.[66] A superior court must therefore "*deal with the proceeding*" on the basis that it has made an order beyond jurisdiction. It is most improbable that Parliament would have intended s 1337P(2) to operate in different ways depending upon the status of the transferee court.

47. The operation of s 1337P(2) within a superior court gives rise to the ***second*** absurdity: at various stages of the proceeding (eg security for costs, orders entering judgment, determination of final costs, and settlement approval), the transferee court is required to "*deal with*" the proceeding as if a GCO had been made by the transferee court. But there would be no GCO, and there would be no tools to administer the relevant invalid order, including the important power in s 33ZDA(3) (see [15] above). In light of this, if the transferee court has power to displace the fiction (as KPMG submits: KS [51], [57]-[59]), one can readily see why KPMG expects it to do so: [17] above.

48. **KPMG's Construction would attract Ch III invalidity**: The Applicants construction is also supported by s 15A of the *Acts Interpretation Act 1901* (Cth) in that s 1337P(2) would be beyond power if it applied to orders, like a GCO, that the transferee court did not have the power to make. ***First***, the institutional integrity of a court is impaired by legislation "*which enlists the court in the implementation of the legislative or executive policies of the relevant State or Territory, or which requires the court to depart, to a significant degree, from the processes which characterise the exercise of judicial power*".[67] On KPMG's construction, s 1337P(2) is such a law. It requires the transferee court to "*deal with the proceeding*" on that basis, even though there is in reality no GCO in force in the proceedings and even though the Court would have no judicial power to make such an order. By "*legislative fiat*",[68] and by the nature of the transferee court's orders, s 1337P(2) would enlist the transferee court in the implementation of the legislative policies of Victoria in a manner contrary to the law, and arguably public policy, of NSW. By requiring the transferee court to act *as if* the GCO had been made in transferee court even though the transferee court is incapable of making the same or similar order, s 1337P(2) would require a significant departure

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66 *Kable*, [38] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) and [56] (Gageler J).

67 *Kuczborski v Queensland* (2014) 254 CLR 51, [140] (Crennan, Kiefel, Gageler and Keane JJ). See also *Bachrach (HA) Pty Ltd v Queensland* (1998) 195 CLR 547, [14].

68 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 (***Re Macks***), [208] (Gummow J) and [292] (Kirby J).

from the processes which characterise judicial power. Relevantly, s 1337P(2) differs from the deeming provisions upheld by this Court in *Residual Assco Group Ltd v Spalvins* and *Re Macks*, which were held not to be impermissibly interfere with Ch III courts because the legislation *conferred* rights and liabilities and provided how *those* rights and liabilities could be enforced.[69] Part 9.6A does not confer any such rights or liabilities; there is only the bare and mandatory command in s 1337P(2).

49. ***Second***, if it applied to orders that the transferee court did not have the power to make, s 1337P(2) would be beyond the Commonwealth's legislative power. Given that it is a command as how the transferee court "*must deal with the proceedings*", s 1337P(2) is a law that regulates the exercise of federal jurisdiction. The only power that the Commonwealth has to regulate federal jurisdiction is s 51(xxxix) of the Constitution.[70] While this Court held in *Rizeq* that s 79 was "*comfortably within the ambit*" of the express incidental power, at [91], it expressly left open *"[w]hether, and if so to what extent, s 51(xxxix) … might extend to permit the whole or some part of [the gap in which State law cannot govern the exercise of federal jurisdiction] to be filled by a Commonwealth law having a different operation*". On KPMG's construction, s 1337P(2) operates in a radically different way to s 79, compelling the transferee court to act inconsistently with the laws of the State or Territory in which jurisdiction is being exercised and by reference to the laws of the State or Territory of the transferor court. In circumstances where the Commonwealth must take State courts as they find them and where Ch III of the Constitution only expressly contemplates that matters may move hierarchically (see s 73) rather than laterally, such a provision is neither necessary nor proper for the execution of any power vested by the Constitution in the Federal Judicature and thus beyond s 51(xxxix).

<u>Question 2(b)</u> – whether the NSWSC can vary or revoke the GCO

50. Question 2(b) asks whether, if the GCO remains in force, the NSWSC would have power to vary or revoke the GCO. It is difficult to answer that question without knowing precisely how (juridically) the GCO would take effect within NSW, ie as something that it makes sense to speak of the NSWSC "*vary[ing]*" or "*revok[ing]*". This is another vice of the "travel" euphemism. If it arises (cf J[7], [158]),

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69 See *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, [20]-[21; *Re Macks*, [25], [30]-[31] (Gleeson CJ), [76]-[77] (Gaudron J), [110], [115] (McHugh J), [230] (Gummow J) and [353] and [367] (Hayne and Callinan JJ).

70 *Rizeq*, [59] (Bell, Gageler, Keane, Nettle and Gordon JJ).

Question 2(b) should be answered "No" on the basis that none of the three powers identified by KPMG as authorizing variation or revocation are apt.

51. ***Section 1337P(2)****:* KPMG (correctly) does not submit that s 1337P(2) in terms confers any substantive power to vary or revoke a GCO at some point later in the proceedings (i.e. Question 2(a)). KPMG instead seems to submit that s 1337P(2) confers a power to make "*any* order" modifying "deemed orders": KS [58] (our emphasis). The VCA correctly held that this was too broad (J[152]-[155]). The words *"subject to any order of the transferee court*" have a "*limited role*" and permit the transferee court "*to prevent the operation of the deeming provision*" (J[153]-[154]). Section 1337P(2) "*is not an ongoing power*" and cannot be read "*as a plenary power to amend orders*" (J[154]). As to the question left open at J [154], taking the transferee Court as it finds it (and given the conferral of power in s 1337P(1)), s 1337P(2) assumes, but does not confer, power. The words "*subject to …*" in s 1337P(2) are a standard drafting device to make clear which or what prevails in the event of a conflict.

52. ***Section 183***: KPMG's reliance on s 183 of the CPA (KS [59]) ignores the absence of an equivalent to s 33ZDA in any NSW statute (let alone the CPA). Given its gap-filling nature, as this Court explained in *Brewster,* s 183 is not "*a vehicle for rewriting*"[71] the CPA; it "*cannot be given a more expansive construction and a wider scope of operation than the other provisions of the scheme*".[72]

53. ***Inherent power***: KPMG's reliance on the NSWSC's inherent power to discharge its own extant interlocutory order (see KS [59]) is misplaced. None of the authorities referred to by KPMG support the existence of power to discharge an order made by *another* superior court, including where the first court has no equivalent jurisdiction or power to make the same order.[73] In any event, a court's inherent power to discharge orders as part of the regulation of its own practice and procedure only applies to procedural orders[74] and would not extend to discharging the GCO as it would interfere with the substantive rights already conferred upon the Plaintiffs and Group Members.

<u>Question 3</u>: Should the proceeding be transferred

54. ***If the GCO is relevant.*** KPMG does not appear to dispute the correctness of the reasoning at J[171]-[174]. That is, KPMG does not contend that the proceeding should

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71 *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, [52] (Sackville J) quoted in *Brewster*, [69]-[70].
72 *Brewster*, [70] (Kiefel CJ, Bell and Keane JJ).
73 See eg *Short v Crawley (No 42)* [2009] NSWSC 1110, [48] (White J).
74 See *Wilkshire and Coffey v Commonwealth of Australia* (1976) 9 ALR 325, 330, 332 (Muirhead J).

be transferred to the NSWSC if the GCO may be taken into account. In this way, an affirmative answer to Question 1 will also dispose of Question 3.

55. ***Errors in the VCA.***[75] It is only if the GCO is held to be entirely irrelevant to s 1337H(2) (cf [19] above) that it becomes relevant to consider the VCA's conclusion that the factors relied on by KPMG were "*just sufficient*" to persuade the VCA that NSW was the more appropriate forum (J[170], [164]). The dispositive reasoning for that conclusion seems to be the first and second sentences of J[169], where the Court held that the accrual of the Applicants' causes of action in NSW "*is a factor that connects the proceeding to NSW*". It is *that* factor which appears to have tipped the balance for the VCA. This was in error for two reasons. ***First***, to hold that Applicants' causes of action accrued in NSW misunderstands the "*nature and consequences in law*"[76] of their residence in NSW (ASOF [23]-[24]). The Applicants' rights arose "*purely and solely*" from Commonwealth law, and their causes of action accrued in the Commonwealth of Australia as a "*single law area*".[77] ***Second***, in any event, in the context of a group proceeding, "*[t]he place of residence of individual lead plaintiffs is of little relevance when group members are Australia-wide*":[78] ASOF [4], [34]-[35].

56. ***If Access to Justice is irrelevant.*** Even if access to justice is "irrelevant or neutral" to the "interests of justice" (KS[63]), it remains that KPMG has not made out a case for transfer. ***First,*** the proceeding cannot be transferred because the NSWSC is not an eligible court under s 1337H(2). The administration of the GCO is one of "*the matters for determination*" in the proceeding, and the NSWC does not have jurisdiction in relation to that matter. The VCA erred in concluding that the term "*jurisdiction*" in s 1337H(2) is being used in the limited and precise sense of a court's authority to decide (see J[99]-[101]).[79] Jurisdiction and power "*are not discrete concepts*"[80] and *"[t]he distinction between*" them "*is often blurred*".[81] A limited usage in s 1337H(2) makes no sense, given that the provision refers (in the plural) to the "*matters for determination*", including in any relevant "*application*".[82] Further, "*jurisdiction*" in the limited and precise sense is consistently dealt with elsewhere in Division 1 using

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75 Document in the nature of a notice of contention, Ground 4 (CRB 476).
76 *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 (***Agtrack***), [6] and [7].
77 *Agtrack*, [6] and [7].
78 *Wileypark*, [22] (Allsop CJ).
79 Document in the nature of a notice of contention, Ground 1 (CRB 475-476).
80 *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, [64].
81 *Harris v Caladine* (1991) 172 CLR 84, 136 (Toohey J).
82 There is no warrant in the text or context of s 1337H to confine such applications to "*substantive matters which proceed as applications in a proceeding*" (cf J[101]).

the language "*civil matters arising under the Corporations legislation*". Instead, the term "*jurisdiction*" must be understood in s 1337H(2) as including the powers that a court is required or permitted to exercise in the execution of jurisdiction: cf KS [66].

57. ***Second***, the mandatory considerations in s 1337L require refusal of the transfer. As for s 1337L(a), Arrium is in liquidation, is not a party (J[12]) and is therefore not "*concerned in the proceeding*" (s 1337L(a)). As for s 1337L(b), the VCA correctly reasoned that the events the subject of the proceeding were the "*publication of financial accounts and capital raising documents of a publicly listed company across the internet with shareholders and potential investors Australia-wide*" (J[165]). As for s 1337L(c), the NSWSC does not have jurisdiction to "*deal with*" the GCO: [26] above.

58. ***Third***, even putting aside the GCO, the "interest of justice" do not favor the NSWSC over the VSC. The proceeding has a strong connection to Victoria. Over a quarter of group members with whom there is a retainer reside in Victoria: see ASOF [34]-[35]. Two of the defendants reside in Victoria (ASOF [25], [27]), and KPMG has offices in Melbourne (ASOF [29]). KPMG and the Director Defendants are each represented by national law firms with offices in Victoria (ASOF [42], [46]), and have briefed Victorian counsel (ASOF [44], [48]). Reliance is placed on Victorian law (J [162](c)). Significant steps have been made in the VSC since the commencement of the proceedings nearly 4 years ago (see ASOF [83] ff). Against those matters, the factors relied upon by KPMG (KS [23]-[31]) are either irrelevant (eg past litigation: KS[28]; the address for service of the funder; KS[30]) or ignore the findings of the VCA at J[165]-[168], which the Applicants embrace. Furthermore, for the reasons identified above, it is an error to assimilate s 1337H(2) with s 5 of the Cross-vesting Act; s 1337H(2) does not invite an arithmetic tabulation of factors however weak. The suggestion that KPMG only has a "persuasive onus" (KS [19]) is misplaced in the context of a contested application and where transfer is discretionary under s 1337H(2): see [29] above.

PART VII: ESTIMATED TIME

59. The Applicants estimate that 2.25 hours will be required for oral argument.

Dated: 21 May 2024

Justin Gleeson

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

CAUSE REMOVED FROM THE COURT OF APPEAL

OF THE SUPREME COURT OF VICTORIA

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 APPLICANTS' SUBMISSIONS

Pursuant to paragraph 2 of Practice Direction No 1 of 2019, the Applicants sets out a list of the constitutional provisions, statutes and statutory instruments referred to in their submissions below.

No	Description	Version / Date	Provision(s)
1.	*Acts Interpretation Act 1901* (Cth)	Current	ss 15A, 33
2.	*Australian Securities and Investments Commission Act 2001* (Cth)	1 July 2014 - 18 March 2015	ss 12DA, 12GF
3.	*Civil Procedure Act 2005* (NSW)	Current	s 183
4.	*Competition and Consumer Act 2010* (Cth)	18 July 2014 - 16 October 2014	Sch 2, ss 18, 236
5.	Constitution	Current	s 51(xxxix) and Ch III (ss 73, 76, 77)
6.	*Corporations Act 2001* (Cth)	Current	Pt 9.6A, Div. 1 (ss 1337A, 1337B, 1337C, 1337E, 1337G, 1337H, 1337J, 1337L, 1337P)
7.	*Corporations Act 2001* (Cth)	1 July 2014 - 18 December 2014	ss 1041E, 1041H, 1041I
8.	*Corporations Act 1989* (Cth)	No longer in force – 13 March 2000 – 29 May 2000	Pt 9 (s 54)
9.	*Corporations (New South Wales) Act 1990* (NSW)	Current	ss 42, 45
10.	*Federal Court of Australia Act 1976* (Cth)	Current	Pt IVA
11.	*Judiciary Act 1903* (Cth)	Current	ss 39, 43, 78B, 79
12.	*Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth)	Current	Recitals and ss 5, 11
13.	*Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW)	15 July 2001 – 23 November 2005	s 5
14.	*Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic)	Current	Preamble and ss 3A, 5 and 11
15.	*Legal Profession Uniform Law* (NSW)	Current	s 183
16.	*Legal Profession Uniform Law* (Vic)	Current	s 183
17.	*Supreme Court Act 1986* (Vic)	Version 105 (effective 1 July 2020)	ss 3, 17B, 33ZDA