



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)

Fifth Respondent

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL OF
THE COMMONWEALTH (INTERVENING)**

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

A. Section 1337P(2) does not infringe Ch III (AG’s submissions, [50]-[58])

- 10 2. Section 1337P(2) neither enlists the transferee court in the implementation of the legislative or executive policies of the transferor jurisdiction (here, Victoria) nor requires the transferee court to depart to a significant degree from the processes which characterise the exercise of judicial power (cf **AS [48]**).
- 3. If the transferee court does have the power to vary or revoke an order that the transferee

court does not have the power to make (like a group costs order), then there is no arguable foundation for the Applicants' argument: that court would control whether, and the extent to which, the order has effect in the transferee court.

4. Even if the transferee court does not have the power to vary or revoke such an order, s 1337P(2) does not infringe Ch III on either basis advanced by the Applicants.

(a) **Enlistment.** This limit on legislative power is concerned with schemes that require courts to act at the behest of the executive or legislature: *Kuczborski* (2014) 254 CLR 51 (**Vol 6, Tab 61**) at [40], [224]; *Totani* (2010) 242 CLR 1 (**Vol 8, Tab 81**) at [149], [226]. Section 1337P(2) does nothing of this kind. It requires a transferee court to proceed "as if" it had made orders in fact made by another court in the independent exercise of federal jurisdiction, thereby ensuring continuity and avoiding duplication. The effect is to create rights and impose duties by reference to the factum of an earlier order: *Spalvins* (2000) 202 CLR 629 (**Vol 8, Tab 79**). Further, s 1337P(2) does not "enlist" the transferee court to give effect to a policy of the transferor jurisdiction. Instead, s 1337P(2) is itself a Commonwealth law, and it requires one court exercising federal jurisdiction to proceed as if it had made orders previously made by another court exercising federal jurisdiction under other Commonwealth laws (including State laws such as s 33ZDA of the *Supreme Court Act 1986* (Vic), when applying as federal law due to s 79 of the Judiciary Act).

(b) **Judicial process.** The requirement for a transferee court to proceed "as if" it had made an earlier order is a common legislative technique and does not involve any departure from the processes which characterise the exercise of judicial power.

B. Section 1337P(2) is supported by a head of power (AG's submissions, [41]-[49])

5. Section 1337P(2) regulates the manner in which a transferee court is to exercise federal jurisdiction. It is therefore supported by s 51(xxxix) of the Constitution: *Rizeq* (2017) 262 CLR 1 (**Vol 8, Tab 80**) at [46], [59]. In those circumstances, it is unnecessary to determine whether it is also supported by the incidental area of s 77(i) and (iii). Alternatively, it is supported by the reference power in s 51(xxxvii), s 1337P(2) having formed part of the text reference that supported the enactment of the *Corporations Act 2001* (Cth).

Dated: 12 November 2024


Stephen Donaghue


Shawn Rajanayagam

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