



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY

BETWEEN:

**ANTHONY BOGAN**  
First Applicant

**MICHAEL THOMAS WALTON**  
Second Applicant

and

**THE ESTATE OF PETER JOHN SMEDLEY (DECEASED)**  
First Respondent

**ANDREW GERARD ROBERTS**  
Second Respondent

**PETER GRAEME NANKERVIS**  
Third Respondent

**JEREMY CHARLES ROY MAYCOCK**  
Fourth Respondent

**KPMG (A FIRM)**  
Fifth Respondent

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

## PART I — CERTIFICATION

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

## PARTS II AND III — INTERVENTION

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2 The Attorney-General of the Commonwealth (**the Commonwealth**) intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth).

## PART IV — ARGUMENT

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### A SUMMARY

3 The Commonwealth makes submissions only in relation to Questions 1 and 2 of the questions reserved on 7 March 2023<sup>1</sup> and addressed by the Court of Appeal of the Supreme Court of Victoria on 26 October 2023,<sup>2</sup> and paragraphs 1-3 of the applicants' Document in the Nature of a Notice of Contention (**NOC**) filed 9 April 2024.<sup>3</sup>

4 Question 2 raises issues as to (a) the effect of transferring the proceeding to the Supreme Court of New South Wales (the **NSWSC**) on the GCO made by the Supreme Court of Victoria (the **VSC**), and (b) the NSWSC's powers with respect to the GCO. Each of those matters bears directly on the answer to Question 1, which concerns the relevance of a GCO to a transfer application. Conversely, there would be an air of unreality in answering Question 1 without regard to the effect attributed to the GCO by s 1337P(2) if the proceeding is transferred. These submissions therefore address Question 2 (and related issues raised by the NOC) before turning to Question 1.

5 The Commonwealth advances five propositions.

5.1 **First**, as to Question 2(a): if this proceeding is transferred to the NSWSC under s 1337H(2) of the *Corporations Act 2001* (Cth), s 1337P(2) of that Act requires the NSWSC to deal with the proceeding as if the group costs order made by the VSC

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<sup>1</sup> *Bogan v Estate of Smedley (Deceased) (No 3)* [2023] VSC 103.

<sup>2</sup> *Bogan v Estate of Smedley (Deceased)* [2023] VSCA 256 (J).

<sup>3</sup> Strictly speaking, the task for this Court is not the correction of error, for in a cause removed under s 40(2) of the *Judiciary Act 1903* (Cth) this Court exercises original, not appellate, jurisdiction: *Attorney-General (NSW) v Commonwealth Savings Bank of Australia* (1986) 160 CLR 315 at 323-324 (the Court). The task for this Court is therefore to address the questions reserved for the consideration of the Court of Appeal "and to answer them ... in whichever manner this Court determines to be correct": *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 269 (Brennan J); see also at 247-248 (Mason CJ), 265 (Brennan J), 280-281 (Deane, Gaudron and McHugh JJ), 303 (Dawson J).

on 3 May 2022 (the **GCO**)<sup>4</sup> had been made by the NSWSC, subject to any order of the NSWSC: see paragraphs 14-32.

- 5.2 **Secondly**, as to Question 2(b) and paragraph 3 of the NOC: the NSWSC has power to make orders in the nature of variation or revocation of the GCO in the exercise of its inherent power, or alternatively under s 1337P(2) or s 183 of the *Civil Procedure Act 2005* (NSW): see paragraphs 33-39.
- 5.3 **Thirdly**, as to paragraph 2 of the NOC: s 1337P(2) is a valid enactment of the Commonwealth Parliament: see paragraphs 40-58.
- 5.4 **Fourthly**, as to Question 1: the GCO is a neutral factor in the decision whether to transfer a proceeding pursuant to s 1337H(2) because (a) subject to any order of the transferee court, that court is required to deal with the proceeding as if it had made a GCO and (b) the transferee court has the power to make orders in the nature of variation or revocation of the GCO: see paragraphs 59-63.
- 5.5 **Fifthly**, as to paragraph 1 of the NOC: the GCO application having been determined and the NSWSC having jurisdiction and power to make orders in the nature of variation or revocation of the GCO, there is no “matter for determination” in which the NSWSC lacks jurisdiction: see paragraphs 64-68.

## **B THE VESTING OF CIVIL JURISDICTION UNDER THE *CORPORATIONS ACT***

Division 1 of Pt 9.6A of the *Corporations Act* (ss 1337A-1337V) deals with the vesting of jurisdiction with respect to civil matters arising under the “Corporations legislation”.<sup>5</sup>

Part 9.6A has its genesis in Pt 9 of the *Corporations Act 1989* (Cth) (the **1989 Act**), which was introduced by the *Corporations Legislation Amendment Act 1990* (Cth).<sup>6</sup> That Act, which was in turn a response to this Court’s decision in *The Incorporation Case*,<sup>7</sup> was

<sup>4</sup> *Bogan v Estate of Smedley (Deceased)* [2022] VSC 201.

<sup>5</sup> “Corporations legislation” is defined in s 9.

<sup>6</sup> Part 9.6A was “intended to produce substantially the same outcomes” as Pt 9 of the 1989 Act and the corresponding provisions of the State *Corporations Acts* before the decision in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 (**Re Wakim**): Explanatory Memorandum, Corporations Bill 2001 (Cth) at [5.34].

<sup>7</sup> *New South Wales v The Commonwealth* (1990) 169 CLR 482. See Commonwealth, *Parliamentary Debates*, House of Representatives, 8 November 1990 at 3664 (Michael Duffy).

intended to “enable the commencement of [a] new national scheme for corporate regulation”.<sup>8</sup>

8 The cross-vesting of jurisdiction in Commonwealth, State and Territory courts was “central to the conferment of a national character” on the 1989 Act.<sup>9</sup> The vesting of civil jurisdiction in Commonwealth, State and Territory courts is now effected by ss 1337B-1337E of the *Corporations Act*, which confer jurisdiction with respect to civil matters arising under the Corporations legislation on the Federal Court, State and Territory Supreme Courts, and Commonwealth, State and Territory lower courts.

9 The “conferment of a national character” on the 1989 Act was “further achieved” by the  
10 bestowal of power on courts to transfer proceedings to other courts having jurisdiction.<sup>10</sup> Such powers are now contained in ss 1337H-1337J. Section 1337H(2) relevantly confers a power on State Supreme Courts to transfer a proceeding or application if the proceeding or application is one with respect to a civil matter arising under the Corporations legislation.<sup>11</sup> It relevantly provides as follows:

if it appears to the transferor court that, having regard to the interests of justice, it is more appropriate for:

- (a) the relevant proceeding; or
- (b) an application in the relevant proceeding;

20 to be determined by another court that has jurisdiction in the matters for determination in the relevant proceeding or application, the transferor court may transfer the relevant proceeding or application to that other court.

10 A proceeding or application may be transferred under s 1337H(2) at any stage in the proceeding.<sup>12</sup> Here, the VSC decided that the transfer application would be heard and determined after the GCO application (**J [30(b)]; CRB 78 [93], 339**).

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<sup>8</sup> Explanatory Memorandum, Corporations Legislation Amendment Bill 1990 (Cth) at [1].

<sup>9</sup> Explanatory Memorandum, Corporations Legislation Amendment Bill 1990 (Cth) at [57]. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 8 November 1990 at 3666 (Michael Duffy). The cross-vesting was effected by ss 51-51B of the 1989 Act and cognate provisions in State *Corporations Acts*: see, eg, *Corporations (New South Wales) Act 1990* (NSW), ss 42-42B; *Corporations (Victoria) Act 1990* (Vic), ss 42-42B.

<sup>10</sup> Explanatory Memorandum, Corporations Legislation Amendment Bill 1990 (Cth) at [57]. See 1989 Act, ss 53-53AA; *Corporations (New South Wales) Act 1990* (NSW), ss 44-44AA; *Corporations (Victoria) Act 1990* (Vic), ss 44-44AA.

<sup>11</sup> *Corporations Act*, s 1337H(1).

<sup>12</sup> *Corporations Act*, s 1337M.

11 Section 1337L sets out matters to which a court must have regard in deciding whether to transfer a proceeding or application under s 1337H.

12 Section 1337P(2) sets out how a transferee court must “deal with” a transferred proceeding. It provides:

If a proceeding is transferred or removed to a court (the *transferee court*) from another court (the *transferor court*), the transferee court must deal with the proceeding as if, subject to any order of the transferee court, the steps that had been taken for the purposes of the proceeding in the transferor court (including the making of an order), or similar steps, had been taken in the transferee court.

10 13 Section 1337A(3) provides that Div 1 of Pt 9.6A does not limit the operation of the provisions of the *Judiciary Act* other than s 39B. In that way, Pt 9.6A “recognises the concurrent operation of s 79 of the *Judiciary Act*”.<sup>13</sup>

## C QUESTION 2(A): THE EFFECT OF TRANSFER ON THE GCO

14 For the reasons that follow, the transferee court must deal with a transferred proceeding as if all orders made by the transferor court had been made by it, irrespective of whether it has power to make a particular order made by the transferor court. It follows that if the proceeding is transferred to the NSWSC, that Court must deal with the proceeding as if the GCO had been made by it. That conclusion is consistent with first-instance decisions in relation to the cognate provision of the *Cross-vesting Acts*,<sup>14</sup> with which the Court of Appeal did not deal.<sup>15</sup>

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### C.1 A statutory fiction without implied limitation

15 By its use of the expression “as if”, s 1337P(2) “introduce[s] a statutory fiction”:<sup>16</sup> it “deems something to be what it is not”.<sup>17</sup> Its effect is to attach certain consequences to

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<sup>13</sup> *Gordon v Tolcher* (2006) 231 CLR 334 at [29] (the Court).

<sup>14</sup> See, eg, *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth), s 11(3); *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW), s 11(3) (together, the *Cross-vesting Acts*).

<sup>15</sup> *Abrook v Paterson* (1995) 58 FCR 293 at 296 (Branson J). See also *Johnson Tiles Pty Ltd v Ezzo Australia Pty Ltd (No 3)* [2003] VSC 244 at [37] (Gillard J).

<sup>16</sup> *Williams v Wreck Bay Aboriginal Community Council* (2019) 266 CLR 499 at [101] (Gageler J). See also *Re Macks; Ex parte Saint* (2000) 204 CLR 158 (*Re Macks*) at [115] (McHugh J); *H Lundbeck A/S v Sandoz Pty Ltd* (2022) 276 CLR 170 at [26]-[28] (Kiefel CJ, Gageler, Steward and Gleeson JJ); *Vunilagi v The Queen* (2023) 97 ALJR 627 at [71] (Gageler J).

<sup>17</sup> *Re Macks* (2000) 204 CLR 158 at [115] (McHugh J).

the orders of a transferor court “as acts in the law”:<sup>18</sup> namely, that the transferee court must proceed as if it had made all orders made by the transferor court.

16 Section 1337P(2) applies to “the steps” taken in the transferor court. As a matter of ordinary meaning, then, s 1337P(2) applies to all steps taken by the transferor court. Whatever the limits of the term “steps”, s 1337P(2) expressly states that the making of an order is a “step” for the purposes of the section. It follows that s 1337P(2) can only be understood as applying only to orders that the transferee court has power to make if the section is read as being subject to an implied limitation. The text, context and purpose of the provision are contrary to such an implication.

10 17 **Textual considerations.** As to the text, there are three strong indicators against the implied limitation. **First**, by making the deeming effect of s 1337P(2) subject to any order of the transferee court, the Parliament expressly identified a method by which a transferee court could vary or discontinue the effect of orders previously made. That is, while at the time the proceeding is received into the transferee court, that court must deal with the proceeding as if a step taken in the transferor court had been taken in the transferee court, that prescription is not perpetual. That express qualification on the effect of s 1337P(2) points against the existence of the implied limitation recognised by the Court of Appeal.

18 **Secondly**, the words “or similar steps” in s 1337P(2) do not support the existence of the implied limitation (cf **J [142]**; **AS [42]**). Those words ensure that where a step taken in  
20 the transferor court lacks a precise equivalent in the transferee court, the transferee court is to deal with the proceeding as if an analogous step had been taken. KPMG’s submissions give one example of the work performed by the words “or similar steps” (**KS [53]**). Likewise, if a proceeding were commenced by originating motion in one jurisdiction and then transferred, the proceeding would be taken to be regularly constituted even if the transferor court required commencement to occur by writ or claim with a pleading (see **J [151]**). In that way, the words “or similar steps” ensure that a transferred proceeding continues smoothly in the transferee court. They do not provide a basis for limiting the plain meaning of the text.

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<sup>18</sup> See *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 (**Humby**) at 243 (Stephen J), quoted in *Re Macks* (2000) 204 CLR 158 at [208] (Gummow J). See also *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83 at [14] (French CJ, Kiefel, Bell and Keane JJ).

- 19 **Thirdly**, the words “had been taken” in the final clause of s 1337P(2) do not support the asserted limitation (cf AS [42]). Those words do not entail an assumption that the steps actually taken in the transferor court, or similar steps, were capable of being taken in the transferee court. Rather, they simply identify the fiction that s 1337P(2) creates: that the transferee court must assume, as a fact, that the steps taken in the transferor court, or similar steps, were taken in the transferee court.
- 20 **Contextual considerations.** As to context, the plain meaning of the text of s 1337P(2) is reinforced by consideration of the immediately surrounding provisions. Section 1337N requires the relevant officer of the transferor court to transfer to the transferee court all documents filed in the transferor court in respect of the proceeding or application, and requires the transferee court to proceed “as if” the transferred proceeding had been originally instituted in the transferee court and the same proceedings had been taken in the transferee court as were taken in the transferor court. Section 1337Q ensures that legal practitioners who are entitled to practise in the transferor court have the same entitlements to practise in relation to the transferred proceeding and related proceedings in the transferee court that they would have if the transferee court were a federal court exercising federal jurisdiction.
- 21 Read together, ss 1337N, 1337P and 1337Q evince a legislative design whereby a transferred proceeding or application is intended to continue smoothly in the transferee court, subject only to that court making an order of the kind referred to in s 1337P(2). That feature of the legislative design is buttressed by s 1337G, which obliges courts having jurisdiction in civil matters arising under the Corporations legislation to act in aid of, and be auxiliary to, each other in those matters. It would be contrary to this aspect of the legislative scheme to construe s 1337P(2) as subject to the implied limitation for which the applicants contend.
- 22 Far from supporting the applicants’ argument, that s 1337A(3) “leaves s 79 of the *Judiciary Act* to operate according to its terms”<sup>19</sup> suggests that no implied limitation exists (cf AS [23]). Having decided not to impose a “universal, federal procedural regime”,<sup>20</sup> the Commonwealth Parliament may be taken to have been aware that the following

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<sup>19</sup> *Grant Samuel Corporate Finance Pty Ltd v Fletcher* (2015) 254 CLR 477 (**Grant Samuel**) at [7] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ).

<sup>20</sup> *Grant Samuel* (2015) 254 CLR 477 at [7] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ).



circumstance might arise. A court makes an order in a proceeding. The order is of a kind that other courts lack power to make. The proceeding is then transferred under s 1337H, s 1337J or s 1337K. In that event, the obvious practical problem arises: what should happen to the order? Section 1337P(2) is the Parliament’s solution to that difficulty. Given the decision to leave room for the operation of s 79 of the *Judiciary Act*, and thereby to “embrace[] procedural heterogeneity” (AS [12], [23]), one would expect s 1337P(2) to state expressly that it does not apply to orders that the transferee court lacks power to make if that had been Parliament’s intention. Not only does s 1337P(2) not contain those express words; it provides no textual support for the asserted limitation at all.

10 23 Further, the extrinsic materials provide no support for the implied limitation identified by the Court of Appeal. The explanatory memorandum to the Bill that introduced the forerunner to s 1337P(2)<sup>21</sup> stated that that provision required the transferee court to “give reciprocal recognition to the steps that had been taken”.<sup>22</sup> In other words, “the concept behind” the transfer provisions in the *Corporations Act*, as with the cognate provisions in the *Cross-vesting Acts*, “is that, as nearly as is possible, the position be the same as if the proceeding was instituted in the transferee court”.<sup>23</sup> Having correctly recognised that the 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]), the Court of Appeal erred in failing to appreciate that that purpose is “best achieve[d]”<sup>24</sup> by construing s 1337P(2) as requiring a transferee court to deal with a transferred proceeding as if all orders made by the transferor court were made by it.

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24 Nor does the fact that s 1337P(2) is a deeming provision support the conclusion reached by the Court of Appeal (cf J [143]). While a deeming provision should not be given “a legal operation beyond that required to achieve the object of its enactment”,<sup>25</sup> for the reasons explained above, the legal operation required to achieve the object of s 1337P(2) is that which coheres with the text: namely, that it applies to all orders made by a transferor court.

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<sup>21</sup> Namely, s 54(2) of the *Corporations Act 1989* (Cth).

<sup>22</sup> Explanatory Memorandum, Corporations Legislation Amendment Bill 1990 (Cth) at [179].

<sup>23</sup> *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217 at 220 (Wilcox J). See also *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 3)* [2012] VSC 399 at [20] (Croft J).

<sup>24</sup> See *Acts Interpretation Act 1901* (Cth), s 15AA.

<sup>25</sup> *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430 at [51] (the Court).

## C.2 There are no “significant complications”

- 25 Construing and applying s 1337P(2) consistently with its plain meaning does not give rise to any of the “significant complications” (J [146]) to which the Court of Appeal referred.
- 26 The absence of a NSW law that disapplies the prohibition in s 183 of the *Legal Profession Uniform Law* (NSW) (the **LPUL (NSW)**) is irrelevant (cf J [146]). Section 183 prohibits law practices from entering into costs agreements pursuant to which a contingency fee is payable.<sup>26</sup> It does not prohibit law practices from being paid a contingency fee pursuant to a court order. Consistently with that analysis, the legislative history makes clear that s 33ZDA(4), which states that s 33ZDA has effect despite anything to the contrary in the *Legal Profession Uniform Law* (Vic), was enacted for the avoidance of doubt.<sup>27</sup> It follows that s 183 says nothing about the effect of a GCO in a transferred proceeding.
- 27 In any event, to the extent that a NSW law purported to deny the force given to a GCO by s 1337P(2), that law would be “directly inconsistent”<sup>28</sup> with s 1337P(2) and therefore inoperative to the extent of that inconsistency by reason of s 109 of the Constitution.<sup>29</sup> Insofar as s 183 of the LPUL (NSW) might be said to evince some policy tending against the payment of contingency fees, it is relevant that a source of power to make orders in the nature of variation or revocation of a GCO in a transferred proceeding will be the law of the Commonwealth (in particular, s 1337P(2)). The matters relevant to the exercise of that power are, in general, to be identified by construing that law, not by reference to the “policy” of another polity.
- 28 The scenario contemplated at J [147]-[149] gives rise to no difficulty. It would be open to the VSC, when faced with both a transfer application and a GCO application, to decide that the GCO application should be decided first, thereby avoiding the scenario. As noted above, that is precisely what the VSC did in this case. Alternatively, if the VSC were to decide the transfer application first, it would be doing so in the knowledge that the

<sup>26</sup> The same is true of the other provisions cited in **DS [9] fn 11**.

<sup>27</sup> Victorian Law Reform Commission, *Access to Justice — Litigation Funding and Group Proceedings* (Report, March 2018) (**VLRC Report**) at [3.95]-[3.97]. Section 33ZDA gave effect to the relevant recommendation in the VLRC Report: Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 2019 at 4590 (Jill Hennessy, Attorney-General).

<sup>28</sup> *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428 at [32] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>29</sup> Section 5E of the *Corporations Act* manifests an intention not to “cover the field”, such that there can be no “indirect inconsistency” between s 1337P(2) and a State law: *Gordon v Tolcher* (2006) 231 CLR 334 at [30] (the Court). See generally *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563-564 (Mason J; Barwick CJ, Gibbs, Stephen and Jacobs JJ agreeing).

transferee court would be bound to reject the GCO application for want of jurisdiction. There is nothing “anomalous” about that (cf **J [149]**).

29 That the NSWSC lacks power to make a GCO is irrelevant (cf **J [146]**). The question is not whether the NSWSC can make a GCO; it is whether it has a sufficient suite of powers to deal with a GCO which has already been made and to which s 1337P(2) applies. For the reasons given below in answer to Question 2(b), it does.

30 Far from being “inconsistent”, or in “tension”, with s 79 of the *Judiciary Act* (cf **J [155]**; **AS [43]**), the Commonwealth’s construction of s 1337P(2) gives the two provisions a complementary operation. Section 79 deals with the application of State laws, “including the laws relating to procedure”, in federal jurisdiction. Section 1337P(2) then deals with  
10 the practical problem of the effect to be given to steps taken, including orders made, pursuant to State laws that apply in federal jurisdiction by reason of s 79 when a proceeding is transferred. In that way, both provisions facilitate the smooth functioning of the “distinctly national” (see **AS [11]**) jurisdiction established under Pt 9.6A of the *Corporations Act*. Further, and in any event, s 79 can only “operate according to its terms”.<sup>30</sup> By its terms, s 79 is subject to Commonwealth laws that “otherwise provide”. Accordingly, any inconsistency or tension between s 1337P(2) and s 79 must be resolved in favour of the former.

31 Finally, the above construction of s 1337P(2) does not give rise to “absurd” consequences  
20 (cf **AS [46]-[47]**). The submission at **AS [46]** misconceives the effect of s 1337P(2). At the risk of repetition, the provision requires a transferee court to proceed “as if” orders made by the transferor court had been made by it. In those circumstances, the principles in relation to the validity of judicial orders made in excess of jurisdiction,<sup>31</sup> on which the applicants rely, are simply irrelevant.

32 Further, the transferee court has power to administer the GCO (cf **AS [47]**). As explained below in answer to Question 2(b), it may make orders in the nature of variation of the GCO; in those circumstances, that s 33ZDA(3) of the *Supreme Court Act 1986* (Vic) does not apply in the NSWSC is of no moment. And because s 1337P(2) has the effect that the

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<sup>30</sup> *Gordon v Tolcher* (2006) 231 CLR 334 at [40] (the Court); *Grant Samuel* (2014) 254 CLR 477 at [7] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ).

<sup>31</sup> *New South Wales v Kable* (2013) 252 CLR 118 at [56] (Gageler J) and the authorities cited therein.

GCO is to be treated as an order of the transferee court, it may be enforced as such by that court.

**D QUESTION 2(B) AND PARAGRAPH 3 OF THE NOC: THE NSWSC HAS POWER TO MAKE ORDERS IN THE NATURE OF VARIATION OR REVOCATION OF THE GCO**

33 In a transferred proceeding, the NSWSC has power to make orders in the nature of variation or revocation of a GCO<sup>32</sup> made by the VSC. It may do so in the exercise of its inherent power. Alternatively, s 1337P(2) and s 183 of the *Civil Procedure Act 2005* (NSW) (the latter as picked up by s 79 of the *Judiciary Act*) confer power to make such  
10 orders.

34 ***Inherent power.*** By virtue of its status as a superior court of record,<sup>33</sup> the NSWSC possesses “inherent power”.<sup>34</sup> That power, which is sourced in “the general responsibility of a superior court of unlimited jurisdiction for the administration of justice”<sup>35</sup> and which “may be deployed in the exercise of federal jurisdiction”,<sup>36</sup> extends to the making of orders that are “necessary to the effective exercise” of the Court’s jurisdiction.<sup>37</sup>

35 An aspect of the NSWSC’s inherent power is the power to vary or set aside interlocutory orders.<sup>38</sup> Adapted to the circumstances of a transferred proceeding and the effect of s 1337P(2), that aspect of the inherent power authorises the NSWSC to make orders in the nature of variation or revocation of a GCO made by the VSC in the transferred  
20 proceeding (cf AS [53]).

36 ***Section 1337P(2).*** Section 1337P(2) contemplates transferee courts having the power to make “any order” that results in the transferee court dealing with a transferred proceeding otherwise than as if all orders made by the transferor court had been made by it. The existence of such power is essential to ensure that the transferee court retains power to

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<sup>32</sup> The locution “orders in the nature of” is necessary given the deeming effect of s 1337P(2).

<sup>33</sup> *Supreme Court Act 1970* (NSW), s 22.

<sup>34</sup> *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268 (*Keramianakis*) at [36] (French CJ; Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ agreeing).

<sup>35</sup> *Grassby v The Queen* (1989) 168 CLR 1 at 16 (Dawson J), cited in *Keramianakis* (2009) 237 CLR 268 at [36] (French CJ; Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ agreeing).

<sup>36</sup> *NH v Director of Public Prosecutions (SA)* (2016) 260 CLR 546 at [68] (French CJ, Kiefel and Bell JJ).

<sup>37</sup> *Keramianakis* (2009) 237 CLR 268 at [36] (French CJ; Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ agreeing).

<sup>38</sup> *Torrac Nominees Pty Ltd v Karabay* (2007) 69 NSWLR 669 at [50] (Young CJ in Eq; Ipp JA and Handley AJA agreeing). See also *Wilkshire v Commonwealth* (1976) 9 ALR 325 at 330 (Muirhead J); *President Torney v Victoria Legal Aid* [2010] VSC 631 at [12] (Croft J).

deal with a transferred proceeding as appropriate. It follows that insofar as the inherent power does not authorise orders in the nature of variation or revocation of a GCO, s 1337P(2) is to be construed as impliedly conferring such power on transferee courts.<sup>39</sup>

37 That construction of s 1337P(2) is open on the text. In particular, the words “subject to any order” in s 1337P(2) recognise the power of transferee courts to make orders in the nature of variation or revocation.<sup>40</sup> So much is supported by the proposition that provisions that confer power on courts should not be construed as subject to “limitations which are not found in the express words”.<sup>41</sup>

38 **Civil Procedure Act, s 183.** Section 183 confers power on the NSWSC, in any proceeding  
10 under Pt 10 of the *Civil Procedure Act* (ie, a representative proceeding), to “make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings”. In a case such as the present, s 183 is picked up and applied by s 79 of the *Judiciary Act*.<sup>42</sup>

39 The power conferred by s 183 of the *Civil Procedure Act* is “wide”,<sup>43</sup> albeit “supplementary or gap-filling”.<sup>44</sup> The relevant gap that s 183 can fill is the asserted absence of power to make an order of the kind referred to in s 1337P(2). *Brewster* does not preclude this construction of s 183. There is nothing in the scheme of Pt 10 of the *Civil Procedure Act* to suggest that the New South Wales Parliament would have made specific provision had it intended the NSWSC to have power to make orders of the kind  
20 referred to in s 1337P(2).<sup>45</sup> If anything, the Parliament should be taken to have assumed that the NSWSC would have such powers in order to give effect to the evident intent of both s 1337P(2) and the cognate provision in the *Cross-vesting Acts* (all of which were

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<sup>39</sup> See *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 302-303 (Mason, Deane and Dawson JJ). See also *Attorney-General (Cth) v Oates* (1999) 198 CLR 162 at [16] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ); *Port of Portland Pty Ltd v Victoria* (2010) 242 CLR 348 at [5] (the Court).

<sup>40</sup> See and compare *Ex parte Fisk* (1885) 113 US 713 at 725 (Miller J for the Court); *Granny Goose Foods Inc v Teamsters* (1974) 415 US 423 at 437-438 (Marshall J for the Court).

<sup>41</sup> *Owners of “Shin Kobe Maru” v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421 (the Court). See also *Deputy Commissioner of Taxation v Huang* (2021) 273 CLR 419 at [23] (Gageler, Keane, Gordon and Gleeson JJ).

<sup>42</sup> *Rizeq* (2017) 262 CLR 1 at [61]-[63], [87]-[89] (Bell, Gageler, Keane, Nettle and Gordon JJ).

<sup>43</sup> *Wigmans v AMP Ltd* (2021) 270 CLR 623 at [32] (Kiefel CJ and Keane J). See also *Brewster* (2019) 269 CLR 574 at [46]-[47] (Kiefel CJ, Bell and Keane JJ), [146] (Gordon J).

<sup>44</sup> *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 (***Brewster***) at [70] (Kiefel CJ, Bell and Keane JJ), [145], [147] (Gordon J).

<sup>45</sup> Cf *Brewster* (2019) 269 CLR 574 at [68] (Kiefel CJ, Bell and Keane JJ), [125] (Nettle J).

already in existence when the *Civil Procedure Act* was enacted) in the context of a representative proceeding.

## **E PARAGRAPH 2 OF THE NOC: SECTION 1337P(2) IS VALID**

40 The applicants contend that if s 1337P(2) applies to orders that a transferee court has no power to make, then it is invalid because it is not supported by s 51(xxxix) of the Constitution and because it is contrary to Ch III of the Constitution. Both contentions should be rejected.

### **E.1 Section 1337P(2) is supported by a head of legislative power**

41 It is sufficient in the present case to conclude that s 1337P(2) is supported by ss 77(i) and  
10 (iii) of the Constitution, either by the express or implied incidental grants contained in those sections, or by the express incidental power granted by s 51(xxxix). To the extent that it is not supported by those heads of power, it is supported by a referral of power under s 51(xxxvii). It is not necessary to consider whether s 1337P(2) might, in other applications, also be supported by other heads of legislative power.

42 **Sections 77(i) and (iii), and 51(xxxix).** Sections 77(i) and (iii) of the Constitution respectively confer on the Commonwealth Parliament the power to make laws defining the jurisdiction of federal courts other than the High Court, and investing State courts with federal jurisdiction. In the exercise of those powers, the *Corporations Act* confers civil jurisdiction on federal courts<sup>46</sup> and State courts,<sup>47</sup> thereby bringing together  
20 Commonwealth, State and Territory courts into a “common jurisdictional framework”.<sup>48</sup>

43 Sections 77(i) and (iii), like all heads of legislative power, carry with them “authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose, and thus carr[y] with [them] power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter”.<sup>49</sup> Section 1337P is a part of an integrated scheme for the management of proceedings in federal

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<sup>46</sup> *Corporations Act*, ss 1337B(1), 1337C(1).

<sup>47</sup> *Corporations Act*, ss 1337B(2)-(3), 1337C(2), 1337D(1)-(2), 1337E(1).

<sup>48</sup> Explanatory Memorandum, Corporations Legislation Amendment Bill 1990 (Cth) at [163].

<sup>49</sup> *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77 (Dixon CJ, McTiernan, Webb and Kitto JJ); *Spence v Queensland* (2019) 268 CLR 355 at [53] (Kiefel CJ, Bell, Gageler and Keane JJ).

jurisdiction and is necessary to effectuate the purpose of the conferral of jurisdiction by s 1337B. It is therefore supported by ss 77(i) and (iii).

44 If any further support be needed, the express incidental power granted by s 51(xxxix) is sufficient. That section “relevantly extends to authorise enactment of laws incidental to the exercise of a power of adjudication conferred or vested in a court by or under Ch III or necessary or proper to make the exercise of such a power of adjudication effective”.<sup>50</sup>

45 Section 1337P(2) is a law incidental to the powers of adjudication vested in courts by ss 1337B-1337E. By ensuring that a proceeding or application that is transferred under ss 1337H-1337K continues as if steps taken in the transferor court had been taken in the  
10 transferee court, s 1337P(2) is “conducive to the success”<sup>51</sup> of the “common jurisdictional framework” established by Div 1 of Pt 9.6A of the *Corporations Act*. It is therefore supported by s 51(xxxix).

46 **Section 51(xxxvii).** Section 51(xxxvii) of the Constitution confers power to make laws with respect to “matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States”.

47 By the *Corporations (Commonwealth Powers) Acts*, the States referred to the Commonwealth Parliament “the matters to which the referred provisions relate, but only to the extent of the making of laws with respect to those matters by including the referred provisions in Acts enacted in the terms, or substantially in the terms, of the tabled text”.<sup>52</sup>  
20 Those Acts define “referred provisions” to mean “the tabled text to the extent to which that text deals with matters that are included in the legislative powers of the Parliament of the State”.<sup>53</sup> “Tabled text” is in turn defined to mean the text of the *Corporations Bill 2001 (Cth)* and the *Australian Securities and Investments Commission Bill 2001 (Cth)*:<sup>54</sup>

comprised in two or more documents (each bearing identification as “part of the tabled text”) as tabled by or on behalf of the Attorney General of New South Wales in the Legislative

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<sup>50</sup> *Rizeq* (2017) 262 CLR 1 at [46] (Bell, Gageler, Keane, Nettle and Gordon JJ). See also *Zurich Insurance plc v Koper* (2023) 97 ALJR 614 at [35] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

<sup>51</sup> *Stemp v Australian Glass Manufacturers Co Ltd* (1917) 23 CLR 226 at 235 (Barton ACJ), quoted in *Re Wakim* (1999) 198 CLR 511 at [122] (Gummow and Hayne JJ).

<sup>52</sup> See, eg, *Corporations (Commonwealth Powers) Act 2001* (NSW), s 4(1)(a); *Corporations (Commonwealth Powers) Act 2001* (Vic), s 4(1)(a). See also *Corporations Act*, s 3(1).

<sup>53</sup> See, eg, *Corporations (Commonwealth Powers) Act 2001* (NSW), s 3(1); *Corporations (Commonwealth Powers) Act 2001* (Vic), s 3(1).

<sup>54</sup> See, eg, *Corporations (Commonwealth Powers) Act 2001* (Vic), s 3(1). The definition in s 3(1) of the *Corporations (Commonwealth Powers) Act 2001* (NSW) is in slightly different language. The minor modifications reflect the fact that it is the jurisdiction by reference to which “tabled text” is defined.

Assembly of New South Wales at any time during the period between the giving of notice of motion for leave to introduce the Bill for the Corporations (Commonwealth Powers) Act 2001 of that State in that Legislative Assembly and the second reading of that Bill in that Legislative Assembly.

48 Whether s 1337P(2) is a referred provision within the meaning of the *Corporations (Commonwealth Powers) Acts* therefore depends on the content of the “tabled text” for the Corporations Bill 2001 (Cth). The “tabled text” for the Corporations Bill 2001 (Cth) contained s 1337P(2) in precisely the form in which it was enacted.

49 The referrals in the *Corporations (Commonwealth Powers) Acts* have effect “only ... if  
10 and to the extent that [a] matter is not included in the legislative powers of the Parliament of the Commonwealth”.<sup>55</sup> Thus, “if and to the extent that” s 1337P(2) is not supported by another head of power, it is supported by s 51(xxxvii). There is no gap. The Commonwealth Parliament has exclusive power to enact laws regulating the exercise of federal jurisdiction<sup>56</sup> and State Parliaments have “no power to command a court as to the manner of exercise of federal jurisdiction conferred on or invested in” a State court.<sup>57</sup> However, if s 1337P(2) is characterised as a law other than as to the regulation of federal jurisdiction, any gap is filled by s 51(xxxvii), which adds to the subject matters of Commonwealth legislative power.<sup>58</sup>

## E.2 Section 1337P(2) does not infringe Ch III of the Constitution

20 50 In *Kuczborski v Queensland*, Crennan, Kiefel, Gageler and Bell JJ observed:<sup>59</sup>

Decisions of this Court established that the institutional integrity of a court is taken to be 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.

51 The applicants contend that s 1337P(2) infringes both of those limitations on legislative power. Both contentions should be rejected.

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<sup>55</sup> See, eg, *Corporations (Commonwealth Powers) Act 2001* (NSW), s 4(2)(a); *Corporations (Commonwealth Powers) Act 2001* (Vic), s 4(2)(a).

<sup>56</sup> *Rizeq* (2017) 262 CLR 1 at [59] (Bell, Gageler, Keane, Nettle and Gordon JJ).

<sup>57</sup> *Rizeq* (2017) 262 CLR 1 at [46] (Bell, Gageler, Keane, Nettle and Gordon JJ), citing *Alqudsi v The Queen* (2016) 258 CLR 203 at [171] (Nettle and Gordon JJ) and *R v Todoroski* (2010) 267 ALR 593 at [8] (Allsop P).

<sup>58</sup> *Graham v Paterson* (1950) 81 CLR 1 at 19 (Latham CJ); *Airlines of NSW Pty Ltd v New South Wales* (1964) 113 CLR 1 at 52 (Windeyer J).

<sup>59</sup> (2015) 254 CLR 51 (*Kuczborski*) at [140] (Crennan, Kiefel, Gageler and Keane JJ).



No enlistment of the NSWSC

52 The proposition that the institutional integrity of a court is impaired by legislation that enlists the court in the implementation of the legislative or executive policies derives from the judgments in *South Australia v Totani*.<sup>60</sup> As Crennan, Kiefel, Gageler and Keane JJ subsequently observed in *Kuczborski*:<sup>61</sup>

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The judgments of the members of the majority in *Totani*<sup>62</sup> identified the vice of s 14 of the SOCC Act, in terms of the *Kable* principle, as the requirement that the Magistrates Court create new norms of conduct the content of which was determined by the executive and legislature, and which restricted the liberty of the subject (over and above the norms binding the public under the general law), without any inquiry by the Court into past or threatened contraventions by the individual of any existing legal norm. The Court was called upon to implement, under the forms of judicial process, an executive judgment to restrict the liberty of any person who was a member of a declared organisation. It was this combination of features which warranted the description of s 14 of the SOCC Act as a provision which sought to enlist the Court to implement the policy of the executive and legislature under the guise of judicial determination.

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53 The applicants cannot sustain the contention that the relevant legislative policy to which the NSWSC is required to give effect is that of Victoria (AS [48]). The GCO was made pursuant to a Commonwealth law: the proceeding being in federal jurisdiction, and s 33ZDA being a law “governing the manner of exercise of State jurisdiction”,<sup>63</sup> the section was picked up and applied “as federal law”<sup>64</sup> by s 79 of the *Judiciary Act*.<sup>65</sup> And the obligation on the NSWSC, subject to contrary order, to proceed as if it had made a GCO also arises by force of Commonwealth law: namely, s 1337P(2).

54 In any event, s 1337P(2) does not enlist the NSWSC in the implementation of any legislative policy. The mere fact “[t]hat the legislature’s policies inform the laws which it passes does not mean that the court’s enforcement of those laws is incompatible with its institutional integrity”.<sup>66</sup> As the emphasised passage above makes clear, what must be demonstrated is that the NSWSC is required to act “at the behest”,<sup>67</sup> or as a mere

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<sup>60</sup> (2010) 242 CLR 1 (*Totani*).

<sup>61</sup> (2014) 254 CLR 51 at [224] (Crennan, Kiefel, Gageler and Keane JJ) (emphasis added).

<sup>62</sup> (2010) 242 CLR 1 at [82] (French CJ), [149] (Gummow J), [235]-[236] (Hayne J), [480] (Kiefel J).

<sup>63</sup> *Masson v Parsons* (2019) 266 CLR 554 at [30] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). See also *Rizeq* (2017) 262 CLR 1 at [63] (Bell, Gageler, Keane, Nettle and Gordon JJ).

<sup>64</sup> *Pedersen v Young* (1964) 110 CLR 162 at 165 (Kitto J).

<sup>65</sup> *Rizeq* (2017) 262 CLR 1 at [81] (Bell, Gageler, Keane, Nettle and Gordon JJ).

<sup>66</sup> *Kuczborski* (2014) 254 CLR 51 at [220] (Crennan, Kiefel, Gageler and Keane JJ). See also *Public Service Association and Professional Officers’ Association Amalgamated (NSW) v Director of Public Employment* (2012) 250 CLR 343 at [44] (French CJ).

<sup>67</sup> *Totani* (2010) 242 CLR 1 at [149] (Gummow J), [226], [229] (Hayne J). See also *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 (*Vella*) at [179] (Gageler J).

“instrument”,<sup>68</sup> of the legislature, thereby denying that court one of “those defining characteristics which mark a court apart from other decision-making bodies”.<sup>69</sup>

55 Section 1337P(2) is readily distinguishable from the impugned provision in *Totani*. As explained above in answer to Question 2(b), the NSWSC has power to make orders in the nature of variation or revocation of the GCO. In that way, it retains “substantial judicial discretion”<sup>70</sup> as to whether, and if so on what terms, it should give effect to orders made by the transferor court. In those circumstances, s 1337P(2) does not enlist the NSWSC in the implementation of any legislative policy.

*No departure from the processes that characterise the exercise of judicial power*

10 56 Section 1337P(2) involves no departure from the processes that characterise the exercise of judicial power. That s 1337P(2) involves no such departure is supported by the fact that transferee courts may make orders in the nature of variation or revocation of a GCO. Moreover, the adoption of statutory fictions to facilitate the administration of justice is a commonplace. So much is apparent from the cases concerning “constitutional deeming legislation”,<sup>71</sup> the validity of which this Court has upheld.<sup>72</sup>

57 That s 1337P(2) is framed in different terms from the legislation at issue in those cases is hardly surprising. The differences reflect the different purposes of that legislation — namely, “to overcome what federal and State Parliaments have perceived to be deleterious consequences” arising from a judicial decision that certain legislation was invalid.<sup>73</sup>

20 Simply to point to the differences is not to identify any “process” that characterises the exercise of judicial power from which s 1337P(2) departs to a significant degree (cf **AS [48]**). Here, s 1337P(2) overcomes a different “deleterious consequence[.]” from that with which constitutional deeming legislation is concerned: namely, that of steps

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<sup>68</sup> *Totani* (2010) 242 CLR 1 at [436] (Crennan and Bell JJ). See also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 124 (McHugh J).

<sup>69</sup> *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ).

<sup>70</sup> *Vella* (2019) 269 CLR 219 at [79] (Bell, Keane, Nettle and Edelman JJ).

<sup>71</sup> To adopt Professor Bateman’s terminology: “Legislating against Constitutional Invalidity: Constitutional Deeming Legislation” (2012) 34 *Sydney Law Review* 721.

<sup>72</sup> *Humby* (1973) 129 CLR 231; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629; *Re Macks* (2000) 204 CLR 158; *Haskins v The Commonwealth* (2011) 244 CLR 22.

<sup>73</sup> *Re Macks* (2000) 204 CLR 158 at [197] (Gummow J).

taken in a transferred proceeding not having effect in the transferee court. In doing so, it involves no departure from the judicial process.

58 That conclusion is supported by the fact that provisions not dissimilar to s 1337P(2) have a history dating back to the early years of Federation.<sup>74</sup> That long history tends to suggest that, far from departing from the processes that characterise the exercise of judicial power, s 1337P(2) is consistent with those processes.<sup>75</sup>

## F QUESTION 1: THE RELEVANCE OF A GCO TO A TRANSFER APPLICATION

59 The critical question for the purposes of s 1337H(2) is whether, having regard to the “interests of justice”, it is “more appropriate” that a court other than the transferor court  
10 determine the application or proceeding.

60 The question whether one court is “more appropriate” than another is different from whether a forum is “clearly inappropriate”.<sup>76</sup> In deciding which court is “more appropriate”, the court must have regard to the matters in s 1337L and should have regard to the “connecting factors” between the proceeding and the various courts that have jurisdiction.<sup>77</sup> The plaintiff’s original choice of forum is a neutral factor; there is no “presumption as to where the balance of the interests of justice might come down”.<sup>78</sup> If one court is “more appropriate” than another, “however so slightly”, then there must be a transfer to that court.<sup>79</sup>

61 “The expression ‘the interests of justice’ is a broad one”.<sup>80</sup> While the interests of the  
20 respective parties “will arise for consideration” in determining where the interests of justice lie, “there may be interests wider than those of either party to be considered”.<sup>81</sup>

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<sup>74</sup> *Judiciary Act* (as enacted), ss 41, 44.

<sup>75</sup> See generally *TCL (Air Conditioner) Zhongshan Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [105] (Hayne, Crennan, Kiefel and Bell JJ); *Palmer v Ayres* (2017) 259 CLR 478 at [37] (Kiefel, Keane, Nettle and Gordon JJ); *Vella* (2019) 269 CLR 219 at [83] (Bell, Keane, Nettle and Edelman JJ).

<sup>76</sup> *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 (**Schultz**) at [7]-[11] (Gleeson CJ, McHugh and Gummow JJ). Cf *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

<sup>77</sup> *Schultz* (2004) 221 CLR 400 at [18] (Gleeson CJ, McHugh and Heydon JJ); *Kadac Pty Ltd v Complete Health Products Pty Ltd* [2015] VSC 613 (**Kadac**) at [12(c)] (Sifris J).

<sup>78</sup> *Schultz* (2004) 221 CLR 400 at [25] (Gleeson CJ, McHugh and Heydon JJ), [77] (Gummow J; Hayne J agreeing), [168] (Kirby J).

<sup>79</sup> *Valceski v Valceski* (2007) 70 NSWLR 36 at [70] (Brereton J).

<sup>80</sup> *Acton Engineering Pty Ltd v Campbell* (1991) 31 FCR 1 at 3 (Black CJ); see also at 5 (Davies J). See also *Dwyer v Hindal Corporate Pty Ltd* (2005) 52 ACSR 335 at [16] (DeBelle J); *Kadac* [2015] VSC 613 at [14] (Sifris J).

<sup>81</sup> *Schultz* (2004) 221 CLR 400 at [15] (Gleeson CJ, McHugh and Heydon JJ).

Because “[t]he ‘interests of justice’ are even-handed”,<sup>82</sup> an advantage to a plaintiff that is matched by a corresponding and commensurate disadvantage to a defendant is a neutral factor in the exercise for which s 1337H(2) calls.<sup>83</sup>

62 Of course, in deciding a transfer application the Court must take account of the existence of a GCO. To that extent, the making of a GCO will be relevant. But it is a neutral factor in the decision whether to transfer a proceeding under s 1337H(2). That is so for the simple reason that the status of the GCO will be the same whether or not the matter is transferred under s 1337P(2), that transfer gives rise to no “lessening of procedural or substantive rights”<sup>84</sup> (cf **AS [22]**).

10 62.1 If the proceeding is not transferred, the GCO will continue to have effect in the VSC. The VSC will have power to makes orders in the nature of variation<sup>85</sup> or revocation<sup>86</sup> of the GCO.

62.2 If the proceeding is transferred, the GCO will be deemed to have effect in the NSWSC by virtue of s 1337P(2). As explained above in answer to Question 2(b), the transferee court will have power to make orders in the nature of variation or revocation of the GCO.

63 For completeness, the Commonwealth submits that although s 1337H(2) uses the word “may”, “it by no means follows”<sup>87</sup> that the provision confers a discretion (cf **AS [25]**, **[30]**). It would be strange if a court could be positively satisfied, having regard to the  
20 interests of justice, that another court is a more appropriate forum, yet could nevertheless decline to transfer the proceeding to that court in the exercise of a “residual discretion”. That is particularly so because it is difficult to identify any matter that could only fall for consideration as part of the asserted residual discretion,<sup>88</sup> given that, as the applicants themselves contend (**AS [20]**), the expression “interests of justice” is a “broad one” (**J [104]**). For those reasons, s 1337H(2) should be construed as imposing a power that

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<sup>82</sup> *Schultz* (2004) 221 CLR 400 at [100] (Gummow J; Hayne J agreeing).

<sup>83</sup> *Schultz* (2004) 221 CLR 400 at [16], [26] (Gleeson CJ, McHugh and Heydon JJ), [100] (Gummow J; Hayne J agreeing, [258] (Callinan J). In the context of s 44 of the *Judiciary Act*, compare *Pozniak v Smith* (1982) 151 CLR 38 at 47 (Gibbs CJ, Wilson and Brennan JJ), 51 (Mason J).

<sup>84</sup> *Wileypark Pty Ltd v AMP Ltd* (2018) 265 FCR 1 at [52] (Allsop CJ; Middleton and Beach JJ agreeing).

<sup>85</sup> See *Supreme Court Act*, s 33ZDA(3).

<sup>86</sup> See paragraphs 34-35 above.

<sup>87</sup> *Leach v The Queen* (2007) 230 CLR 1 at [38] (Gummow, Hayne, Heydon and Crennan JJ).

<sup>88</sup> *Hancock Prospecting Pty Ltd v 150 Investments Pty Ltd* (2017) 120 ACSR 495 at [65] (Yates J).

must be exercised if it is “more appropriate” that a court other than the transferor court determine the application or proceeding.<sup>89</sup>

**G PARAGRAPH 1 OF THE NOC: THE NSWSC HAS “JURISDICTION IN THE MATTERS FOR DETERMINATION IN THE ... PROCEEDING”**

64 By paragraph 1 of the NOC, the applicants seek to re-agitate an argument concerning the construction of s 1337H(2) that was rejected by the Court of Appeal. The argument is that a court only has “jurisdiction” within the meaning of s 1337H(2) if it has both jurisdiction to decide the matter and power to make orders appropriate to deal with the matter, such that a court does not have “jurisdiction in the matters for determination” if it lacks power to deal with a GCO; and that the VSC therefore lacks power to transfer the matter to the NSWSC because it lacks power to deal with the application (see **J [73]-[75]; AS [56]**).

65 Even if the applicants’ construction of s 1337H(2) were correct, it would not assist them because in the present case the NSWSC has power to deal with the “matters for determination in the ... proceeding”. The expression “matters for determination” refers to matters the determination of which is pending. Put another way, a matter is not “for” determination if it has already been determined.<sup>90</sup> In this proceeding, the question of whether to make a GCO has already been determined. It is therefore not a matter for determination in the proceeding. Further, insofar as the ongoing status of the GCO can be said to be a matter for determination in the proceeding, for the reasons explained in Part IV(D) above the NSWSC has power to deal with the GCO, including by making orders in the nature of variation or revocation (cf **AS [56]**).

66 Accordingly, even assuming that in the context of s 1337H(2) “jurisdiction” includes power, the NSWSC has “jurisdiction in the matters for determination in the ... proceeding”. The applicants’ argument may therefore be rejected for reasons independent of those given by the Court of Appeal (see **J [99]-[101]**).

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<sup>89</sup> It follows that the first-instance authorities collected in **KS [49] fn 43** were wrongly decided. See also *In the matter of Sol Sana Pty Ltd* [2018] NSWSC 570 at [2]-[4] (Leeming JA).

<sup>90</sup> See *Macquarie Dictionary* (online) (definition of “for”, sense 1) (“with the object or purpose of”); *Oxford English Dictionary* (online) (definition of “for”, sense IV.8.a) (“[w]ith a view to; with the object or purpose of; as preparatory to”).

## PART V — ANSWERS TO QUESTIONS RESERVED

67 For the above reasons, the Commonwealth submits that Questions 1 and 2 should be answered as follows:

**Question 1:** In exercising the discretion to transfer proceedings to another court under s 1337H(2) of the *Corporations Act 2001* (Cth), is the fact that the Supreme Court of Victoria has made a group costs order under s 33ZDA of the *Supreme Court Act 1986* (Vic) relevant?

10 **Answer:** Yes. In light of the construction of s 1337P(2) advanced in response to Question 2(a), the fact that the Supreme Court of Victoria has made a group costs order under s 33ZDA of the *Supreme Court Act 1986* (Vic) is a neutral factor in deciding whether to transfer proceedings to another court under s 1337H(2) of the *Corporations Act 2001* (Cth).

**Question 2:** If the proceedings are transferred to the Supreme Court of New South Wales:

- (a) will the GCO made by the Supreme Court of Victoria on 3 May 2022 remain in force and be capable of being enforced by the Supreme Court of New South Wales, subject to any order of that Court; and
- (b) if the GCO will remain in force, does the Supreme Court of New South Wales have power to vary or revoke the GCO?

**Answer:**

If the proceedings are transferred to the Supreme Court of New South Wales:

- 20
- (a) the GCO made by the Supreme Court of Victoria on 3 May 2022 will be capable of being enforced by the Supreme Court of New South Wales, subject to any order of that Court; and
  - (b) the Supreme Court of New South Wales will have power to make orders in the nature of variation or revocation of the GCO.

## PART VI — ESTIMATE OF TIME

68 It is estimated that up to 20 minutes will be required to present the Commonwealth's oral argument.

**Dated:** 4 June 2024



**Mark Costello**  
(03) 9225 8731  
mark.costello@vicbar.com.au



**Shawn Rajanayagam**  
(03) 9225 6524  
rajanayagam@vicbar.com.au

*Counsel for the Attorney-General of the Commonwealth (intervening)*

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

**ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE  
COMMONWEALTH (INTERVENING)**

- 10 Pursuant to *Practice Direction No 1 of 2019*, the Attorney-General of the Commonwealth sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
<b><i>Constitutional provisions</i></b>			
1.	<i>Commonwealth Constitution</i>	Current	ss 51(xxxvii), (xxxix), 77(i), (iii), Ch III
<b><i>Statutory provisions</i></b>			
2.	<i>Acts Interpretation Act 1901 (Cth)</i>	Current	s 15AA
3.	<i>Civil Procedure Act 2005 (NSW)</i>	Current	s 183
4.	<i>Corporations Act 1989 (Cth)</i>	As at 18 December 1990	Pt 9
5.	<i>Corporations Act 2001 (Cth)</i>	Current	ss 1337B-1337E,

			1337H-1337L, 1337N-1337Q
6.	<i>Corporations (Commonwealth Powers) Act 2001</i> (NSW)	Current	ss 3(1), 4(1)(a), (2)(a)
7.	<i>Corporations (Commonwealth Powers) Act 2001</i> (Qld)	Current	ss 3(1), 4(1)(a), (2)(a)
8.	<i>Corporations (Commonwealth Powers) Act 2001</i> (SA)	Current	ss 3(1), 4(1)(a), (2)(a)
9.	<i>Corporations (Commonwealth Powers) Act 2001</i> (Tas)	Current	ss 3(1), 4(1)(a), (2)(a)
10.	<i>Corporations (Commonwealth Powers) Act 2001</i> (Vic)	Current	ss 3(1), 4(1)(a), (2)(a)
11.	<i>Corporations (Commonwealth Powers) Act 2001</i> (WA)	Current	ss 3(1), 4(1)(a), (2)(a)
12.	<i>Corporations (New South Wales) Act 1990</i> (NSW)	Current	Pt 9
13.	<i>Corporations (Victoria) Act 1990</i> (Vic)	Current	Pt 9
14.	<i>Judiciary Act 1903</i> (Cth)	As enacted	ss 41, 44
15.	<i>Judiciary Act 1903</i> (Cth)	Current	s 79
16.	<i>Jurisdiction of Courts (Cross-vesting) Act 1987</i> (Cth)	Current	ss 5, 11(3)
17.	<i>Jurisdiction of Courts (Cross-vesting) Act 1987</i> (NSW)	Current	ss 5, 11(3)
18.	<i>Legal Profession Uniform Law</i> (NSW)	Current	s 183
19.	<i>Legal Profession Uniform Law</i> (Vic)	Current	s 183
20.	<i>Legal Profession Uniform Law</i> (WA)	Current	s 183
21.	<i>Supreme Court Act 1970</i> (NSW)	Current	s 22
22.	<i>Supreme Court Act 1986</i> (Vic)	Version 109	s 33ZDA