IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

Not Restricted

S ECI 2019 01926

BETWEEN:

NICOS ANDRIANAKIS — Plaintiff

v

UBER TECHNOLOGIES INCORPORATED
and others according to the attached schedule — Defendants

JUDGE:	MACAULAY J
WHERE HELD:	Melbourne
DATE OF HEARING:	4 and 6 September 2019
DATE OF RULING:	20 December 2019
CASE MAY BE CITED AS:	Andrianakis v Uber Technologies (Ruling No 1)
MEDIUM NEUTRAL CITATION:	[2019] VSC 850

TORT – Conspiracy – Unlawful means conspiracy – Claim that defendants combined with the intention of injuring the plaintiff and group members by unlawful means – Whether the pleading of the subjective element of intention to injure by unlawful means adopts correct legal test.

PRACTICE AND PROCEDURE – Pleadings – Application to strike out statement of claim – Whether statement of claim fails to plead a cause of action or is embarrassing – Whether conspirators and overt acts adequately identified.

PRACTICE AND PROCEDURE – Group proceeding – Application that proceeding not continue as group proceeding – Single Victorian plaintiff representing group members in four Australian States – Whether plaintiff has a sufficient interest to represent all group members or can otherwise adequately or effectively represent all group members – Whether any substantial common questions of fact or law – *Supreme Court Act 1986* (Vic) Part 4A ss 33C, 33H, 33N , 33ZF.

PRACTICE AND PROCEDURE - Service out of Australia pursuant to r 7.02 *Supreme Court (General Civil Procedure) Rules 2015* – Foreign defendants' application to set aside service – Rules 7.04 and 8.08 – Whether r 7.02 as amended by SR No 109/2016 was made without power - Adjudicatory jurisdiction of the Court – Subject matter jurisdiction of the Court –

Source of authority for judges of the court to make rules relating to service of process out of Australia – s 25(1)(a) of the *Supreme Court Act 1986* (Vic).

PRACTICE AND PROCEDURE – Security for costs – Quantum of security to be provided – Application for security for costs by only two of seven defendants – Approach to the quantification of security for costs of only some among multiple defendants where costs include common costs.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr David Collins SC Ms Melanie Szydzik Ms Siobhan Kelly	Maurice Blackburn Pty Ltd
For the Defendants	Mr Neil Young QC Mr David Sulan	Jones Day

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HIS HONOUR:

Introduction

1 From around April 2014 in Victoria, New South Wales and Queensland, and from around October 2014 in Western Australia, a ride-sharing service known as UberX became available to people in those States for the provision of commercial, point-to-point passenger transport services. The rollout of that service in those Australian States was an extension of a similar rollout that had commenced in the United States of America in 2013 and was spreading to other parts of the world.

2 As described below, the impact of that rollout was felt by taxi-cab, hire car and limousine service owners, operators and drivers, the incumbent providers of point-to-point passenger transport services in each of the four Australian States.

3 This is a group proceeding commenced by a Victorian taxi-cab operator and driver, Mr Andrianakis, seeking damages for his lost income and the reduction in the value of his business caused, he maintains, by the arrival of UberX in the passenger transport market in Victoria. Mr Andrianakis brings the proceeding on his own behalf, on behalf of all other Victorian point-to-point passenger transport service drivers, operators and owners, and on behalf of similar drivers, operators and owners in NSW, Queensland and WA.

4 The identity of each of the defendants is described below, but collectively they are alleged to be the entities responsible for introducing UberX to Australia and operating the service (**Uber entities**). Of the seven Uber entities, two are Australian companies and the others are foreign companies or firms.

5 At this stage of the proceeding Mr Andrianakis has served a writ endorsed with a statement of claim on each of the seven Uber entities, and subsequently filed an amended statement of claim (**the ASOC**). Service on the five foreign defendants was effected relying upon Order 7 of the *Supreme Court (General Civil Procedure) Rules 2015* (**the Rules**) which provides for service out of Australia.

6 The Australian Uber defendants filed an appearance to the proceeding and the five

foreign Uber defendants filed conditional appearances in accordance with r 8.08 of the Rules. With the leave of the court given at a directions hearing, the Uber defendants have, by filing three summonses,[1] brought a number of applications before being required to file their defences. In short, those applications are as follows:

(a) by the foreign defendants, an application to set aside service out of the jurisdiction; and

(b) by the Australian defendants, an application to strike out the ASOC, alternatively an order that the proceeding not proceed as a group proceeding or, alternatively, that it only proceed on behalf of Victorian group members; and

(c) a further application by the Australian defendants for security for costs.

7 Arising from the applications that have been filed, and submissions made at the hearing of those applications, the following questions need to be answered:

(a) Should the court strike out the ASOC, in whole or in part, for not disclosing a cause of action, being embarrassing or otherwise for abuse of process?

(b) Should the court order under s 33N of the *Supreme Court Act 2015* (**the Act**) that the proceeding no longer proceed as a group proceeding?

(c) Should the Court order, pursuant to s 33ZF of the Act, that the NSW, Qld and WA group members be removed from the proceeding?

(d) Should the Court order pursuant to rr 7.04 and 8.08 of the Rules that the service upon the foreign defendants be set aside?

(e) In what sum should the Court order the plaintiff to pay security for the costs

[1] Amended summons filed on 19 August 2019 on behalf of the fourth and seventh defendants (pleading summons); Amended summons filed 4 September 2019 filed on behalf of first, second, third, fifth and sixth defendants (service-out summons); and summons filed on behalf of the fourth and seventh defendants on 7 August 2019 (security for costs summons).

of the Australian defendants?

Background

8 In order to better explain the particular questions that need to be addressed for deciding these applications, it is first necessary to give a brief overview of the relevant allegations of fact. The following description is derived from the ASOC and the documents referred to within it.

9 Broadly speaking, the UberX ride-sharing service consists of a system for delivering a commercial point-to-point passenger transport service whereby a prospective passenger, the Rider, requests a driver, the UberX Partner, to collect him or her from one designated point and transport him or her to another, for a fee. The request is made via an app (a software application) installed on a smartphone and is received by the UberX Partner on an associated app installed on that person's smartphone. Once the passenger transport service has been supplied, a fee is debited from the Rider's funds by means of an electronic funds transfer to an Uber entity. A share of the fee is then distributed electronically to the UberX Partner. These two apps and the software that lies behind them are central to the operation of the UberX service.

10 The promoters and proprietors of the UberX service, that is, the Uber entities, do not own a fleet of cars nor do they employ a workforce of drivers. Rather, they established the software and digital platform by and upon which the service is conducted; recruited drivers, the UberX Partners, as independent contractors who were willing to perform the service using their own vehicles; made the two apps (the rider app and the driver app) available to Riders and UberX Partners respectively to enable them to find one another by making and responding to a request for a transport service; promoted the service; and generally provided necessary administrative and financial infrastructure.

11 In each of the four Australian States where the UberX service commenced, there was an established regime of taxi-cab, hire car, limousine and/or like services supplying commercial point-to-point passenger transport services. These existing services were

regulated by local regulations in each State, typically requiring the drivers, owners and operators of such services to be licensed or accredited to supply the relevant service and to only use vehicles that were also licensed or accredited for such use.

12 Regulations extended, amongst other things to matters such as requiring payment of licence fees, restricting the assignment of licences, stipulating the qualifications or credentials of drivers and fixing standards for vehicles. Licences were usually finite in number and, for that reason, acquired a tradeable value. They constituted a valuable commodity in the business of the service provider.

13 Adherence to the regulations was enforced by laws which made it an offence to own or operate a commercial passenger transport service without holding the requisite licence or accreditation, or to use an unauthorised vehicle for such a service. Arguably, the practical effect of the regulations was that they created and upheld a form of market protection for those holding the requisite licences and accreditation in the supply of commercial point-to-point passenger transport services.

14 When UberX services began in Australia, the UberX Partners, so it is alleged, typically were neither licensed or accredited to be drivers, owners or operators for the provision of commercial passenger transport services in any of the four States. Nor, it is said, were their vehicles typically licensed or accredited for use in the provision of such services. Accordingly, so it is alleged, the provision of the UberX service in the four Australian states typically involved breaches of the local laws and regulations which regulated the supply and operation of commercial point-to-point passenger transport services.

15 Not only that, the introduction of the UberX service was said to have had a dramatic, adverse effect on the incomes of the incumbent passenger transport providers and of the value of the businesses — that is to say, upon the income of the licensed drivers, owners and operators of taxi-cabs, hire cars and limousines, and the value of their businesses.

Should the ASOC be struck out?

16 The cause of action relied upon by the plaintiff is the tort of conspiracy by unlawful means.

17 In *Maritime Union of Australia v Geraldton Port Authority*,[2] RD Nicholson J identified the constituent elements of an unlawful means conspiracy as follows:[3]

> (a) each of the alleged … co-conspirators was a party to an agreement or combination with either of the other … co-conspirators;
>
> (b) the purpose of that agreement or combination was to injure the applicants by unlawful means;
>
> (c) the agreement or combination was carried into effect by the commission of agreed unlawful acts; and
>
> (d) those unlawful acts caused damage to the applicants.

18 Mr Andrianakis alleges that the Uber entities entered an agreement or combination among themselves to establish UberX in each of the four States with the intention of harming the incumbent licensed commercial point-to-point passenger service providers. The agreed means of establishing the UberX service was through the engagement of unlicensed drivers using non-accredited vehicles. The provision of the service using unlicensed drivers with non-accredited vehicles was, at the relevant time, an offence in each of the States. Knowing and intending that the conduct of the UberX service by that means would be illegal, each of the Uber entities that facilitated the establishment of the UberX service was complicit with the UberX Partners (that is, the drivers) in the offences which they committed when performing the service. Further, it is alleged that the establishment and conduct of the UberX service in each State by that means caused economic loss to the incumbent, licensed commercial point-to-point passenger services providers, such as Mr Andrianakis in Victoria.

19 The Australian defendants seek an order that the ASOC be struck out pursuant to r

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2 (1999) 93 FCR 34 ('*Maritime Union*').

3 Ibid at [421]. Cited with approval by Weinberg J in *Dresna Pty Ltd v Misu Nominees Pty Ltd* [2003] FCA 1537, [102] ('*Dresna*'). A similar list of elements, albeit arranged in a different order, was given by McDonald J in *Talacko v Talacko* [2015] VSC 287, [160] (appeal upheld, but the elements of the tort were not an issue on the appeal: *Bennett v Estate of Talacko (Decd); Talacko v Bennett* [2017] VSCA 163).

23.02 of the Rules. That rule empowers the Court to order that the whole or any part of a pleading be struck out or amended if it or part of it does not disclose a cause of action, is scandalous, frivolous or vexatious, may prejudice, embarrass or delay the fair trial of the proceeding or is otherwise an abuse of the process of the Court.

20 It will be necessary to first describe the structure and content of the pleading in some greater detail before explaining and dealing with the various pleading objections that are made to it. But, in overview, the objections are that the pleading:

(a) is embarrassing or does not disclose a cause of action because it fails to identify who were the parties to each of the different conspiracies in the four States (especially by the use of the phrase "one or more of" when referring to the seven Uber entities);

(b) is embarrassing because it does not plead overt acts separately from pleading the agreement itself; that is, it conflates the two elements by relying upon a common body of facts for inferring each of them, again using the phrase "one or more of", and is generally confusing; and

(c) does not disclose a cause of action because it adopts and applies an incorrect legal test for 'intention to injure by unlawful means' and thus fails to adequately identify how each Uber entity had as its *object* the injury of the relevant class members.

The pleaded claim in overview

21 Including its schedules, the ASOC runs for 126 pages with 144 substantive paragraphs. The content of the pleading is helpfully indexed and is structured in accordance with the following headings:

Part A Parties and Group Members

Part B The Uber Group's establishment and operation of UberX

Part C The Uber Entities' Strategy

Part D Fines and Greyballing

Part E Conspiracy by unlawful means

Part F Loss and damage

Part G Common questions of law or fact.

22 The proceeding is identified in **Part A** as a group proceeding which Mr Andrianakis is said to have commenced on his own behalf and on behalf of Victorian Group Members, New South Wales Group Members, Queensland Group Members and Western Australian Group Members (collectively, the **Group Members**). In each State, the Group Members are described, with some differences from State to State, as encompassing the licenced owners, operators and drivers of taxi cab, hire car, limousine and like services.

23 It is worth emphasising, because it is a fact that gives rise to an argument put by the defendants, that Mr Andrianakis only holds taxi cab licences in Victoria and there is no named-plaintiff who is an owner, operator or driver of a licensed passenger transport service in any State other than Victoria.

24 The seven defendants, comprising the defined Uber entities, consist of: Uber Technologies Incorporated (**Uber Inc**), Uber International Holdings BV (**Uber Holding**), Uber BV, Uber Australia Pty Ltd (**Uber Australia**), Rasier Operations BV (**Rasier Operations**), and Uber Pacific Holdings BV and Uber Pacific Holdings Pty Ltd (a partnership called **Rasier Pacific**). Only Uber Australia Pty Ltd and Uber Pacific Holdings Pty Ltd are Australian companies. The others are foreign entities.

25 In **Part B** of the ASOC the plaintiff sets out the role which each Uber Entity played in the establishment of the UberX service in the four Australian States. Without repeating every allegation, the essential roles may be paraphrased in the following paragraphs.

26 Uber Inc (a company incorporated in the USA) is the ultimate parent company of a

group of over 110 entities, including the other six Uber Entity defendants.[4] Uber Inc published the two apps, the rider app and the driver app, and licensed them to Uber BV (a company incorporated in the Netherlands) for use outside of the USA.[5] Having first developed the service in the USA, in August 2012 Uber Inc decided to operate UberX in Australia and it provided financial support to Uber Australia for that purpose. From October 2012, Uber Holding (a company incorporated in the Netherlands) managed the Uber Group's international operations, including by setting objectives for the Australian market and supporting Uber Australia financially.[6]

27 Ultimately, the UberX ride-sharing service was made available in Victoria, NSW and Queensland in April 2014, and in WA in October 2014. It was 'made available' by the provision of the rider app to would-be Riders and the driver app to recruited UberX Partners. The activation and operation of the software and IT architecture that supported those two apps allowed Riders and drivers to connect and to implement the financial aspects of the ride-sharing transaction.

28 Between October 2012 and the launch of UberX in the Australian States, a number of things are alleged to have taken place. Uber BV registered Riders and entered contracts with them setting out the terms of the provision of the service.[7] Uber Australia employed staff to market the service and to prepare for the recruitment of the UberX Partners.[8] Uber Inc and Uber Australia commenced an engagement with regulatory authorities in the Australian States in an attempt to legalise the UberX service.[9]

29 Further, a number of additional steps are alleged to have been taken by 'one or more of the Uber entities'. As has been mentioned, this particular pleading device is the subject of complaint by the Uber applicants. So, it is alleged that one or more of the

4 Paragraph 10.
5 Paragraph 14.
6 Paragraph 20.
7 Paragraph 21.
8 Paragraph 23.
9 Paragraph 27.

Uber entities –

(a) From February 2014, marketed the UberX service to prospective Riders, including encouraging the uptake of the use of the rider app;[10]

(b) From February 2014, marketed the UberX service to prospective UberX Partners, including encouraging the uptake of the use of the driver app;[11]

(c) Set minimum vehicle standards for use in the service, published information for prospective UberX Partners about UberX Partner and vehicle requirements in Australian States, processed applications for those seeking to provide the UberX service in Australia and (if necessary) notified Uber BV of approved applicants and their details.[12]

30 In terms of other allegations that are particular to individual Uber entities, it is also alleged that in February 2014 Uber BV sublicensed the driver app to Rasier Operations (a company incorporated in the Netherlands) which, in turn, entered into contracts with UberX Partners setting out the terms for the supply of the UberX service and other ancillary matters.[13] Although those terms included that the UberX Partner represented that they possessed, and would produce to Rasier Operations, all requisite licences and permits necessary to legally perform point-to-point passenger services in the State in which they intended to operate, the plaintiff alleges that at all material times Rasier Operations had no intention that UberX Partners should comply with that term, nor did it ever enforce it.

31 From December 2015, Rasier Operations further sublicensed the software in the rider app and the driver app to Rasier Pacific, and thereafter Rasier Pacific entered the relevant provider agreement with UberX Partners. Those agreements contained similar terms to those in the Rasier Operations contracts. Again, it is alleged that Rasier Pacific had no intention that UberX Partners should comply with the terms

10 Paragraph 28.
11 Paragraph 29.
12 Paragraphs 30-32.
13 Paragraphs 34-38.

requiring compliance with local laws or to enforce the terms requiring production of licences and permits which evidenced that compliance.[14]

32 Under the heading, 'Uber Strategy', in **Part C** of the ASOC, the plaintiff pleads the legal compliance requirements subsisting in each Australian State for the conduct of point-to-point passenger transport services. He alleges that only a limited number of drivers, operators and vehicles met those requirements.[15] He further alleges that the Uber entities intended that the UberX service would compete with existing point-to-point passenger service providers in each State. Any driver who did *not* have to meet the legal compliance requirements applicable in each State would, it is said, enjoy a competitive advantage over those who did.[16]

33 So, it is alleged, the Uber entities intended, and did, recruit drivers as UberX Partners who would be unlikely to want to supply the UberX service if they had to meet the legal compliance requirements for their State. Each Uber entity is said to have intended and known that UberX Partners, would not meet the driver compliance requirements, would not use a car meeting the vehicle compliance requirements, and would not be exposed to the cost of those compliance requirements.[17]

34 In **Part D**, headed 'Fines and Greyballing', Mr Andrianakis alleges that in each State the relevant regulatory authority issued fines to various UberX Partners for offences under the State law governing point-to-point passenger service providers, and that 'one or more of the Uber entities' publicised that they would pay, and then did pay or reimbursed UberX Partners for, the fines so incurred.[18] It is also alleged that Uber Inc developed a software tool, known as Greyball, to identify and deny services to regulatory enforcement officers to assist UberX Partners evade fines and that 'one or more of the Uber entities' used Greyball with that effect.[19]

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14 Paragraphs 40-42.
15 Paragraphs 50, 51.
16 Paragraphs 49, 56.
17 Paragraph 57.
18 Paragraphs 58-65.
19 Paragraph 66-67.

35 Parts B, C and D, as just described, alleged the factual foundation for what then follows, namely **Part E**, the allegations of conspiracy by unlawful means in each of the four States.

36 The pleading of conspiracy by unlawful means in relation to each State follows the same essential scheme. It varies between the States only because of the difference in the detail of the local statutory requirements governing the use of commercial passenger services and the local law of complicity. The essential scheme can be described, for present purposes, as the following generic set of allegations concerning the operation of UberX as it applied for each State:

(a) During the claim period,[20] a driver and an owner of a vehicle operating as a commercial passenger vehicle, without there being an appropriate licence or permit for that vehicle under the State's transport law, were each guilty of an offence.

(b) UberX Partners who provided the UberX service in the claim period typically did so using vehicles which were not authorised to be operated as a commercial passenger vehicle under an applicable licence, permit or other authority, and thereby *committed offences*.

(c) During the claim period, a person was prohibited from driving a commercial passenger vehicle unless the person held driver accreditation under the State's transport law.

(d) UberX Partners who provided the UberX service in the claim period typically did so without holding applicable driver accreditation and thereby *committed offences*.

(e) During the claim period each of the Uber entities *knew* the essential matters comprising the commission of those offences by UberX Partners.

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[20] A different claim period was defined in each State: 1 April 2014-23 August 2017 (Victoria), 7 April 2014-18 December 2015 (New South Wales), 17 April 2014-9 June 2017 (Queensland), and 10 October 2014-4 July 2016 (Western Australia). The end date in each case is believed to be the date in which the UberX service ceased to be unlawful in each relevant State.

(f) During the claim period, Uber Inc, Uber BV, Rasier Operations and (after 21 December 2015) Rasier Pacific, further or alternatively one or more of the other Uber entities, were *complicit* (in the terms of the relevant local complicity laws) in the commission of the offences by the UberX Partners.

(g) During the claim period the Uber entities[21] *agreed or combined*, with the *intention of injuring* the local licensed, commercial passenger vehicle operators by establishing, operating and promoting UberX in the State *by unlawful means*, namely their complicity in the offences of the UberX Partners.

(h) Pursuant to that conspiracy, the Uber entities did various overt acts pleaded in specified paragraphs within Parts B, C and D of the ASOC.

37 Finally, it is alleged that the income to be derived by Group Members by providing point-to-point passenger transport services, and the value of their licences, permits and accreditation in each State, were reduced as a result of the operation of UberX. The Victorian, NSW, Queensland and WA Group Members are said to have each suffered loss and damage because of the conspiracy alleged in those parts of the ASOC referable to their particular State.

Pleading principles

38 An extensive summary of pleading principles, and the grounds on which the sufficiency of a pleading may be impugned, is conveniently collected in *Wheelahan v City of Casey (No 12)*.[22] For present purposes, the most relevant principles are these: the function of a pleading is to alert the other party to the case they need to meet and to define the precise issues for determination;[23] the cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action;[24] a pleading is 'embarrassing' within the meaning of r 23.02 when it places the opposite party in a position of not knowing what is alleged;[25] and the power to strike out a pleading is

21 Rasier Pacific only after 21 December 2015.
22 [2013] VSC 316 at [25] (J Dixon J) ('*Wheelahan*').
23 Ibid at [25(b)].
24 Ibid at [25(c)].
25 Ibid at [25(d)].

discretionary, and ought only be exercised when there is some substantial objection to the pleading complained of or some real embarrassment is shown.[26]

39 Like fraud, conspiracy is not an allegation that should be made lightly and such an allegation must be pleaded with precision and sufficient supporting particularity.[27]

40 Where it is contended that a pleading does not disclose a cause of action, the case must be particularly clear to justify the court intervening, at a summary stage, to deprive a party of the right to trial on the cause of action as pleaded.[28]

41 It is to be borne in mind that there are other interlocutory processes, subsequent to the pleading, that continue to perform and progress the function of informing the other side of the case to be met and to ensure that it is not ambushed at trial. With that understanding, and without underestimating the importance of a pleading for identifying the elements of the claim brought by a plaintiff against a defendant, a judgment is to be made whether the pleading outlines the case, at that stage, at an appropriate level of detail or at too great a level of generality or abstraction.[29]

42 It is commonly the case that conspiracy is alleged on the basis of inferential reasoning.[30] Pertinently, for present purposes, in *BATAL*, Kaye J said:

> The drawing an inference does not take place by a series of independent judgments based on individual facts taken in isolation. Rather, the process of inferential reasoning involves a consideration of the united and combined force and effect of the overt acts, when taken together.[31]
>
> It is the relevant coincidence of a number of facts, considered in combination, which may or may not be sufficient to give rise to the inference contended for.
>
> …
>
> It must also be borne in mind that the drawing of inferences from admissible

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26 *Wheelahan* at [25(o)].

27 *Australian Wool Innovation v Newkirk* (2005) ATPR 42-053 at [59] citing *Hughes v Western Australian Cricket Association Inc* (1986) 69 ALR 660 at 700 (Toohey J); *British American Tobacco Australia Ltd v Gordon (No 3)* [2009] VSC 619 at [15] *('BATAL')*; *CC Containers & Ors v Lee & Ors* [2011] VSC 537 at [8].

28 *AS v Minister for Immigration and Border Protection* [2014] VSC 593 at [12] (Kaye J).

29 *Bright v Femcare Ltd* (2000) 175 ALR 50 at 71 [61] (Lehane J), and *Whittenbury v Vocation Ltd* [2017] FCA 1185 at [8] (Middleton J).

30 *BATAL* at [59]. See also *Chong v CC Containers Pty Ltd* (2015) 49 VR 402 441 [133]–[135] (*'Chong'*).

31 *Chamberlain v R (No 2)* (1984) 153 CLR 521, 536 (Gibbs CJ, Mason J).

> evidence is essentially a question of fact, to be determined on the evidence.[32] The relevant inferences to be drawn, and the question whether ultimately the evidence to be adduced in support of the overt acts support an inference of the existence of the alleged conspiracy, will significantly depend on the nature and quality of the evidence given at trial.[33]

43 When determining whether a pleading should be allowed, it is not appropriate for the Court to determine whether the inference can properly or reasonably be drawn: rather, that is the task of the trial judge who will have the benefit of all the evidence, not just a summary of the material facts by way of a pleading and the particulars. At the stage of considering the pleading's sufficiency, where the existence of important facts depend upon inference, the Court should permit the claim in the pleaded form to go forward unless the inference cannot be said to have any real prospect of success.[34]

Does the ASOC fail to adequately identify the conspirators and their overt acts?

44 The first two of the defendants' pleading complaints (see [20] above) are interrelated: namely, that the ASOC, (1) does not specifically identify which of the Uber entities are alleged to have combined with the common intention of injuring the plaintiff, and (2) fails to adequately plead the overt acts from which it is to be inferred that *each* Uber entity joined and then acted *pursuant to* the alleged conspiracies.[35]

45 Those complaints are logically related in a case such as the present in which the joining of a party to any of the alleged conspiracies is, in large measure, to be inferred from acts done by the particular entity; and those same acts are relied upon as the overt acts done by that entity pursuant to the conspiracy it has allegedly joined. On the point of any apparent circularity — criticised by the defendants as a 'conflation' of the elements of joining the conspiracy and acting in accordance with it — it is well recognised in cases of conspiracy that the agreement of parties to an alleged conspiracy (that is, their joinder to it) is commonly to be inferred from the very acts which they carry out in the alleged performance of it. The point was made

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32 Cf *R v Cengiz* [1998] 3 VR 720.
33 *BATAL* at [59], [60].
34 *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* [2014] VSC 181 at [17] (Ferguson J).
35 See in particular Uber's written submission at paragraphs 10(a) and (b).

succinctly by Redlich, Santamaria and Kyrou JJA in *Chong v CC Containers*:[36]

> The overt acts done in furtherance of the combination may support the inference that there was such an agreement or understanding to further the common unlawful object of the combination.

46 Here, the defendants' argument starts with the fact that there are *four* different conspiracies alleged, one in each State, and there are *seven* Uber defendants. They emphasise the entitlement of each defendant to know the critical factual allegations levelled against it with respect to each alleged conspiracy. The defendants draw upon what Ryan J in *Elliot v Seymour*[37] identified as comprising those critical facts: that is, when the agreement was made; the unlawful means agreed to be employed; the facts and circumstances making those means unlawful; the unlawful acts actually performed; and how those acts caused damage to the plaintiff.

47 Because there are four different conspiracies and each State had its own regulatory scheme and laws of complicity, it may be accepted that there will, of necessity, be different contraventions, different unlawful means, different time periods, different actors, and so on. In that context, the Uber defendants were strongly critical of the pleading convention adopted by the plaintiffs. That is, they criticised the method of pleading a series of acts in Parts B, C and D of the ASOC, and then 'rolling up' allegations of the Uber entities having combined in the conspiracy and acted pursuant to it, in a 'formulaic' way, without adequate particularisation pertinent to each separate entity for each conspiracy. One of the particular pleading devices used by the plaintiff which the defendants say contributes to, or exacerbates, the difficulty in identifying the specific allegations made against each entity is the use of the phrase 'one or more of' in connection with allegations of fact against the Uber entities. Examples of this use are summarised at [29] above.

48 Ultimately, however, I think that the Uber defendants have somewhat overstated the difficulties they say emerge from the pleading. The ASOC needs to be read by

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36 (2015) 49 VR 402, 441 [133] citing *Australian Wool Innovation v Newkirk* (2005) ATPR 42-053 at [62] (Hely J).

37 [1999] FCA 976 at [97], cited by Weinberg J in *McKellar* [146], [147] and *Dresna* [128].

following the cross-referencing within the document, that is by tracking from one allegation back to an earlier set of supporting allegations. Further, many allegations need to be read within the context of other broader allegations, such as the corporate structure and overall business strategy of the group. When this is done carefully, a number of the claimed difficulties tend to get resolved. Moreover, in a number of respects the knowledge of the detail of what occurred lies peculiarly within the Uber camp and, in my view quite reasonably, the plaintiff has stated that where that is the case further particularisation of specific allegations will be given following discovery.

49 Accepting that this is a complex claim, nevertheless the ASOC adequately informs the reader, in respect of each entity –

- who is alleged to have combined,
- when the combination is said to have been made,
- what unlawful means the alleged conspirators agreed to use and what made those means unlawful, and
- what unlawful acts were performed pursuant to the combination.

50 I will explain why I have reached that conclusion.

51 The method used by the plaintiff to allege each Uber entity's participation in the conspiracies has two elements that work in combination. One is to describe a broad contextual setting for the establishment of UberX in Australia, and the other is to point to specific tasks and actions undertaken by the individual Uber entities toward that purpose.

52 The plaintiff's case is that UberX was not made available or operated as the result of any single act, but rather by a series of acts performed by the defendants in combination and in the context of a broader global business strategy. The inference that each Uber entity joined the conspiracies is thus to be inferred from its own acts, viewed in the context of the acts of others within the same corporate group, and all

in the broader context of the group's worldwide business strategy.

53 The overall strategy of the Uber Group worldwide, and in Australia in particular, is pleaded in Part B of the ASOC. Some relevant parts of it are summarised at [26] and [27] above. To repeat some of those allegations, the seven Uber entities form part of a single corporate group.[38] Uber Inc was, at all relevant times, the parent or ultimate holding company of each of them.[39] The Uber Group was established to conduct a business in a number of countries using the rider and driver apps, and the associated software and IT architecture, to enable and facilitate the operation of point-to-point passenger transport services.[40] Uber Inc directly or indirectly controls the Uber Group, including having oversight of its operations and business strategy.[41]

54 The plaintiff has particularised some of his allegations by referring to a body of documents, many of which emanate from the Uber entities themselves, which set out or illustrate the Uber Group's business goals and strategy.[42] Some speak of the roles played by individual Uber entities. Extracted below are examples from some of those documents referred to in the ASOC.

55 On behalf of Uber Australia, Mr Brad Kitschke, describing himself as 'Director Public Policy', sent a submission to the Senate Economics References Committee by email dated 4 October 2015.[43] That submission contains the following information:

> Corporate Structure
>
> Uber Australia Pty Ltd is a wholly-owned subsidiary of Uber International Holding BV, which is based in the Netherlands. Uber BV is in turn an indirect wholly-owned subsidiary of Uber Technologies Inc.
>
> - Uber BV is responsible for the management of our international operations -- including our business strategy and development, and financial investments, including engineering.
>
> - Uber BV's management team sets the local business objectives for the

38 Paragraph 10.
39 Paragraph 10.
40 Paragraph 16.
41 Paragraph 18.
42 The documents referred to in the ASOC are extracted in exhibit JMCE-3 to the affidavit of John Mark Caton Emmerig sworn 15 August 2019, running to over 1850 pages.
43 Referred to in the particulars at [20] of the ASOC.

Australian market, which are then supported by Uber Australia.

- Uber Australia provides certain support services – such as local marketing promotions to potential riders and drivers – to Uber BV. Uber BV pays Uber Australia for the performance of those services.

…

Uber in Australia and Globally

Uber Technologies, Inc. was founded in the US five years ago to solve a simple need: the need to get a ride. Today people can push a button and get transportation within minutes in over 320 cities around the world and more than 61 countries, including Australia. It doesn't matter where you are or where you are going. There is no destination discrimination or refusals based on what you look like or where you live. And if the train or bus doesn't get them all the way home, Uber can help make that last mile connection.

In the process, the Uber platform has also helped create hundreds of thousands of new opportunities for people all around the world. …

The Uber platform first became available in Australia three years ago and we are already having a positive impact locally.

- Creating new economic opportunities: Uber now has 15,000 driver-partners in Australia — and that number is growing fast. And for every dollar spent by a rider, the lion's share is kept by the partner, contributing to the prosperity of her or his local community.

- Increased competition has helped stimulate the point-to-point transport market: Uber has helped open up this market, which had previously been artificially capped by State and Territory governments.

- Local employment: In each of the Australian cities where Uber Australia has an office, we have hired local staff, leased office space and become part of the local community. Uber currently employs approximately 70 staff in Australia. In Australia, the Uber platform is available in Queensland, New South Wales, Victoria, South Australia, and Western Australia. We have plans to expand to all Territories and States in Australia over time. The Committee would be aware that the Australian Capital Territory recently announced its intention to create a regulatory framework for ridesharing and be the first jurisdiction to do so.[44]

56 In terms of its strategy to 'open up' markets, and the risks associated with doing so, the Uber Group's approach appears to be set out in Uber Inc's Registration Statement filed with the United States Securities Exchange Commission dated 11 April 2019.[45] In that statement Uber Inc discloses various risk factors relevant to an

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44 Exhibit JMCE-3 at 332-334.

45 Referred to in many places in the ASOC, for example, in the particulars to [28]. See JMCE-3 between

investor's decision to invest in the company. One of the risks is that in certain jurisdictions its business operation may continue to be blocked or limited, might therefore have to be modified, and may be subject to legal and regulatory risks that adversely impact its future prospects.[46] Amplifying those risks, the statement continues:

> Legal and Regulatory Risks Related to Our Business
>
> *We may continue to be blocked from or limited in providing or operating our products and offerings in certain jurisdictions, and may be required to modify our business model in those jurisdictions as a result*.
>
> …
>
> In certain jurisdictions, we are subject to national, state, local, or municipal laws and regulations that are ambiguous in their application or enforcement or that we believe are invalid or inapplicable. In such jurisdictions, we may be subject to regulatory fines and proceedings and, in certain cases, may be required to cease operations altogether if we continue to operate our business as currently conducted, unless and until such laws and regulations are reformed to clarify that our business operations are fully compliant. In certain of these jurisdictions, we continue to provide our products and offerings while we assess the applicability of these laws and regulations to our products and offerings or while we seek regulatory or policy changes to address concerns with respect to our ability to comply with these laws and regulations. Our decision to continue operating in these instances has come under investigation or has otherwise been subject to scrutiny by government authorities. Our continuation of this practice and other past practices may result in fines or other penalties against us and Drivers imposed by local regulators, potentially increasing the risk that our licenses or permits that are necessary to operate in such jurisdictions will not be renewed. Such fines and penalties have in the past been, and may in the future continue to be, imposed solely on Drivers, which may cause Drivers to stop providing services on our platform. In many instances, we make the business decision as a gesture of goodwill to pay the fines on behalf of Drivers or to pay Drivers' defense costs, which, in the aggregate, can be in the millions of dollars. Furthermore, such business practices may also result in negative press coverage, which may discourage Drivers and consumers from using our platform and could adversely affect our revenue. In addition, we face regulatory obstacles, including those lobbied for by our competitors or from local governments globally, that have favored and may continue to favor local or incumbent competitors, including obstacles for potential Drivers seeking to obtain required licenses or vehicle certifications. We have incurred, and expect that we will continue to incur, significant costs in defending our right to operate in accordance with our business model in many jurisdictions. To the extent that efforts to block or limit our operations are successful, or we or Drivers are required to comply with regulatory and other requirements applicable to taxicab and car services, our revenue and growth would be

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1446 ff.

[46] Statement page 13, JMCE-3 page 1473.

adversely affected.[47]

57 Part of Uber Inc's strategy in facing local restrictions on its drivers is explained in these terms:

> *Drivers may become subject to increased licensing requirements, and we may be required to obtain additional licenses or cap the number of Drivers using our platform*.
>
> Many Drivers currently are not required to obtain a commercial taxi or livery license in their respective jurisdictions. However, numerous jurisdictions in which we operate have conducted investigations or taken action to enforce existing licensing rules, including markets within Latin America and the Asia-Pacific region, and many others, including many countries in Europe, the Middle East, and Africa, have adopted or proposed new laws or regulations that require Drivers to be licensed with local authorities or require us or our subsidiaries to be licensed as a transportation company. Local regulations requiring the licensing of us or Drivers may adversely affect our ability to scale our business and operations. In addition, it is possible that various jurisdictions could impose caps on the number of licensed Drivers or vehicles with whom we may partner or impose limitations on the maximum number of hours a Driver may work, similar to recent regulations that were adopted in Spain and New York City, which have temporarily frozen new vehicle licenses for Drivers using platforms like ours. If we or Drivers become subject to such caps, limitations, or licensing requirements, our business and growth prospects would be adversely impacted.
>
> *We may be subject to liability for the means we use to attract and onboard Drivers*.
>
> We operate in an industry in which the competition for Drivers is intense. In this highly competitive environment, the means we use to onboard and attract Drivers may be challenged by competitors, government regulators, or individual plaintiffs. …[48]

58 The plaintiff alleges that in the Australian context, consistently with that strategy, the Uber entities have sought to persuade governments and authorities to change local regulatory frameworks so that the UberX operation would be brought within them. By way of example, a series of communications are alleged to have occurred between May and June 2014 between Uber Inc and/or Uber Australia representatives and representatives of TransLink, a division of the Queensland Department of Transport and Main Roads. Those communications are relied upon as evidence of attempts by Uber Inc and/or Uber Australia to bring about regulatory change. An email between TransLink representatives on 4 June 2014 recorded the

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47 Statement page 54-55; JMCE-3 1514-1515.

48 Statement pages 62-63; JMCE-3 pages 1522-1523.

views expressed by the Uber representatives at a meeting the previous day, in the following terms:

> Uber are aware that they are operating outside the legislative and regulatory framework and do so in 57 of the 60 markets they are currently present in. They intend to continue to operate and expect the regulatory body (TransLink) to enforce local rules as they currently stand. Their intention is to seek a change in the regulatory framework to validate their operations and will not cease operations to enable this work, if supported, to occur.
>
> …
>
> The Department requested access to Uber's driver database so that warnings could be issued to drivers who are likely unaware that they are operating outside the existing regulation and could be in breach of the legislation. Uber's response was to reject our request as it was not his job to make our job easier.[49]

59 Numerous examples of promotional material, apparently emanating from one or other of the Uber entities responsible for marketing the UberX operations in Australia, are referenced in the particulars to the ASOC to demonstrate the target market for Uber's offering. Taking one as an example,[50] an email dated 4 July 2014 from 'Team Uber Melbourne <supportmelbourne@uber.com' contained the text and layout for a promotion that stated as follows:

> With today's price cut, uberX riders will be up to 30% cheaper than a taxi!

Bar chart graphics appearing below the quote depicted the claimed dollar-cost of a ride in a taxi, on the one hand, or by UberX, on the other, over three designated trips across Melbourne suburbs, showing a lower cost by Uber X in each case.[51]

60 It is against the background of that overall context and the Uber Group's business strategy that particular allegations of conduct by each individual entity are made. Those allegations also appear in Parts B, C and D of the ASOC. They are summarised in a general fashion at [26]-[31], [33] and [34] above. The plaintiff is evidently unable to state affirmatively which of the seven Uber entities was responsible for all of the conduct so, where he cannot specify a particular Uber entity, he alleges that it was

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49 Referred to in particular 1(c) to [27] of the ASOC; JMCE-3, 96.
50 Referred to in particular 1(c) to [28] of the ASOC.
51 JMCE-3, pages 102-104.

carried out by 'one or more of them'.

61 In circumstances where the knowledge of which particular entity within the seven Uber defendants was responsible for some particular conduct lies within the Uber defendants themselves, and the particular task has been clearly identified and described, it is difficult to accept that defendants are put to a genuine disadvantage of not knowing what it is that is alleged against them by the plaintiff not spelling out each responsible entity at this stage.

62 Against the pleaded background of the corporate structure, business strategy, steps taken to establish and operate UberX in the four States, Uber's engagement with regulatory authorities and the features of the regulatory and market framework in each State, the pleading of each conspiracy comes next. Although the generic form of the conspiracy pleading has been outlined above, in order to deal with the specific complaints made by the Uber defendants it is helpful to set out one of the conspiracy allegations in full. I will focus on the allegation of conspiracy by unlawful means as it is said to have occurred in Victoria.

63 Paragraphs 68 - 71 of the ASOC allege that, during the relevant claim period, UberX drivers in Victoria breached ss 158(1) and 165 of the Victorian *Transport (Compliance and Miscellaneous) Act 1983* (**Transport Act**). Commencing with paragraph 72, the unlawful means conspiracy in Victoria is pleaded as follows:

> 72. At all material times during the Victorian Claim Period each of the Uber Entities knew of the essential matters comprising the:
>
> (a) commission of the offences against s 158(1) of the Victorian Transport Act by UberX Partners as alleged in paragraph 69 above; and/or
>
> (b) commission of the offences against s 165 of the Victorian Transport Act by UberX Partners as alleged in paragraph 71 above.
>
> Particulars
>
> 1. The knowledge of each of the Uber Entities of the use by UberX Partners of motor vehicles to carry passengers for hire or reward is to be inferred from the fact that the Uber Entities combined to achieve the

commencement and operation of UberX in each of the Australian States, as alleged in Part B.

2. As to knowledge of UberX Partners' lack of any licence, permit or other authority under Division 5 of Part VI of that Act, the Plaintiff refers to paragraph 57 and the particulars thereto.

3. As to knowledge of UberX Partners' lack of driver accreditation, or appropriate driver accreditation, under s 166 of the Victorian Transport Act, the Plaintiff refers to the allegations in paragraph 57 and the particulars thereto.

4. Further particulars may be provided after discovery.

73. At all material times from at least April 2014 to 31 October 2014, Uber Inc, Uber B.V., Rasier Operations and, further or alternatively, one or more of the other Uber Entities (except Rasier Pacific) aided, abetted, counselled or procured the commission of offences against ss 158(1) and 165 of the Victorian Transport Act as alleged in paragraphs 69 and 71:

(a) by reason of the matters referred to in the preceding paragraph and paragraph 57 concerning knowledge and intention; and

(b) by engaging in the following acts:

(i) Uber B.V. operating and making the Uber app available to Riders on the terms of the Rider Contract, which enabled Riders to request UberX from UberX Partners who did not satisfy the Compliance Requirements;

Particulars

The allegations in paragraphs 15(a), 22 and 57 are referred to and relied upon.

(ii) Uber Inc and/or Uber B.V. utilising or making available the Architecture to communicate Rider requests for UberX to UberX Partners who did not satisfy the Compliance Requirements;

Particulars

The allegations made in paragraphs 15(a), 33, 46 and 57 are referred to and relied upon.

(iii) further and alternatively to (ii), any other of the Uber Entities utilising or making available the Architecture to communicate Rider requests for UberX to UberX Partners who did not satisfy the Compliance Requirements;

(iv) one or more of the Uber Entities developing and

implementing marketing activities, as alleged in paragraphs 28 and 29;

(v) one or more of the Uber Entities publishing information about becoming an UberX Partner on the website www.uber.com as alleged in paragraph 31, which enabled persons who did not satisfy the Compliance Requirements to become UberX Partners;

(vi) one or more of the Uber Entities reviewing applications, and accompanying information, to become an UberX Partner and determining whether the applications would be approved, as alleged in paragraph 32, with the intention and knowledge that persons approved as UberX Partners typically did not, and would not, satisfy the Compliance Requirements;

Particulars

The allegations made in paragraphs 32 and 57 are referred to and relied on.

(vii) Uber B.V. activating, via the Architecture, an UberX Partner account, accessible in the Uber Partner app for successful UberX Partner applicants in Victoria who did not satisfy the Compliance Requirements, by which it enabled them to receive and accept requests for UberX from Riders;

Particulars

The allegations made in paragraphs 33 and 57 are referred to and relied on.

(viii) Rasier Operations entering into the Rasier Operations Contract as alleged in paragraphs 35 to 37 with UberX Partners who did not and would not satisfy the Compliance Requirements, and then performing those contracts, by which it enabled those UberX Partners to receive and accept requests for UberX from Riders;

(ix) Rasier Operations making available a smartphone for the purpose of UberX Partners accessing the Uber Partner app, as alleged in paragraph 38 above;

(x) Uber B.V. charging the Fare to the Rider's credit card or PayPal account, withholding an amount reflecting a fee for use of the Uber Partner app and remitting the balance to the UberX Partner, as alleged in paragraph 47;

(xi) one or more of the Uber Entities, either alone or in combination, communicating an intention to pay, and paying, procuring the payment of, or reimbursing UberX Partners for, Regulatory Fines incurred by

UberX Partners in Victoria, as alleged in paragraph 59; and

(xii) one or more of the Uber Entities, either alone or in combination, employing the Greyball program, as alleged in paragraph 67.

74. At all material times from 1 November 2014 and throughout the Victorian Claim Period Uber Inc, Uber B.V., Rasier Operations, Rasier Pacific (from around 21 December 2015), and, further or alternatively, one or more of the other Uber Entities intentionally assisted, encouraged or directed the commission of offences against ss 158(1) and 165 of the Victorian Transport Act as alleged in paragraphs 69 and 71 and/or intentionally assisted, encouraged or directed the commission of an offence against ss 158(1) or 165 as alleged in paragraphs 69 and 71 where the entity or entities knew that it was probable that an offence against the other of ss 158(1) and 165 would be committed:

(a) by reason of the matters referred to at paragraph 72 and paragraph 57 concerning knowledge and intention; and

(b) by engaging in the following acts:

(i) Uber B.V. operating and making the Uber app available to Riders on the terms of the Rider Contract, which enabled Riders to request UberX from UberX Partners who did not satisfy the Compliance Requirements;

Particulars

The allegations in paragraphs 15(a), 22 and 57 are referred to and relied upon.

(ii) Uber Inc and/or Uber B.V. utilising or making available the Architecture to communicate Rider requests for UberX to UberX Partners who did not satisfy the Compliance Requirements;

Particulars

The allegations made in paragraphs 15(a), 33, 46 and 57 are referred to and relied upon.

(iii) further and alternatively to (ii), any other of the Uber Entities utilising or making available the Architecture to communicate Rider requests for UberX to UberX Partners who did not satisfy the Compliance Requirements;

(iv) one or more of the Uber Entities developing and implementing marketing activities, as alleged in paragraphs 28 and 29;

(v) one or more of the Uber Entities publishing

information about becoming an UberX Partner on the website www.uber.com as alleged in paragraph 31, which enabled persons who did not satisfy the Compliance Requirements to become UberX Partners;

(vi) one or more of the Uber Entities reviewing applications, and accompanying information, to become an UberX Partner and determining whether the applications would be approved, as alleged in paragraph 32, with the intention and knowledge that persons approved as UberX Partners typically did not, and would not, satisfy the Compliance Requirements;

Particulars

The allegations made in paragraphs 32 and 57 are referred to and relied on.

(vii) Uber B.V. activating, via the Architecture, an UberX Partner account, accessible in the Uber Partner app for successful UberX Partner applicants in Victoria who did not satisfy the Compliance Requirements, by which it enabled them to receive and accept requests for UberX from Riders;

Particulars

The allegations made in paragraphs 33 and 57 are referred to and relied on.

(viii) Rasier Operations entering into the Rasier Operations Contract as alleged in paragraphs 35 to 37 (up to about 20 December 2015) with UberX Partners who did not and would not satisfy the Compliance Requirements, and then performing those contracts, by which it enabled those UberX Partners to receive and accept requests for UberX from Riders;

(ix) Rasier Operations making available a smartphone for the purpose of UberX Partners accessing the Uber Partner app, as alleged in paragraph 38 above;

(x) Rasier Pacific entering into the Rasier Pacific Contract as alleged in paragraphs 39-41 above with UberX Partners who did not and would not satisfy the Compliance Requirements, and then performing those contracts, by which it enabled those UberX Partners to receive and accept requests for UberX from Riders;

(xi) Rasier Pacific making available a smartphone for the purpose of UberX Partners accessing the Uber Partner app, as alleged in paragraph 43 above;

(xii) Uber B.V. charging the Fare to the Rider's credit card or PayPal account, withholding an amount reflecting a fee

for use of the Uber Partner app and remitting the balance to the UberX Partner, as alleged in paragraph 47;

(xiii) one or more of the Uber Entities, either alone or in combination, communicating an intention to pay, and paying, procuring the payment of, or reimbursing UberX Partners for, Regulatory Fines incurred by UberX Partners in Victoria, as alleged in paragraph 59; and

(xiv) one or more of the Uber Entities, either alone or in combination, employing the Greyball program, as alleged in paragraph 67.

75. In the premises:

(a) in the period from April 2014 to 31 October 2014, by reason of the matters alleged in paragraph 73, Uber Inc, Uber B.V., Rasier Operations and/or one or more of the other Uber Entities, (except Rasier Pacific), were complicit within the meaning of the common law;

(b) in the period from 1 November 2014 until about 20 December 2015, by reason of the matters alleged in paragraph 74, Uber Inc, Uber B.V., Rasier Operations and/or one or more of the other Uber Entities, (except Rasier Pacific), were involved within the meaning of s 324 of the Crimes Act 1958 (Vic); and

(c) in the period from about 21 December 2015 to 23 August 2017, by reason of the matters alleged in paragraph 74, Uber Inc, Uber B.V., Rasier Operations, Rasier Pacific and/or one or more of the other Uber Entities were involved within the meaning of s 324 of the Crimes Act 1958 (Vic), in the commission of offences against ss 158(1) and/or 165 of the Victorian Transport Act by UberX Partners as alleged in paragraphs 69 and 71.

Conspiracy by unlawful means in Victoria

76. At all material times from at least April 2014 and throughout the Victorian Claim Period, the Uber Entities other than Rasier Pacific, agreed or combined with the common intention of injuring the Plaintiff, the Victorian Taxi Group Members and/or the Victorian Hire Car Group Members by establishing, promoting and operating UberX in Victoria by unlawful means, namely by the Uber Entities' complicity (howsoever described in the preceding paragraph) in the contraventions by UberX Partners:

(a) of s 158(1) of the Victorian Transport Act, as alleged in paragraph 69; and/or

(b) of s 165 of the Victorian Transport Act, as alleged in paragraph 71.

Particulars

1. The agreement or combination is to be inferred from:

   (a) the facts and matters alleged in Parts B, C and D; and

   (b) the Uber Inc Prospectus, including at pp 54-55 and 62.

2. The agreement or combination was aimed at or directed to the Plaintiff, the Victorian Taxi Group Members and/or the Victorian Hire Car Group Members, which is to be inferred from the matters alleged in Parts C and D, in particular the Uber Entities' intention for UberX to compete with other Point to Point Passenger Transport Services in Victoria, as alleged in paragraph 49. In the result the Uber Entities other than Rasier Pacific shared the common intention of injuring the Plaintiff, the Victorian Taxi Group Members and/or the Victorian Hire Car Group Members.

77. At all material times from about 21 December 2015 and throughout the Victorian Claim Period, Rasier Pacific joined the agreement or combination pleaded in the preceding paragraph with the intention of injuring the Plaintiff, the Victorian Taxi Group Members and/or the Victorian Hire Car Group Members by operating, or assisting in the operation of, UberX in Victoria by unlawful means, as pleaded in paragraphs 69 and 71.

Particulars

1. That Rasier Pacific joined the agreement or combination alleged in the preceding paragraph is to be inferred from the facts and matters alleged in paragraphs 40-43, 45, 47(e), 47(f) and Parts C and D.

2. The agreement or combination was aimed at or directed to the Plaintiff, the Victorian Taxi Group Members and/or the Victorian Hire Car Group Members, which is to be inferred from the matters alleged in Parts C and D, in particular the Uber Entities' intention for UberX to compete with other Point to Point Passenger Transport Services in Victoria, as alleged in paragraph 49. In the result Rasier Pacific shared the common intention of injuring the Plaintiff, the Victorian Taxi Group Members and/or the Victorian Hire Car Group Members.

78. In pursuance of the said conspiracy, the Uber Entities did the overt acts pleaded in paragraphs 14-15, 17-21, 23, 26-35, 37-40, 42-43, 45-48, 53-55, 57, 59 and 67.

64 Taking up each of the defendants' complaints in turn, it can be seen that the identity of each Uber entity that is alleged to have joined the conspiracy is unambiguously stated. That is, in paragraph 76 of the ASOC it is alleged that each of the Uber entities, except Rasier Pacific (the partnership of Uber Pacific Holdings BV and Uber Pacific Holdings Pty Ltd: see [24] above), joined the conspiracy by April 2014; and in paragraph 77 it is alleged that Rasier Pacific joined from 21 December 2015. Equally, those same paragraphs state the date on or by which each entity had joined the conspiracy — sufficient for each entity to appreciate the case that is made against it.

65 Paragraph 76 also states that the agreement or combination, made with the intention of injuring the plaintiff and Victorian Group Members, was evinced by the Uber entities (other than Rasier Pacific) 'establishing, promoting and operating UberX in Victoria by unlawful means'. That agreement or combination, according to paragraph 1 of the particulars, is to be inferred from all of the allegation in Parts B, C and D. As I have already summarised, those parts contain the allegations of the Uber Group's corporate structure and its strategy to establish UberX in the four Australian States, the relevant regulatory and market framework, and the allegations of individual (or collective) acts in furtherance of that purpose.

66 Further, paragraph 76 identifies the 'unlawful means' of each Uber entity as being its complicity (in accordance with Victorian law) in the contravention of the Transport Act by the Victorian UberX Partners. Those contraventions, and the complicity of those Uber entities in them, are set out in the preceding paragraphs 68-74, culminating in paragraph 75 of the ASOC.

67 So far as presently revealed, the individual acts of complicity are alleged and particularised in paragraph 73 and 74 of the ASOC. That each entity knew of the essential matters comprising the commission of the offences is to be inferred from the fact that each such entity combined with the others to achieve the commencement and operation of UberX in each of the Australian States, as alleged in Part B: see paragraph 72 of the ASOC. Whether such inferences should ultimately be drawn is a matter for trial, but, in my view, it is sufficiently clear what the

plaintiff alleges against each entity about those matters.

68 Finally, by paragraph 78 of the ASOC the plaintiff alleges each entity's overt acts done in pursuance of the conspiracy by reference back to specific allegations made earlier in the ASOC:

- 14-15 concern Uber BV and Uber Inc;
- 17-21 concern Uber Inc, Uber Holding and Uber BV;
- 23 concerns Uber Australia;
- 26-35 concern Uber Inc, Uber Australia, Uber BV and Rasier Operations explicitly, in respect of some allegations, and one or more of the Uber entities in relation to others;
- 37-40 concern Rasier operations and the Rasier Pacific partners;
- 42-43 concern the Rasier Pacific partners;
- 45-48 concern Uber BV, Rasier Operations and the Rasier Pacific partners explicitly, in relation to some allegations, and one or more of the Uber entities in relation to others;
- 53-55, 57 concern all Uber entities; and
- 59, 67 concern one or more Uber entities.

69 Although the matching of particular allegations against particular entities requires some careful cross-referencing, there is sufficient notice given to each Uber entity of the overt acts alleged against it, save for those in relation to which the plaintiff is presently unable to be more specific. In that respect, however, I repeat the observations that I have already made about lack of genuine disadvantage in this regard (see [61] above).

70 Whilst I have only analysed the Victorian conspiracy allegations in detail, no real difference in principle was argued about the sufficiency of the conspiracy pleading in relation to the other States.

71 Drawing these matters together, it is my judgment that the plaintiff has provided sufficient detail of his allegations of the agreement by each Uber entity, and the overt acts of each entity, for each to know the essential elements of the case brought against it. I reach that view bearing in mind that there are further interlocutory processes to come that will expand upon the detail and fill some of the gaps; some of the presently 'missing' detail is likely to lie within the knowledge of the Uber entities themselves; a good deal of the material-fact allegations rest upon drawing inferences from other subsidiary facts (which have been pleaded), set in a broader factual context, the reasonableness of which is to be assessed with the benefit of the evidence at trial; and it is common, and logical, in a case of conspiracy that the ingredients of 'agreement' and 'intention' share a common factual platform with the ingredient of 'overt acts' because of the circumstantial nature of the case.

72 All of that said, I do not overlook the serious nature of a conspiracy allegation and the need for such an allegation to be pleaded with precision and sufficient supporting particularity. In my view, subject to the qualification I turn to next concerning the pleading of the 'intention' element, the ASOC satisfies these requirements.

73 As a result, I reject the Uber defendants' submission that the ASOC is embarrassing and should be struck out for failing to adequately identify the parties to the various conspiracies or the overt acts each of them did pursuant to those conspiracies.

Does the ASOC adequately plead an intention to injure by unlawful means?

74 The defendants' third pleading complaint (see [20] above) raises a question of law: that is, what must be proven to establish that the conspirators intended to injure the plaintiff by unlawful means (see the ingredients of the cause of action at [17] above)?

75 In a sense, the defendants suggest an answer to that question in the way in which they formulate their objection to the pleading, namely, that it fails to adequately identify how each Uber entity had as *its object* the injury of the relevant class members. On the defendants' submission, because, as it currently stands, the

pleaded intention fails to apply the correct legal standard, the ASOC fails to plead a cause of action for conspiracy by unlawful means and must be struck out.

76 The question of the precise legal content for the ingredient of intention to harm or injure has been the subject of much discussion and debate in many cases for a considerable time. Illuminating judicial expositions on the topic can be found in cases such as *Lonrho Plc v Fayed*,[52] *Maritime Union of Australia v Geraldton Port Authority*,[53] *McKellar v Container Terminal Management Services Limited*,[54] *Fatmi v Bryant*,[55] *Dresna Pty Ltd v Misu Nominees*[56] and *OBG v Allan*.[57]

77 As can be seen from paragraph 76 of the ASOC (extracted above) the plaintiff alleges that the Uber entities 'agreed or combined with the common intention of injuring the plaintiff', particularising that alleged agreed intention (in paragraph 2 of the particulars) by asserting that it was 'aimed at or directed to' the plaintiff and group members. That intention is to be inferred, amongst other things, from the Uber entities' 'intention for UberX to compete with other point-to-point passenger transport services in Victoria'.

78 The cases distinguish between the subjective element of intention required for the tort of conspiracy to injure, and the element of intention required for conspiracy by unlawful means. Whereas the former requires that the defendants' *predominant* actuating purpose in combining is to injure the plaintiff, for the tort of conspiracy by unlawful means it need only be shown that the defendants had *an intention* to injure.[58]

79 It is not enough that the defendants combined to do an unlawful act which has the effect of causing damage to the plaintiff, even if that damage was foreseeable, if the

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52 [1992] 1 AC 448, 466-468 ('*Lonrho*').
53 (1999) 93 FCR 34 (RD Nicholson J), [427]-[442] ('*Maritime Union of Australia*').
54 (1999) 165 ALR 409 (Weinberg J) [131]-[154] (*McKellar*').
55 [2002] NSWSC 1750 (Campbell J) [176]-[181] ('*Fatmi*'), and on appeal (2004) 59 NSWLR 678, [13]-[17] (Handley JA, McColl JA agreeing) ('*Fatmi, Appeal*').
56 [2003] FCA 1537 (Weinberg J) [99]-[111] ('*Dresna*'), and on appeal [2004] FCAFC 169, [7]-[12] (Kiefel and Jacobson JJ) ('*Dresna, Full Court*).
57 [2007] 4 All ER 545, [62], [134] (Lord Hoffman), [164]-[167] (Lord Nicholls) ('*OBG*').
58 *Lonrho*, 466-468; *McKellar,* [135] (Weinberg J); *Dresna*, [104] (Weinberg J).

defendants did not also have at least an intention to cause the plaintiff that harm. In *Lonrho v Fayed* the House of Lords approved of a statement made by Lord Denning MR in a previous, related matter, in which he stated (emphasis added) –

> It is sufficient if the conspiracy is **aimed or directed at** the plaintiff, and it can reasonably be foreseen that it may injure him, and does in fact injure him.[59]

80 As Weinberg J observed in *McKellar* –

> The requirement that the conspiracy be 'aimed at' the plaintiff, though perhaps difficult to apply in some cases, is sufficient to keep liability within reasonable grounds. It prevents claims by those who suffer incidental, though foreseeable, loss as a result of the commission of what is sometimes described as an 'undirected' crime.[60]

81 Kiefel and Jacobson JJ in *Dresna* amplified what was meant by the criterion that the conspiracy should be 'aimed at' the plaintiff in this way (emphasis added) –

> The test for an action based upon a conspiracy is **what was the object in the mind** of those combining when they acted as they did: *Crofter Hand Woven Harris Tweed Company, Limited v Veitch* [1941] UKHL 2; [1942] AC 435 at 445. As is pointed out in WVH Rogers, *Winfield and Jolowicz on Tort*, 16th edn, Sweet & Maxwell, London, 2002, p 649, [18.24] ('*Winfield and Jolowicz*'), what is required is that they **should have acted in order that, not with the result that**, the plaintiff should suffer damage. And it may be observed that it was for this reason that the plaintiff failed in *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173. In that case an order had been made under the *Southern Rhodesia Act 1965* making it an offence to supply oil to Southern Rhodesia. Lonrho did not continue supply through a pipeline from a port in Mozambique. It alleged that Shell and others had provided oil and that this affected the period of disuse of the pipeline. *Winfield and Jolowicz* point out with respect to the case (at p 652, [18.28]) that, whilst injury to Lonrho's business was foreseeable, it was not Shell's purpose to bring it about. In **no sense were the acts '*aimed at*' Lonrho**.[61]

82 More recently, in *OBG v Allan*, the House of Lords, hearing three appeals together, considered the content of the element of intention to injure in a range of torts for economic loss caused by intentional acts. One of the claims heard on appeal (*Douglas v Hello*) involved the tort of conspiracy by unlawful means. Generally, for each of the torts, Lord Hoffman thought it necessary to distinguish between ends, means and consequences, saying –

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59 *Lonrho*, 467, approved by Lord Bridge at 468 (with whom Lords Brandon, Templeman, Goff and Jauncey agreed).

60 *McKellar,* [137].

61 *Dresna,* Full Court, [12].

> One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's action.[62]

83 The matter involving conspiracy by unlawful means was a claim brought by a magazine proprietor who had an exclusive contractual right to publish photographs of a celebrity wedding suing a rival magazine proprietor who had published photographs of the wedding obtained surreptitiously from an unauthorised source. Holding that the pursuit of gain nonetheless involved an intention to harm, Lord Hoffman said (emphasis added) –

> Thus the position of [the defendant magazine proprietor] was that he wished to defend his publication against the damage it might suffer on account of having lost the exclusive. But that, it seems to me, is precisely the position of every competitor who steps over the line and uses unlawful means. The injury which he inflicted on [the plaintiff magazine] in order to achieve the end of keeping up his sales was simply the **other side of the same coin**.[63]

84 Similarly, Lord Nicholls agreed that for the tort of conspiracy by unlawful means, a defendant may intend to harm the claimant's business either as an end in itself or as a means to an end –

> He inflicts damage as the means whereby to protect or promote his own economic interests.[64]

85 Nevertheless, Lord Nicholls emphasised –

> The defendant's conduct in relation to the loss must be deliberate. In particular, a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with an intention for this purpose. The defendant must *intend* to injure the *claimant* and the claim. This intent must be a cause of the defendant's conduct …[65]

86 Adding what he termed an 'explanatory gloss' to that statement, Lord Nicholls also employed the 'two sides of the same coin' metaphor –

> Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where **loss to the claimant is the obverse side of the coin from gain to the**

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62 *OBG*, [62].
63 Ibid, [134].
64 Ibid, [164].
65 *OBG*, [166].

> **defendant**. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort.[66]

87 Some single judges of Australian courts have considered and applied these aspects of the speeches of Lord Hoffman and Lord Nicholls in *OBG v Allan*, but so far as I can ascertain they have not been considered by the High Court or at the intermediate appellate level.

88 In the argument before me, the Uber defendants argued that the plea of intention to injure levelled against them is no more than bald assertion and that the particularisation of the allegation takes the matter little further. Specifically, the defendants contend that merely claiming that the agreement was 'aimed or directed' at the plaintiff and group members is empty of any factual assertion and is conclusionary only. Further, an intention to compete cannot of itself amount to an intention to injure in the relevant sense. Moreover, it does not follow that the launch of UberX necessarily meant loss to every Victorian group member. They argue that the asserted loss assumed that the Victorian group members in fact had some right of exclusivity, a right which was neither pleaded nor sustainable as a matter of law.

89 Turning to the language used in *OBG v Allan*, the defendants sought to distinguish the present case from the taking of the unauthorised photographs (in the matter of *Douglas v Hello*). In the present case, the defendants argued that the claimed losses to group members cannot sensibly be described as the 'other side of the same coin' to the gain to be derived by the defendants from UberX entering the market. They argued that the claimed losses rise no higher than mere consequences or results, rather than being the intended means by which the defendants sought to achieve their gain. Put another way, the alleged intended harm cannot be sheeted home to each Uber entity *as its object* in establishing UberX in the four Australian States, nor has it been specifically alleged to be so.

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66 Ibid, [167].

90 I have already set out the plaintiff's description of the intended harm as particularised in the ASOC (at [77] above). I accept the defendants' argument that, if so confined, a bare allegation of an intention to compete hardly qualifies as the kind of deliberate intention to cause injury which the law requires. Intention to compete, alone, would not ordinarily imply an inevitable injury to existing market participants; nor would it imply that injury to those participants must be the means by which the new competitor achieves its gain, or that injury to those participants is the other side of the coin to that gain.

91 I also agree that the mere assertion that the agreement or combination was aimed or directed at the plaintiff and group members is bereft of any factual content. 'Aimed or directed at' may be a test against which the Court ultimately determines whether the alleged factual scenario amounts to an intention of the requisite kind, but a plaintiff cannot plead the mental element simply by asserting that the test has been met.

92 Nevertheless, there is more to the allegation of intention to injure to be discerned from the ASOC than a bare intention to compete, despite that formulation being the only fact particularised under paragraph 76.

93 At [32] and [33] above, I summarised the allegations (made in paragraphs 49 to 56 of the ASOC) concerning the regulatory compliance requirements existing in each State for point-to-point passenger transport services, and the competitive advantage given to UberX Partners by not complying with them. Further, at paragraph 142A of the ASOC, the plaintiff asserts that the operation of UberX in the four Australian States reduced the incomes and licence values of group members –

> … who by reason of the matters alleged in paragraph 50 were **exclusively entitled** to provide or otherwise facilitate the provision of Point-to-Point Passenger Transport Services in respect of each of those States …[emphasis added].

94 From the whole of the ASOC, there is a discernible case put forward that the Uber entities intended that the means by which UberX would typically operate in the four Australian States would be through the supply of point-to-point passenger transport

services by unlicensed drivers using non-accredited vehicles who would enjoy a competitive advantage over the incumbent licensed participants. Further, by that means of operation, UberX would wrest a share of that market from incumbent licensed participants, otherwise entitled to competition-free operation, diverting some of their income to UberX Partners, thereby causing economic loss to those incumbent participants while achieving the Uber entities' goal of establishing and operating UberX.

95 In his written submission for this application, the plaintiff articulated the harm which the Uber entities allegedly intended to inflict upon group members and why such intention met the requisite legal standard, in this way:

> 3.32. No doubt the primary objectives of the Uber Entities in combining to establish and operate UberX in the Australian States through the complicity of Uber Entities in the illegal provision of Point to Point Passenger Transport Services (as that term is defined in the Amended Statement of Claim) by UberX Partners were to obtain market share and receive revenue, being the service fees paid by UberX Partners from the payments they received for Point to Point Passenger Transport Services illegally provided by them.
>
> 3.33. The establishment and operation of UberX involving the illegal provision of Point to Point Passenger Transport Services *necessarily caused* Group Members to suffer *harm by losing the economic advantage of being the exclusive participants* involved in the provision of Point to Point Passenger Transport Services, and *being exposed to competition from UberX operating illegally* (**the intended harm**).
>
> 3.34. Causing the intended harm to the Group Members was the *means by which the Uber Entities achieved their end* of receiving service fees from UberX Partners providing Point to Point Passenger Transport Services illegally.[67] [italics added].

96 The 'discernible case', as I have called it, and the argument put forward in the plaintiff's written argument, are both predicated upon–

(a) the existence of an *exclusive right* enjoyed by himself and group members to operate a point-to-point passenger transport service (as defined) during the claim period in each State;

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67 Nico Andrianakis Submissions 'Strike Out and Service Applications', Submissions in *Andrianakis v Uber Technologies Incorporated & Ors* S ECI 2019 01926, 30 August 2019 [3.32]-[3.34].

(b) the premise that such an exclusive right was critical to the plaintiff and group members sustaining their income and business value so that the loss of (or at least interference with) that exclusivity, of itself, would cause them inevitable financial harm; and

(c) the proposition that the Uber entities' intention that UberX compete with their licensed point-to-point passenger transport services, during the claim period in each State, necessarily carried with it an intention to remove (or at least interfere with) the exclusive right of the plaintiff and group members to operate those services, and thus to cause them harm.

97 I do not accept the defendants' argument that this conception of an intention to harm could not, in legal principle, amount to the kind of intention required by law to establish conspiracy by unlawful means. One needs to be careful not to construe the verbal formula used by Kiefel and Jacobson JJ in *Dresna* to distinguish deliberate harm aimed at a plaintiff from merely foreseeable incidental harm, as if that formula imposed a predominant-intention test. To require that the harm be 'the object in mind' or that the defendants have acted 'in order that, not with result that, harm be inflicted on the plaintiff', is still to be understood as requiring something *less* than the predominant, actuating purpose of the defendants' agreement or combination. As Weinberg J explained in *McKellar,* concerning the expression 'aimed or directed at', these verbal formulae are designed to keep liability within reasonable bounds and to exclude loss as the result of 'undirected' crime.

98 Injury to the plaintiff and group members need not be the predominant purpose of the Uber entities' agreement to establish UberX by unlawful means (should that be proven). But, facts need to be pleaded which provide a foundation for the allegation that each Uber entity had deliberately intended the plaintiff and group members to suffer loss.

99 Without wishing to convey any view about merits, intended loss or harm satisfying the legal standard might arguably be established by proving that each Uber entity

intended that the means by which UberX would be established in each State would be through unlawful competition in an otherwise exclusive market, in circumstances where the economic advantages of that exclusivity to the plaintiff and group members was critical to the maintenance of their incomes and business value, so that the intrusion of the unlawful competition would necessarily cause them loss.

100 As can be seen, this formulation of intended harm is similar to what I said (above, at [94]) is the 'discernible case', reading the ASOC as a whole. It is also similar to the description of the intended harm in the plaintiff's written submission. Nevertheless, I accept the Uber entities' complaint that some elements of that formulation are not explicitly pleaded.

101 If this, or something like it, is to be the plaintiff's case on this vital element of the tort of conspiracy by unlawful means, it should be pleaded as fully and as transparently as possible. As presently pleaded, it is too general and it relies upon some unstated, or at least implied, premises. A clearer and more transparent articulation of the intention to harm should be provided, if for no other reason, to expose the real facts that will have to be proven (and contested) and the real issues to be determined at trial.

102 Ultimately, whether or not the facts relied upon by the plaintiff for the existence of harm and, relatedly, the intention to cause it, ever actually establish those elements, is a matter for evidence at trial. But I do not accept the defendants' arguments that, if so expressed, that formulation of harm and intention to harm could not be sustained as a matter of law.

103 Turning to a further matter, as with the elements of agreement, the defendants argued that the proposition that each Uber entity had the ascribed intention is entirely inferential and, what is more, the inferences sought to be drawn are impermissible because they amount only to conjecture and speculation. Without repeating the reasoning (see [64] - [71] above), I reject that argument for the same reasons I rejected the similar argument in relation to the element of agreement or

combination. Whether or not the intention to harm should be inferred from all the evidence in relation to all or any of the Uber entities is a matter for trial; at present, subject to the pleading clarification I will require, as just stated, I consider that the inference is at least open against each Uber entity.

104 Yet another argument raised by the Uber entities is that the identity of the persons to whom the conspiracy to injure by unlawful means is directed is too nebulous and ill-defined.

105 It is to be recalled that the plaintiff alleges that each defendant agreed or combined with the common intention of injuring –

- In Victoria, the plaintiff, the Victorian Taxi Group Members and/or the Victorian Hire Car Group Members;
- In New South Wales, the New South Wales Taxi Group Members and/or the New South Wales Hire Car Members;
- In Queensland, the Queensland Taxi Group Members and/or the Queensland Hire Car Group Members; and
- In Western Australia, the Western Australian Taxi Group Members and/or the Western Australian Hire Car Group Members;

(as each of those groups is defined in the ASOC).

106 Schedule C (glossary) and Schedule A (Group Members) to the ASOC, in combination, set out a detailed description of those persons who comprise each category and sub-category. For example, the Victorian Taxi Group Members and Victorian Hire Car Group Members are more particularly described in Schedule A as falling within the following seven sub-categories:

> (a) a **taxi-cab licence holder** was a person who or which held accreditation under Division 4 of Part VI of the Victorian Transport Act as the holder of a taxi-cab licence as defined at s 86 of that Act;
>
> (b) an **accredited taxi-cab operator** was a person who or which held accreditation under Division 4 of Part VI of the Victorian Transport Act as a taxi-cab operator;

(c) an **accredited taxi-cab driver** was a person accredited under Division 4 of Part VI of the Victorian Transport Act to drive a taxi-cab as defined at s 86 of that Act;

(d) an **accredited taxi-cab network service operator** was a person accredited under Division 4 of Part VI of the Victorian Transport Act to provide a "taxi-cab network service", as defined at s 130A of that Act;

(e) a **hire car licence holder** was a person who or which held a hire car licence under Division 4 of Part VI of the Victorian Transport Act and as defined at s 86 of that Act;

(f) a **hire car operator** was a person who operated a hire car, as defined at s 86 of the Victorian Transport Act; and

(g) an **accredited hire car driver** was a person accredited under Division 4 of Part VI of the Victorian Transport Act to drive a hire car as defined at s 86 of that Act.

107 Similar category-descriptions are provided for the relevant groups and sub-groups in the other three States.

108 To establish (and therefore to plead) a claim for conspiracy by unlawful means, it must be shown that the conspiracy was directed to a person or class of persons with the design of injuring them, namely the person or persons making the claim for loss and damage.[68] If directed at a class, the conspiracy must be directed at each and every member of that class.[69]

109 In *BATAL* it was alleged that the conspirators had agreed or combined to conceal or destroy documents so that prospective litigants against tobacco companies would be deprived of evidence that might enable them to prove their cases. One of the objections raised at the pleading stage was that the objects (that is, the targets) of the conspiracy had not been adequately identified. Kaye J analysed the relevant authorities on this topic.[70] Distinguishing the claim before him from the one that had been pleaded in *Dresna* (which was disallowed because the claim failed to adequately identify the target of the intended harm), his Honour said, allowing the pleading –

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68 *Dresna*, Full Court, [9].
69 *Dresna*, Full Court, [11].
70 *BATAL*, [26]-[39].

> In the present case, it is not pleaded that the conspiracy was directed at members of the public. Rather, it is pleaded that the conspiracy was directed ("aimed") at such persons who, from time to time, issued proceedings against the two plaintiffs, claiming damages for injury caused by smoking their products. Although the members of such a group may vary over time, the membership of that group could be ascertained at any particular date. Further, it is clear that the conspiracy, sought to be pleaded in this case, was one directed at each member of that group, because the pleaded intention was to deprive any person, who instituted such litigation, of that person's rights to obtain discovery against one or other of the plaintiffs in the present proceeding.[71]

110 In the same way, although potentially very large and fluctuating from time to time, in this case the class that is identified as the target group of each conspiracy is clearly defined and its membership is ascertainable. Each pleaded conspiracy is said to be aimed at every member of each sub-class upon the premises that every one of them had the economic advantage of barriers against unlicensed competitors entering the market (ASOC paragraph 50), was susceptible to financial loss by the entry of such unlicensed competitors, and actually suffered loss because of that entry (ASOC paragraph 142A).

111 In my view, on the authorities, the intention to harm all members of an ascertainable class by facilitating unlawful competition in the passenger transport markets in which the members of that class derived their income, as pleaded, at least arguably meets the requirements of intention for the tort of conspiracy by unlawful means. It is not deemed to failure at trial. As a pleading, it should be allowed.

112 Finally, before turning to the argument about the constitution of the proceeding as a group proceeding, there was a brief and discrete debate about the source and content of the law of complicity in Victoria before 31 October 2014, as alleged in paragraph 75(a) of the ASOC. The short point was whether the common law conception of complicity applied (the plaintiff's position), or the statutory formulation appearing in s 324 of the *Crimes Act 1958* (Vic) (the defendants' position) applied. Due to some uncertainty about the application of s 324 to any offence which is not, by reason of the *Crimes Act 1958*, punishable as a summary offence (which

71 *BATAL*, [37].

may exclude conspiracy), the plaintiff has now elected to amend his pleading to allege both forms of complicity in the alternative for the period before 31 October 2014.[72] For that reason, it is not necessary for me to rule on that issue.

Should orders be made under Part 4A of the Supreme Court Act?

113 Two additional applications are made in the defendants' pleading summons, both under provisions of Part 4A of the Act. The first, made pursuant to s 33N of the Act, is that the proceeding no longer continue as a group proceeding. The second, made under s 33ZF of the Act, is that the plaintiff be directed to amend his claim to redefine group members as being Victorian drivers, owners and operators only — that is, that he remove group members from States in New South Wales, Queensland and Western Australia. The second of those two applications is the defendants' fall-back position should they fail on the first.

114 Under the umbrella of these two applications, the defendants have raised a range of sub-arguments, specifically that:

(a) the circumstances from which the claims of group members arise are insufficiently related to meet the requirement in s 33C(1)(b) of the Act;

(b) further, those claims do not give rise to a substantial common question of law or fact, as required by s 33C(1)(c) of the Act;

(c) Mr Andrianakis does not have a sufficient interest in the claims of drivers, owners and operators outside of Victoria to be the representative plaintiff for those group members;

(d) as presently constituted, there is no vehicle in this proceeding for evidence to be given concerning the conspiracies in States other than Victoria because there is no plaintiff for whom that evidence would be relevant; and

(e) the claims of group members for States outside of Victoria raise questions of

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72 He has done the same, for similar reasons, at paragraph 88 with respect to the defendants' alleged complicity in the New South Wales UberX partners' offences.

fact and law so diverse from those raised for group members in Victoria (and from those for group members in each other State) that it will be inefficient, impractical and unjust to have all claims tried in the one proceeding.

115 Rather than deal with those arguments under headings related to one application or the other, it is more convenient to analyse each of them before considering their impact on the individual applications.

116 First, I turn to some of the key statutory provisions in Part 4A of the Act.

117 Sub-section 33C(1) sets out three criteria, frequently referred to as the threshold provisions, which must be satisfied for a proceeding to be commenced as a group proceeding. It provides:

> **Commencement of proceeding**
>
> (1) Subject to this Part, if—
>
> (a) seven or more persons have claims against the same person; and
>
> (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
>
> (c) the claims of all those persons give rise to a substantial common question of law or fact—
>
> a proceeding may be commenced by one or more of those persons as representing some or all of them.

118 Sub-section (2) extends or clarifies the scope of sub-section (1) by stating that a proceeding may be commenced as a group proceeding (a) whether or not the relief sought for the represented individuals is the same, and (b) whether or not the proceeding –

> (i) is concerned with separate contracts or transactions between the defendant and individual group members; or
>
> (ii) involves separate acts or omissions of the defendant done or omitted to be done in relation to individual group members.

119 Section 33Q of the Act addresses the circumstance whereby the determination of the question or questions common to all group members will not finally determine the

claims of all group members. In that circumstance the Court may give directions in relation to the determination of the remaining questions. In the case of questions common to the claims of only some of the group members, those directions may include directions establishing a *sub-group* consisting of those group members. The directions may also appoint a person to be the sub-group representative party who will be liable for the costs associated with the determination of the questions common to the sub-group members.

120 Section 33D(1) of the Act concerns the requirements of standing for a person to represent others in a group proceeding:

> **Standing**
>
> (1) A person referred to in paragraph (a) of section 33C(1) who has a sufficient interest to commence a proceeding on the person's own behalf against another person has a sufficient interest to commence a group proceeding against that other person on behalf of other persons referred to in that paragraph.

Sub-section 33D(2) further clarifies that where such a person commences a group proceeding, he or she does not lose 'sufficient interest' to continue the proceeding by ceasing to have his or her own claim against the defendant.

121 Relevant to issues concerning who may be an appropriate representative for group members (and sub-group members), s 33T of the Act empowers the Court to substitute another group member as plaintiff if it appears that the existing plaintiff 'is not able adequately to represent the interests of the group members'. A similar power is provided in relation to the adequacy of representation for sub-group members, if a representative is appointed.

122 Section 33N of the Act provides the Court with the power to order that the proceeding no longer proceed as a group proceeding. It is the provision relied upon by the defendants in the first of their two applications under Pt 4A. Section 33N(1) provides:

> **Proceeding not to continue under this Part**
>
> (1) The Court may, on application by the defendant, order that a

> proceeding no longer continue under this Part if it is satisfied that it is in the interests of justice to do so because—
>
> (a) the costs that would be incurred if the proceeding were to continue as a group proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
>
> (b) all the relief sought can be obtained by means of a proceeding other than a group proceeding; or
>
> (c) the group proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
>
> (d) it is otherwise inappropriate that the claims be pursued by means of a group proceeding.

123 Finally, for present purposes, it is relevant to mention s 33ZF of the Act which allows the Court, of its own motion or on the application by a party, to make 'any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding'.

124 Section 33C is to be given a liberal interpretation.[73] It is clear from its terms that s 33C(1)(b) does not require that the *claims* of persons joined in a group proceeding be the same, similar or related — rather, the claims must arise from the same, similar or related *circumstances*. 'Relatedness' suggests something wider than identity or similarity.[74] Assessing relatedness serves the purpose of enabling a practical judgment to be made as to whether the relationships between the circumstances of each claim merit their grouping into one representative proceeding.[75]

125 Given that the relatedness of the circumstances giving rise to claims is a threshold criteria, it is necessary to understand what is a *claim*. The notion of a 'claim' has been given considerable attention. The term is not limited to meaning a cause of action,[76] although cause of action is included within that term both in the sense of the legal

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73 *AS v Minister for Immigration and Border Patrol* [2014] VSC 593, [54] (Kaye J); see also *AS v Minister for Immigration and Border Protection* [2017] VSC 137, [42] (J Forrest J).

74 *Zhang De Yong v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 118 ALR 165 at 185, (French J) ('*Zhang*').

75 Ibid, (French J).

76 *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317, [113] (Carr J) ('*Bray*'); *Dillon v RBS* (2017) 252 FCR 150, 159 [43] (Lee J) ('*Dillon*').

and factual basis for the action and the associated demand for relief.[77]

126 Individual claims need not be based on the same conduct and may arise out of quite disparate transactions.[78] It follows that the claim of the representative plaintiff and those of the group members in a group proceeding can be quite different.

127 In *Webster (Trustee) v Murray Goulburn Co-op Co. Ltd (No 2)*,[79] Justice Beach stated (summarising the analysis of Lee J in *Dillon*):[80]

> First, the concept of "claim" as used in s 33C has a wide meaning and is broader and different to the concept of a cause of action. Second, the claim of one person does not need to be based upon the same conduct as the claim of another person and, moreover, may arise out of a separate and different transaction, as long as the threshold elements of s 33C(1)(b) and (c) are satisfied. Third, the fact that the plaintiff's individual case may ultimately fail does not mean that the plaintiff does not have a claim per se in terms of satisfying the threshold elements at this point. Fourth, a claim of a member say of sub-group A and a claim of a member say of sub-group B can both be together undifferentiated "claims" within the statutory term as used in s 33C(1); the very idea of sub-groups entails that they are part of a broader set i.e. a group having and making claims through the representative party. And if one appreciates that proposition, then the real focus must be on the conditions in s 33C(1)(b) and (c).

128 Turning to the threshold requirement in s 33C(1)(c), that there be a substantial common question of law and fact arising from the claims, the High Court held in *Wong v Silkfield*[81] that:

> … 'substantial' does not indicate that which is 'large' or 'of special significance' or would 'have a major impact on the … litigation' but, rather, is directed to issues which are 'real or of substance'.[82]

129 In *Green v Barzen Pty Ltd*,[83] in a passage approved by the Full Court in *Cash Converters v Gray*,[84] Finkelstein J expressed the requirement for commonality thus:

> All that is necessary to show commonality is that there are some substantial common issues, that is to say, common issues that are serious and significant. The issues need not be determinative of the claims of the applicant or any

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77 *Bray,* [113] (Carr J) and [245] (Finkelstein J).
78 *Dillon,* [43] (Lee J).
79 [2017] FCA 1260 ('*Webster*').
80 Ibid, [77].
81 (1999) 199 CLR 255 ('*Wong*').
82 Ibid, 267 at [28].
83 *Green v Barzen Pty Ltd (formally Dukes Finacial Services Pty Ltd)* [2008] FCA 920 ('*Green*').
84 (2014) 223 FCR 139, at [24] (Jacobson, Middleton and Gordon JJ).

> group member. Put another way, the commonality requirement does not involve looking at the quantity of the common issues alleged but at their quality.[85]

Are the circumstances similar or related: s 33C(1)(b)?

130 The "claims" of group members in each state, whilst not amounting to exactly the same cause of action because each State conspiracy is different, nonetheless, all share the same legal elements. Moreover, all share the same foundational factual substratum and arise from similar or at least related (alleged) factual circumstances.

131 Those *alleged* similar or related factual circumstances include Uber's business strategy applied Australia-wide, directed and coordinated by the same company, Uber Inc; a common general *modus operandi* for recruiting and entering contracts with UberX Partners; the same use and dependency upon common software infrastructure to operate the UberX service; the same strategy to use, typically, unlicensed drivers who drive non-accredited vehicles offending similar State laws; the same or similar market conditions into which the UberX service was introduced, namely a regulated market with barriers to entry in the form of compliance regulations for drivers and cars; the same or similar approach for dealing with the regulatory regimes and regulatory authorities in each State; and a similar impact upon the incumbent licensed or accredited drivers, owners and operators of point to point passenger transport services from the introduction of UberX in each State.

132 It is true that, across the many claims that are represented in the proceeding, the circumstances from which those claims arise involve some notable differences, primarily because they are claims arising in different States. There are different conspiracy timeframes; there may be a different sub-set of the Uber entities involved in each conspiracy; the unlawful means will be different because each conspiracy will involve contraventions of the particular State regulations and the complicity law of that State; and there will probably be different market conditions from one State to another.

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85 *Green*, [15].

133 But in my view these differences are not enough to deny the overall similarity or relatedness of the circumstances from which the claims arise, as that criteria is to be construed in s 33C(1)(b). I disagree with the defendant's characterisation of the similarities as being 'minor', particularly when one has regard to the proper meaning of the terms used in s33C(1)(b) and the function which the application of the criteria is meant to perform.

134 Despite the differences upon which the defendants rely, assessed at this early stage and based upon the allegations pleaded in the ASOC, the similarities and relatedness of the circumstances from which the claims of the group members arise tend to support the practical merit of grouping claims into one proceeding. In other words, there appears to be good practical sense in grouping the claims arising from the four states into the one proceeding due to the similarity and relatedness of the circumstances from which they arise.

Is there a common substantial question of law or fact: s33C(1)(c)?

135 At paragraph 144 of the ASOC the plaintiff specified those matters which he says amount to questions of law or fact common to the claims of the group members. They are as follows:

(a) whether the Uber Entities committed the acts and/or engaged in the conduct alleged in the ASOC;

(b) whether the Uber Entities engaged in the strategy to compete with other Point to Point Passenger Transport Services and to recruit UberX Partners who did not satisfy the Compliance Requirements as alleged in the ASOC;

(c) whether the UberX Partners, and/or the Uber Entities, committed the offences alleged in the ASOC;

(d) whether the Uber Entities were complicit (howsoever described in each of the Australian States) in the commission of offences by the UberX Partners as alleged in the ASOC;

(e) whether the Uber Entities entered into agreements or combinations as alleged in the ASOC;

(f) whether the Uber Entities shared a common intention to injure the Plaintiff and Group Members as alleged in the ASOC;

(g) whether the Uber Entities carried into effect the conspiracies as alleged in the ASOC; and

(h) what are the principles for identifying and measuring losses suffered by the Plaintiff and Group Members as a result of the conspiracies as alleged in the ASOC.

136 Uber, criticised all of those matters as lacking either commonality or substance. In my view, some of these criticisms had force, others did not.

137 Some that are claimed to be common questions, in reality, will differ from State to State for reasons already outlined: in particular, the questions set out in paragraphs (c), (d) and (g) are not common except at an unhelpful, generic level. Each of them will only be common, at best, among group members in a particular state.

138 The Uber entities criticised the question in paragraph (a) as containing only matters of "background and marketing" and otherwise being inconsequential. They submitted that the matters in paragraph (b) did not properly reflect any allegation in the ASOC and was similarly inconsequential. The question set out in paragraph (h) was also one which they claimed would be diverse amongst group members and not common.

139 The plaintiff appeared to accept that there was a degree of generality in some of the common facts set out in paragraph 144. In oral submissions, the plaintiff concentrated most on the question concerning the proper legal test for the intention to injure in the tort of conspiracy by unlawful means.

140 From the authorities cited above, what must be shown is at least one common

question of law or fact; it must be real or of substance as opposed to trivial or inconsequential; it need not be determinative of the action, nor be 'large', but the characteristic of substantiality is to be judged as a matter of quality rather than quantity.

141 I am most clearly persuaded of the existence of a substantial common question from the debate which took place, as reflected in my reasons above, concerning the requirement of the intention to injure for the tort of conspiracy by unlawful means. In my opinion, that question is a substantial common question of law affecting all claims. The existence of that question alone satisfies the criteria in s 33C(1)(c).

142 Beyond that — although more are not required — I also think that the questions of fact posed in paragraphs (a) and (b) are common for all claims because of the circumstantial nature of the plaintiff's case for proving the elements of agreement or combination. By that I mean, as observed at [51] above, the plaintiff's means of proving each Uber entity's participation in the conspiracies, with the intention of harming group members, relies upon proving two elements. The first is the general background and strategy of the Uber Group. Paragraphs 144 (a) and (b) encapsulate the factual questions going to the existence of the general background and strategy alleged by the plaintiff.

143 I also think that, whilst having the appearance of being general, because of the role those factual matters play in the plaintiff's circumstantial case they are matters of substance for the claims in the relevant sense. I therefore reject the characterisation of the factual matters in those paragraphs as being inconsequential or lacking in substance.

144 For these reasons I find that the criteria in s 33C(1)(c) it is satisfied.

Can Mr Andrianakis represent group members outside of Victoria?

145 In their written submissions, the Uber entities said relatively little about the plaintiff's capacity to represent group members outside of Victoria. At [36] they submitted that the plaintiff 'has no relevant connection with the other states and the

determination of his claim will not be representative of the claims of group members outside of Victoria'. No submission was made that the plaintiff lacked 'sufficient interest' to have standing to commence the group proceeding pursuant to s 33D.

146 In oral submissions, the Uber entities argued that Mr Andrianakis was not authorised by Part 4A of the Act to mount a cause of action that he did not have himself and, further, that litigating his cause of action would not provide a vehicle to adduce evidence relevant only to the causes of action of group members in other states.

147 In my opinion, these submissions misunderstand the requirements for constituting a group proceeding.

148 I should first touch on one matter which, although not in dispute in the proceeding, is an important foundation for the jurisdiction of the Supreme Court of Victoria to hear and determine the claims of persons residing in other Australian states for torts committed in those states. Since the passage of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* in all Australian states, the Supreme Court of Victoria has been able to exercise the original jurisdiction of the Supreme Courts of New South Wales, Queensland and Western Australia. Accordingly, there is no jurisdictional impediment to the Victorian court hearing claims or causes of action arising in other states of the Commonwealth which would, but for the cross-vesting legislation, fall within the original jurisdiction of the other state courts.

149 Returning to the arguments made by the Uber entities, for a person to have standing to commence a group proceeding on behalf of others, Part 4A requires only that the criteria in s 33C be satisfied and that a plaintiff with a claim that qualifies under that section has sufficient interest to commence his or her own proceeding for that claim. If those conditions are met, then that plaintiff also has sufficient interest to commence the group proceeding on behalf of others with the same claims: see s 33D.

150 Here, because the claims of the group members in all states satisfy the s 33C criteria (as I have found they do) and Mr Andrianakis has sufficient interest to bring such a

claim of his own, he has standing to be the representative plaintiff for all.

151 There is no requirement that all must have the same cause of action against the defendants. Section 33C(2)(b)(i) and (ii) (above [118]) make it clear that group members may have causes of action that differ from one another.

152 Further, not all questions have to be common amongst all group members. As s 33Q of the Act provides (above [119]), when some questions are common to the claims of some group members only, sub-groups may be established and sub-group representatives appointed. In due course, sub-groups may be established in this proceeding, with representatives appointed, but that prospect does not deny the standing of Mr Andrianakis to represent all group members so long as he satisfies s 33D of the Act. As I said, the Uber entities do not address or challenge his standing under that provision.

Can Mr Andrianakis call evidence only relevant to claims outside of Victoria?

153 Nor is there anything in the assertion that, in this proceeding as constituted, there will be no 'vehicle' for the admission of evidence for a cause of action that Mr Andrianakis does not possess. Again, this submission misapprehends that all group members must have the same cause of action and overlooks the stated constitutional requirements for a group proceeding.

154 Once properly constituted as a group proceeding, evidence may be admitted that is relevant to the determination of the common questions of fact which arise from the claims of the group members. Some of those questions of fact may concern acts and omissions of a defendant done in relation to individual group members other than Mr Andrianakis, as contemplated by s 33C(2)(b)(ii). In other words, evidence of those acts and omissions will not be germane to Mr Andrianakis' claim but will be relevant to and admissible to determine the common questions of fact arising from the claims of group members whom Mr Andrianakis represents. In due course, directions for the introduction of evidence relevant for the determination of questions common to group members who may have a cause of action different from

that of the plaintiff, can be (and commonly are) made for trial management purposes, including the possible use of sample group members.[86]

155 It follows that I reject the defendants' submission that Mr Andrianakis cannot represent the interests of NSW, Queensland or WA group members or call evidence in the proceeding relevant only to those group members.

Will it be inefficient to hear all claims in one proceeding?

156 Section 33N (above, [122]) confers a discretion upon the court to order that a proceeding no longer continue as a group proceeding if satisfied that it is in the interests of justice to do so. Four grounds are provided upon which the court may reach that satisfaction, set out in subparagraphs (a)-(d).

157 The exercise of the discretion is only to be considered once the gateway provisions (ss 33C and 33H) are passed and the group proceeding is commenced,[87] and so the defendants' application that I should do so is made on the footing that I have rejected their arguments under s33C (as indeed I have).

158 The structure of s 33N makes clear that the first step is to consider whether one or more of the reasons set out in subparagraphs (a)-(d) are made out. If so, the power to order de-classification thus enlivened, the second step is to consider whether it is in the interests of justice to so order.[88]

159 The defendants rely upon the grounds in subparagraphs (c) and (d) (the 'inefficiency' ground and the 'inappropriate' ground). The focus of those grounds is 'the claims' of the group members and a consideration of the efficiency or appropriateness of those claims in the existing representative proceeding. The enquiry is a wide one.[89]

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86 Grave, Adams and Betts, *Class Actions in Australia* (Thomson Reuters ,2nd ed, 2012) [12.210]; Supreme Court of Victoria, *Practice Note SC Gen 10, Conduct of Group Proceedings (Class Actions)*, para 9.

87 *Silkfield Pty Ltd v Wong* (1998) 90 FCR 152 at 156 (Foster J), approved in *Wong,* 268 at [35].

88 *AS v Minister for Immigration* [2017] VSC 137, (J Forrest J) [47] and [61]; *P Dawson Nominees Pty Ltd v Multiplex Ltd and Another* (2007) 242 ALR 111, 116-117 at [21] (Finkelstein J).

89 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd and Another* (2007) 164 FCR 275, 293-294 at [127]-[133] (Jacobson J with French J agreeing) ('*Multiplex*').

160 It is implicit that a comparison may be made between how the two factors in subparagraphs (c) and (d) apply to the existing representative proceeding, on the one hand, and how they would apply to a hypothetical non-representative proceeding, on the other. A difference of view has been expressed in the cases as to whether the comparison is simply an available, but not mandatory, consideration,[90] or is a necessary consideration.[91] Adopting either approach leads to the same conclusion in this case. When considering the efficiency and appropriateness of the group proceeding for dealing with or pursuing group members' claims in the current case, such a comparison is of real practical assistance for determining whether it is in the interests of justice to order that the proceeding no longer continue under Part 4A.

161 In assessing efficiency, Kiefel J in *Bright v Femcare* considered that the requirement that the proceeding be seen as an inefficient means of dealing with the claims might not be met if 'there is some real benefit to be gained' by having them dealt with as a group proceeding. Further,

> [a] consideration as to whether the proceedings would, or would not, provide an efficient means of dealing with the claims of Group Members would almost certainly involve an assessment of the findings which might be made in an applicant's case and of the extent to which they would be likely to resolve the other claims.[92]

162 For the second step, whether or not it is in the interests of justice to de-class the proceeding, Finkelstein J thought that question required weighing that outcome against three considerations, namely, the public interest of promoting efficient use of court time and parties' resources; providing a remedy for those without the resources to bring individual actions; and protecting defendants against multiple suits and the risk of inconsistent findings.[93]

163 I approach the application adopting the principles I have just referred to.

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90 Ibid, [130] (Jacobson J and French J).
91 *Perera* v *GetSwift Ltd* (2018) 363 ALR 394, 410 at [61],[63] (Middleton , Murphy and Beach JJ).
92 *Bright v Femcare* (2002) 195 ALR 574, 601 at [128] ('*Bright, Full Court*').
93 Ibid, 605-606 at [152].

164 I readily acknowledge that there are real limitations to the consideration of efficiency and appropriateness at the stage when only the plaintiff has filed his pleading and no issues have yet been joined.[94] Once a defence has been filed, a clearer picture will emerge of the extent to which the facts pleaded in the ASOC are disputed. Knowing what is admitted and disputed and what other facts the defendants positively assert, a clearer picture should also emerge about the extent to which the resolution of individual claims will be assisted by the application and determination of those facts.

165 Going on the pleadings as they currently stand, there is a reasonable degree of commonality across all claims on questions of fact, not only for group members from state to state, but also for group members within each state. That is in part because of the degree of dependency, for the proof of all of the conspiracies, on the alleged centralised business strategy and the coordinated introduction of UberX in the four states.

166 It follows that there is a reasonable degree of commonality in the claim of Mr Andrianakis and the claims of other group members. To resolve Mr Andrianakis' case will involve determining whether several Uber entities agreed or combined with an intention to harm him by unlawful means. In turn, proof of the agreement or combination with that intention toward Mr Andrianakis in Victoria is to be undertaken by establishing the facts set out in Parts A, B, C and D of the ASOC,[95] only some of which are uniquely referable to Victoria. The facts that are not specifically referable to Victoria include-

(a) the roles played by each Uber entity in the introduction of UberX to the Australian states;

(b) the various elements required for the operation of UberX, in particular the centrality and use of the two software apps and the particular Uber entities

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94 *Jenkings v Northern Territory of Australia* [2017] FCA 1263, [95] (White J); *AS v Minister of Immigration* [2014] VSC 593, [65] (Kaye J).

95 Summarised above at [24]–[34].

licensed to operate them;

(c) the strategy for recruiting UberX Partners, the terms and conditions upon which they were engaged and the non-enforcement of those conditions pertaining to driver and vehicle accreditation; and

(d) the overall approach of the Uber entities to State regulators for law change.

167 I have already explained how the pleaded claim uses a combination of the general and the specific to allege facts from which the essential elements of agreement and intention are to be inferred for each conspiracy. It appears to me that the resolution of the individual claims of group members other than Mr Andrianakis both in Victoria and in each other state, if brought as individual proceedings, would still require proof of many of the same facts alleged in Parts A, B, C and D of the ASOC. Proof of those same matters, claim by claim, would involve a substantial devotion of court resources around the country. It is unlikely that a great many individual drivers and operators would have the necessary resources to mount such a claim singularly. Even if they did, the Uber entities would then be exposed to multiple actions and the undesirable risk of inconsistent findings on issues that are common to the multiple claims.

168 Of course, overarching all claims is the central and fundamental question of the correct legal content for the element of intention to harm in the tort of conspiracy by unlawful means and its application to each of the state conspiracies.

169 In my view, at this early stage and considering only the facts alleged by the plaintiff, there is real benefit in having the claims of group members, and the common questions of fact and law that arise from them, dealt with in the one proceeding. Moreover, I see no other reason for it being inappropriate to do so. I reject the argument that the differences in the claims are such as to make the proceeding an inefficient or ineffective means of determining them.

170 I accept that the proceeding is large, and that determining the non-common issues

might be unwieldy due to the diversity and complexities inherent in the claims. But, there are two answers to that concern at this stage. First, it is too early to say just how unwieldy the proceeding might become. Secondly, the court has a range of case management tools to be deployed in dealing with diversity and complexity. At the appropriate time, they will be considered.

171 I do not find that either of the conditions in subparagraphs (c) or (d) of s 33N are established. That said, to the extent that any inefficiency may be perceived in conducting the claims as a group proceeding, weighing the public interest factors referred to by Finkelstein J in *Bright v Femcare*,[96] I am not persuaded that the interests of justice require an order be made under s 33N of the Act.

Conclusion on Part 4A applications.

172 Returning, then, to the specific applications made by the Uber entities under Part 4A, the conclusions that I have reached on each of the five arguments set out at [114] above lead me to further conclude –

(a) there is presently no cause to order, pursuant to s 33N of the Act, that the proceeding not continue as a group proceeding; and

(b) neither is it appropriate or necessary, to ensure justice is done, to direct pursuant to s 33ZF of the Act that the plaintiff amend his claim to redefine Group Members by removing the New South Wales, Queensland or Western Australian Group Members (as defined in the ASOC).

Should service upon the foreign defendants be set aside?

173 By their amended summons, filed 4 September 2019, the foreign Uber defendants (being the first, second, third, fifth and sixth) apply for an order pursuant to r 7.04 and 8.08 of the Rules to set aside service of the writ and statement of claim upon them. They also seek the setting aside of an *ex parte* order as to service made under r 6.11. Rule 6.11 provides that where, for any reason, a document has not been served

96 *Bright*, Full Court, 605-606 at [152].

as required by the rules, but has come to the notice of the person to be served, it is to be taken to have been served on the day it came to the person's notice. The *ex parte* order referred to is an order made by Dixon J on 7 June 2019 that service of the writ and Statement of Claim was taken to have been served on the foreign defendants on 10 May 2019.

174 Order 7 of the rules concerns service out of Australia. Rule 7.02 governs when service of originating process may be served out of Australia without leave. For this case, the relevant provision is r 7.02(a) which provides –

> **When allowed without leave**
>
> An originating process may be served out of Australia without leave in the following cases—
>
> (a) when the claim is founded on a tortious act or omission—
>
> (i) which was done or which occurred wholly or partly in Australia; or
>
> (ii) in respect of which the damage was sustained wholly or partly in Australia;
>
> …

175 Order 8 provides for the filing of an appearance by a defendant served with originating process. An appearance may either be unconditional, in which case the defendant is taken to have submitted to the jurisdiction, or conditional. Rule 8.08 deals with a conditional appearance and provides as follows –

> **Conditional appearance**
>
> (1) A defendant may file a conditional appearance.
>
> (2) A notice of conditional appearance shall be in Form 8B.
>
> (3) A conditional appearance shall have effect for all purposes as an unconditional appearance, unless, on application by the defendant, the Court otherwise orders.
>
> (4) Application under paragraph (3) shall be made by summons within 14 days after the day the conditional appearance is filed.

176 As r 8.08(4) provides, to avoid the consequence of a conditional appearance becoming unconditional, a defendant who has filed such an appearance must make

an application to the court. In this case, the foreign defendants have made application under r 7.04 for an order that service of the originating process be set aside. That rule provides –

> **Court's discretion whether to assume jurisdiction**
>
> (1) On application by a person on whom an originating process has been served out of Australia, the Court may by order set aside the originating process or its service on the person or dismiss or stay the proceeding.
>
> (2) Without limiting paragraph (1), the Court may make an order under this Rule if satisfied—
>
> (a) that service out of Australia of the originating process is not authorised by these Rules; or
>
> (b) that the Court is an inappropriate forum for the trial of the proceeding; or
>
> (c) that the claim has insufficient prospects of success to warrant putting the person served out of Australia to the time, expense and trouble of defending the claim.

177 In their summons, the foreign defendants asserted, as the ground for seeking the order to set aside service, that the Statement of Claim 'discloses no arguable cause of action that the foreign defendants committed the torts pleaded'. I call that the defendants' 'principal ground'. A second ground, which I will come to in due course, relied upon a challenge to the validity of r 7.02 itself.

Are there insufficient prospects of success?

178 In their written submissions, the foreign defendants argued that, having regard to the fundamental deficiencies in the ASOC (which they advanced in respect of the strike-out application, including the Part 4A deficiencies) the Court could not be satisfied there was any maintainable cause of action falling within r 7.02 against the foreign defendants. So the argument was put, alternatively, that the claim had insufficient prospects of success to warrant putting the foreign defendants to the time, expense and trouble of defending the claim (r 7.04(2)(c)), or that service out of Australia was not authorised by the rules (r 7.04(2)(a)). Lack of authorisation was said to be the consequence of there not being a maintainable cause of action against

the foreign defendants, in turn because of the insufficient prospects of success. Thus, the real issue was whether or not there were insufficient prospects of success.

179 In oral submissions, the Uber entities acknowledged that their arguments under r 7.04 were substantially the same as their arguments in favour of striking out the pleading or pursuing the relief under the Part 4A, and that the outcome of their application would be governed by the outcome of those other arguments. As I have rejected those arguments in respect of the strike out application, it must follow that, subject to the plaintiff amending his ASOC to more clearly and transparently articulate the intention to injure, the foreign defendants' application under r 7.04 must also fail.

180 Even so, despite the defendants' acceptance that their strike-out arguments would effectively resolve this application, I will briefly step through the reasoning applicable to determining the application under r 7.04(2)(c), namely a consideration of whether the claim has insufficient prospects of success.

181 The question of whether a claim has insufficient prospects of success, for this purpose, is to be determined on the same principles for determining a summary judgment application in Victoria.[97] The test for summary judgment in Victoria is set out in s 63 of the *Civil Procedure Act 2010* (Vic), which is whether the claim 'has no real prospects of success'. That phrase has been interpreted in *Lysaght Building Solutions Pty Ltd (trading as Highline Commercial Construction) v Blanalko Pty Ltd*[98] as enquiring whether the application has a 'real' as opposed to a 'fanciful' chance of success, a test which is, to some degree, more liberal than the 'hopeless' or 'bound to fail' test put forward in *General Steel Industries Inc v Commissioner for Railways (NSW)*.[99] It is a power that should be exercised with caution and only if it is clear there is no real question to be tried.

182 For largely the same reasons I gave for rejecting the argument that the pleading fails

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97 *Agar v Hyde* (2000) 201 CLR 552, 576 at [60]; *Bendigo and Adelaide Bank Limited v Quine* (2018) 55 VR 701, 708 at [14].

98 (2013) 42 VR 27, 39 at [29].

99 (1964) 112 CLR 125.

to disclose a cause of action, and anticipating a pleading clarification along the lines which I earlier outlined, I conclude that the plaintiff's chance of success in the proceeding is real and not fanciful. On that basis, the defendants fail to establish that the claim has insufficient prospects of success or that service out of Australia is not authorised (for lack of a maintainable cause of action).

Is r 7.02 invalid?

183 I then turn to a second ground raised by the foreign defendants in support of their application under r 7.04. It is best understood as an alternative ground for the application under r 7.04(2)(a), namely that service out of Australia was not authorised by the rules. By this second ground, the defendants argue that the rule under which the plaintiff purported to serve the defendants out of Australia was invalid, so that any service made pursuant to it must therefore have been unauthorised.

184 Before the making of the *Supreme Court (General Civil Procedure) Rules 2015*, the former Rules (made in 2005) provided in r 7.01(1) –

> (1) Originating process may be served out of Australia without order of the Court where—
>
> …
>
> (i) the proceeding is founded on a tort committed within Victoria;
>
> (j) the proceeding is brought in respect of damage suffered wholly or partly in Victoria and caused by a tortious act or omission wherever occurring;

[underlining added].

185 When originally made, the 2015 Rules substantially reproduced r 7.01. By the *Supreme Court (Service Out of Australia Amendment) Rules 2016* (**the 2016 amendment**),[100] Order 7 was replaced. The new Order 7 came into effect on 1 October 2016. Also headed 'Service out of Australia', the former rule 7.01 was remade in an amended form as r 7.02, the relevant part of which is above at [174].

100 Statutory Rule No 109/2016.

Apart from some differences in verbiage, the most prominent change was that whereas the previous rule was limited to proceedings founded on torts committed within Victoria, the new rule expanded the territory within which the tortious act or omission and the damage sustained from it may occur to the whole of Australia.

186 As already noted, well before 2015 the Supreme Court of Victoria gained original subject-matter jurisdiction to hear and determine claims founded on torts committed in Australia, but outside of Victoria, because of the uniform cross vesting legislation. As I will explain, however, the service-out rules concern the *adjudicatory* jurisdiction of the Court, rather than *subject matter* jurisdiction, a materially different concept. While the Supreme Court of Victoria had subject matter jurisdiction to entertain a claim in respect of a tort committed in, say, New South Wales, before the 2016 amendment, service of such a proceeding on a defendant out of Australia could not have been effected relying upon the former r 7.01.

187 Moreover, the alternative source of authority for serving process out of Australia was r 7.06 under which leave was required from the Court before service. The types of cases for which that process was available was limited to only two classes of cases, neither of which include a proceeding founded upon a tort.

188 It follows that the rule change in 2016 permitted, for the first time, a plaintiff to serve out of Australia originating process for a claim founded upon a tort committed and damage suffered outside of Victoria.

189 By their written submissions[101] the defendants argued that r 7.02 as introduced in 2016 represents an impermissible expansion, by judge-made rule, of the Court's jurisdiction. The defendants contended that, insofar as they authorised service out of Australia of claims founded on torts committed wholly or partly *in Australia* (as opposed to, *within Victoria*), the new rules were not authorised by any statutory rule-making power conferred on the judges of the court.

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101 Uber Technology Incorporated & Ors "Defendants' Submissions on Strike Out Application" *Andrianakis v Uber Technologies Incorporated & Ors,* S ECI 2019 01926, 19 August 2019, [32].

190 Assuming (incorrectly, as I will explain) that the purported source of power to make the 2016 amendment stemmed from s 25(1)(f)(i) of the Act ('any matter relating to the practice and procedure of the Court') or perhaps s 25(1)(ac) of the Act, ('the conduct of proceedings and parties to the proceedings generally'), they submitted neither paragraph authorised such a change to the rules and, so, the judges lacked the power to make it. In their submissions they made reference to *Ousley v The Queen*[102] and *Adam P Brown Male Fashions Pty Ltd v Phillip Morris Inc*[103] to support the argument that the change brought about by introducing the new rule 7.02, in place of what existed previously, effected a change to substantive law and not one of practice and procedure.

191 For reasons which I will explain, it is my view that the Uber defendants are correct in submitting that –

(a) the change brought by the 2016 amendment, permitting service out of Australia of a proceeding founded upon a tort committed in Australia but outside of Victoria, had the effect of enlarging the adjudicatory jurisdiction of the Supreme Court of Victoria; and

(b) such an enlargement was a substantive change to the law rather than a mere procedural change, thus requiring statutory authority to make it; but

(c) *incorrect* in asserting that there was no statutory authority for the judges of the court to make the new rule.

Jurisdiction

192 It is important at the outset to distinguish between two of the senses in which 'jurisdiction' is often spoken about.[104]

193 One is a reference to the nature of the disputes — that is to say the *subject matter* of

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102 (1997) 192 CLR 69, 114.

103 (1981) 148 CLR 170, 179-177.

104 See generally, Mark Leeming, *Authority to decide: The Law of Jurisdiction in Australia* (Federation Press, 1st ed, 2012) Ch 1 ('*Leeming*').

disputes — with which a court is empowered to deal. For example, subject-matter criteria may concern the nature of the legal cause of action, the type of relief that may be given, the category of persons involved or affected, or the scope of geographic territory in which acts or consequences occurred. In a court of 'unlimited jurisdiction', such as the Supreme Court of a State, the subject matter that the court may deal with is relatively unconfined.

194 But another sense in which 'jurisdiction' is used, is to define the reach of the court in terms of its ability to render individuals amenable to its coercive, adjudicative power - that is, its *adjudicatory* or *personal* jurisdiction. This jurisdiction is defined by the limits of its effective service boundaries.

195 Thus, in *David Syme,*[105] Gummow J wrote of the '*distinction between jurisdiction in the sense of effective service upon a defendant, and jurisdiction in the sense of entertainment of disputes as to particular subject matter*…'.[106] His Honour referred to the same distinction made by Mason, Wilson and Deane JJ in *Flaherty*[107] when contrasting the effective service jurisdiction of State and Federal courts, derived from the *Service and Execution of Process Act* (Cth) (**SEPA**), and the subject matter jurisdiction so exercised by those courts which derives from another source. Their Honours highlighted that distinction when saying that s 51(xxiv) of the Constitution under which the SEPA was made '*envisages an extension in the reach of the process of the courts of the States and does not speak in terms of the investiture of the State courts with new substantive jurisdiction*'.[108]

196 Mostly, what we are concerned about here is jurisdiction in the 'effective service' or 'personal' sense. I will refer to this jurisdiction as '**adjudicatory jurisdiction**'.

Adjudicatory Jurisdiction

197 The following common law principles are primarily taken from a passage by Mason

105 *David Syme & Co Ltd v Grey* (1992) 38 FCR 303 ('*David Syme*').
106 Ibid, 313 (underlining added).
107 *Flaherty v Girgis* (1987) 162 CLR 574 ('*Flaherty*').
108 Ibid, 598.

and Dean JJ in *Gosper v Sawyer*,[109] later approved by the High Court in *John Pfeiffer Pty Ltd v Rogerson:*[110]

(a) At common law, absent the defendant's submission to jurisdiction, civil jurisdiction is territorial, that is to say, related to the territory of whose system of government the particular court forms part.

(b) Aside from actions *in rem*, the ordinary basis of territorial jurisdiction is the personal presence of the defendant within the courts territory.

(c) The usual method by which a court asserts such jurisdiction is the issue (or issue and service) of its writ directed to the defendant.

(d) Because the effective assertion of jurisdiction is confined by the limits of actual jurisdiction, a court's power to issue process in an action *in personam* is *prima facie* exercisable only against those present within the limits of its territory (at either the time of issue or the time of service).[111]

(e) A court cannot extend its process and so exercise sovereign power beyond its own territorial limits: conversely, a court's power to authorise service of its writ is ordinarily a measure of its jurisdiction in an action *in personam*.

(f) A *statutory* conferral of power upon a court to order service of its process outside its territory will ordinarily be construed as carrying with it an implied grant of jurisdiction to entertain an action, of which it is otherwise cognizant, against the person served: whenever a defendant can be legally served with a writ, then the court, on service being effected, has jurisdiction to entertain an action against him.[112]

(g) Thus, a (statutory) conferral upon a court of a power to order service outside

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109 *Gosper v Sawyer* (1985) 160 CLR 548, 564-565 (*'Gosper'*).

110 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 517 (*'Pfieffer'*).

111 Citing *Laurie v Carroll* (1958) 98 CLR 310, 324 (*'Laurie'*) . Also see *Leeming* '6.2 Presence is sufficient to found jurisdiction', p 174.

112 See as well, *Leeming*, '6.6 Extraterritorial Service', p 186.

its territory will provide the basis of 'an extension of jurisdiction'.[113] This extension is sometimes called 'the long arm' jurisdiction of a court.

(h) The question whether a court *possesses* the actual power to make an order for service outside its territory is not a mere matter of the practice or procedure observed by the particular court in the exercise of its jurisdiction. The exercise of an actual power to order service outside territorial jurisdiction is a component and a measure of jurisdiction itself.[114]

198 Critically, for present purposes, courts may take extraterritorial jurisdiction, through service of the court's originating process outside the territorial bounds of the court's jurisdiction, pursuant to power conferred directly under statute or by rules of court made pursuant to statutory power.[115]

199 The question raised by the defendants' argument is whether the power to authorise extraterritorial service by r 7.02 (made under the 2016 amendment) is a power conferred by a rule *made pursuant to a statutory power*.

Relevant legislative history

200 In Victoria, at least after an amendment to the *Supreme Court Act 1915*,[116] there were two sources of power for the court to authorise service of its process out of its territory:

(a) One, ***SEPA***, for service in other states and territories of Australia; and

(b) the other, by the authority of a rule of court, itself made under an express statutory power for the court to make rules with respect to service out of its territory, whether within Australia or beyond.

201 Service out of Victoria but *within Australia* was authorised both by SEPA and a rule

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113 *Laurie,* 332. See also *J.E. Lindley & Co v Pratt* [1911] VLR 444, 447-448 (Hodges J).

114 *Laurie,* 322–324.

115 *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93, 107; *Laurie,* 322; *Flaherty,* 592-3; *John Pfeiffer,* 517.

116 Act 2590 of 2015.

made under the Act. But service *out of Australia* was only authorised under a rule. Jumping forward, after an amendment made to *SEPA* in 1992, service out of Victoria but within Australia has been solely governed by *SEPA*.[117]

202 By s 25 of the 1915 Act, as originally enacted, Parliament gave the Court rule-making power for specific matters and, generally, for regulating matters of practice and procedure. No express power was given to make rules for service out of the jurisdiction. Authority for service out of the jurisdiction was conferred directly by the statute itself, in ss 141 - 145.

203 By an amending Act, Act 2590 of 1915, Parliament further provided that instead of ss 141 -145, Rules of Court as set out in Schedule A to the Act would apply in respect of service out of the jurisdiction, except as to existing proceedings. The Act further added to those powers possessed by the judges of the court to make rules, as conferred by the principal Act, a power to '*alter annul or add to the Rules in the Schedule … and to make any other Rules for regulating service out of the jurisdiction of the Court*'. Schedule A effectively replicated the provisions in ss 141-145. Those sections remained in force, presumably, to apply to proceedings that had already been commenced.

204 Order XI of the *Supreme Court Rules 1916* referred to ss 141 – 145 as the laws governing service of process out of the jurisdiction. Later rules incorporated the Schedule A provisions into Order XI itself. Albeit expanded as time progressed, Order XI of the Rules continued in that form until it was re-made as Order 7 which came into effect on 1 January 1987 (as explained in more detail below).

205 A brief legislative history after 1915, follows:

(a) The 1915 amendments were repeated in 1922 (Act No 3264) and then incorporated into a 1928 consolidation of the Act as Division 8 (ss 138-139) and the Fifth Schedule.

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117 *Service and Execution of Process Act 1992*, (Cth), s 8(4)(a).

(b) By the *Supreme Court Act 1939*, amending the 1928 Act, Parliament repealed ss 138 and 139 and the Fifth Schedule, one assumes because by that stage it was no longer necessary to have statutory provisions allowing for foreign service when those provisions had long been incorporated in the rules (ie Order XI).

(c) The *Supreme Court Act 1958* re-enacted the former s 139, and the Fifth Schedule, as s 126 (together with the schedule). Soon after, in 1959, the *Statute Law Revision Act 1959* repealed s 126 and the Fifth Schedule, leaving Order 11 as the only Victorian law relating to service out of the jurisdiction. In introducing the Revision Act the Minister explained that the re-enactment of former s 139 and the Fifth Schedule had been a mistake.[118]

(d) New *General Rules of Procedure in Civil Proceedings 1986* were made, conditionally, by the judges of the Court on 18 March 1986. Those conditional rules were ratified, validated and approved by Parliament by the *Supreme Court (Rules of Procedure) Act 1986*. Importantly, by that Act a new category of rule-making power was conferred upon the judges of the Court as an addition to the categories in s 25(1) of the 1958 Act, namely –

> (m) For making provision for or with respect to any matter dealt with the *General Rules of Procedure in Civil Proceedings 1986*.

(e) The new 1986 Rules, as ratified, took effect on 1 January 1987. Former Order 11 became new Order 7. At the same time, a new *Supreme Court Act 1986* (the current Act) came into force. The additional rule-making power introduced by the *Supreme Court (Rules of Procedure) Act 1986* was, in substance, re-enacted as s 25(1)(a):

> 25(1) The Judges of the Court … may make Rules of Court for or with respect to the following:
>
> (a) any matter dealt with any Rules of Court in force on 1 January 1987 …

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118 Victoria, *Parliamentary Debates,* Legislative Council, 23 September 1959, 283 (LHS Thompson, Minister).

(f) When introducing the *Supreme Court (Rules of Procedure) Act 1986*, the Minister explained:

> Most of the new rules can be made under the existing heads of rule-making power in the *Supreme Court Act 1958*. Other aspects of the rules are clearly dependent on statutory amendment; for example, removal of the distinction between a judge exercising jurisdiction in open court and chambers. In addition, some parts of the rules arguably change the substantive law; for example, the rules that deal with preliminary discovery and discovery from a person who is not a party to proceedings. It is of particular importance to remove any doubt that this third and very important category of rule is within the rule-making power of the judges.[119]

206 As this brief history shows, in 1915 Parliament converted the direct statutory authority for service out of jurisdiction into a court rule and gave the judges of the court wide power to make any other rule regulating extraterritorial service. That power was continued thereafter. By 1987, the net result was that Parliament had conferred a broad authority on judges of the Supreme Court to make rules *for or in respect of* any matter *dealt with* in any rule of court in force on 1 January 1987. The rules then in force included an Order that 'dealt with' service of the court's process out of Victoria, whether within Australia or beyond. Those rules specifically authorised service of originating process out of Victoria, without any prior order of the court, for a proceeding founded on a tort committed within Victoria (r 7.02(1)(i)).

207 To repeat, since 1987 three further material events occurred.[120] First, as already noted, uniform cross-vesting legislation around Australia conferred the original jurisdiction of other Supreme Courts on the Supreme Court of Victoria. Secondly, after the 1992 amendment to SEPA, the extraterritorial service rules of court were confined to authorising service outside of Australia. Thirdly, taking effect on 1 October 2016, the judges of the court made the 2016 amendment substituting a new Order 11. It was those rules that expanded the territory within which a tort may occur, for founding a claim that may be served outside of Australia, from Victoria to Australia.

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119 Victoria, *Parliamentary Debates,* Assembly, 7 May 1986, 1815 (CRT Mathews, Minister).

120 Various reiterations of the Rules were made between 1987 and 2016, as set out in *Civil Procedure Victoria*, LexisNexis [I 1.05], but these are not material for present purposes.

208 Although the Supreme Court of Victoria had already enjoyed subject-matter jurisdiction to entertain such claims since 1987, until the 2016 amendment there was no rule that authorised the service of such a proceeding out of Australia. The 2016 amendment was made 'under section 25 of the *Supreme Court Act 1986* and all other enabling powers'.[121] That section enabled the Judges of the Court to make rules 'for or with respect to' service of the court's process out of Australia, that being a matter dealt with by the Rules in force on 1 January 1987.[122]

209 I accept (for current purposes) that the new rule enlarged the adjudicatory jurisdiction of the Court by adding a category of claim — albeit for which it already enjoyed subject-matter jurisdiction — to those which could be served out of Australia under the pre-existing rule. To that extent, the new rule was a change to substantive law. But the nature of that change was embraced within the scope of matter for or in respect of service of originating process outside of Australia. That is to say, altering the territorial scope of permissible claims (yet still within the Court's subject matter jurisdiction) that may be served out of Australia fell within the scope of matter for or with respect to service out of Australia, that being a matter already dealt with by the rules.

Conclusion

210 Construed in the context of the legislative history of extraterritorial service laws in Victoria and the court's rule-making power in that regard,[123] s 25(1)(a) gave ample statutory authority to the Judges of the Court to make r 7.02 in its current form. The foreign defendants' application to set aside service on the ground that r 7.02 was made without power, and thus invalid, must therefore be rejected.

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121 2016 amendment, r 2.

122 By virtue of s 41A of the *Interpretation of Legislation Act 1984* (Vic), the Judges of the Court also have power to 'repeal, revoke, rescind, amend, alter or vary' any rule of court they make.

123 Prior legislative provisions may assist in the interpretation of a current law: see, for example, *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249, 256 at [12]-[21], 262 at [29]-[30] (McHugh, Gummow, Hayne and Heydon JJ) and, generally, DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, (LexisNexis, 8th ed, 2014) 121 [3.31].

What sum should be fixed as security for the costs of the Australian defendants?

211 By their summons seeking security for costs, the two Australian Uber entities (that is the fourth and seventh defendants) apply for an order pursuant to s 33ZF of the Act and/or the inherent jurisdiction of the Court that the plaintiff provide security for their costs, up to and including the filing of defences, in the sum of $500,000 by payment of a cash deposit into court.

212 There is no dispute that security for costs should be paid; the only issue is in what amount. Whereas, the two Australian defendants seek a sum of $500,000, as set out in the summons, Mr Andrianakis submits that $85,000 is the more appropriate amount.

213 From the affidavit material filed, and the submissions both written and oral, it is evident that there are two fundamental differences between the parties in their approach to the quantification of security.

(a) The first is that Mr Andrianakis contends that the amount of security ordered should reflect an apportionment of 'common' costs between the seven defendants, being costs which are either common to all defendants or from which the five foreign defendants will also benefit. For that reason, most of the $85,000 represents approximately 2/7ths of the common costs (as the plaintiff assesses them), with a smaller component of some costs referable only to the Australian defendants, such as costs for filing their appearance and preparing their security for costs application. Conversely, the Australian defendants do not accept that any apportionment is appropriate.

(b) The second difference is in the estimation of the costs of all defendants up to and including the filing of defences. Whereas the Australian defendants estimate that sum (on a standard basis) as $500,000, the plaintiff puts it in the vicinity of $250,000.

214 In determining the quantum of security, the Court is to apply the following principles:

(a) The Court is to order an amount which it thinks is 'just and reasonable' having regard to all of the circumstances of the case.[124]

(b) The purpose of security for costs is not to provide a defendant with full protection for the estimated costs of the party seeking security.[125]

(c) The Court is to adopt a 'broad brush' approach to the determination of the amount of security to be ordered.[126] The task of the Court is not to undertake precise mathematical calculations.[127]

(d) That said, the broad brush approach does not involve an abstract process; it must have an evidentiary basis.[128]

(e) The Court is not bound to give security in the amount sought and is not bound by the estimates of the parties.[129]

(f) In making its assessment of the appropriate quantum, the Court may scrutinise individual items but not to the extent of minute examination, akin to a taxation.[130]

(g) The amount ultimately fixed by the Court must not be so low that it fails to provide any real protection to the party seeking security, or so high that it is oppressive to the party required to provide security.[131]

(h) Insufficiency in the evidence substantiating a claim for security may be reason for the Court to look critically at the estimate provided and may be reason for the Court to apply a heavier percentage discount to the amount sought.[132]

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124 *Trailer Trash Franchise Systems Pty Ltd v GM Fascia & Gutter Pty Ltd* [2017] VSCA 293 ('*Trailer Trash*') at [65] (Tate and Kyrou JJA). The statement of the applicable principles in this decision were relied upon as recently as 21 June 2019 by the Court of Appeal in *Michos v Eastbrooke Medical Centre Pty Ltd* [2019] VSCA 140 at [89] (Kyrou and T Forrest JJA).

125 *Trailer Trash* at [63] (Tate and Kyrou JJA).

126 Ibid at [64] (Tate and Kyrou JJA).

127 Ibid at [64] (Tate and Kyrou JJA).

128 Ibid at [64] (Tate and Kyrou JJA).

129 Ibid at [64] (Tate and Kyrou JJA).

130 Ibid at [64] (Tate and Kyrou JJA).

131 Ibid at [65] (Tate and Kyrou JJA).

132 *Pathway Investments Pty Ltd & Anor v National Australia Bank Limited* [2012] VSC 97 at [38] and [55]

215 The Australian defendants relied upon the affidavit of John Mark Caton Emmerig of Jones Day, the defendants' solicitors, sworn 7 August 2019. Mr Emmerig is a solicitor of undoubted experience, having 31 years' experience in conducting major commercial litigation in the State and Territory Supreme Courts and in the Federal Court of Australia, including over 24 years' experience in class actions. In addition to his practical experience, Mr Emmerig has also authored many articles and papers on class actions law.

216 Mr Emmerig's approach to estimating the costs up to the filing of a defence, broadly speaking, involved the following steps:

(a) first, describing the principal tasks undertaken from the date of service of the writ on the Australian defendants to the date of his affidavit, and assessing the costs and disbursements comprising solicitors' fees, counsels' fees and other disbursements (exclusive of GST) for those tasks, which he estimated to be $345,000;

(b) secondly, describing the anticipated next steps from the date of swearing his affidavit through to the filing of defence (including preparation for, and appearing at the interlocutory applications which I heard), and estimating the costs and disbursements for those tasks, which he estimated to be approximately $390,000;

(c) thirdly, totalling those two components of cost at $735,000 (exclusive of GST); and

(d) then, finally, estimating that 70% of those total costs would be the recoverable portion on a standard basis were the Australian defendants to be successful in the proceeding, reducing the amount to $514,500, which he rounded to $500,000 as the claimed security.

217 The plaintiff relied upon two affidavits affirmed by Elizabeth Jane O'Shea, a solicitor

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(Davies J) ('*Pathway*').

with Maurice Blackburn Lawyers, the plaintiff's lawyers, one affirmed 28 August 2019 and the other 29 August 2019. Exhibited to those affidavits was a copy of a report dated 27 August 2019 by Anna Sango, an accredited costs law specialist, and an amended table to that report dated 29 August 2019.

218 Ms Sango was asked to provide an estimate of the reasonable costs of the two Australian defendants in the period up to, and including, filing of their defences. She has been a legal practitioner in Victoria since 1986 and a Law Institute of Victoria Accredited Specialist in Costs Law since October 2010. She has been engaged in numerous cases as an expert witness on costs in State and Federal jurisdictions, including group proceedings. I am satisfied she is qualified to provide an expert opinion on costs.

219 In her report, Ms Sango listed the relevant steps in the proceeding up to and including 7 August 2019. She then listed the projected, next steps in the proceeding from 8 August 2019 up to the filing of the Australian defendants' defences. She reviewed Mr Emmerig's affidavit and in particular the tasks he described as giving rise to the two components of costs, past costs of $345,000 and future costs of $390,000. She challenged or queried aspects of Mr Emmerig's assessment, including what she thought appeared to be duplication of work between the Melbourne and Sydney offices of Jones Day, a lack of detail to explain the number of solicitors involved in tasks, the level of their seniority and the hours they spent, and the rate of counsels' fees.

220 Ms Sango's opinion is that it is appropriate to apportion common costs between the Australian defendants and the foreign defendants. Essentially, that is because a large amount of the work that has been done and will be done is for the common benefit of *all* Uber defendants and yet it is only the Australian defendants which have applied for security for their costs.

221 Ms Sango also is of the view that $500,000 is an unreasonable amount for the totality of the defendants' costs for the relevant period. As to the past component, she was of

the view that the estimated amount lacked sufficient information to allow any competent assessment of its reasonableness. As to the future component, she thought it was unreasonably excessive pointing out that Senior Counsel's rates and solicitors' hourly rates exceeded (in some case by a large margin) the maximum amount allowed on Scale.

222 On her assessment, the relevant components of cost for the past and the future, to the date of filing defences, are $37,876.72 and $47,139.17 respectively, totalling just over $85,000.

223 The first point of difference is the question of whether to apportion. As a statement of general principle, in order to achieve a fair and just result in the particular circumstances of a given case, a court *may* decide, in the exercise of its broad discretion 'to determine by whom and to what extent' costs are to be paid, to apportion a liability for or entitlement to costs incurred in common with others.[133] Often, the appropriate stage at which to apply any apportionment is at taxation, with the Court having first ordered, simply, that parties jointly liable for or entitled to costs incurred in common with others pay or receive the costs, leaving it for taxation to carry out the apportionment.

224 Here, at this stage, there is to be no taxation to determine the appropriate quantum of security. I am to fix a sum according the principles outlined above. I consider it is appropriate as a matter of fairness that the Australian defendants only receive (and the plaintiff only provide) security for the rateable proportion of those costs incurred by them in common with the foreign defendants, each benefiting equally from the incurrence of those cost. Since they are the only defendants to have applied for security, the court should only award the Australian defendants their proportion of the common costs so incurred.

225 The Australian defendants argued that an apportionment 'lacked logic' and the calculation 'was not linear'. For the reasons stated, I disagree that it lacks logic. As

133 See my discussion in *Victorian WorkCover Authority v Adventure Park Pty Ltd* [2019] VSC 270, [22]-[34].

for it not being 'linear', I take that submission to be making the point that most costs would need to be incurred for any one defendant alone, in any event, and that simply apportioning costs rateably fails to grapple with a true individual assessment of each defendant's costs. That is largely a repeat of the 'lacks logic' argument. Otherwise, the answer to it is that it is not the court's task at this point to make an exact assessment of a defendant's recoverable costs.

226 In this case, having regard to my refusal to set aside service of the proceeding on the foreign defendants, with result that their appearance to the proceeding will now be unconditional, this question of apportionment is likely to be of relatively temporary significance. That is, I expect that the foreign defendants will soon apply for security and, without having yet heard any argument on the point, the balance of the total costs (i.e. the 5/7ths) will likely be provided in their favour.

227 I then turn to the second point of difference, the assessment of those total costs.

228 Each side selected a number of specific aspects of the others' assessment of costs to illustrate, as they would have it, that the other sides' approach to the assessment was either too generous or too miserly. Each made valid points. On the one hand, I have an impression that the plaintiff's assessment somewhat overlooks the complexity and scale of this particular piece of litigation. On the other hand, I have the impression that the Australian defendants' assessment involves some overly generous scales and rates of fees and may well involve a measure of duplication and devotion of excessive resources (so far as a standard rate assessment is concerned) to some tasks. Fundamentally, it is difficult to draw clear conclusions about those matters for the reason, as observed by Ms Sango, that Mr Emmerig's affidavit lacks granularity on specifics such as the number and seniority of the solicitors involved in the work and the hourly rates at which their charges have been calculated.

229 But, I am to take a broad brush to this assessment. Security is not designed to provide the Uber defendants with full protection. Aiming to provide 'real protection' to the defendants without being oppressive to the plaintiff, for security purposes I

start with an amount for total costs for all defendants (common and otherwise) in the order of $375,000. Apportioning 2/7ths of a notional common-cost component of that total, and allowing a modest element for any costs incurred for only the Australian defendants, I fix security for the costs of those defendants at $115,000.

Conclusion

230 I will now state my conclusions on the applications made in the three summonses.

Pleading Summons

231 In view of the conclusion at [101] above, I will direct Mr Andrianakis to further amend the ASOC to plead the element of intention to harm more clearly and transparently. Pending the filing of that further amended ASOC, I will adjourn the application made in paragraph 1 of the pleading summons (that the ASOC be struck out).

232 I will dismiss paragraphs 2 and 3 of that summons (the applications made pursuant to ss 33N(1) and 33ZF of the Act).

Service-out Summons

233 For the reasons I have stated, I propose to dismiss the foreign defendants' application to set aside the service upon them of the writ and statement of claim (including the *ex parte* order as to service under r 6.11 of the Rules). But, because I have directed Mr Andrianakis to further amend the statement of claim, and because one ground of the application to set aside service was the sufficiency of the prospects of success on the claim, I will defer making any orders on the summons until the further amended pleading has been filed.

Security for Costs

234 I will order that Mr Andrianakis provide security for the costs of the Australian defendants up to and including the filing of defences in the sum of $115,000 by payment of a cash deposit to the court.

Other

235 I will fix an appropriate date by which the security should be provided, and make any other consequential orders including those as to costs on all of the summonses, after further discussion with the parties.

SCHEDULE OF PARTIES

NICOS ANDRIANAKIS	Plaintiff
and	
UBER TECHNOLOGIES INCORPORATED (4849283)	First Defendant
UBER INTERNATIONAL HOLDINGS BV (RSIN 851 929 357)	Second Defendant
UBER BV (RSIN 852 071 589)	Third Defendant
UBER AUSTRALIA PTY LTD (ACN 160 299 865)	Fourth Defendant
RASIER OPERATIONS BV (RSIN 853 682 318)	Fifth Defendant
UBER PACIFIC HOLDINGS BV (RSIN 855 779 330)	Sixth Defendant
UBER PACIFIC HOLDINGS PTY LTD (ACN 609 590 463)	Seventh Defendant