HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

KPMG (A FIRM) (ABN 51 194 660 183)
Applicant

and

ANTHONY BOGAN
First Respondent

MICHAEL THOMAS WALTON
Second Respondent

THE ESTATE OF PETER JOHN SMEDLEY, DECEASED
Third Respondent

ANDREW GERARD ROBERTS
Fourth Respondent

PETER GRAEME NANKERVIS
Fifth Respondent

JEREMY CHARLES ROY MAYCOCK
Sixth Respondent

APPLICATION FOR REMOVAL

The applicant (**KPMG**) applies for an order under section 40 of the *Judiciary Act* 1903 removing the whole of the cause now pending in the Supreme Court of Victoria which is proceeding S ECI 2020 03281 between *Anthony Bogan & Anor v The Estate of Peter John Smedley Deceased & Ors*.

PART I: Precise order sought

1. Pursuant to section 40(2) of the *Judiciary Act 1903* (Cth), the whole of the cause in proceeding S ECI 2020 03281 pending in the Supreme Court of Victoria is removed into the High Court of Australia.

PART II: Concise statement of the question

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

PART III: Brief statement of the factual background

3. On 14 August 2020, the first and second respondents (**the plaintiffs**) commenced representative proceedings in the Supreme Court of Victoria against KPMG and the third to sixth respondents (**the defendants**) (**Pavlakis [12]**). The proceedings are brought on behalf of persons who acquired an interest in fully paid ordinary shares in Arrium Limited between 19 August 2014 and 4 April 2016 (**Pavlakis [5]**). In their Statement of Claim, the plaintiffs allege the defendants engaged in misleading or deceptive conduct and breached various provisions of the *Corporations Act*, the *Australian Securities and Investments Commission Act 2001* (Cth) and the *Australian Consumer Law* (Cth) (**Pavlakis [13]**).

4. On 2 February 2021, the plaintiffs applied for a "group costs order" (**GCO**) under s 33ZDA of the *Supreme Court Act* (**Pavlakis [20]**). Section 33ZDA(1) provides:

> On application by the plaintiff in any group proceeding, the Court, if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding, may make an order–
>
> (a) that the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being a percentage set out in the order; and
>
> (b) that liability for payment of the legal costs must be shared among the plaintiff and all group members.

This provision is unique to Victoria. No other court in Australia is empowered to make an order, in any kind of proceeding, for legal costs to be paid on a "contingency fee" basis. To the contrary, costs agreements providing for contingency fees are prohibited throughout Australia.[1]

5. In correspondence dated 23 November 2020, KPMG suggested that New South Wales was the more appropriate and natural forum for the proceedings. On 26 February 2021, KPMG

[1] *Legal Profession Uniform Law* (NSW), s 183; *Legal Profession Uniform Law* (Vic), s 183; *Legal Profession Act 2008* (WA), s 285; *Legal Practitioners Act 1981* (SA), Sch 3 cl 27; *Legal Profession Act 2007* (Qld), s 325; *Legal Profession Act 2007* (Tas), s 309; *Legal Profession Act 2006* (ACT), s 285; *Legal Profession Act 2006* (NT), s 320.

applied to transfer the proceedings from the Supreme Court of Victoria to the Supreme Court of NSW (**Pavlakis [23]**). KPMG submitted that the transfer application should be determined ***before*** the GCO application. The plaintiffs submitted that the GCO application should be determined first. On 31 March 2021, without giving reasons, Nichols J rejected KPMG's submission, directing that the transfer application be determined after the application for a GCO (**Pavlakis [25]-[26]**).

6. On 3 May 2022, for reasons given on 26 April 2022, the Supreme Court of Victoria (John Dixon J) made an order that the legal costs payable to the solicitors for the plaintiffs, Banton Group, be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being 40% inclusive of GST (subject to further order). Among other things, his Honour found that, if a GCO were not made, "there is a considerable risk, indeed a probability, that the Funder will conclude that the funding agreement is not financially viable for it and will not continue to fund the proceedings".[2] KPMG submitted that the GCO should not be ordered "as it would then be used as an anchor to resist KPMG's application to transfer the proceeding";[3] his Honour did not address that submission.

7. KPMG seeks to have the proceeding removed into this Court for the determination of KPMG's application that the proceedings be transferred to NSW, in light of the GCO which has been made. Once the cause is removed, this Court "may do whatever is necessary for the complete adjudication of the cause",[4] which would include the power to determine KPMG's transfer application.

PART IV: Brief statement of the applicant's argument in support of removal

Power to transfer proceedings

8. The Supreme Court of Victoria has power to transfer the proceedings to the Supreme Court of NSW under s 1337H of the *Corporations Act*.[5] Section 1337H(2) provides:

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2 *Bogan v The Estate of Peter John Smedley (Deceased)* [2022] VSC 201 at [105].

3 *Bogan v The Estate of Peter John Smedley (Deceased)* [2022] VSC 201 at [104].

4 *Felton v Mulligan* (1971) 124 CLR 367 at 399 (Walsh J).

5 That provision, rather than the equivalent provision of the *Jurisdiction of Courts (Cross-vesting Act) 1987* (Vic), applies because the proceeding is "with respect to a civil matter arising under the Corporations legislation": *Rushleigh Services Pty Ltd v Forges Group Ltd (in liq)* [2016] FCA 1471 at [73] (Foster J).

> Subject to subsections (3), (4) and (5), if it appears to the transferor court that, having regard to the interests of justice, it is more appropriate for:
>
> (a) the relevant proceeding; or
>
> (b) an application in the relevant proceeding;
>
> to be determined by another court that has jurisdiction in the matters for determination in the relevant proceeding or application, the transferor court may transfer the relevant proceeding or application to that other court.

9. Section 1337L sets out a non-exhaustive list of mandatory considerations relevant to a decision to transfer. These are: the principal place of business of any body corporate concerned in the proceeding, the place or places where the events that are the subject of the proceeding occurred, and the other courts that have jurisdiction to deal with the proceeding.

10. If a proceeding is transferred or removed to another court, s 1337P(2) provides that the transferee court "must deal with the proceeding as if, subject to any order of the transferee court, the steps that had been taken for the purposes of the proceeding in the transferor court (including the making of an order), or similar steps, had been taken in the transferee court".

11. Crucially, s 1337R(a) provides that "[a]n appeal does not lie from a decision of a court in relation to the transfer of a proceeding" under s 1337H. Accordingly, if the Supreme Court of Victoria were to make a decision on KPMG's transfer application, s 1337R would preclude an appeal not only to the Victorian Court of Appeal but also to this Court.

12. In its transfer application, KPMG will submit that the overwhelming preponderance of factors favour transfer of the proceedings to the Supreme Court of NSW. The factors are set out in more detail in **Pavlakis [29]-[67]**, but in summary:

(a) Arrium Limited was headquartered in Sydney, as were the Company Secretary and the Group Finance, Treasury and Internal Audit teams. The relevant board meetings, audit committee meetings, financial reports and declarations occurred in Sydney, and the relevant locations in respect of the capital raising (including the offices of the underwriter) were all in Sydney (**Pavlakis [29]-[33], [35]**).

(b) The relevant KPMG partners and team were based in Sydney, conducted the relevant meetings and work between KPMG's Sydney offices and Arrium's Sydney offices, and continue to reside in Sydney (**Pavlakis [36]**).

(c) The plaintiffs reside in NSW (**Pavlakis [42]-[43]**). The surviving directors live elsewhere but consider NSW the appropriate forum, including because a number of their potentially key witnesses reside there (**Pavlakis [40]-[41]**).

(d) The liquidators and company books and records are in Sydney (**Pavlakis [48]**). Liquidator examinations occurred in the Supreme Court of NSW in 2018 (**Pavlakis [50]-[55]**). In 2019 the Plaintiffs obtained orders for examination and access to documents in the Supreme Court of NSW. In 2022, this Court ultimately affirmed their entitlement to such orders, and the Plaintiffs have indicated an intention to seek to renew the orders for access in the Supreme Court of NSW this year (**Pavlakis [57]-[65]**).

(e) Two related proceedings concerning similar facts were heard to conclusion across 38 concurrent hearing days in the Supreme Court of NSW in 2021 (a third settled). Appeals are set down on 1 August 2022 in Sydney (**Pavlakis [66]-[67]**).

(f) The legal representatives of all parties are primarily based in Sydney, the majority of whom have been instructed since the liquidator examinations (and, for the director defendants, the three related proceedings) in the Supreme Court of NSW (**Pavlakis [2], [39], [44], [67]** ***cf*** **[45])**.

13. It is apparent from the evidence filed in the GCO application that the only reason the plaintiffs commenced in Victoria was the introduction of provisions permitting the Supreme Court of Victoria to make GCOs (**Pavlakis [46]-[47]**).

14. The question is whether, notwithstanding the preponderance of factors favouring transfer of the proceedings to NSW, the Supreme Court of Victoria may nonetheless have regard to the making of a GCO, and the prospect that it may not be enforced if the proceedings are transferred to NSW, as a consideration weighing ***against*** transfer of the proceedings.

15. For the reasons below, the making of the GCO is irrelevant to the exercise of the discretion conferred by s 1337H(2) of the *Corporations Act*. Alternatively, given the GCO will "travel" with the proceedings in the event that they are transferred, and the Supreme Court of NSW will have power to deal with that order as it considers appropriate, the making of the GCO is a neutral factor in the exercise of the discretion.

Making of a GCO not relevant

16. The fact that a GCO has been made in the proceedings is irrelevant to determining whether the proceedings should be transferred under s 1337H(2) for two reasons.

17. *First*, consistently with the submissions made by KPMG in the Supreme Court of Victoria, the proper sequence should have been for the transfer application to be determined ***before*** the application for a GCO. Where it is contended that a matter should be transferred because of its factual connections with another jurisdiction, it is a subversion of the policy of the transfer provisions to determine a GCO application first and thereby provide an "anchor" to Victoria that would not otherwise have existed.

10 **18.** In argument on the sequencing of the transfer application and the GCO application, doubt was expressed as to "the Supreme Court of New South Wales's ability to give effect to any group costs order" (at [6]). Upon closer review, as set out below, the Supreme Court of NSW ***can*** give effect to the GCO. However, the subversion of the policy of the transfer provisions is exacerbated if the "anchor" to Victoria that is created by the making of a GCO rests, in part, on the uncertainty of enforcement of the GCO in NSW.

19. If the transfer application had been determined first, as it ought to have been, the GCO that will now be relied upon as a reason to refuse a transfer of the proceedings to NSW would not exist. That being so, the fact that a GCO has been made, and the findings made by John Dixon J in the course of the GCO application, are irrelevant to the transfer application.

20 **20.** *Secondly*, and in any event, where a party enjoys a procedural advantage by reason of having instituted the proceedings in one forum, and the other party suffers a corresponding disadvantage by reason of that choice, that procedural advantage is irrelevant to the assessment of the "interests of justice" for the purposes of provisions such as 1337H. So much was held by this Court in *BHP Billiton Ltd v Schultz*.[6] In that case, the Court unanimously held that, in exercising power under the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW), the Supreme Court of NSW made a material error in taking into account the plaintiff's choice of forum as a matter not to be "lightly overridden", as well as the advantages conferred on the plaintiff by s 11A of the *Dust Diseases Tribunal Act 1989*

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[6] (2004) 221 CLR 400; see also *Opes Prime Stockbroking Ltd (in liq) (Scheme Administrators appt) v Stevens* [2014] NSWSC 659 at [25]; Davies et al, *Nygh's Conflict of Laws in Australia* (10th ed, 2019) at [6.31].

(NSW).[7] Section 11A allowed the Dust Diseases Tribunal to award damages assessed on the assumption that the injured person would not develop another dust-related condition, but to award further damages at a future date if the injured person did develop another dust-related condition.

21. Gleeson CJ, McHugh and Heydon JJ said (at [26]):[8]

> If, in a particular respect, the first respondent's assumed advantage and the appellant's assumed disadvantage are commensurate, the one simply being the converse of the other, then that does not advance the matter. … [T]he problem would be compounded if a judge were to become involved in comparing the respective merits of New South Wales and South Australian legislation. From whose point of view would those merits be judged? How could a judge form a preference between the public policy reflected in an Act of the Parliament of New South Wales and the public policy reflected in an Act of the Parliament of South Australia? If it came to that point, the appropriate course would be for the judge to draw back, and to consider the interests of justice by reference to more neutral factors.

22. The joint reasons distinguished an earlier decision of the NSW Court of Appeal, which held that the unique procedural powers of the Dust Diseases Tribunal ***were*** relevant to the interest of justice in the context of a transfer application made under the *Jurisdiction of Courts (Cross-vesting Act) 1987*.[9] Their Honours said (at [21], emphasis added):

> The Court of Appeal pointed out that these were not merely forensic advantages to one party that represented a corresponding disadvantage to the other party, but were factors relevant to a decision under s 5 because they have the capacity to assist ***both*** plaintiffs and defendants in the efficient and economical resolution of disputes, ***and therefore serve the public interest***.

23. Gummow J (Hayne J agreeing) said that the "interests of justice" are "even-handed" (at [100]). His Honour said, "[t]o fix upon the advantages s 11A conferred upon Mr Schultz, without any consideration of the operation of s 30B upon the interests of both parties, was to give further effect to the false notion of Mr Schultz's 'venue privilege'" (at [80]).[10]

24. Kirby J said (at [169]):

> The "interests of justice" necessarily include justice to all parties. It would be incompatible with our notions of justice to apply the NSW Cross-vesting Act in a way that favoured the

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7 The Court divided on the appropriate relief, with the majority ordering transfer of the proceedings to the Supreme Court of South Australia.

8 See also [15]-[16].

9 *James Hardie & Coy Pty Ltd v Barry* (2000) 50 NSWLR 357 at [112], [116] (Mason P).

10 Section 30B of the *Supreme Court Act 1935* (SA) conferred upon the South Australian Supreme Court a power to make interim assessments of damages, by determining liability and adjourning the final assessment of damages.

> rights of one party to litigation over others, rewarding the party selecting the initial venue with significant substantive (as distinct from purely procedural) advantages for doing so.

25. Finally, Callinan J said (at [258]):

> … one person's legitimate advantage is another person's disadvantage. There should be no presumption in litigation in favour of any party. Courts are required to do equal justice. It is wrong to say that proceedings should be conducted in the, or indeed any Tribunal because a plaintiff, or for that matter a defendant, is likely to have a better chance of winning or more easily winning there.

26. His Honour said that the legislature, in enacting the *Cross-vesting Act*, indicated "that it regarded forum shopping as an evil" (at [217]). In this regard, the Explanatory Note in respect of the NSW Act said that "Courts will need to be ***ruthless*** in the exercise of their transferral powers to ensure that litigants do not engage in 'forum-shopping' by commencing proceedings in inappropriate courts" (emphasis added).[11]

27. Notwithstanding these clear statements, there are a number of subsequent first instance decisions which have held that the "forensic advantage or disadvantage conferred by procedural law" ***is*** relevant to the assessment of the "interests of justice". Indeed, in *Dwyer v Hindal Corporate Pty Ltd* (which concerned a transfer application under s 1337H of the *Corporations Act*),[12] Debelle J said that the relevance of this factor – taken from a list of relevant factors set out in a 1994 decision of the ACT Supreme Court – was consistent with the reasoning in *BHP Billiton Ltd v Schultz*. The approach in these decisions is wrong. Of course, the opportunity for review of those decisions by intermediate appellate courts (and this Court) has been eliminated by s 1337R of the *Corporations Act* and its equivalents.

28. The making of a GCO is, first and foremost, an advantage to the plaintiffs' solicitors (and, in this case, the funder standing behind the solicitors). That of itself indicates that it is not a matter which ought be taken into account. To the extent that, without a GCO, the proceedings might not continue, that is an advantage conferred on the plaintiffs by reason of their having instituted proceedings in the Supreme Court of Victoria, which operates to the disadvantage of the defendants in those proceedings. That is, the defendants are required

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[11] The Explanatory Memorandum to the Commonwealth Act had identical language (at [6]).

[12] (2005) 52 ACSR 335 at [18]-[19] (Debelle J), citing *Dawson v Baker* (1994) 120 ACTR 11 at 25 (Higgins J, Gallop J agreeing). See also *Rushleigh Services Pty Ltd v Forge Group Ltd (in liq)* [2016] FCA 1471 at [77] (Foster J); *President's Club Ltd v Palmer Coolum Resort Pty Ltd* [2019] QSC 209 at [154]-[157] (Wilson J), citing *World Firefighters Games Brisbane v World Firefighters Games Western Australia Inc* (2001) 161 FLR 355 at [32] (Philippides J).

to defend proceedings that they may not otherwise have needed to defend if the Supreme Court of Victoria did not have the power to make a GCO. Consistently with the unanimous decision in *BHP Billiton Ltd v Schultz*, that advantage is irrelevant to the question of whether the Supreme Court of NSW is "more appropriate" to hear the proceedings "having regard to the interests of justice". The question of whether the Supreme Court of NSW is "more appropriate" should be decided "by reference to more neutral factors". In this regard, given s 1337H of the *Corporations Act* was clearly modelled on s 5 of the *Cross-vesting Acts*, the Parliament evidently intended that, in deciding whether to transfer proceedings, courts should be similarly "ruthless" to ensure litigants do not engage in forum-shopping.[13]

10 **29.** The irrelevance of a GCO to the "interests of justice" is supported by this Court's recent decision in *BMW Australia Ltd v Brewster*.[14] In that case, the majority held that, having regard to the context of the statutory power of the Federal and Supreme Courts in representative proceedings to "make any order [that] the Court thinks appropriate or necessary to ensure justice is done in the proceedings", it cannot be said to be "appropriate or necessary to ensure that justice is done" in a representative proceeding for a court to promote the prosecution of the proceeding "in order to enable it to be heard and determined by that court".[15] The majority said that the relevant provisions empower the making of orders as to ***how*** an action should proceed in order to do justice; they are not concerned with the radically different question as to ***whether*** an action can proceed at all. Similarly,
20 s 1337H(2) is concerned with ***where***, in the interests of justice, the proceedings should be determined (akin to the "how" question in *Brewster*) and cannot be concerned with whether they should proceed at all.

30. In any event, John Dixon J did ***not*** find that the proceedings could not be continued at all if a GCO was not made. It is not the case that ***no*** funding is available in NSW. The funder standing behind the plaintiffs' solicitor has funded the proceedings since 2018, assuming the proceedings would commence in NSW.[16] Its continued funding was always

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[13] See also *Re Samwise Holdings Pty Ltd* [2016] NSWSC 1610 at [7] (Brereton J) ("… one function of s 1337J [which enables transfers from federal and State family courts] is to encourage plaintiffs to institute proceedings in the most appropriate court and to discourage them from opportunistic forum shopping").

[14] (2019) 269 CLR 574.

[15] *Brewster* (2019) 269 CLR 574 at [3], see also [47] (Kiefel CJ, Bell and Keane JJ, Nettle and Gordon JJ agreeing).

[16] *Bogan* [2022] VSC 201 at [42]; Pavlakis at [55].

discretionary, and connected to an assessment of the commerciality of the proceedings.[17] In the GCO application, the funder indicated that, in view of the uncertainty surrounding the availability of a common fund order and its ongoing assessment of the prospects of the claim, it ***may not*** be willing to accept the risk attending these proceedings without the security of a GCO.[18] That the Victorian regime has, since July 2020, permitted funding to keep a high-risk matter on foot longer or more easily than the funding regime available in NSW provides no basis to conclude that the even-handed "interests of justice" preclude a transfer to NSW. The identification of the more appropriate forum should not be influenced by a funder's ***preference*** to avoid a jurisdiction where there is uncertainty as to whether common fund orders can be made.

Even if a GCO is relevant, it is a neutral factor

31. As noted above, there is asserted uncertainty as to whether the Supreme Court of NSW would be able to enforce the GCO if the proceedings were transferred. If this matter is not removed into this Court, the Supreme Court of Victoria could never resolve this asserted uncertainty. Its decision would not be binding on the Supreme Court of NSW, and there could be no appeal from the decision.

32. To the extent there remains doubt, this Court should resolve any uncertainty as follows. *First*, as noted above, s 1337P(2) creates a default presumption that any order made prior to transfer will travel to the new jurisdiction, "subject to any order of the transferee court". That the transferee court may have lacked the power to make the orders itself is irrelevant.[19] It follows that, subject to any order of the transferee court, the GCO would be in force. It would be a matter for that court to decide whether to revoke the order, in whole or in part, pursuant to the power conferred by s 1337P(2). *Secondly*, by exercise of that power, or alternatively s 183 of the *Civil Procedure Act 2005* (NSW) (under which a court may make any order it "think appropriate or necessary to ensure that justice is done in the proceedings"), the transferee court would have power to vary the GCO.[20]

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[17] *Bogan* [2022] VSC 201 at [43](f) and [54]-[58], [80](b).

[18] *Bogan* [2022] VSC 201 at [48], [52], [54], [60]-[63], [80], [105].

[19] *Abrook v Paterson* (1995) 58 FCR 293 at 296 (Branson J); *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 3)* [2003] VSC 244 at [37] (Gillard J).

[20] In this regard, the power to revoke or vary a GCO which has already been made before the transfer is distinguishable from the making of a common fund order, which was held to be outside the scope of s 183 in *Brewster*.

33. No doubt as to the enforceability of the GCO in NSW is raised by the prohibition on the entry by legal practitioners into costs agreements containing contingency fees imposed by s 183 of the *Legal Profession Uniform Law* (NSW). *First*, nothing in s 183 of the *Legal Profession Uniform Law* speaks to a contingency fee imposed by order of a court (as opposed to one obtained by agreement). *Secondly*, even if there were a conflict between this provision and the order applied by s 1337P(2) of the *Corporations Act*, as federal legislation s 1337P(2) would prevail by force of s 109 of the Constitution.

34. For these reasons, the transfer application should be resolved on the basis that the GCO could be enforced in the Supreme Court of NSW, subject to any contrary order of that Court. The prospect of that Court making a contrary order is not something which ought to preclude the transfer if that Court is otherwise the more appropriate forum for the dispute.

Why the proceedings should be removed

35. The following matters tend strongly in favour of the removal of the proceedings into this Court, for determination of KPMG's transfer application.

36. *First*, there would be no appeal to this Court from a determination of that application by the Supreme Court of Victoria. Removal would therefore not cut across the appellate process; conversely, removal is the only way for this Court to consider the matter.[21]

37. *Secondly*, the application raises questions of general importance. They include:

(a) the correctness of the procedural course adopted by the Supreme Court of Victoria, determining a GCO application before a transfer application;

(b) the correctness of the first instance authorities treating procedural advantages to a plaintiff as relevant to a transfer application, and whether a GCO is a matter that may permissibly be considered in this way; and

(c) whether a GCO made in Victoria can "travel" to another jurisdiction and the powers of a transferee court to deal with that GCO.

38. This case is unlikely to be the only one in which the question of the relevance (if any) to a transfer application of the making of a GCO will arise. The GCO regime makes the

[21] *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 247-248 (Mason CJ); cf *Bienstein v Bienstein* (2003) 195 ALR 225 at [45] (McHugh, Kirby and Callinan JJ).

Supreme Court of Victoria an attractive forum in which to commence representative proceedings. The procedural manner in which the competing applications were dealt with and the outcome of the transfer application in this case sets a precedent for future cases. In each such case, s 1337R and its equivalents will preclude any appeal to this Court.

39. *Thirdly*, this matter presents the issues starkly and in a manner ripe for removal. The preponderance of connecting factors to NSW is striking and not likely to be productive of a factual controversy. The parties could readily be expected to agree facts on these points.

40. It is appropriate to remove the matter "having regard to all the circumstances, including the interests of the parties and the public interest" (*Judiciary Act*, s 40(4)).

10 **PART V: Costs**

41. There is no reason why an order for costs should not be made in favour of the respondents in the event that the application is refused.

PART VI: List of authorities

42. *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at [15]-[16], [21], [26], [80], [100], [169], [217], [258].

43. *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 at [3], [47].

PART VII: Applicable legislative provisions

44. See annexure.

Dated: 10 May 2022

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30 **TAKE NOTICE:** Before taking any step in the proceedings you must, within **14 DAYS** after service of this application, enter an appearance and serve a copy on the applicant.

The applicant is represented by Ashurst.

Judiciary Act 1903

No. 6, 1903

Compilation No. 49

Compilation date:	18 February 2022
Includes amendments up to:	Act No. 3, 2022
Registered:	28 February 2022

Prepared by the Office of Parliamentary Counsel, Canberra

Part VII—Removal of causes

40 Removal by order of the High Court

(1) Any cause or part of a cause arising under the Constitution or involving its interpretation that is at any time pending in a federal court other than the High Court or in a court of a State or Territory may, at any stage of the proceedings before final judgment, be removed into the High Court under an order of the High Court, which may, upon application of a party for sufficient cause shown, be made on such terms as the Court thinks fit, and shall be made as of course upon application by or on behalf of the Attorney-General of the Commonwealth, the Attorney-General of a State, the Attorney-General of the Australian Capital Territory or the Attorney-General of the Northern Territory.

(2) Where:

(a) a cause is at any time pending in a federal court other than the High Court or in a court of a Territory; or

(b) there is at any time pending in a court of a State a cause involving the exercise of federal jurisdiction by that court;

the High Court may, upon application of a party or upon application by or on behalf of the Attorney-General of the Commonwealth, at any stage of the proceedings before final judgment, order that the cause or a part of the cause be removed into the High Court on such terms as the Court thinks fit.

(3) Subject to the Constitution, jurisdiction to hear and determine a cause or part of a cause removed into the High Court by an order under subsection (2), to the extent that that jurisdiction is not otherwise conferred on the High Court, is conferred on the High Court by this section.

(4) The High Court shall not make an order under subsection (2) unless:

(a) all parties consent to the making of the order; or

(b) the Court is satisfied that it is appropriate to make the order having regard to all the circumstances, including the interests of the parties and the public interest.

(5) Where an order for removal is made under subsection (1) or (2), the proceedings in the cause and such documents, if any, relating to the cause as are filed of record in the court in which the cause was pending, or, if part only of a cause is removed, a certified copy of those proceedings and documents, shall be transmitted by the Registrar or other proper officer of that court to the Registry of the High Court.

41 Proceedings after removal

When a cause or part of a cause is removed into the High Court under section 40, further proceedings in that cause or part of a cause shall be as directed by the High Court.

42 Remittal of causes

(1) Where a cause or part of a cause is removed into the High Court under section 40, the High Court may, at any stage of the proceedings, remit the whole or a part of that cause or part of a cause to the court from which it was removed, with such directions to that court as the High Court thinks fit.

(2) Where it appears to the High Court that the High Court does not have original jurisdiction, whether by virtue of subsection (3) of section 40 or otherwise, in a cause or part of a cause that has been removed into the High Court under section 40, the High Court shall proceed no further in the cause or part of a cause but shall remit it to the court from which it was removed.

43 Effect of interlocutory orders etc. before removal of cause

Where a cause is removed in whole or in part into the High Court from another court:

(a) every order relating to the custody or preservation of any property the subject-matter of the cause that has been made

Corporations Act 2001

No. 50, 2001

Compilation No. 115

Compilation date:	1 April 2022
Includes amendments up to:	Act No. 14, 2022
Registered:	26 April 2022

This compilation is in 7 volumes

Volume 1:	sections 1–260E
Volume 2:	sections 283AA–600K
Volume 3:	sections 601–742
Volume 4:	sections 760A–994Q
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This compilation includes commenced amendments made by Act No. 9, 2022. Amendments made by Act No. 14, 2022 have not commenced but are noted in the endnotes.

Prepared by the Office of Parliamentary Counsel, Canberra

(c) except in accordance with the law of the State under which the State Family Court is constituted—the Supreme Court of that State.

1337G Courts to act in aid of each other

All courts having jurisdiction in:

(a) civil matters arising under the Corporations legislation; or

(b) matters referred to in subsection 1337B(3);

and the officers of, or under the control of, those courts must severally act in aid of, and be auxiliary to, each other in all those matters.

Subdivision C—Transfer of proceedings

1337H Transfer of proceedings by the Federal Court and State and Territory Supreme Courts

(1) This section applies to a proceeding (the ***relevant proceeding***) in a court (the ***transferor court***) if:

(a) the relevant proceeding is:

(i) a proceeding with respect to a civil matter arising under the Corporations legislation; or

(ii) a subsection 1337B(3) proceeding; and

(b) the transferor court is:

(i) the Federal court; or

(ii) a State or Territory Supreme Court.

(2) Subject to subsections (3), (4) and (5), if it appears to the transferor court that, having regard to the interests of justice, it is more appropriate for:

(a) the relevant proceeding; or

(b) an application in the relevant proceeding;

to be determined by another court that has jurisdiction in the matters for determination in the relevant proceeding or application,

the transferor court may transfer the relevant proceeding or application to that other court.

(3) If:

(a) the relevant proceeding is a subsection 1337B(3) proceeding; and

(b) the transferor court is a State or Territory Supreme Court;

the transferor court must transfer the relevant proceeding to the Federal Court unless the matter for determination in it arises out of, or relates to, another proceeding pending in any court of that State or Territory that:

(c) arises, or a substantial part of which arises, under the Corporations legislation; and

(d) is not a subsection 1337B(3) proceeding;

regardless of which proceeding was commenced first.

(4) Even if subsection (3) does not require a State or Territory Supreme Court to transfer a subsection 1337B(3) proceeding to the Federal Court, it may nevertheless do so if it considers that to be appropriate, having regard to the interests of justice, including the desirability of related proceedings being heard in the same State or Territory.

(5) If:

(a) the relevant proceeding is a subsection 1337B(3) proceeding in relation to a matter; and

(b) the transferor court is the Federal Court;

the transferor court may only transfer the relevant proceeding, or an application in the relevant proceeding, to a State or Territory Supreme Court if:

(c) the matter arises out of, or relates to, another proceeding pending in any court of that State or Territory that:

(i) arises, or a substantial part of which arises, under the Corporations legislation; and

(ii) is not a subsection 1337B(3) proceeding;

regardless of which proceeding was commenced first; and

(d) the transferor court considers the transfer to be appropriate, having regard to the interests of justice, including the desirability of related proceedings being heard in the same jurisdiction.

(6) Nothing in this section confers on a court jurisdiction that the court would not otherwise have.

(7) The fact that some references in this section to the interests of justice include the desirability of related proceedings being heard in the same jurisdiction does not of itself mean that other references to the interests of justice, in this section or elsewhere in this Act, do not include that matter.

1337J Transfer of proceedings by Federal Circuit and Family Court of Australia (Division 1) and State Family Courts

(1) This section applies to a proceeding (the ***relevant proceeding***) in a court (the ***transferor court)*** if:

(a) the relevant proceeding is with respect to a civil matter arising under the Corporations legislation; and

(b) the transferor court is:

(i) the Federal Circuit and Family Court of Australia (Division 1); or

(ii) a State Family Court.

(2) If it appears to the transferor court:

(a) that the relevant proceeding arises out of, or is related to, another proceeding pending in:

(i) the Federal Court; or

(ii) another State or Territory court;

and that the court in which the other proceeding is pending is the most appropriate court to determine the relevant proceeding; or

(b) that having regard to:

(i) whether, in the transferor court's opinion, apart from this Division, the relevant proceeding, or a substantial

(b) recommend that the relevant proceeding or application be transferred by the Supreme Court to the other court.

(5) The relevant Supreme Court is not bound to comply with a recommendation under subsection (4) and it may instead decide:
(a) to deal with the relevant proceeding or application itself; or
(b) to transfer the relevant proceeding or application to some other court (which could be the transferor court).

(6) Nothing in this section allows the relevant Supreme Court to transfer the relevant proceeding or application to another court otherwise than in accordance with section 1337H and the other requirements of this Division.

(7) Nothing in this section confers on a court jurisdiction that the court would not otherwise have.

(8) In this section:

relevant Supreme Court means the Supreme Court of the State or Territory of which the transferor court is a court.

1337L Further matters for a court to consider when deciding whether to transfer a proceeding

In deciding whether to transfer under section 1337H, 1337J or 1337K a proceeding or application, a court must have regard to:
(a) the principal place of business of any body corporate concerned in the proceeding or application; and
(b) the place or places where the events that are the subject of the proceeding or application took place; and
(c) the other courts that have jurisdiction to deal with the proceeding or application.

1337M Transfer may be made at any stage

A court may transfer under section 1337H, 1337J or 1337K a proceeding or application:
(a) on the application of a party made at any stage; or

(b) of the court's own motion.

1337N Transfer of documents

If, under section 1337H, 1337J or 1337K, a court (the ***transferor court***) transfers a proceeding, or an application in a proceeding, to another court:

(a) the Registrar or other proper officer of the transferor court must transmit to the Registrar or other proper officer of the other court all documents filed in the transferor court in respect of the proceeding or application, as the case may be; and

(b) the other court must proceed as if:

(i) the proceeding had been originally instituted in the other court; and

(ii) the same proceedings had been taken in the other court as were taken in the transferor court; and

(iii) in a case where an application is transferred—the application had been made in the other court.

1337P Conduct of proceedings

(1) Subject to sections 1337S, 1337T and 1337U, if it appears to a court that, in determining a matter for determination in a proceeding, the court will, or will be likely to, be exercising relevant jurisdiction, the rules of evidence and procedure to be applied in dealing with that matter are to be the rules that:

(a) are applied in a superior court in Australia; and

(b) the court considers appropriate to be applied in the circumstances.

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

(3) In this section:

relevant jurisdiction means:

(a) jurisdiction conferred on the Federal Court of Australia or the Federal Circuit and Family Court of Australia (Division 1) with respect to civil matters arising under the Corporations Legislation; or

(b) jurisdiction conferred on a court of a State or Territory with respect to matters referred to in subsection 1337B(3).

1337Q Rights of appearance

(1) This section applies if a proceeding (the ***transferred proceeding)*** in a court (the ***transferor court***) is transferred to another court (the ***transferee court)*** under this Division.

(2) A person who is entitled to practise as a barrister or a solicitor, or as both a barrister and a solicitor, in the transferor court has the same entitlements to practise in relation to:

(a) the transferred proceeding; and

(b) any other proceeding out of which the transferred proceeding arises or to which the transferred proceeding is related, being another proceeding that is to be determined together with the transferred proceeding;

in the transferee court that the person would have if the transferee court were a federal court exercising federal jurisdiction.

1337R Limitation on appeals

An appeal does not lie from a decision of a court:

(a) in relation to the transfer of a proceeding under this Division; or

(b) as to which rules of evidence and procedure are to be applied pursuant to subsection 1337P(1).

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(5) If the plaintiff or the sub-group representative party does not commence an appeal within the time provided, another member of the group or sub-group may, within a further 21 days, commence an appeal as representing the group members or sub-group members, as the case may be.

(6) If an appeal is brought from a judgment of the Trial Division in a group proceeding, the Court of Appeal may direct that notice of the appeal be given to such person or persons, and in such manner, as that court thinks fit.

(7) Section 33J does not apply to an appeal.

(8) The notice of appeal must describe or otherwise identify the group members or sub-group members, as the case may be, but need not specify the names or number of those members.

Division 6—Miscellaneous

33ZD Costs

S. 33ZD inserted by No. 78/2000 s. 13, amended by No. 22/2020 s. 4 (ILA s. 39B(1)).

(1) In a group proceeding, the Court—

(a) may order the plaintiff or the defendant to pay costs;

(b) except as authorised by section 33Q or 33R, may not order a group member or a sub-group member to pay costs.

S. 33ZD(2) inserted by No. 22/2020 s. 4.

(2) Subsection (1)(b) is subject to any order made under section 33ZDA.

33ZDA Group costs orders

S. 33ZDA inserted by No. 22/2020 s. 5.

(1) On application by the plaintiff in any group proceeding, the Court, if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding, may make an order—

(a) that the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being the percentage set out in the order; and

(b) that liability for payment of the legal costs must be shared among the plaintiff and all group members.

(2) If a group costs order is made—

(a) the law practice representing the plaintiff and group members is liable to pay any costs payable to the defendant in the proceeding; and

(b) the law practice representing the plaintiff and group members must give any security for the costs of the defendant in the proceeding that the Court may order the plaintiff to give.

(3) The Court, by order during the course of the proceeding, may amend a group costs order, including, but not limited to, amendment of any percentage ordered under subsection (1)(a).

(4) This section has effect despite anything to the contrary in the Legal Profession Uniform Law (Victoria).

(5) In this section—

group costs order means an order made under subsection (1);

legal costs has the same meaning as in the Legal Profession Uniform Law (Victoria).

Legal Profession Uniform Law (NSW) No 16a

New South Wales

Status information

Currency of version
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Legislation on this site is usually updated within 3 working days after a change to the legislation.

Provisions in force
The provisions displayed in this version of the legislation have all commenced. See Historical Notes

Note:
The Legal Profession Uniform Law is applied and modified as a law of NSW by the NSW *Legal Profession Uniform Law Application Act 2014*. This version is the Law as it applies in NSW.

Responsible Minister
Attorney General

Authorisation
This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the *Interpretation Act 1987*.

File last modified 1 July 2018.

(4) A law practice must not enter into a costs agreement in contravention of this section or of the Uniform Rules relating to uplift fees.

Civil penalty: 100 penalty units.

183 Contingency fees are prohibited

(1) A law practice must not enter into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates.

Civil penalty: 100 penalty units.

(2) Subsection (1) does not apply to the extent that the costs agreement adopts an applicable fixed costs legislative provision.

(3) A contravention of subsection (1) by a law practice is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner associate or foreign lawyer associate involved in the contravention.

184 Effect of costs agreement

Subject to this Law, a costs agreement may be enforced in the same way as any other contract.

185 Certain costs agreements are void

(1) A costs agreement that contravenes, or is entered into in contravention of, any provision of this Division is void.

Note If a costs agreement is void due to a failure to comply with the disclosure obligations of this Part, the costs must be assessed before the law practice can seek to recover them (see section 178(1)).

(2) A law practice is not entitled to recover any amount in excess of the amount that the law practice would have been entitled to recover if the costs agreement had not been void and must repay any excess amount received.

(3) A law practice that has entered into a costs agreement in contravention of section 182 is not entitled to recover the whole or any part of the uplift fee and must repay the amount received in respect of the uplift fee to the person from whom it was received.

(4) A law practice that has entered into a costs agreement in contravention of section 183 is not entitled to recover any amount in respect of the provision of legal services in the matter to which the costs agreement related and must repay any amount received in respect of those services to the person from whom it was received.

(5) If a law practice does not repay an amount required by subsection (2), (3) or (4) to be repaid, the person entitled to be repaid may recover the amount from the law practice as a debt in a court of competent jurisdiction.