SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCI 2020 0033

UBER AUSTRALIA PTY LTD (ACN 160 299 865) — First Applicant

and

UBER PACIFIC HOLDINGS PTY LTD — Second Applicant

v

NICOS ANDRIANAKIS — Respondent

S EAPCI 2020 0034

UBER TECHNOLOGIES INCORPORATED (4849283) & ORS (according to the attached Schedule) — Applicants

v

NICOS ANDRIANAKIS — Respondent

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| JUDGES: | NIALL, HARGRAVE and EMERTON JJA |
| WHERE HELD: | MELBOURNE |
| DATE OF HEARING: | 28 May 2020 |
| DATE OF JUDGMENT: | 21 July 2020 |
| MEDIUM NEUTRAL CITATION: | [2020] VSCA 186 |
| JUDGMENT APPEALED FROM: | *Andrianakis v Uber Technologies (Ruling No 1)* [2019] VSC 850 (Macaulay J) |

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INTERLOCUTORY APPEAL – Leave to appeal granted – Appeals dismissed.

TORT – Conspiracy – Unlawful means conspiracy – Claim that applicants combined with the intention of injuring defendant and group members by unlawful means – Whether judge erred by incorrectly stating test for intention element of tort of conspiracy to injure by unlawful means – Plaintiff required to establish intention to injure the plaintiff – Defendant's intention to injure plaintiff need not be predominant motive for engaging in unlawful conduct, but may be mixed with other purposes or motives – *Dresna Pty Ltd v*

*Misu Nominees Pty Ltd* [2003] FCA 1537, *Dresna Pty Ltd v Misu Nominees Pty Ltd* [2004] FCAFC 169, *McKellar v Container Terminal Management Services Ltd* (1999) 165 ALR 409, *McWilliam v Penthouse Publications* Ltd [2001] NSWCA 237 considered.

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 – Allegations disclose clear case which is not fanciful with no real prospect of success – *CA & CA Ballan Pty Ltd v Oliver Hume (Australia) Pty Ltd* (2017) 55 VR 62, *Trkulja v Google LLC* (2018) 263 CLR 149 applied.

PRACTICE AND PROCEDURE – Group proceeding – Application that proceeding not continue as group proceeding – Single Victorian plaintiff representing group members in four Australian States – Whether judge erred in finding that *Supreme Court Act 1986* s 33C(1) was satisfied – Whether any substantial common questions of fact or law – No error – Claims in respect of each state give rise to common questions of fact, or mixed fact and law – *Dillon v RBS Group (Australia) Pty Ltd* (2017) 252 FCR 150, *Webster (Trustee) v Murray Goulburn Co-Op Co Ltd (No 2)* [2017] FCA 1260, *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317 applied; *Supreme Court Act 1986* Part 4A ss 33C, 33N, 33ZF.

PRACTICE AND PROCEDURE – Service out of Australia pursuant to *Supreme Court (General Civil Procedure) Rules 2015* r 7.02 – Foreign applicants' application to set aside service – Whether *Supreme Court Act 1986* s 25(1)(a) provided statutory authority to make r 7.02(a) – Whether s 25(1)(a) outside the legislative power of the Victorian Parliament – Rule 7.02(a) authorised by s 25(1)(a) – With respect to authorising r 7.02(a), s 25(1)(a) within the power of the Victorian Parliament – *Mobil Oil Aust Pty Ltd v Victoria* (2002) 211 CLR 1, *Flaherty v Girgis* (1985) 4 NSWLR 248 considered; *Supreme Court (General Civil Procedure) Rules 2015* rr 7.04, 7.02, 8.08, *Supreme Court Act 1986* s 25(1)(a).

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| APPEARANCES: | Counsel | Solicitors |
|---|---|---|
| For the Applicants | Mr N J Young QC with Mr D Sulan | Jones Day |
| For the Respondent | Mr D G Collins QC with Ms M Szydzik | Maurice Blackburn Pty Ltd |

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NIALL JA
HARGRAVE JA
EMERTON JA:

1 These appeals arise from a group proceeding brought by Nikos Andrianakis ('the plaintiff' or Andrianakis), a Victorian taxi-cab operator and driver, seeking damages for his lost income and the reduction in the value of his business which he claims was caused by the unlawful introduction of 'UberX' services in the point-to-point passenger transport market in Victoria. The plaintiff brought the proceeding on his own behalf, and on behalf of all other Victorian point-to-point transport service drivers, operators and owners, and on behalf of similar drivers, operators and owners in New South Wales, Queensland and Western Australia. The alleged cause of action is the tort of conspiracy to injure by unlawful means.

2 The seven defendants in the proceeding are companies in the Uber group of companies under the ultimate control of the first defendant, Uber Inc (collectively, 'Uber' or 'the Uber entities' as the context requires). Two of the Uber entities are registered in Australia, and five are foreign-based entities.[1] The plaintiff alleges that the Uber entities were responsible for introducing the UberX services into Australia and then operating those services in unlawful competition with the plaintiff and all the other group members.

3 The proceeding was commenced on 3 May 2019. The Australian Uber entities filed an unconditional appearance. Following an order that the writ and statement of claim were taken to have been served on the foreign Uber entities, the foreign Uber entities entered a conditional appearance. The two groups of Uber entities then sought to prevent the proceeding from continuing by the filing of summonses. First, the Australian Uber entities applied by summons for the following orders:

(1) under r 23.02 of the *Supreme Court (General Civil Procedure) Rules 2015*, that the statement of claim be struck out as either not disclosing a cause of action or

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[1] For ease of reference, the term 'Uber' will be used interchangeably to refer to the Australian Uber entities, the foreign Uber entities, or all of them as the context requires.

being embarrassing;

(2) under s 33N(1) of the *Supreme Court Act 1986* ('the Act'), that the proceeding no longer proceed under pt 4A of that Act as a group proceeding; and

(3) further or alternatively, pursuant to s 33ZF of the Act, that the plaintiff be directed to amend the definition of group members to remove those group members in New South Wales, Queensland and Western Australia.

4 Second, the foreign Uber entities applied by summons seeking an order that service of the writ and statement of claim on them be set aside under rr 7.04 and 8.08.

5 On 24 July 2019, the plaintiff filed an amended statement of claim. The summonses were amended to refer to that pleading.

6 The primary judge dismissed both summonses and gave the plaintiff leave to file and serve a further amended statement of claim in order to remedy a single deficiency which he identified. The primary judge published reasons for decision on 20 December 2019,[2] in which he rejected all of Uber's contentions except for one concerning the sufficiency of the allegation that Uber intended to cause loss to the group members. The judge directed that the plaintiff file a further amended statement of claim 'to plead the element of intention to harm more clearly and transparently', adjourned the further hearing of the application to strike out the amended statement of claim, and otherwise dismissed the summonses. The plaintiff then filed a proposed further amended statement of claim — which addressed the judge's criticisms of the pleading.

7 On 31 March 2020, the judge granted leave to file the further amended statement of claim and made directions for the filing of defences and any replies. The Uber entities were ordered to pay the plaintiff's costs of the summonses, subject to a 20 per cent reduction of the costs of the strike-out application.

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2 *Andrianakis v Uber Technologies (Ruling No 1)* [2019] VSC 850 ('Reasons').

8 The Uber entities now seek leave to appeal nearly all aspects of the judge's orders. There are two applications for leave to appeal, one by the Australian Uber entities and one by the foreign Uber entities. As the applications for leave raise arguable issues, leave to appeal will be granted. It is logical and convenient to first deal with the appeal by the Australian Uber entities, because it involves a consideration of the nature of the allegations in the proceeding and informs the outcome of the appeal brought by the foreign Uber entities.

**PART A: APPEAL BY AUSTRALIAN UBER ENTITIES**

9 The plaintiff alleges that the Uber entities, or one or more of them, engaged in the tort of conspiracy by unlawful means with intent to injure the plaintiff and the other group members, by reason of which they have suffered loss and damage. In the amended statement of claim, the element of intent to injure had not been sufficiently alleged and, in this limited respect, the primary judge accepted Uber's contentions.[3] In that regard, the primary judge stated that the plaintiff's 'discernible case'[4] from reading the amended statement of claim as a whole appeared to allege an intention to injure which could be explicitly pleaded in an arguable form, in the following terms:

> 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*.[5]

10 The first ground of appeal contends that the primary judge erred in the emphasised words in the above quote from his Reasons 'by misstating the test for intention to injure by unlawful means and permitting the [plaintiff] to reformulate

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3 Reasons [100].

4 Ibid [94], [96], [100].

5 Ibid [99] (emphasis added) ('Reasons [99]').

his pleading in accordance with that test.' Before considering ground 1, it is first necessary to set out some more detail of the allegations in the amended statement of claim and, later, in the further amended statement of claim.

***Summary of the plaintiff's allegations***

*Uber and the UberX services*

11 UberX is a system for delivering commercial point-to-point passenger transport services. The prospective passenger, called a 'Rider' in the pleading, requests a driver, called an 'UberX Partner' in the pleading, to transport them from one place to another for a fee. The passenger determines the pickup time, location and destination. The request is made through an Uber software application on the passenger's smartphone ('the rider app'). Prospective drivers receive the requests through a different Uber software application on their smartphone ('the driver app') and are able to accept and provide the transport service. Once the passenger transport service has been supplied, a fee is debited from the passenger's funds by means of an electronic funds transfer to an Uber entity. A share of the fee is then distributed electronically to the driver. These two apps and the software that lies behind them are central to the operation of the UberX service.

12 The Uber entities do not own a fleet of cars nor do they employ a workforce of drivers. Rather, Uber established the software and digital platform by and upon which the service is conducted; recruited drivers as independent contractors who were willing to perform the service using their own vehicles; published minimum standards for vehicles used to provide services by the drivers; made the rider app and the driver app available to passengers and drivers; promoted and marketed the services to prospective drivers and passengers; and generally provided necessary administrative and financial infrastructure.

13 The decision was made for Uber to begin operating in Australia in around August 2012. UberX services were made available in Victoria, New South Wales and

Queensland from April 2014, and in Western Australia from October 2014.

*The legal and regulatory regime*

14 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 legislation 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. Legislation required the payment of licence fees, restricting the assignment of licences, stipulating the qualifications or credentials of drivers and fixing safety standards for vehicles. Some licences were finite in number and for that reason acquired a tradeable value.[6] They constituted a valuable commodity in the business of the service provider. Ongoing obligations included obligations to renew licences, report prohibited conduct, and, in some cases, prescribed methods for calculating fares and fixed maximum fares.

15 Adherence to the regulations was enforced by laws which made it an offence to own or operate a commercial point-to-point passenger transport service without holding the requisite licence or accreditation, or to use an unauthorised vehicle for such a service. The plaintiff alleges that Uber drivers providing UberX services during the relevant period committed various offences under the law then in force in the relevant state, and that one or more of the Uber entities were variously complicit in these offences.

16 The plaintiff alleges that the effect of these regulations gave licensed owners and operators a form of exclusivity. They could lawfully compete with each other but were otherwise legislatively protected from competition in the market for point-

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6 By way of illustration, the plaintiff alleges that he held three Victorian taxi-cab licences which he had acquired in 1985 for $65,000; in 1988 for $108,000; and in the mid-1990s for $120,000.

to-point passenger services in their respective states.

*The intention to provide UberX services in breach of the regulatory regime*

17 The plaintiff alleges that, when UberX services began in Australia, the UberX drivers were, typically, neither licensed nor accredited to be drivers, owners or operators for the provision of commercial passenger transport services in any of the four States. Nor were their vehicles licensed or accredited for use in the provision of such services. Accordingly, the provision of the UberX service in the four Australian states usually involved breaches of the local laws and regulations which regulated the supply and operation of commercial point-to-point passenger transport services.

18 The plaintiff claims that from at least October 2013, Uber Inc and/or Uber Australia engaged with Australian state regulatory authorities and governmental representatives for the purpose of securing a 'favourable regulatory environment' for the operation of UberX in the relevant state or securing regulatory change that would have the effect of legalising or rendering lawful Uber's operation in those states.

19 The plaintiff alleges that the Uber entities intended that UberX services would be provided in breach of the relevant statutory requirements for providing point-to-point passenger transport services in each of the relevant states. This intention is alleged to be inferred from, among other things, the engagements with the state regulatory authorities — which recognised that Uber knew that its UberX services were unlawful — and from the following matters:

(1) The UberX business model was only viable if, among other things, Uber could quickly recruit a large and widely dispersed network of drivers who had not otherwise provided point-to-point passenger transport services, such that UberX services could be provided quickly and relatively inexpensively to passengers. This could not be achieved if Uber drivers had to go through the onerous and expensive process of becoming licensed under the various State

regimes.

(2) While the terms of the contracts between an Uber driver and the relevant Uber entities included representations or acknowledgments by the prospective Uber drivers that they possessed the relevant licences and permits required by law to operate as a point-to-point passenger transport provider, the relevant Uber entities never intended that Uber drivers would in fact be required to or would comply with those 'legal prerequisites'.

(3) One or more of the Uber entities publicising that Uber would pay or reimburse fines received by Uber drivers for breaches of the point-to-point passenger transport laws and regulations in force in the relevant state, and in fact paying or reimbursing Uber drivers for those fines.

(4) The practice of 'Greyballing', by which one or more of the Uber entities allegedly developed and made available a software tool which identified prospective passengers who were suspected of being regulatory enforcement officers, and which operated to deny UberX services to those prospective passengers. This was allegedly for the purpose of evading regulatory scrutiny and the issuing of fines and compliance notices.

*Intention to compete with group members*

20 The plaintiff alleges that the Uber entities intended that UberX services would compete with existing point-to-point passenger service providers in each State. The particulars set out various publications and statements made by Uber entities, government reports, and Uber promotions favourably comparing the price of UberX rides with taxi trips. That competition would be through UberX drivers who did not meet the driver and vehicle compliance requirements for point-to-point passenger transport services; would not be required to obtain the requisite licences and accreditation, a finite number of which could be issued; and would not be exposed to the cost of those compliance requirements. The UberX drivers, and the Uber entities,

therefore gained a competitive advantage over persons providing point-to-point passenger transport services who did comply with the relevant legal and regulatory requirements.

*Damage to plaintiff and group members*

21 The plaintiff alleges that, as a result of the introduction of UberX services by one or more of the Uber entities in Victoria, he has suffered loss and damage in the form of reduced income and the reduced value of his business.

*Conspiracy to injure by unlawful means*

22 Paragraph 76 of the amended statement of claim, considered by the primary judge, was in the following terms:

> 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.

*Judge's reasons: ground 1*

23 The primary judge held that this form of pleading was deficient. The judge stated that this allegation of intended harm was a 'bare allegation of an intention to compete' which did not qualify as 'the kind of deliberate intention to cause injury which the law requires'.[7] Moreover, the judge held that the allegation was 'mere assertion that the agreement or combination was aimed or directed at the plaintiff and group members and is bereft of any factual content … a plaintiff cannot meet the mental element simply by asserting that the test has been met'.[8] The judge continued, however, to summarise the discernible case alleged in the amended statement of claim as a whole, in the following terms:

> 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.
>
> …
>
> 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;
>
> (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*.[9]

24 The judge then noted the uncontroversial proposition that, for the tort of conspiracy to injure by unlawful means, it is not necessary that the intention to cause

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7 Reasons [90].

8 Ibid [91].

9 Ibid [92], [96] (emphasis added).

harm to the plaintiff is the predominant intention,[10] and said in Reasons [99] that in his view an arguable case for intention to harm in the context of this case could be pleaded in the terms set out at [9] above, which bear repeating:

> 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*.[11]

25 The judge described this formulation of intended harm as 'similar' to the discernible case from reading the amended statement of claim as a whole,[12] but held that some elements of that formulation were not explicitly pleaded as they should have been.[13] The judge concluded in this respect:

> 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.
>
> 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.[14]

***The further amended statement of claim***

26 Following the opportunity afforded by the judge's Reasons, the plaintiff filed a further amended statement of claim in terms similar to the judge's formulation in

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10 Ibid [97]–[98].

11 Ibid [99] (emphasis added).

12 Ibid [100].

13 Ibid.

14 Ibid [101]–[102].

Reasons [99]. The amendments expressly alleged that Uber's unlawful competition was in an 'otherwise exclusive market' and introduced new allegations concerning Uber's alleged intention to cause harm to the plaintiff and other group members.

27 As to the allegation of an 'exclusive market', the plaintiff alleges in paragraph 57A and 57B of the further amended statement of claim that:

> 57A. Throughout the Claim Period the Group Members were *entitled to have the advantage* of being the providers and facilitators of Point to Point Passenger Transport Services *without unlawful competition* from competitors operating in contravention of the Compliance Requirements which were applicable in the relevant Australian State.
>
> 57B. *The absence of unlawful competition* from competitors operating in contravention of the Compliance Requirements without the costs and limitations imposed by the Compliance Requirements *was critical to the maintenance of the incomes and the value of licences, permits, accreditations and authorities of Group Members*.[15]

28 These allegations are general in nature, relating to all four states containing the group members. In considering the further amendments, it is then convenient to focus on the allegations concerning the Victorian conspiracy only, which — with necessary differences in legislative provisions — are replicated in respect of the other states:

> **Conspiracy by unlawful means in Victoria**
>
> 75A. At all material times from at least April 2014 and throughout the Victorian Claim Period, the Uber Entities, other than Rasier Pacific, *intended that the means* by which UberX would be established and operate in Victoria would be by UberX Partners unlawfully competing with the Plaintiff, the Victorian Taxi Group Members and the Victorian Hire Car Group Members in contravention of:
>
> (a) s 158 of the Victorian Transport Act. as alleged in paragraph 69; and/or
> (b) s 165 of the Victorian Transport Act. as alleged in paragraph 71.
>
> *as a result of which the Plaintiff*, the Victorian Taxi Group Members and the Victorian Hire Car Group Members *would suffer loss*.

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15 Emphasis added.

**Particulars**

The matters alleged in Part C and paragraphs 68 to 71 are referred to and relied on. [These allegations include allegations as to Uber's business strategy in Australia, Uber's intention that its drivers would compete illegally with the plaintiff and the group members, and the form of exclusivity enjoyed by the plaintiff and the group members as alleged in paragraphs 57A and 57B.]

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 75) 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, *as the means by which the Uber Entities* other than Rasier Pacific *intended to establish and operate UberX in Victoria was by UberX Partners unlawfully competing with the Plaintiff, the Victorian Taxi Group Members and the Victorian Hire Car Group Members and causing them loss as alleged in paragraph 75A*, which was achieved by the illegal conduct of Uber Entities alleged in paragraph 73. By reason of the above the Uber entities, other than Rasier Pacific, had 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 as from 21 December 2015 the means by which the Uber Entities intended to continue to establish and operate UberX was by UberX Partners unlawfully competing with the Plaintiff, the Victorian Taxi Group Members and the Victorian Hire Car Group Members and causing them loss as alleged in paragraph 75A, which was achieved by the illegal conduct of Uber Entities alleged in paragraph 73. 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, 47–48, 53–55, 57, 59 and 67.[16]

***Ground 1: Does the pleaded intention to injure raise an arguable case?***

29 Uber contends the primary judge's holding at Reasons [99] misstates the intention or purpose element of the tort and by so doing impermissibly extends the tort. Specifically, Uber contends that the judge's formulation impermissibly suggests that intention may be established if unlawful competition would *necessarily cause* a plaintiff harm. Uber further contends that the amendments made in the further amended statement of claim suffer from the same vice, namely, that only consequential loss is alleged. For the reasons given below, we do not accept that this is so. In our view, the amendments in the further amended statement of claim have introduced a pleading of intention to cause injury in a form countenanced by the applicable authorities.

30 On the hearing of the appeal, there was no controversy about the content of

[16] Emphasis and commentary added.

the applicable Australian authorities, which were binding on the primary judge. Indeed, the primary judge accepted that this was so in his Reasons. The relevant Australian authorities concerning the tort of conspiracy by unlawful means which were relied upon by Uber and the judge, particularly those concerning the necessity to prove intent to injure the plaintiff, are set out below. Uber contends that these cases represent intermediate appellate authority binding on the primary judge, and ought to have been applied by him to simply strike out the amended statement of claim,[17] and that the judge should not at Reasons [99] have endeavoured to re-formulate the substance of the plaintiff's case as he understood it.

*Applicable law: intention to injure*

31 In *Dresna Pty Ltd v Misu Nominees Pty Ltd*,[18] Weinberg J noted the difference between the two forms of the tort of conspiracy, namely, a conspiracy by unlawful means and a conspiracy by lawful means. A conspiracy by lawful means requires an agreement or combination between two or more persons to perform acts which, although themselves not unlawful, are done with the sole or predominant purpose of injuring the plaintiff.[19] An unlawful means conspiracy requires an agreement or combination to perform unlawful acts with the intention, which need not be the sole or predominant purpose of the conspirators, to injure the plaintiff.[20] Weinberg J emphasised, however, that an unlawful means conspiracy 'still requires proof of an intention to injure',[21] and continued:[22]

> It is generally thought that the correct test of intention in this context is that stated by Lord Denning MR in the Court of Appeal decision in *Lonrho Ltd v*

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17 See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151 [135]; [2007] HCA 22 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

18 [2003] FCA 1537 ('*Dresna*').

19 Ibid [99] (Weinberg J).

20 Ibid [99]–[104] (Weinberg J); *McKellar v Container Terminal Management Services Ltd* (1999) 165 ALR 409, 435 [135]; [1999] FCA 1101 (Weinberg J) ('*McKellar*').

21 *Dresna* [2003] FCA 1537, [104] (Weinberg J).

22 Ibid [107] (Weinberg J), quoting *Lonrho Ltd v Shell Petroleum Co Ltd* [1981] Com LR 74, [75] (Lord Denning MR) ('*Lonrho*') (emphasis added).

*Shell Petroleum Co Ltd*... His Lordship said…:

> I would suggest that a conspiracy to do an unlawful act — when there is no intent to injure the plaintiff and it is not aimed or directed at him — is not actionable ... But if there is an intent to injure him then it is actionable. The intent to injure may not be the predominant motive. It may be mixed with other motives ... *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*.

32 Weinberg J then referred to his earlier decision in *McKellar*, and said of the intention requirement that 'though perhaps difficult to apply in some cases, [it] was intended to prevent claims by those who suffered incidental, though foreseeable loss, as a result of the commission of what is sometimes described as "undirected conduct"'.[23]

33 Finally, Weinberg J accepted as correct the statement of Mason P in the New South Wales Court of Appeal in *McWilliam v Penthouse Publications Ltd*[24] that a plaintiff in an unlawful means conspiracy case:

> must establish intent to injure the plaintiff. *It is not enough to establish that the acts of the conspirators necessarily involve injury to the plaintiff* or that that plaintiff was a person reasonably within the contemplation of the conspirators as a person likely to suffer damage…[25]

34 On appeal in *Dresna*, the Full Court of the Federal Court wholly endorsed the reasoning of Weinberg J. Kiefel and Jacobson JJ referred to Weinberg J's reasoning,[26] expressly agreed with the passage from *McWilliam* quoted by Weinberg J and stated that, for the tort of conspiracy to injure by unlawful means to be established, a plaintiff must prove that the defendants 'acted in order that, not with the result that, the plaintiff should suffer damage'.[27] Earlier, Kiefel and Jacobson JJ said that 'the test for an action based on a conspiracy is what was the object in the mind of those

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23 Ibid [108], citing *McKellar* (1999) 165 ALR 409, 435; [1999] FCA 1101 (Weinberg J).

24 [2001] NSWCA 237 ('*McWilliam*').

25 *Dresna* [2003] FCA 1537, [125] (Weinberg J) quoting *McWilliam* [2001] NSWCA 237 (Mason P, Handley and Hodgson JJA agreeing) (emphasis added).

26 *Dresna Pty Ltd v Misu Nominees Pty Ltd* [2004] FCAFC 169, [7]–[11] (Kiefel and Jacobson JJ).

27 Ibid [9], [12].

combining when they acted as they did',[28] but in our view that general statement should not be understood as requiring that the intention to injure must be the sole or predominant motive, as stated in *Lonrho*.[29]

*Applicable law: striking out pleadings*

35 Uber's contentions on ground 1 fail to grapple with the high hurdle it must cross, and the low bar confronting the plaintiff. When a defendant contends that a statement of claim should be struck out because it does not disclose a cause of action it is necessary for a defendant in the position of Uber to establish that it would be futile to allow the statement of claim to go forward, because it raises a claim that has no real prospect of success in the sense of being 'fanciful'. It follows that, where there is a contentious or debatable point of law which arises on a pleading, it is usually inappropriate for a trial judge or the Court of Appeal to determine the issue on a strike-out application, particularly where the answer may depend upon the factual context.

36 This approach is consistent with that of this Court in *CA & CA Ballan Pty Ltd v Oliver Hume (Australia) Pty Ltd*[30] and of the High Court in *Trkulja v Google LLC*.[31] In *CA Ballan*, this Court emphasised that, although the test for summary judgment has been slightly lessened by the real prospect of success criterion, the High Court cases concerning the previous test nevertheless demonstrate the need for there to be a very clear case indeed, which could not be altered by evidence at trial, before striking out a statement of claim on the basis that it raises a case which would not survive a summary judgment application.[32] In that regard, this Court in *CA Ballan* spoke in terms that the Court should be mindful that the evidence at trial 'can shape the case

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28 Ibid [12].

29 [1981] Com LR 74, 75.

30 (2017) 55 VR 62; [2017] VSCA 11 ('*CA Ballan*').

31 (2018) 263 CLR 149; [2018] HCA 25 ('*Trkulja*').

32 *CA Ballan* (2017) 55 VR 62, 72–3 [24]–[28]; [2017] VSCA 11 (Redlich, Tate and Ferguson JJA).

in ways that have not been anticipated despite the best efforts of the litigants and their legal advisors',[33] and adopted the observations of Whelan JA in *Mutton v Baker*[34] that:

> Even if it is said that an issue is purely a question of law, the court should not strike out a claim on this basis if it is conceivable that some factual matter could emerge at trial which might alter the analysis.[35]

37 In *Trkulja*,[36] the High Court held that this Court erred in striking out a statement of claim involving the application of clear principles of law to the facts in a novel context. The High Court stated:

> That was not an appropriate way to proceed. In point of principle, the law as to publication is tolerably clear. It is the application of it to the particular facts of the case which tends to be difficult, especially in the relatively novel context of internet search engine results. And contrary to the Court of Appeal's approach, there can be no certainty as to the nature and extent of Google's involvement in the compilation and publication of its search engine results until after discovery. There are only the untested assertions of Google deponents. Furthermore, until and unless Google files a defence it cannot be known what defences will be taken (whatever Google might now say is its intention regarding the defences on which it will rely). Nor does it profit to conjecture what defences might be taken and whether, if taken, they would be likely to succeed. For whatever defences are taken, they will involve questions of mixed fact and law and, to the extent that they involve questions of fact, they will be matters for the jury. Given the nature of this proceeding, there should have been no thought of summary determination of issues relating to publication or possible defences, at least until after discovery, and possibly at all.[37]

*Ground 1: analysis*

38 Here, the Court is concerned with the contention that the plaintiff's allegation that Uber had the necessary intention to injure the plaintiff and the other group members has no factual basis known to the law, because it is merely an allegation

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33 Ibid 73 [27].

34 [2014] VSCA 43.

35 *CA Ballan* (2017) 55 VR 62, 73 [27]; [2017] VSCA 11 (Redlich, Tate and Ferguson JJA) citing *Mutton v Baker* [2014] VSCA 43, [55] (Whelan JA).

36 (2018) 263 CLR 149; [2018] HCA 25.

37 Ibid 164 [39] (citations omitted).

that Uber's unlawful conduct would have the necessary consequence that the group members would suffer financial loss. It is first necessary to consider what the further amended statement of claim alleges in this respect. Taking the allegations concerning the Victorian conspiracy as an example, Uber contends that paragraph 75A merely alleges consequential loss to the Victorian group members 'as a result' of the allegedly unlawful conduct, and contains no allegation that Uber intended that such loss would occur. This raises an issue as to how paragraph 75A, and like paragraphs concerning the other states, should be understood in the context of the pleading as a whole and light of the judge's Reasons — especially at Reasons [99]. For the following reasons, Uber's narrow reading of the allegations should be rejected.

39 Paragraphs 75A and 76 must be read together. In paragraph 75A, the plaintiff alleges that the Uber entities intended to unlawfully compete with group members and, as a result of that unlawful competition, the group members would suffer loss and damage. As drafted, it is not unambiguously clear that the intention attributed to the Uber entities extends to the loss and damage that will be suffered. However, paragraph 76 expressly alleges an agreement or combination with the common intention of injuring the plaintiff and the Victorian group members. The amended paragraph 2 of the particulars to paragraph 76, while clumsily expressed, alleges that it can be inferred that the common intention was aimed at or directed to the plaintiff and the Victorian group members because ('as') the means by which Uber intended to unlawfully compete with them was by causing them loss as alleged in paragraph 75A.

40 This understanding of the allegations is consistent with Reasons [99], in which the judge summarised an arguable case of intention to injure by the plaintiff proving:

(1) that Uber intended to establish its business by means of Uber drivers unlawfully competing with the plaintiff and the other group members 'in an otherwise exclusive market';

(2) in circumstances where the economic advantages of that exclusivity were critical to the maintenance of their incomes and business values; and

(3) 'so that [ie with the intention that] the intrusion of the unlawful competition would necessarily cause them loss'.

41 Reasons [99] should be read in this way, because the 'discernible case' summarised by the judge involved the proposition that Uber's intention to unlawfully compete 'necessarily carried with it *an intention* to remove (or at least interfere with) the exclusive right of the plaintiff and the group members to operate … and thus *to cause them harm*'.[38]

42 When the allegations are read in this way, the plaintiff's allegation of intention to injure does not raise a fanciful case with no prospects of success at trial after full discovery has been given, all the evidence has been heard, and factual issues have been resolved. In summary, to establish an unlawful means conspiracy, a plaintiff is required to establish that the purpose of the defendants in combining to engage in or to be complicit in the unlawful conduct *included* an intention to injure the plaintiff, and that the plaintiff in fact suffered injury by reason of the unlawful conduct. The defendants' intention to injure the plaintiff need not be the predominant motive for engaging in the unlawful conduct, but may be mixed with other purposes or motives — such as the pursuit of gain for the defendant or others — which may be the predominant motive.

43 Putting aside cases where a defendant's sole or predominant intention was to cause harm to the plaintiff, for example out of spite, hatred or revenge,[39] the requisite mental element of intent has been described as 'elusive' where it forms one of several reasons or motives for engaging in the unlawful conduct. In this regard, it is generally accepted that the requisite intent will be established if the plaintiff proves

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38 Reasons [96(c)] (emphasis added).

39 For example, *Deutsch v Rodkin* [2012] VSC 450.

that the unlawful conduct was, at least in part, 'aimed or directed at the plaintiff'.[40] While this manner of proving intent has been described as 'perhaps difficult to apply in some cases',[41] it is accepted as a necessary control mechanism 'to keep liability within reasonable grounds',[42] in the sense that 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'[43] or 'undirected [unlawful] conduct'.[44] Further, it is accepted that the intent to injure is sufficient if it is directed towards all members of an identifiable class of persons, including the plaintiff.[45]

44 Here, on the basis of the preceding allegations in the further amended statement of claim, the plaintiff alleges that the Uber entities intended that the Uber drivers would unlawfully compete with him and all other class members and intended that such unlawful competition would result in the plaintiff and all class members suffering losses — which they have in fact suffered. If these matters are proved at trial then, depending upon the precise content of the evidence, the facts as a whole may justify the pleaded inference that the Uber entities intended to injure the plaintiff. In our view, that is sufficient to take this case outside one which is fanciful and has no real prospect of success.

45 Moreover, as discussed below in considering ground 2, the intention of the defendant to injure the plaintiff will almost always be a matter of inference drawn from the evidence as a whole. The plaintiff accepts that he must do more than simply establish that injury was a necessary consequence, and in our view the pleading accepts the burden of the existing Australian law. Although a plaintiff will

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40 *Lonrho* [1981] Com LR 74, 75 (Denning MR); *McKellar* (1999) 165 ALR 409, 435; [1999] FCA 1101; *Dresna* [2003] FCA 1537, [107] (Weinberg J); *Dresna Pty Ltd v Misu Nominees Pty* Ltd [2004] FCAFC 169, [12] (Kiefel and Jacobson JJ); *Fatimi Pty Ltd v Bryant* (2004) 59 NSWLR 678, 682 [14]; [2004] NSWCA 140 (Handley JA, McColl JA agreeing).

41 *McKellar* (1999) 165 ALR 409, 435 [137]; [1999] FCA 1101 (Weinberg J).

42 Ibid.

43 Ibid (emphasis added).

44 *Dresna* [2003] FCA 1537, [108] (Weinberg J).

45 *Dresna Pty Ltd v Misu Nominees Pty* Ltd [2004] FCAFC 169, [7] (Kiefel and Jacobson JJ).

have to go beyond identifying unlawful means and pointing to the fact of injury, the nature and extent of the unlawful means may be relevant to establishing the requisite intent. The fact, if it be established, that the Uber entities were unlawfully competing by entering into a restricted and regulated market may be relevant to establishing intent.

46 Before leaving ground 1, it is necessary to mention two additional matters relied upon by Uber. First, Uber contends that the various state statutory regimes did not, in fact, give the state group members any kind of exclusivity — only a permission to do that which was otherwise unlawful. In this respect, Uber relies upon the recent decision of Bradley J in *Queensland Taxi Licence Holders v State of Queensland*.[46] In that case, a number of Queensland taxi licence holders sued the state of Queensland for equitable compensation based on promissory estoppel, statutory damages under the *Australian Consumer Law*, and damages for breach of contract. Bradley J gave summary judgment for the defendant on the claims for equitable compensation and contract. His Honour struck out the *Australian Consumer Law* claims, but gave to leave to replead them. In rejecting the plaintiffs' claim that there existed a contractual relationship between taxi licence holders and the state of Queensland, Bradley J held that the *Transport Operations (Passenger Transport) Act 1994* (Qld) merely gave the taxi drivers 'an excuse for an act which would otherwise be unlawful'[47] — that is, providing a taxi service. The taxi drivers were not 'entitled' to provide taxi services.[48]

47 Further, Bradley J held that the structure of the Queensland regulatory scheme meant that a mere taxi licence was not singly sufficient to authorise the provision of 'taxi industry services' or enjoy 'taxi licence privileges'. Separate provisions and authorisations were required to be involved in booking and

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46 [2020] QSC 94 ('*Queensland Taxi*').

47 Ibid [90] citing *Federal Commissioner of Taxation v United Aircraft Corporation* (1943) 68 CLR 525, 533; [1943] HCA 50 (Latham CJ).

48 Ibid [90].

dispatching taxis, to be accredited as a 'taxi operator', and to operate a particular vehicle as a taxi.[49]

48 The decision in *Queensland Taxi* has limited application to the present proceeding. For one thing, the group members in the current proceeding are far more comprehensive, including not only taxi licence holders but also taxi operators, drivers, and network providers. More fundamentally, the plaintiff in this proceeding does not claim he was 'entitled' to provide taxi services as a statutory or contractual right arising from legislation. He claims he was 'entitled to have the advantage' of providing taxi services 'without unlawful competition';[50] in the sense that the plaintiff and other group members, while entitled to compete against each other, would not be the subject of unlawful competition by drivers who did not have the necessary licences and permissions under the various state statutory regimes. In that sense, the plaintiff and other group members 'had a lawful right, interest, opportunity or advantage' which it was the object of Uber to deprive them of by unlawful competition.[51]

49 Second, Uber contends that the judge's formulation at Reasons [99] was influenced by misplaced reliance on the House of Lords decision in *OBG Ltd v Allan*.[52] We do not accept that contention. As discussed above, the primary judge accepted that the authorities relied on by Uber represented the current state of the Australian law of conspiracy by unlawful means. While the judge appears to have considered *OBG* on the apparently mistaken belief that it also dealt with the same tort,[53] the judge nevertheless reached the conclusion that the amended statement of

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49 Ibid [96]–[102].

50 See Plaintiff's Further Amended Statement of Claim dated 9 April 2020 [57A] and [57B], set out above at [27].

51 Cf. *Fatimi Pty Ltd v Bryant* (2004) 59 NSWLR 678, 683 [22]; [2004] NSWCA 140 (Handley JA, McColl JA agreeing).

52 [2007] 4 All ER 545 ('*OBG*').

53 Reasons [82]. The causes of action in the appeal in *OBG* referred to by the judge, *Douglas v Hello! Ltd (No 3)* [2006] QB 125, were breach of confidence and unlawful interference with economic interests: *OBG* [2007] 4 All ER 545 [138].

claim did not sufficiently plead intention within the requirements of Australian law.[54] In the subsequent paragraphs, the judge then formulated Reasons [99] without apparent influence from the decision in *OBG*, citing instead *Dresna Pty Ltd v Misu Nominees Pty Ltd* and also *McKellar*.[55] In particular, the judge's discussion of *OBG* focussed on the so-called 'two sides of the same coin' metaphor[56] — but the judge's subsequent discussion of the 'discernible case', and the formulation at Reasons [99], does not adopt that concept. In these circumstances, as we have reached the view that the further amended statement of claim raises an arguable case on the basis of Australian authorities, it is unnecessary to consider *OBG* further.

***Ground 2: Is the further amended statement of claim embarrassing?***

50 We turn to consider ground 2, which contends that the judge erred in refusing to strike out the further amended statement of claim because it is embarrassing. It is first necessary to set out the relevant principles to be applied. In *Wheelahan v City of Casey (No 12)*,[57] John Dixon J exhaustively summarised the principles to be applied in the following terms:

> (a) Order 13 of the [*Supreme Court (General Civil Procedure) Rules 2005*] set out the relevant requirements of a sufficient pleading, while r 23.02 provides the grounds on which the sufficiency of a pleading may be impugned;
>
> (b) the function of a pleading in civil proceedings is to alert the other party to the case they need to meet (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial;
>
> (c) the cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression 'material facts' is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action;

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54 Reasons [90]–[91].

55 Ibid [97] citing *Dresna Pty Ltd v Misu Nominees Pty Ltd* [2004] FCAFC 169 and *McKellar* (1999) 165 ALR 409; [1999] FCA 1101.

56 Ibid [83]–[89].

57 [2013] VSC 316 ('*Wheelahan*').

(d) as a corollary, the pleading must be presented in an intelligible form – it must not be vague or ambiguous or inconsistent. Thus a pleading is 'embarrassing' within the meaning of r 23.02 when it places the opposite party in the position of not knowing what is alleged;

(e) the fact that a proceeding arises from a complex factual matrix does not detract from the pleading requirements. To the contrary, the requirements become more poignant;

(f) pleadings, when well-drawn, serve the overarching purpose of the *Civil Procedure Act 2010* (Vic);

(g) a pleading which contains unnecessary or irrelevant allegations may be embarrassing – for example, if it contains a body of material by way of background factual matrix which does not lead to the making out of any defined cause of action (or defence), particularly if the offending paragraphs tend to obfuscate the issues to be determined;

(h) it is not sufficient to simply plead a conclusion from unstated facts. In this instance, the pleading is embarrassing;

(i) every pleading must contain in a summary form a statement of all material facts upon which the party relies, but not the evidence by which the facts are to be proved (r 13.02(1)(a));

(j) the effect of any document or purport of any conversation, if material, must be pleaded as briefly as possible, and the precise words of the document or the conversation must not be pleaded unless the words are themselves material (r 13.03);

(k) particulars are not intended to fill gaps in a deficient pleading. Rather, they are intended to meet a separate requirement – namely, to fill in the picture of the plaintiff's cause of action (or defendant's defence) with information sufficiently detailed to put the other party on guard as to the case that must be met. An object and function of particulars is to limit the generality of a pleading and thereby limit and define the issues to be tried;

(l) a pleading should not be so prolix that the opposite party is unable to ascertain with precision the causes of action and the material facts that are alleged against it;

(m) extensive cross-referencing of facts in a pleading may render parts of the pleading unintelligible;

(n) in an application under r 23.02, the court will only look at the pleading itself and the documents referred to in the pleading;

(o) the power to strike out a pleading is discretionary. As a rule, the power will be exercised only when there is some substantial objection to the pleading complained of or some real embarrassment is shown; and

(p) if the objectionable part of the pleading is so intertwined with the rest of the pleading so as to make separation difficult, the appropriate

course is to strike out the whole of the pleading.[58]

51 The primary judge in this case considered that the most relevant principles from those listed in *Wheelahan* were those contained in sub-paragraphs (b), (c), (d) and (o), and added that, 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'.[59]

52 We agree with the primary judge's approach and note that it is consistent with the decision of Hargrave J in *Babcock & Brown DIF III Global Co-Investment Fund, LP v Babcock & Brown International Pty Ltd (No 2)*,[60] where, after setting out the relevant principles from *Wheelahan* applicable to that case, he said:

> To this summary, I would add that the Court should consider the pleading under a challenge as a whole and adopt a practical case management approach to pleading objections, rather than accepting technical objections when the true nature of the case to be met is clear from reading the pleading as a whole and there is no embarrassment to filing a responsive pleading. Such an approach accords with the discretionary nature of the power to strike out and with the overarching purpose under the Civil Procedure Act. However, in cases alleging dishonesty or fraud, precise pleadings with full particulars are required.[61]

53 In a similar vein, his Honour noted that, in considering pleading objections on the ground that the pleading is embarrassing, the Court should stand back and consider the pleading as a whole and in that light ask: does the case alleged give clear notice of the case to be met at trial?[62]

54 This modern approach to applications to strike out pleadings on the ground that they are embarrassing is reflected in this Court's decision in *CA Ballan*,[63] where

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58 Ibid [25] (citations omitted).

59 Reasons [39], citing *Hughes v Western Australian Cricket Association Inc* (1986) 69 ALR 660, 700; [1986] FCA 465 (Toohey J); *British American Tobacco Australia Ltd v Gordon* (No 3) [2009] VSC 619, [15] ('*BATAL*') and other authorities.

60 [2017] VSC 556.

61 Ibid [15].

62 Ibid [17].

63 (2017) 55 VR 62; [2017] VSCA 11.

the Court stated that, while important, pleadings are primarily used 'to help the parties define the real issues in dispute', while bearing in mind that pleadings are 'procedural tools only'.[64]

55 It is also important to note that, in a case such as the present where conspiracy is alleged, a plaintiff's case will necessarily be based on inferences from the overt acts of the parties done in pursuance of the alleged agreement or combination. For example, in *Adsteam Building Industries Pty Ltd v Queensland Cement & Lime Co Ltd (No. 4)*,[65] McPherson J considered a pleading of an agreement, arrangement, understanding or undertaking in the context of an allegation that four defendants were each an 'associate' of the other within the meaning of the *Companies (Acquisition of Shares) Code* (Qld) and like legislation then in force. The defendants applied to strike out the statement of claim on grounds including that the relevant agreement, arrangement, understanding or undertaking had not been pleaded with sufficient particularity. McPherson J considered the pleading as a whole and said that:[66]

> Stripped of all its unnecessary verbiage, what is being alleged is no more and no less than that there was an understanding between the defendants … that they, or at least some of them, would acquire a sufficient number of NACL shares to ensure that control of the conduct of the affairs of NACL passed to those defendants or one or more of them.
>
> If such an understanding does exist, it is extremely unlikely that the plaintiffs will be in a position at trial to adduce direct evidence that the defendants arrived at it. That is to say, it is improbable in the extreme that they will be able to prove that the understanding alleged was arrived at on a particular day or days, or between identified individuals acting on behalf of named companies, etc. In a practical sense it is impossible to expect the plaintiffs to give precise particulars of matters of that kind. However, that does not mean either that the plaintiffs' pleading must be struck out for want of particularity, or that they are relieved of the duty to give any particulars at all. The defendants are entitled to be apprised before trial of the nature of the plaintiffs' case. Their right to be so apprised must be accommodated to the nature of that case itself, which is one that sets up the existence of an understanding of a kind which, as I have said, is not likely to be established by direct evidence.

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64 Ibid 71 [21].

65 [1985] 1 Qd R 127.

66 Ibid 133 (citations in original).

> The law is by no means without experience of cases of this kind. Cases or criminal conspiracy are the most obvious example. Direct evidence to prove the making of an agreement to carry out an unlawful purpose is rarely available to the prosecution in such cases. As has repeatedly been said, in those cases proof of conspiracy almost invariably rests upon inference deduced from acts of the parties done in pursuance of the apparent common purpose.[67] From the nature of the thing, the prosecution may not be able to give particulars or evidence of the actual making of the agreement; but what certainly can be done is to give particulars of the 'acts' relied upon to justify the inference that such a conspiracy exists, and which are put forward as original evidence or res gestae of the existence of the conspiracy itself.[68]

56 To similar effect are the statements of Kaye J in *BATAL*:

> The drawing of 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.[69]
>
> 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 evidence is essentially a question of fact, to be determined on the evidence.[70] 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.[71]

57 Moreover, as noted by the primary judge,[72] in considering whether to strike out a statement of claim as embarrassing, the Court should keep steadily in mind that there are other interlocutory processes subsequent to the pleadings (especially discovery) which continue to perform and progress the function of informing the other side of the case to be met at trial. Thus, even if a defendant simply denies an allegation and puts a plaintiff to proof of it, rather than pleading a positive case as to what the true facts are, the defendant's discovery may well reveal the truth and

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67 *Mulcahy v R* (1868) LR 3 HL 306, 317 (Willes J); *R v Minuzzo & Williams* [1984] VR 417, 429–30.

68 *Tripodi v R* (1961) 104 CLR 1, 7; [1961] HCA 22 (Dixon CJ, Fullagar and Windeyer JJ).

69 *Chamberlain v R (No 2)* (1984) 153 CLR 521, 536; [1984] HCA 7 (Gibbs CJ and Mason J).

70 Cf. *R v Cengiz* [1998] 3 VR 720.

71 *BATAL* [2009] VSC 619, [59], [60] (citations in original).

72 Reasons [41].

enable the plaintiff to fill any gaps in the statement of claim which are beyond its knowledge.

*Analysis*

58 It is first necessary to record that, reading the statement of claim as whole, the case which the plaintiff seeks to mount in the further amended statement of claim is not difficult to understand. Uber does not complain that it cannot understand any part of the pleading, so that it does not know the case to be met at trial. Indeed, senior counsel for Uber candidly acknowledged in oral submissions that he understood the case which was alleged. From our reading of the further amended statement of claim, Uber will have no difficulty in pleading a defence — and no such difficulty was suggested in argument. In our view, Uber's objections to the form of the pleading must be considered in that context.

59 First, Uber contends that the allegations of agreement or combination in paragraphs 76 and 77 of the statement of claim are simply a 'rolled-up' conclusion based on the facts and matters alleged elsewhere in the statement of claim. That may be so. But in our opinion, a reading of the identified allegations in the context of the statement of claim as a whole, discloses a clear case that specific Uber entities, *or one or more of them*, performed acts from which, if proved, the requisite agreement or combination may arguably be inferred at trial. In this regard, senior counsel for Uber said in oral argument that there is an artificiality about alleging a conspiracy between companies in the same corporate group, all of which are subject to the overall control of the parent company — in this case Uber Technologies Incorporated, the first defendant — and that it may transpire that once all of the evidence is in at trial, no question of an agreement or combination between the subsidiary companies arises, because they were all acting under the overall direction of the parent company. If that is a defence which Uber wishes to take, it is a matter which can be simply pleaded.

60 Second, if its first contention was rejected, Uber contends that the plaintiff's

frequent use throughout the statement of claim of allegations that acts were performed by 'one or more' of the defendants is impermissible, especially in the case of a serious allegation like conspiracy. Uber contends that it is not for the defendants to 'try and work out, or speculate, which allegation is made against which defendant'. We do not accept that contention. As explained above, it is in the nature of conspiracy allegations that the precise facts are not within the knowledge of the plaintiff. All that the plaintiff can do is plead the overt acts which were performed and rely on inferences from the evidence as a whole at trial to establish the necessary elements of the tort. In this case, the primary judge was right to conclude that:

> 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.[73]

61 Moreover, as counsel for the plaintiff pointed out in oral submissions, the statement of claim contains specific allegations of specific conduct by each of the defendants. Where the plaintiff has been unable to allege which specific Uber entity engaged in conduct, it is a matter for trial as to which company or companies in the group engaged in the relevant conduct.

62 Third, Uber contends that the overt acts of the Uber entities are confusingly pleaded by a cross-referencing to earlier paragraphs of the pleading. In our view, there is nothing in this complaint. A well-represented party such as Uber should have no difficulty in understanding the case to be met and pleading to it in a properly drawn defence.

63 Ground 2 is not made out.

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[73] Ibid [61].

*Ground 3: Should the non-Victorian group members be excluded?*

64 Before the primary judge, Uber sought an order under s 33N(1) of the Act that the proceeding no longer proceed as a group proceeding. The primary judge rejected that application, and Uber does not seek leave to appeal. Uber seeks leave to appeal against the primary judge's decision to reject its application under s 33ZF of the Act that the plaintiff be directed to amend the definition of group members to remove those group members in New South Wales, Queensland and Western Australia. If successful in that application, the proceeding would continue as a group proceeding in respect of the Victorian group members only. The sole basis of ground 3 is that the primary judge erred in holding that the requirements of s 33C(1) of the Act were satisfied.

65 Section 33C(1) of the Act provides as follows:

> (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.

66 Section 33C(2) of the Act makes it plain that there may be material differences between the nature of the claims by the individual group members, in the following terms:

> (2) A group proceeding may be commenced—
>
> (a) whether or not the relief sought—
>
> (i) is, or includes, equitable relief; or
>
> (ii) consists of, or includes, damages; or
>
> (iii) includes claims for damages that would require individual assessment; or

(iv) is the same for each person represented; 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.

67 Section 33D(1) of the Act complements s 33C(1), by introducing the concept that a person falling within s 33C(1)(a) will have a 'sufficient interest' to commence a group proceeding on behalf of other group members whose claims satisfy both sub-paragraphs (b) and (c) of section 33C(1).

68 Section 33N(1) of the Act provides that the court may order that a proceeding no longer continue as a group proceeding:

> … 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.

69 Section 33ZF of the Act gives the court power to make 'any order the court thinks appropriate or necessary to ensure that justice is done in [a group] proceeding'.

*Applicable legal principles: s 33C(1) of the Act*

70 A convenient starting point for the approach to be adopted to the construction and application of s 33C(1) is the decision of French J in *Zhang v Minister for*

*Immigration, Local Government and Ethnic Affairs*,[74] in which his Honour said:

> The question whether the claims of the persons who are proposed as members of a group arise out of 'the same, similar or related circumstances' as required by s 33C(1) is not to be answered by an elaboration of that verbal formula. It contemplates a relationship between the circumstances of each claimant and specifies three sufficient relationships of widening ambit. Each claim is based on a set of facts which may include acts, omissions, contracts, transactions and other events. As appears from s 33C(2), the circumstances giving rise to claims by potential group members do not fall outside the scope of the legislation simply because they involve separate contracts or transactions between individual group members and the respondent or involve separate acts or omissions of the respondent done or omitted to be done in relation to individual group members.
>
> The outer limits of eligibility for participation in representative proceedings are defined by reference to claims in respect of or arising out of related circumstances. The word 'related' suggests a connection wider than identity or similarity. In each case there is a threshold judgment on whether the similarities or relationships between circumstances giving rise to each claim are sufficient to merit their grouping as a representative proceeding. At the margins, these will be practical judgments informed by the policy and purpose of the legislation. At some point along the spectrum of possible classes of claim, the relationship between the circumstances of each claim will be incapable of definition at a sufficient level of particularity, or too tenuous or remote to attract the application of the legislation.[75]

71 The statements of French J were approved by Kaye J in *AS v Minister for Immigration and Border Protection*,[76] where his Honour referred to the courts adopting a reasonably liberal approach to determining whether a group proceeding complies with sub-paragraphs (b) and (c) of s 33C(1).[77]

72 This approach by French J is consistent with later High Court authority concerning the width of pt 4A of the Act and like legislation in other states; and in particular as to the foundational requirements of s 33C. Thus, in *Mobil Oil Australia Pty Ltd v Victoria*,[78] Gleeson CJ referred to the primary object of the group proceeding

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74 (1993) 45 FCR 384; [1993] FCA 489 ('*Zhang*').

75 Ibid 404–5.

76 [2014] VSC 593, [55]. See also, *AS v Minister for Immigration (Ruling No 7)* [2017] VSC 137, [38], [40], [41], where J Forrest J took a similarly liberal approach.

77 [2014] VSC 593, [54].

78 (2002) 211 CLR 1; [2002] HCA 27 ('*Mobil*').

legislation in the following terms:

> It is to avoid multiplicity of actions, and to provide a means by which, where there are many people who have claims against a defendant, those claims may be dealt with, consistently with the requirements of fairness and individual justice, together.[79]

73 In *Wong v Silkfield Pty Ltd*,[80] the High Court, in relation to pt 4A and s 33C, placed particular emphasis on the requirement in s 33C(1)(c) that there be a substantial common question of law or fact:

> Clearly, the purpose of the enactment of Pt IVA was not to narrow access to the new form of representative proceedings beyond that which applied under regimes considered in cases such as *Carnie*. This suggests that, when used to identify the threshold requirements of s 33C(1), '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'.
>
> The circumstance that proceedings which pass the threshold requirement of s 33C may later be terminated as representative proceedings, by order made under s 33N, confirms rather than denies such a construction of s 33C(1). Further, as Foster J pointed out, the broadening provisions in sub-s (2) of s 33C emphasise the width of the entitlement conferred by s 33C(1) to commence a representative proceeding.
>
> Foster J noted that the only issue of fact which could be common to all members of the postulated group, identified and unidentified, would be that raised in the statement of claim respecting the representation as to the accuracy of the s 49 statements. His Honour, like Spender J at first instance, regarded the identified common issue as 'substantial' in the necessary sense. This was because the allegations involved were serious and significant and detrimental misrepresentations were claimed. It was not to the point that, in the final resolution of the litigation, this might not prove to be the 'major' or 'core' issue. It was not necessary to show that litigation of this common issue would be likely to resolve wholly, or to any significant degree, the claims of all group members.[81]

74 Consistent with these views, Gordon J said in *Timbercorp*:[82]

> … Pt 4A expressly contemplates and provides for the individuality of claims

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79 Ibid 24 [12] (cited with approval in *Timbercorp Finance Pty Ltd (in liq) v Collins* (2016) 339 ALR 11, 20–21 [43]; [2016] HCA 44 (French CJ, Kiefel, Keane and Nettle JJ) ('*Timbercorp*')).

80 (1999) 199 CLR 255; [1999] HCA 48 ('*Wong v Silkfield*').

81 Ibid 267–8 [28]–[30] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ) (citations omitted).

82 (2016) 259 CLR 212; [2016] HCA 44.

> within a group proceeding. For example, a group proceeding may be commenced 'whether or not the relief sought … is the same for each person represented'[83] and whether or not the proceeding 'is concerned with separate contracts or transactions between the defendant and individual group members',[84] or 'involves separate acts or omissions of the defendant done or omitted to be done in relation to individual group members'.[85]
>
> … Section 33C expressly recognises that each group member may, as an individual, have different claims against the defendant, but the foundation of the group proceeding is that they all have an interest in the resolution of a substantial common question of law or fact.[86]

75 Finally, in considering the principles applicable to s 33C, it is necessary to refer to the concept of 'claims' in that section. In *Dillon v RBS Group (Australia) Pty Ltd*,[87] Lee J described the issue of whether a plaintiff can represent group members as being governed by s 33C(1) — '[t]he starting (and end) point is s 33C(1)'[88] — and stated:[89]

> The provision directs attention to the notion of a 'claim' — a fundamental concept in Pt IVA proceedings. It is critical to understand that a 'claim' is not the cause of action pleaded.[90] It is a term to be given a wide meaning[91] and need not be based on the same conduct and may arise out of quite disparate transactions. …
>
> The 'claims' of all persons referred to in this 'gateway' provision are only required to be in respect of, or arise out of, similar or related circumstances and give rise to one substantial common issue of law or fact. It necessarily follows that the claims of the applicants (who represent the group) and group members (represented persons) can be quite different.[92] .

76 To similar effect is the statement of Beach J in *Webster (Trustee) v Murray*

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83 Section 33C(2)(a)(iv) of the Act.

84 Section 33C(2)(b)(i) of the Act.

85 Section 33C(2)(b)(ii) of the Act.

86 *Timbercorp* (2016) 259 CLR 212, 246 [104]–[105]; [2016] HCA 44 (Gordon J) (citations in original).

87 (2017) 252 FCR 150; [2017] FCA 896 ('*Dillon*').

88 Ibid 158 [42].

89 Ibid 159 [43]–[44] (citations in [43] in original; citations in [44] omitted).

90 *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209, 219 [23]–[24], 222-3 [34]–[35]; [2000] FCA 617 (Moore J).

91 *Allphones Retail Pty Ltd v Weimann* [2009] FCAFC 135, [80] (Tracey and McKerracher JJ).

92 Citing *Timbercorp Finance Pty Ltd v Collins* 259 CLR 212, 246 [104]; [2016] HCA 44 (Gordon J).

*Goulburn Co-Op Co Ltd (No 2)*:[93]

> 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).

77 Previously, in *Bray v F Hoffman-La Roche Ltd*,[94] Finkelstein J considered the meaning of 'claims' in s 33C(1) in similarly wide terms:

> The better view, in my opinion, is that the word means, in this present context, *the facts which give rise to the action as well as to the legal basis of the action. That is, s 33C is concerned to establish that the action be sufficiently collective in nature* so as to warrant it being brought as a representative or class action. For an action to be 'collective in nature' I mean that it involves claims which are closely connected *either by reference to the underlying facts (inevitably there will be differences)* ***or*** *to the underlying legal principles (where there might also be differences) that are raised by the facts*. This approach appears to be mandated both by the language of s 33C(1) as well as its context. …[95]

78 This statement by Finkelstein J was expressly accepted by the Full Court of the Federal Court in *Cash Converters International Ltd v Gray*.[96]

79 The principles concerning the proper interpretation and application of s 33C of the Act which are relevant to this case may be summarised as follows:

(1) Courts have adopted a reasonably liberal approach to ss 33C(1)(b) and (c).[97]

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93 [2017] FCA 1260, [77] ('*Webster v Murray Goulburn*').

94 (2003) 130 FCR 317; [2003] FCAFC 153 ('*Bray*').

95 Ibid 372 [245] (emphasis added).

96 (2014) 223 FCR 139, 145 [24]; [2014] FCAFC 111 (Jacobson, Middleton and Gordon JJ) ('*Cash Converters*').

97 *AS v Minister for Immigration and Border Protection* [2014] VSC 593, [55] (Kaye JA).

The words of s 33C are wide and should be applied according to their terms and the expressed legislative purpose: to avoid multiplicity of proceedings and facilitate group proceedings, consistently with the requirements of fairness and individual justice.[98]

(2) The only requirement to satisfy s 33C(1)(b) is that the circumstances underlying the various claims must be similar or related. The word 'related' suggests a connection wider than identity or similarity.[99] The successively broadening provisions in sub-s (2) emphasise the width of the requirement.[100]

(3) The requirement in s 33C(1)(c) for a 'substantial' common issue of law or fact refers to issues which are 'real or of substance', not 'large' or 'of special significance'; in the sense that the question will 'have a major impact on the … litigation'[101] or will be the 'major' or 'core' issue at trial.[102]

(4) The word 'claims' refers to the facts which constitute the causes of action of the plaintiff and the other group members, as well as the legal basis of those causes of action. It is those facts, *or* those legal principles, which are 'required to be in respect of, or arise out of, similar or related circumstances and give rise to one substantial common issue of law or fact'.[103] A claim will be sufficiently closely connected either if the underlying facts or the underlying legal principles raised by the facts are sufficiently closely connected.[104]

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98 *Mobil* (2002) 211 CLR 1, 24 [12]; [2002] HCA 27 (Gleeson CJ); *Wong v Silkfield* (1999) 199 CLR 255, 267–8 [28]–[30]; [1999] HCA 48 (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).

99 *Zhang* (1993) 45 FCR 384, 405; [1993] FCA 489 (French J).

100 *Wong v Silkfield* (1999) 199 CLR 255, 267 [30]; [1999] HCA 48 (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).

101 Ibid, 267 [28].

102 Ibid 268 [30].

103 *Dillon* (2017) 252 FCR 150, 158–9 [42]–[44]; [2017] FCA 896 (Lee J); *Webster v Murray Goulburn* [2017] FCA 1260, [77].

104 *Bray* (2003) 130 FCR 317, 372 [245]; [2003] FCAFC 153 (Finkelstein J), approved in *Cash Converters* (2014) 223 FCR 139, 145 [24]; [2014] FCAFC 111 (Jacobson, Middleton and Gordon JJ).

80 The primary judge set out the relevant statutory context and the applicable legal principles,[105] and concluded that the requirements of s 33C(1) were satisfied. As to whether the claims between the various states arise out of similar or related circumstances, as required by s 33C(1)(b), the judge considered the similarity or relatedness of the alleged factual substratum underlying the claims in each state,[106] and the differences between the claims from state to state.[107] He concluded that 'these differences are not enough to deny the overall similarity or relatedness of the circumstances from which the claims arise'.[108] While the judge accepted that the cause of action in each state was not identical, because each state-based conspiracy is based on different timeframes, may involve a different subset of Uber entities, and involves different legislation, the judge was satisfied that the 'legal elements' of the conspiracy claims — to be applied in the context of the differing legislation in each state — were 'the same legal elements' and that all of the claims shared the 'same foundational factual substratum and arise from similar or at least related (alleged) factual circumstances'.[109]

81 As to whether there is a common substantial question of law or fact, as required by s 33C(1)(c), the primary judge set out the plaintiff's alleged common questions, which are in the following terms:

> (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

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105 Reasons [113]–[129].

106 Ibid [131].

107 Ibid [132].

108 Ibid [133].

109 Ibid [130].

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.[110]

82 The primary judge accepted that the necessary degree of commonality was not present in the questions set out in (c), (d) and (g),[111] and inferentially also rejected paragraph (e).[112] The primary judge accepted, however, that paragraph (f) raised a common legal question as to 'the proper legal test for the intention to injure in the tort of conspiracy by unlawful means',[113] and the application of that test to the similar circumstances of each state-based conspiracy.[114] Further, although he thought it was not required, the judge was also persuaded that the questions of fact posed in paragraphs (a) and (b) were common for all claims 'because of the circumstantial nature of the plaintiff's case for proving the elements of agreement or combination … with the intention of harming group members'.[115] In his Honour's view, these factual matters went to the general background and strategy of the Uber group as alleged by the plaintiff, and those factual matters are a substantial basis of the case for inferring the necessary elements of the conspiracies alleged in each state.

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110 Ibid [135].

111 Ibid [137].

112 Ibid [132], [137].

113 Ibid [139].

114 Ibid [141].

115 Ibid [142].

*Have the requirements of s 33C(1) been satisfied?*

83 In its written case, Uber contends that the trial judge erred in finding that s 33C(1) of the Act was satisfied in circumstances where the plaintiff, a Victorian taxi driver, brought proceedings on behalf of group members who were taxi drivers or hire car operators in New South Wales, Queensland and Western Australia. The group member definition provides seven categories of group members per state, for a total of twenty-eight categories. Uber contends that, while the plaintiff's claims may be representative of the seven Victorian categories, his claims do not arise out of similar or related circumstances to the matters alleged on behalf of the group members from the other states.

84 Uber contends that the primary judge overlooked significant differences in the alleged conspiracies in each of the states. In particular:

(1) each of the alleged offences arose under different state-based transport legislation; and

(2) the mechanism for proving the alleged complicity of the Uber entities in the alleged unlawful acts is different for each state, arising under different formulations in state-based crimes legislation, with different elements.

85 In oral submissions, Uber's counsel developed these contentions, focussing on the requirement under s 33C(1)(b) that the claims of all group members are 'in respect of, or arise out of, the same, similar or related circumstances'. In this regard, counsel contended that the statement of Finkelstein J in *Bray* should be understood as limiting the concept of 'claims' in s 33C(1) to the *material facts and legal principles making up the cause of action* alleged by the plaintiff in a group proceeding. In other words, the reference to 'similar or related circumstances' in s 33C(1)(b) relates to only 'those facts and circumstances that constitute the essential material facts … that provide the cause of action'. In support of that narrow reading of s 33C1(b), Uber refers to s 33D, which refers to a plaintiff ceasing to have a 'a claim'; s 33W, which refers to a plaintiff settling his or her 'claim'; and s 33ZE, which refers to a limitation

period applying to a group member's 'claim'. On this basis, it is contended that concept of 'claim' is used consistently throughout pt 4A of the Act to refer to 'a judicial remedy for relief arising out of the material facts that constitute the cause of action'.

86 We do not accept that the word 'claims' in s 33C(1)(b) should be given so narrow a construction. The terms of Finkelstein J's statement in *Bray* are much wider. His Honour described the concept of 'claims' in s 33C(1) as being claims that are 'sufficiently collective in nature', in the sense that they are:

> closely connected either by reference to the underlying facts (inevitably there will be differences) *or* to the underlying legal principles (where there might also be differences) that are raised by the facts.[116]

87 This is general language. Finkelstein J did not talk in terms of the material facts necessary to constitute the cause of action alleged by the plaintiff, and expressly stated that close connection may arise by reference to either underlying facts *or* underlying legal principles. Such an approach to the construction of s 33C(1) is consistent with other judicial interpretation of the concept of 'claims' which we have set out above.[117]

88 In our view, the primary judge made no error in his statements concerning the meaning of 'claims' in s 33C(1) when he said:[118]

> The notion of a 'claim' has been given considerable attention. The term is not limited to meaning a cause of action,[119] *although cause of action is included within that term* both in the sense of the legal and factual basis for the action and the associated demand for relief.[120]
>
> Individual claims need not be based on the same conduct and may arise out

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116 *Bray* (2003) 130 FCR 317, 372 [245]; [2003] FCAFC 153 (emphasis added).

117 *Dillon* (2017) 252 FCR 150, 158–9 [42]–[44]; [2017] FCA 896 (Lee J); *Webster v Murray Goulburn* [2017] FCA 1260, [77].

118 Reasons [125]–[126] (emphasis added) (citations in original).

119 *Bray* (2003) 130 FCR 317, [113]; [2003] FCAFC 153 (Carr J); *Dillon v RBS* (2017) 252 FCR 150, 159 [43]; [2017] FCA 896 (Lee J).

120 *Bray* (2003) 130 FCR 317, [113] (Carr J), [245] (Finkelstein J); [2003] FCAFC 153.

> of quite disparate transactions.[121] It follows that the claim of the representative plaintiff and those of the group members in a group proceeding can be quite different.

89 Once Uber's narrow interpretation of 'claims' in s 33C(1) is rejected, no error has been shown in the primary judge's decision that the claims of the plaintiff (and other group members) are in respect of, or arise out of, similar or related circumstances. At a factual level there are many alleged facts which are not specifically referrable to Victoria, including those set out by the primary judge as follows:

> 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.[122]

90 To that summary of similar or related factual circumstances underlying all of the claims, we would add the alleged Uber practices of 'Greyballing' and reimbursing drivers for fines. These are important allegations from which, if proved, it may be inferred that Uber knew that the Uber drivers were breaching the various state-based regimes for regulating point-to-point passenger services — which is an integral part of the allegations that Uber was complicit in the offences committed by its contracted drivers.

91 Uber's submissions acknowledged that there are common facts underlying the claims in all states. However, Uber contends that these similarities are 'superficial common features' of the claims, or 'merely background facts', when

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121 *Dillon v RBS* (2017) 252 FCR 150, [43]; [2017] FCA 896 (Lee J).

122 Reasons [131] (emphasis in original); see also [166].

compared with the 'radical differences' between the various state-based claims — in particular:

(1) different state legislation governing the provision of point-to-point passenger transport services;

(2) different offences created by each state's legislation for breach;

(3) different complicity provisions in the crimes legislation of each state;

(4) as a result, different unlawful means in each state.

92 Central to Uber's contentions in this regard were the different complicity requirements of each of the four states. For example, Uber referred to the difference between s 324 of the *Crimes Act 1958* (Vic), which makes a person 'involved' in the commission of an offence liable, and s 351 of the *Crimes Act 1900* (NSW), which makes a person who 'aids, abets, counsels or procures the commission of [an] … offence' liable. In our view, this example does not assist Uber's contention that the various state-based claims lack the required similarity or relatedness for the purposes of s 33C(1)(b). Looking at the four state-based claims as a whole, it is clear that Uber's conspiracy allegations all depend upon the existence of legislative regimes governing point-to-point passenger services (with their individual differences) and Uber's complicity under the criminal law for its involvement (however expressed) under the criminal law of each state. The similarity of the issues which will arise may be seen in the obvious intention of the legislative provisions in each state. First, they are all concerned with regulating the point-to-point passenger services market, by licensing and accreditation requirements for lawful operations. Second, they are concerned with making persons who *knowingly* participate in breaches of such legislation criminally liable. The similarity of the circumstances, and the legal issues arising, are clearly apparent.

93 Uber next contends that, in any event, the plaintiff has not satisfied the requirement in s 33C(1)(c) that there be a substantial common question of law or fact

in each of the state-based claims. We do not accept that contention, generally for the reasons given by the primary judge and the reasons we have given above in rejecting Uber's contentions concerning s 33C(1)(b). In particular, the claims in respect of each state will give rise to common questions of fact, or mixed fact and law, as to whether it can be inferred from the similar or related factual circumstances underlying all the claims that:

(1) Uber knew that its business strategy necessarily involved the Uber drivers acting unlawfully; and

(2) Uber intended to injure the plaintiff and other group members.

94 Ground 3 is not made out.

**PART B: APPEAL BY FOREIGN UBER ENTITIES**

95 The foreign Uber entities were served with the writ in the proceeding under r 7.02(a) of the *Supreme Court (General Civil Procedure) Rules 2015* which, where the context requires, we will refer to as 'the current rules'. Rule 7.02(a) 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;

96 The foreign Uber entities applied to the primary judge under r 7.04 to set aside service on them. Rule 7.04(1) gives the Court a discretion to set aside service of originating process served out of Australia. Rule 7.04(2) provides:

> (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.

97 Having entered a conditional appearance, the foreign Uber defendants also applied under r 8.08(3) for an order setting aside service on them. This application raised no separate questions to the application under r 7.04.

98 The foreign Uber entities raised two grounds of appeal against the primary judge's dismissal of their applications to set aside service, as follows:

(1) the judge erred by holding that s 25(1)(a) of the Act gave statutory authority to the Judges of the Court to make r 7.02 in its current form; and

(2) the judge erred by finding that the plaintiff had a maintainable cause of action, or sufficient prospects of success in the proceeding, and on that ground service should be set aside under r 7.04(2)(c).

99 Ground 2 can be readily dismissed. Whether or not a claim has insufficient prospects of success within the meaning of r 7.04(2)(c) is to be determined by the same principles which govern a summary judgment application.[123] Accordingly, to succeed in having service set aside on this ground, it was necessary for Uber to establish, as with its strike-out summons, that the plaintiff's claim had 'no real prospects of success'. For the reasons given above in dismissing ground 1 of the appeal by the Australian Uber entities, ground 2 of the appeal by the foreign Uber entities must be dismissed. The judge was right to reach that conclusion.[124]

100 We turn to consider ground 1, which raises two separate questions:

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123 *Agar v Hyde* (2000) 201 CLR 552, 576 [60]; [2000] HCA 41 (Gaudron, McHugh, Gummow and Hayne JJ.).

124 Reasons [182].

(1) whether s 25(1)(a) of the Act provided statutory authority to make r 7.02(a); and

(2) if so, whether s 25(1)(a) is outside the legislative power of the Victorian Parliament.

***Was r 7.02 authorised by s 25(1)(a) of the Act?***

101 Section 25(1)(a) is in the following terms:

> **25 Power to make Rules**
>
> (1) The Judges of the Court (not including any reserve Judge) may make Rules of Court *for or with respect to* the following:
>
> (a) *Any matter dealt with* in any Rules of Court in force on 1 January 1987;[125]

102 On 1 January 1987, r 7.01(1) of ch I of the *General Rules of Procedure in Civil Proceedings 1986* ('1986 Rules') dealt with the circumstances in which originating process could be served out of Victoria without order of the Court, in the following terms:

> **For what claims**
>
> 7.01(1) Originating process may be served out of Victoria without order of the Court where—
>
> (a) the whole subject-matter of the proceeding is land situate within Victoria (with or without rents or profits) or the perpetuation of testimony relating to land so situate;
>
> (b) any act, deed, will, contract, obligation or liability affecting land situate within Victoria is sought to be construed, rectified, set aside or enforced in the proceeding;
>
> (c) any relief is sought against a person domiciled or ordinarily resident within Victoria;
>
> (d) the proceeding is for the administration of the estate of a person who died domiciled within Victoria or is for any relief or remedy which might be obtained in any such proceeding;

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125 Emphasis added.

(e) the proceeding is for the execution, as to property situate within Victoria, of the trusts of a written instrument of which the person to be served is a trustee and which ought to be executed according to the law of Victoria;

(f) the proceeding is one brought to enforce, rescind, dissolve, rectify, annul or otherwise affect a contract, or to recover damages or other relief in respect of the breach of a contract, and the contract—

(i) was made within Victoria;

(ii) was made by or through an agent carrying on business or residing within Victoria on behalf of a principal carrying on business or residing out of Victoria; or

(iii) is governed by the law of Victoria;

(g) the proceeding is brought in respect of a breach committed within Victoria of a contract wherever made, even though that breach was preceded or accompanied by a breach out of Victoria that rendered impossible the performance of that part of the contract which ought to have been performed within Victoria;

(h) the proceeding is founded on a contract the parties to which have agreed that the Court shall have jurisdiction to entertain a proceeding in respect of the contract;

*(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;*

(k) an injunction is sought ordering the defendant to do or refrain from doing anything within Victoria, whether or not damages are also claimed in respect of a failure to do or the doing of that thing;

(l) the proceeding is properly brought against a person duly served within or out of Victoria and another person out of Victoria is a necessary or proper party to the proceeding;

(m) the proceeding is either brought by a mortgagee of property situate within Victoria (other than land) and seeks the sale of the property, the foreclosure of the mortgage or delivery by the mortgagor of possession of the property or brought by a mortgagor of property so situate (other than land) and seeks redemption of the mortgage, reconveyance of the property or delivery by the mortgagee of possession of the property, but does not seek except so far as permissible under any other paragraph of this Rule any personal judgment or order for the payment of any moneys due under the mortgage;

(n) the proceeding is brought under the Commonwealth Act known as the Civil Aviation (Carrier's Liability) Act 1959 as amended from time

to time.[126]

103 The 1986 Rules were replaced by the *Supreme Court (General Civil Procedure) Rules 1996* and then the *Supreme Court (General Civil Procedure) Rules 2005*. Rule 7.01(1) of the 1986 Rules was replicated in each of these versions and was thus clearly within the power under s 25(1)(a). However, r 7.02(a) of the current rules extends the power to serve originating process out of Australia. The previous limitation to proceedings founded on torts committed 'within Victoria' or in respect of damage suffered 'in Victoria' was removed and replaced with power to serve originating process out of Australia without leave in respect of tortious conduct committed in Australia or tortious conduct (wherever occurring) in respect of which damage is sustained 'in Australia'.

104 The primary judge construed r 7.01 of the 1986 Rules as a rule which dealt with service outside of Victoria as a general matter or topic.[127] In reaching that conclusion, the judge explained the difference between *subject matter* jurisdiction and *adjudicatory* jurisdiction;[128] accepted that laws providing for service outside of the territorial jurisdiction — sometimes called 'long arm jurisdiction' — involved an extension of the Court's adjudicatory jurisdiction and were not mere matters of practice and procedure;[129] and held that any law authorising service outside of the State of Victoria was required to be made by statute or rules of Court made pursuant to statutory power.[130] Thus, the judge characterised the issue before the Court — as to whether r 7.02(a) of the current rules was made within the power conferred by s 25(1)(a) of the Act — as a matter of statutory construction. The parties agree that

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126 Emphasis added.

127 Reasons [206]–[210].

128 Ibid [193]–[196].

129 Ibid [197].

130 Ibid [198] citing *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93, 107; [1957] HCA 10 (Dixon CJ and Fullagar J); *Laurie v Carroll* (1958) 98 CLR 310, 322; [1958] HCA 4 (Dixon CJ, Williams and Webb JJ); *Flaherty v Girgis* (1987) 162 CLR 574, 592–3; [1987] HCA 17 (Mason, Wilson and Deane JJ); *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 517; [2000] HCA 36 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

this was the correct way to approach the issue, and so do we.

105 Uber contended before the primary judge, and contends on appeal, that r 7.02(a) of the current rules was not authorised by s 25(1)(a) of the Act because it deals with a different 'matter' than the provisions of r 7.01 of the 1986 Rules, which dealt only with service outside of Victoria without leave if the proceedings arose from circumstances where there was a specified territorial connection with Victoria. Generally, Uber contends that each sub-paragraph of r 7.01 of the 1986 Rules expressly refers to a circumstance having a territorial connection with Victoria, or should be so read. Specifically, Uber contends that r 7.01(i) and (j) dealt with torts committed 'within Victoria' or damage suffered 'in Victoria' from tortious conduct which was within the territorial jurisdiction of the Court. Thus, to the extent the current r 7.02(a) abandoned the necessity for a territorial connection with Victoria, it was made beyond the power conferred by s 25(1)(a).

106 Uber contends that its construction of r 7.01 of the 1986 Rules is supported by the decision of the High Court in *Mobil Oil Aust Pty Ltd v Victoria*,[131] where the plurality stated that for service under r 7.01 of the 1996 Rules to have been effective outside Australia: 'there must [have been] some nexus between the subject matter of the proceeding and [Victoria] or between the defendant and [Victoria]'.[132]

107 Uber contends also that its construction of r 7.01 of the 1986 Rules is supported by the principle that a statute is presumed not to have extraterritorial effect absent plain words or emphatic contextual indications to the contrary.[133]

108 We do not accept Uber's contentions.

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131 (2002) 211 CLR 1; [2002] HCA 27.

132 Ibid 37 [60] (Gaudron, Gummow and Hayne JJ).

133 *Jumbunna Coal Mine NL v Victorian Coal Miner' Association* (1908) 6 CLR 309, 363; [1908] HCA 95 (O'Connor J); *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391, 423; [1932] HCA 52 (Dixon J); *Koop v Bebb* (1951) 84 CLR 629, 640; [1951] HCA 77 (Dixon, Williams, Fullagar and Kitto JJ); *Ex parte Iskra* (1964) 80 WN (NSW) 923, 934 (Brereton J).

109 The starting point is that s 25(1) of the Act must be construed broadly, consistently with the general principle that a grant of power to a court (including the conferral of jurisdiction) should not be construed as subject to a limitation not appearing in the words of that grant.[134] The first task is to determine the 'true nature and purpose of the (rule-making) power'.[135] The reference to a 'matter' dealt with in the 1986 Rules plainly refers to the subject matter rather than to the content of individual rules. Further, the power to make rules 'for or with respect to' those subject matters means that the rule must bear some relationship to the subject matter. It is not limited to merely replicating the former rules.

110 Order 7 in the 1986 Rules is headed 'Service out of Victoria'. The former r 7.01 identified the circumstances in which originating process might be served out of Victoria without an order of the Court; the former r 7.06 identified the circumstances in which leave to serve outside might be given. The remainder of the former rule then regulated service, including when a party served could apply to the Court to set aside service. In general terms, to add to or subtract from the circumstances described in r 7.01 or r 7.06 would not trespass into an entirely different subject matter.

111 The primary judge was right to construe the broad phrase 'for or with respect to … any matter dealt with [in the 1986 Rules]', in its application to r 7.01 of those rules, as service 'out of Victoria whether within Australia or beyond'.[136] Construed in this way, r 7.02(a) of the current rules does no more than widen, in plain words, the circumstances in which service of originating process out of Victoria is allowed without leave being first obtained.

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134 *FAI General Insurance Co. Ltd. v. Southern Cross Exploration N.L.* (1988) 165 CLR 268, 283–284 (Wilson J), 290 (Gaudron J); [1988] HCA 13. See also *Knight v. F.P. Special Assets Ltd* (1992) 174 CLR 178, 185 (Mason CJ and Deane J), 202–203 (Dawson J), 205 (Gaudron J); [1992] HCA 28.

135 *Williams v Melbourne Corporation* (1933) 49 CLR 142, 155; [1933] HCA 56 (Dixon J); *South Australia v Tanner* (1989) 166 CLR 161, 164; [1989] HCA 3 (Wilson, Dawson, Toohey and Gaudron JJ); *R v Gavare* [2011] SASCFC 38, [46] (Gray J, with Duggan and Sulan JJ agreeing).

136 Reasons [206].

112 Even if it be accepted that each of the circumstances listed in r 7.01(a)–(n) should be read as having an express or implied nexus with Victoria,[137] that does not address the present question for determination — which requires focus on what 'matter' was dealt with by r 7.01 of the 1986 Rules, not on the proper interpretation of r 7.01(a)–(n). In our view, the primary judge was correct to read r 7.01 as a rule dealing generally with the matter of when originating process may be served out of Victoria without leave. This construction is consistent with the use in s 25(1)(a) of the broad phrase 'for or with respect to … any matter dealt with [in the 1986 Rules]'.

113 We conclude that r 7.02(a) of the current rules was authorised by s 25(1)(a) of the Act.

***Is s 25(1)(a) outside legislative power?***

114 In the event that the Court determined, as we have, that s 25(1)(a) authorised the making of r 7.02(a) of the current rules, Uber contends that, to that extent, s 25(1)(a) exceeded the legislative power of the Parliament of Victoria and should be read down by invalidating r 7.02(a) in order to bring it within power. Uber's contention in this regard was not put before the primary judge. The contention involves the following steps.

115 First, Uber relies upon the 'rule of construction' that general language in a statute should be confined 'to a subject matter under the effective control of the legislature'.[138]

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137 The plaintiff contended that the following circumstances in r 7.01 had no nexus with Victoria: (1) r 7.01(h) concerned contracts, wherever made and wherever breached, where the parties agree to submit to the jurisdiction of Victorian courts. Such a contract may have no nexus with Victoria, territorial or otherwise, except for the parties choosing Victoria as the forum to resolve their disputes; (2) r 7.01(l) concerned service on persons who were, for whatever reason, necessary or proper parties to a proceeding, where another party was properly sued and 'duly served within or without of Victoria'. Such parties, for example third parties joined by a defendant, may have committed no actionable wrong in Victoria or engaged in any conduct having a nexus with Victoria; (3) r 7.01(n) makes no reference to any nexus with Victoria, referring only to a proceeding brought under a Commonwealth Act.

138 *Pearce v Florenca* (1976) 135 CLR 507, 513–14; [1976] HCA 26 (Gibbs J).

116 Second, Uber refers to s 16 of the *Constitution Act 1975*, which provides that: 'The Parliament shall have power to make laws in and for Victoria in all cases whatsoever'. Uber relies on the principle that this power is subject to a territorial limitation, namely, that the law in question have a 'sufficient connection' with Victoria.[139] Uber concedes, however, that this test of sufficient connection is to be 'liberally applied'. This concession is consistent with the statement of the plurality in *Mobil* that:

> It is clear that legislation of a State parliament 'should be held valid if there is any real connexion — *even a remote or general connexion* — between the subject matter of the legislation and the State'.[140] This proposition has now twice been adopted in unanimous judgments of the Court[141] and should be regarded as settled.[142]

117 Third, Uber contends that, however liberally this test is applied, r 7.02(a) has no sufficient connection to Victoria — because there is no nexus between the subject matter of r 7.02(a), insofar as it applies to the plaintiff's claims made on behalf of the non-Victorian group members, and Victoria. In this regard, Uber contends that the introduction of the uniform cross-vesting legislation, under which the Supreme Court of each state was invested with the same jurisdiction as the Supreme Courts of the other states, does not provide the necessary connection.[143]

118 We do not accept Uber's contention that there is no sufficient connection between r 7.02(a) in its application to the non-Victorian claims and Victoria. In our view, a law providing for service of process outside of Victoria in respect of a proceeding over which the Supreme Court has jurisdiction under the cross-vesting legislation is clearly a law 'in and for Victoria'. Such a law complements the

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139 Ibid 518.

140 Ibid.

141 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 14; [1988] HCA 55 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340, 372; [1989] HCA 49 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

142 *Mobil* (2002) 211 CLR 1, 34 [48]; [2002] HCA 27 (Gaudron, Gummow and Hayne JJ) (citations in original).

143 See, eg, *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Vic) s 4(3).

expanded jurisdiction of the Supreme Court under the cross-vesting legislation. This result is consistent with the decision of the High Court in *Mobil*,[144] in which the validity of class action provisions of pt 4A of the Act was confirmed.

119 In *Mobil,* Gleeson CJ described the sufficiency of the connection in the following terms:

> The *Constitution Act 1975* (Vic), in s 16, provides that the Parliament of Victoria 'shall have power to make laws in and for Victoria in all cases whatsoever'. That power, although differently expressed, is not different in substance from the corresponding powers conferred upon other State legislatures. The *Australia Act 1986* (Cth), in s 2(1), provides that each State has 'full power to make laws for the peace, order and good government of that State that have extra-territorial operation'. *The territorial connection between Pt 4A and Victoria is neither remote nor general. It is direct and specific. It concerns the jurisdiction of the Supreme Court of Victoria. It only operates in relation to claims in respect of which the Supreme Court otherwise has jurisdiction*.[145]

120 In *Mobil*, the defendant in the group proceeding (Mobil) was a Victorian company, was alleged to have committed wrongs in Victoria and was served in Victoria. But this was not essential to the above-quoted statement. After reviewing the Court's jurisdiction in *Mobil*, Gleeson CJ continued:

> No one could fairly describe the jurisdiction involved in the present case, where product liability claims are brought against a company incorporated in Victoria, in respect of goods manufactured in Victoria, as long-arm jurisdiction. *But, in any event, Pt 4A takes the jurisdiction of the Supreme Court of Victoria, in terms of the amenability to process of a defendant, as it finds it*.[146]

121 The plurality in *Mobil* did not say anything which undermines these statements by Gleeson CJ. The plurality's statement that r 7.01 of the 1996 Rules required, for valid service outside Australia, a nexus between the subject matter of the proceeding and Victoria, or between the defendant and Victoria, concerned the requirements of that rule – which is a different question to that at issue. Here, the issue is whether a new rule, which authorises service on defendants outside Australia of proceedings for which the court has subject-matter jurisdiction under

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144 (2002) 211 CLR 1; [2002] HCA 27.

145 Ibid 23 [10] (emphasis added).

146 Ibid (emphasis added).

the cross-vesting legislation, has a sufficient connection with Victoria. For the reasons given by Gleeson CJ, it clearly does.

122 Before leaving this issue, we note that the plaintiff contends that this result is also consistent with the decision of the New South Wales Court of Appeal in *Flaherty v Girgis*.[147] Uber disagrees, and contends that the case considered and disposed of a point not raised on this appeal.

123 *Flaherty v Girgis* concerned the proper construction of a New South Wales Supreme Court rule which, in terms similar to r 7.01(i) and (j) of the Victorian 1986 Rules, authorised service of originating process outside New South Wales 'where the proceedings are founded on, or are for the recovery of, damage suffered wholly or partly in the State caused by a tortious act or omission wherever occurring …'.

124 The plaintiff in *Flaherty v Girgis* resided in New South Wales. She alleged by her statement of claim that she sustained injury in Queensland where she was struck by a car driven by the defendant. She alleged that her injuries caused her damage in both Queensland, where they were inflicted, and in New South Wales where she was hospitalised, suffered continuing pain and incurred loss or expense associated with her injuries.

125 The defendant applied to set aside service of the statement of claim on grounds including that the rule was beyond the legislative power of the state of New South Wales because it was not a law for the 'peace, welfare and good government of New South Wales', as required by s 5 of the *Constitution Act 1902* (NSW). The leading judgment on this issue was given by McHugh JA, who considered that 'the real question' was whether s 122 of the *Supreme Court Act 1970* (NSW) was, in authorising the rule, 'a law for the peace, welfare and good government of New

147 (1985) 4 NSWLR 248.

South Wales?'[148] McHugh JA (Kirby P and Samuels JA agreeing)[149] decided that it was.[150]

126 The defendant in *Flaherty v Girgis* contended that the rule in question was:

> invalid because it imposes a liability on a person, who is not present, resident or domiciled in New South Wales, in respect of an accident occurring out of the State, by means of the service of process on him out of the State [and therefore that] no relevant fact has any connection with New South Wales.[151]

127 McHugh JA accepted the plaintiff's submission that '[t]he liability of the defendant exists independently of the rule and is antecedent to its operation'.[152] McHugh JA reasoned that the defendant's liability did not arise from the rule because the New South Wales Supreme Court already had jurisdiction under the principles of private international law which then prevailed (sometimes described as the 'double actionability principles').[153] McHugh JA concluded that, as the rule was merely 'a step in the process of permitting a New South Wales court to give judgment in respect of a liability already existing under the law of New South Wales, it [could not] be other than a law for the peace, welfare and good government of New South Wales'.[154] Moreover, the fact that the rule permitted service outside of New South Wales, and thus had extraterritorial operation, did not prevent it from being a law for the peace, welfare and good government of New South Wales.[155]

128 Uber contends that *Flaherty v Girgis* is beside the point and unhelpful, because it involved rejection of a contention which Uber does not make, namely, that r 7.02(a) is invalid because it imposes a liability where the criterion for liability had no real

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148 Ibid 267.

149 Ibid 253 (Kirby P), 259 (Samuels JA).

150 Ibid 270.

151 Ibid 269.

152 Ibid.

153 Ibid, referring to *Koop v Bebb* (1951) 84 CLR 629; [1951] HCA 77; *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20; [1965] HCA 61.

154 Ibid 270.

155 Ibid.

connection with the state.

129 We do not accept Uber's contentions. Although the argument as to the imposition of liability is not put by Uber, the validity of the rule — and thus its authorising power under s 122 of the *Supreme Court Act 1970* (NSW) — was upheld because the New South Wales Supreme Court already had jurisdiction under the double actionability principle of private international law which then applied. Although that principle is no longer good law,[156] since its commencement on 1 July 1988 the cross-vesting legislation has invested the Supreme Courts of each of the states with the same jurisdiction as the Supreme Courts of the other states. On this basis, we conclude that the reasoning in *Flaherty v Girgis* supports the conclusion that s 25(1)(a), to the extent that it authorised r 7.02(a), was within the power of the Parliament of the State of Victoria. We note that this conclusion also finds support in the decision of the Supreme Court of New South Wales in *Seymour-Smith v Electricity Trust of South Australia*,[157] where, after the enactment of the cross-vesting legislation, *Flaherty v Girgis* was applied to uphold the validity of a differently expressed rule providing for service outside New South Wales.[158]

**CONCLUSION**

130 None of the appeal grounds has been established. Both appeals will be dismissed.

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156 *Breavington v Godelman* (1988) 169 CLR 41; [1988] HCA 40; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; [2000] HCA 36.

157 (1989) 17 NSWLR 648.

158 Ibid 657–60 (Rogers CJ Comm D).

**SCHEDULE OF PARTIES**

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| UBER TECHNOLOGIES INCORPORATED (4849283) | First Applicant |
| UBER INTERNATIONAL HOLDING B.V. (RSIN 851 929 357) | Second Applicant |
| UBER B.V. (RSIN 852 071 589) | Third Applicant |
| RASIER OPERATIONS B.V. (RSIN 853 682 318) | Fourth Applicant |
| UBER PACIFIC HOLDINGS B.V. (RSIN 855 779 330) | Fifth Applicant |
| - and - | |
| NICOS ANDRIANAKIS | Respondent |