**IN THE HIGH COURT OF AUSTRALIA**
**SYDNEY REGISTRY**

**No. S161 of 2015**

BETWEEN:

**GREGORY IAN ATTWELLS**
First Appellant



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**NOEL BRUCE ATTWELLS**
Second Appellant

and

**JACKSON LALIC LAWYERS PTY LTD**
Respondent

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# SUBMISSIONS OF THE LAW SOCIETY OF NEW SOUTH WALES

## (SEEKING LEAVE TO APPEAR AS AMICUS CURIAE)

Filed on behalf of the Law Society
of New South Wales:
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## PART I: CERTIFICATION

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

## PART II: BASIS OF INTERVENTION

2. The Law Society of New South Wales (the **Law Society**) seeks leave to appear as amicus curiae on the basis that:

   (a) the Law Society wishes to make submissions on matters of general principle or importance that are in addition to those made by either the appellants or the respondent, being submissions that the Court should have to assist it to reach a correct determination;[1]

   (b) the additional submissions that the Law Society wishes to make seek to provide a larger view of the matter before the Court than that put by the parties;[2] and

   (c) the Law Society's additional submissions will, with respect, provide significant assistance to the Court, and will cause no, or only trivial, delay or increase in costs.[3]

## PART III: WHY LEAVE SHOULD BE GRANTED

3. The Law Society is the professional association of solicitors in New South Wales. Along with other functions, including regulatory functions imposed upon it by the *Legal Profession Uniform Law* (NSW), it represents the interests of solicitors in New South Wales.

4. It may be accepted that the Law Society does not itself have any direct legal interest in the fate of advocates' immunity such as to ground a right to intervene.[4] Equally, however, it is submitted that the solicitors who it represents do have such an interest.

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1 See *Roadshow Films Pty Ltd v iiNet Ltd (No 1)* (2011) 248 CLR 37 at [3].

2 See *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 312; *Levy v Victoria* (1997) 189 CLR 579 at 603.

3 See *Roadshow Films Pty Ltd v iiNet Ltd (No 1)* (2011) 248 CLR 37 at [4]; *Levy v Victoria* (1997) 189 CLR 579 at 605.

4 As to which, see *Roadshow Films Pty Ltd v iiNet Ltd (No 1)* (2011) 248 CLR 37 at [2]-[3]; *Levy v Victoria* (1997) 189 CLR 579 at 600-605.

which is a factor relevant to the exercise of the Court's discretion to grant leave to the Law Society to be heard as amicus curiae.[5]

5. Insofar as the interest of the solicitors represented by the Law Society is concerned, it is not merely an interest in contending "for what they consider to be a desirable state of the general law".[6] If the advocates' immunity were to be modified or abolished, solicitors face the prospect, not only of a new potential liability going forward, but also, significantly, the possibility of future claims in respect of past conduct that was, at the time it was engaged in, regarded as covered by the immunity.

6. Moreover, the solicitors that the Law Society represents practice in all areas of law including criminal law, family law, and public law. The nature of legal practice, and the considerations relevant to advocates' immunity, in those areas may differ in significant respects from those applicable to the conduct of general private or commercial litigation. The Law Society thus seeks to ensure that the Court has the benefit of submissions on the full implications for the practice of law generally of any modification of the test for, or the abolition of, the advocates' immunity.

7. It may be observed that similar considerations to those identified above appear to have been regarded as making appropriate the intervention of professional associations in the litigation that culminated in *Lai v Chamberlains*.[7] That is to say, in *Chamberlains v Lai*, it was held that "it [was] clearly desirable for the court to have their assistance on the questions of law and legal policy that arise".[8]

8. Furthermore, in the Law Society's submission, the parties to the appeal have not fully addressed all relevant issues concerning the role of settlements, and negotiations regarding them, in all areas of modern legal practice. It is vitally important that the Court appreciates the full nature and extent of the interrelationship between the exercise of judicial power and the negotiation, approval, and giving effect to, of settlements.

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5 *Roadshow Films Pty Ltd v iiNet Ltd (No 1)* (2011) 248 CLR 37 at [6].

6 Cf. *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 331.

7 [2007] 2 NZLR 7.

8 [2005] NZSC 32 at [5].

9. Overall, the submissions that the Law Society seeks leave to make as amicus curiae are not concerned with the particular interest that the respondent has in succeeding on the facts of this case, but address broader considerations and interests at the level of general principle or importance.

10. For these reasons, the Law Society seeks leave to make submissions concerning:

(a) the formal and close interrelationship between the exercise of judicial power by Courts in managing and disposing of litigation, the obligations of lawyers in conducting proceedings in a Court, and the negotiation, approval, and giving effect to, of settlements; and

10 (b) the considerations relevant to the existence and content of advocates' immunity in contexts other than general, private law, litigation (especially criminal, family, and public law).

**Part IV: APPLICABLE PROVISIONS**

11. Neither the appellants nor the respondent has stated whether there are any provisions, whether found in any constitution, statute, or regulation, that they contend govern the outcome of this case. The Law Society does not consider that there are any such provisions.

**Part V: SUBMISSIONS**

*Settlements and the Conduct of Proceedings in Court*

20 12. The appellants submit that the immunity, as formulated in *Giannarelli v Wraith*[9] and *D'Orta-Ekenaike v Victoria Legal Aid*,[10] does not "necessarily" apply to negligent conduct in relation to settlements (AS [36]). That is said to be for two reasons:

(a) *First*, the appellants submit that such conduct may not necessarily be "work done out of court which leads to a decision affecting the conduct of the case in court" (see AS [40]). To come within that formulation, the appellants submit, it is "necessary to assess the degree of connection between work undertaken out of court and steps taken in court", and suggest that a sufficient nexus will only be found where there is the "interposition of a judicial actor between the

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9 (1988) 165 CLR 543 (*Giannarelli*).

10 (2005) 223 CLR 1 (*D'Orta*).

alleged negligence of the solicitor and the causally-connected injury" (AS [49]).

(b) *Secondly*, the appellants submit that "a negligent settlement or abandonment of a cause of action does not necessarily involve any collateral attack on a judicially quelled controversy" (AS [38]), with the result that there is no engagement with "the supporting principle of finality" (AS [41]).

13. Both of those submissions raise for consideration the place of settlement negotiations, and the way in which negotiated agreements are given effect, in litigious disputes. In the Law Society's submission:

(a) The connection between conduct relating to settlements and the conduct of a case in court is extremely close, and falls within the immunity as articulated in *Giannarelli* and *D'Orta*.

(b) An allegation that a particular settlement was the product of negligence involves a collateral attack on a judicially quelled controversy, sufficient to engage the rationale identified in *D'Orta* as underpinning the immunity.

14. To make good those propositions, it is necessary to examine in some detail the way in which decisions concerning the settlement of proceedings may arise in the conduct of litigation, and the way in which a negotiated agreement of the parties is carried into effect.

15. It is no longer possible, if it ever was, to conceive of a formal dichotomy between the resolution of a litigious dispute by the exercise of judicial power, on the one hand, and by the negotiated agreement of the parties, on the other. The distinction is blurred both by the encouragement of negotiated settlements by Courts as part of the discharge of their case management function, and the involvement of Courts in approving or acting in accordance with negotiated settlements. The engagement of judicial power with the process of negotiating and giving effect to settlements in turn makes it impossible to deny that the conduct of lawyers in relation to settlements is intimately connected with the conduct of proceedings in Court. That recognition is reinforced by the fact that obligations imposed upon legal practitioners in relation to the conduct of proceedings are now regarded as extending to the negotiation of the settlement of the underlying dispute.

16. The formal role of Courts in promoting the settlement of litigious disputes is seen most clearly in the powers conferred upon judges to refer proceedings (or parts of proceedings) to mediation.[11] Such orders may be made without an application for such an order having been made by a party, including in circumstances where no party agrees to mediate.[12] Furthermore, the Court is able to make orders that control the way in which the mediation is conducted.[13]

17. Courts are required to consider whether proceedings (or parts of them) should be referred to mediation, and at what stage.[14] The power to order a mediation is to be exercised having regard to the overriding purpose of the relevant Act and Court Rules (i.e., to facilitate the just, quick and cheap resolution of the real issues in the proceedings, or words to that effect).[15]

18. Various protections equivalent to those that apply in Court proceedings are conferred upon participants in a Court-ordered mediation. The same privilege with respect to defamation as exists with respect to judicial proceedings, or documents produced in judicial proceedings, may apply in relation to the mediation.[16] The mediator is

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11 See, e.g., *Federal Court of Australia Act* 1976 (Cth), s. 53A; *Civil Procedure Act* 2005 (NSW), s. 26; *Civil Procedure Act* 2010 (Vic), s. 66 and *Supreme Court (General Civil Procedure) Rules* 2005 (Vic), rr. 50.07-50.07.4; *Civil Proceedings Act* 2011 (Qld), s. 43; *Uniform Civil Procedure Rules* 1999 (Qld), r. 319; *Supreme Court Act* 1935 (WA), s. 69 and *Rules of the Supreme Court* 1971 (WA), O4A, rr. 2 and 8; *Supreme Court Act* 1935 (SA), s. 65; *Alternative Dispute Resolution Act* 2001 (Tas), s. 5; *Court Procedures Rules* 2006 (ACT), r. 1179.

12 See, e.g., *Federal Court of Australia Act* 1976 (Cth), s. 53A(1A); *Civil Procedure Act* 2005 (NSW), s. 26(1); *Civil Procedure Act* 2010 (Vic), s. 66(2) and *Supreme Court (General Civil Procedure) Rules* 2005 (Vic), r. 50.07; *Uniform Civil Procedure Rules* 1999 (Qld), r. 319(5); *Rules of the Supreme Court* 1971 (WA), O4A, r. 2; *Supreme Court Act* 1935 (SA), s. 65; *Court Procedures Rules* 2006 (ACT), r. 1179(2).

13 See, e.g., *Federal Court Rules* 2011 (Cth), r. 28.22; *Uniform Civil Procedure Rules* 2005 (NSW), rr. 20.2 and 20.6; *Civil Procedure Act* 2010 (Vic), s. 48(2); *Rules of the Supreme Court* 1971 (WA), O4A, r. 8; *Supreme Court Act* 1935 (SA), s. 72(1)(d); *Court Procedures Rules* 2006 (ACT), r. 1404(3)(g).

14 See, e.g., *Federal Court Rules* 2011 (Cth), r. 28.01.

15 See, e.g., *Federal Court of Australia Act* 1976 (Cth), s. 37M; *Civil Procedure Act* 2005 (NSW), s. 56; *Civil Procedure Act* 2010 (Vic), ss. 7-9; *Uniform Civil Procedure Rules* 1999 (Qld), r. 5; *Rules of the Supreme Court* 1971 (WA), O1 rr. 4A and 4B, O4A, r. 2; *Supreme Court Civil Rules* 2006 (SA), r. 3; *Court Procedures Rules* 2006 (ACT), r. 21.

16 See, e.g., *Civil Procedure Act* 2005 (NSW), s. 30(2); *Civil Proceedings Act* 2011 (Qld), s. 52; *Supreme Court Act* 1935 (WA), s. 71; *Alternative Dispute Resolution Act* 2001 (Tas), s. 10(2).

frequently given the same protection and immunity as a judge.[17] On occasion, the protections and immunities provided by statute extend to parties and witnesses attending the mediation.[18]

19. In the event that a settlement is reached, provision is made for the formal disposition of the proceedings by the Court in accordance with the parties' agreement. For example, in the Federal Court, the parties may file a consent order which "has the same force and validity as an order made after a hearing by the Judge".[19] And in the Courts of New South Wales, the Court "may make orders to give effect to any agreement or arrangement arising out of a mediation session".[20] Other jurisdictions make similar provision.[21]

20. It may thus be seen that the power to order a mediation is one of the range of powers possessed by a Court to enable it to dispose, justly and efficiently, of the disputes that are brought before it. By the exercise of that power, the process by which a settlement is negotiated, or attempted to be negotiated, is brought within, and made an aspect of, the conduct of the proceedings generally. The conduct of parties and their lawyers in relation to a mediation is thus made a part of the conduct of the case "in Court".

21. In some jurisdictions, procedures involving an even closer involvement between the Court and settlements may be seen. For example, in Victoria, judges may order, and preside over, a "judicial resolution conference".[22] A range of protections and immunities are conferred in relation to the conduct of those conferences.[23]

22. A Court-ordered mediation (or other procedures like the Victorian "judicial resolution conference") are, however, simply the most obvious means by which the process of

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17 See, e.g., *Federal Court of Australia Act* 1976 (Cth), s. 53C; *Civil Procedure Act* 2005 (NSW), s. 33; *Civil Proceedings Act* 2011 (Qld), s. 52; *Supreme Court Act* 1935 (WA), s. 70; *Supreme Court Act* 1935 (SA), s. 65(2); *Alternative Dispute Resolution Act* 2001 (Tas), s. 12.

18 See *Civil Proceedings Act* 2011 (Qld), s. 52.

19 *Federal Court Rules* 2011 (Cth), rr. 28.25 and 39.11.

20 *Civil Procedure Act* 2005 (NSW), s. 29.

21 See, e.g., *Civil Proceedings Act* 2011 (Qld), s. 50; *Supreme Court Act* 1935 (SA), s. 65(7); *Alternative Dispute Resolution Act* 2001 (Tas), s. 8(1); *Court Procedures Rules* 2006 (ACT), r. 1182(1).

22 See *Civil Procedure Act* 2010 (Vic), s. 66, coupled with the definitions of "appropriate dispute resolution" and "judicial resolution conference" in s. 3.

23 *Civil Procedure Act* 2010 (Vic), ss. 67 and 68.

negotiating a settlement of a litigious dispute is made part of the conduct of the proceedings in Court. In the Federal Court, it is expressly provided that the "conduct of a civil proceeding before the Court" includes "negotiations for settlement" of the dispute;[24] and such negotiations are, obviously enough, not limited to negotiations in a Court-ordered mediation. The obligations on parties (and their lawyers) to conduct proceedings in such a way as to assist in achieving the overriding objective thus extends to the appropriate consideration of, and engaging in, settlement negotiations.

23. The connection between settlement negotiations and the conduct of proceedings in Court may also be seen in the Rules of Court, and related common law rules, concerning offers of compromise and the consequences of their acceptance or rejection. Offers to compromise a claim serve at least two functions. The first, and most obvious, is to enable the settlement of a dispute. The second, less obvious, but also important, is to provide an advantage in relation to costs in the event that the proceedings are not settled.[25] It may thus be seen that an offer to settle proceedings is a step taken, in part, for the purposes of achieving a particular result in the event the matter is determined by a judge.

24. There are also other, more specific, contexts in which Court-ordered mediation is a central part of the process by which Courts quell controversies. For example, the *Native Title Act* 1993 (Cth) provides that, save in limited circumstances, the Federal Court "must" refer applications to mediation.[26] Wide powers are conferred on the Court to give directions in relation to the conduct of the mediation,[27] and the mediator may even appear at a hearing by the Court if the Court considers that the mediator may be able to assist in relation to the proceeding.[28] The Court may direct the holding of conferences "to help in resolving any matter".[29] And the Court may, including on its own motion, adjourn proceedings to allow time for negotiations. The Court may

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24 *Federal Court Act* 1976 (Cth), s. 37N.

25 See, e.g., *Federal Court Rules* 2011 (Cth), r. 25.14; *Uniform Civil Procedure Rules* 2005 (NSW), rr. 42.14 and 42.15; *Supreme Court (General Civil Procedure) Rules* 2005 (Vic), r. 26.08; *Uniform Civil Procedure Rules* 1999 (Qld), r. 360; *Rules of the Supreme Court* 1971 (WA), O24A r. 10; *Supreme Court Civil Rules* 2006 (SA), r. 188; *Supreme Court Rules* 2000 (Tas), r. 289; *Calderbank v Calderbank* [1976] Fam 93; [1975] 3 All ER 333.

26 Section 86B.

27 Section 86B(5C).

28 Section 86BA.

29 Section 88.

determine questions of fact or law referred to it by the mediator.[30] Overall, therefore, it may thus be seen that the mediation is very much part of the process by which the *Court* works to resolve the dispute between the parties. Consistently with that close involvement, the mediator has same protection and immunity as a Justice of the High Court.[31]

25. The intimate connection of conduct in relation to settlements or proposed settlements and the conduct of proceedings in Court is further revealed by the involvement of Courts in approving or otherwise sanctioning, and in giving effect to, negotiated resolutions of disputes. Such involvement occurs in a wide variety of contexts, including the following:

(a) Representative proceedings may not be settled or discontinued without the approval of the Court.[32] On an application for approval, the Court will inquire into whether the overall settlement is a fair and reasonable compromise of the claims of the group members, and whether the internal distribution of the settlement sum is fair and reasonable.[33] The role the Court plays in doing so is "important and onerous".[34]

(b) In representative proceedings, a representative party may only settle his or her individual claim with the leave of the Court.[35] The grant or refusal of such leave may have significant consequences for the ongoing conduct of the proceedings (including whether they will be allowed to continue as a representative proceeding).[36]

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30 Sections 86D and 94H.

31 Section 94R.

32 See, e.g., *Federal Court of Australia Act* 1976 (Cth), s. 33V; *Civil Procedure Act* 2005 (NSW), s. 173; *Civil Procedure Act* 2010 (Vic), s. 33V.

33 See, e.g., *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250 at 258; *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 at [19]-[20]; *Haslam v Money for Living (Aust) Pty Ltd (Administrators Appointed)* [2007] FCA 897 at [20]; *Wepar Nominees Pty Ltd v Schofield (No 2)* [2014] FCA 225 at [15]; *Practice Note CM 17 – Representative Proceedings Commenced Under Part IVA of the Federal Court of Australia Act 1976*, at [11.2].

34 *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [8].

35 See, e.g., *Federal Court of Australia Act* 1976 (Cth), s. 33W; *Civil Procedure Act* 2005 (NSW), s. 174; *Civil Procedure Act* 2010 (Vic), s. 33W.

36 *Tongue v Tamworth City Council* (2004) 141 FCR 233 at [30]-[38].

(c) Proceedings commenced by or on behalf of a person under a legal incapacity (including a child) may not be settled except with the approval of the Court.[37] This will involve the Court determining whether the settlement is beneficial to the person under the legal incapacity.[38]

(d) The Federal Court may make orders which give effect to agreements in relation to proceedings under the *Native Title Act* 1993 (Cth) "if it appears to the Court to be appropriate to do so".[39] This requires the Court to be satisfied that the agreement has been reached freely and on an informed basis.[40]

(e) Parties to patent dispute proceedings may settle on terms that one or more patents are amended. In considering whether to give effect to that part of the settlement, the Court has a general discretion under the *Patent Act* 1900 (Cth), guided by the public interest, whether to allow or refuse such amendment.[41]

(f) Trustees frequently commence proceedings for the purpose of seeking judicial advice that they would be justified in settling a particular claim (or, conversely, in prosecuting or defending it).[42]

(g) Similarly, a Court-appointed liquidator of a company may not compromise a debt to the company if more than $100,000[43] without the approval of the Court (or the committee of inspection or resolution of the creditors).[44] The same

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37 See, e.g., *Federal Court Rules* 2011 (Cth), r. 9.70; *Civil Procedure Act* 2005 (NSW), s. 76; *Supreme Court (General Civil Procedure) Rules* 2005 (Vic), r. 15.08; *Public Trustee Act* 1978 (Qld), s. 59; *Rules of the Supreme Court* 1970 (WA), O24A rr. 10, 11; *Supreme Court Civil Rules* 2006 (SA), r. 257; *Supreme Court Rules* 2000 (Tas), r. 299.

38 *Re Ley's Will Trusts* [1964] 1 WLR 640 at 643; *Permanent Trustee Co Ltd v Mills* (2007) 71 NSWLR 1 at [29].

39 Sections 86F, 87 and 87A.

40 *Hughes (on behalf of the Eastern Guruma People) v Western Australia* [2007] FCA 365 at [9]; *Brown (on behalf of the Ngarla People) v Western Australia* [2007] FCA 1025 at [22].

41 *Novartis AG v Bausch & Lomb (Australia) Pty Ltd* (2004) 62 IPR 71 (FCA) at [14].

42 See, e.g., *Trustee Act* 1925 (NSW), s. 63; *Supreme Court (General Civil Procedure) Rules* (Vic), O 54; *Trusts Act* 1973 (Qld), s. 96; *Trustees Act* 1962 (WA), s. 92; *Trustee Act* 1936 (SA), s. 91; *Trustee Act* 1925 (ACT), s. 63; *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at [71]-[74].

43 See *Corporations Regulations* 2001 (Cth), reg. 5.4.02.

44 *Corporations Act* 2001 (Cth), ss. 477(2A), 477(2B).

applies to liquidators in a voluntary winding up.[45] The same may even apply in circumstances where the settlement does not involve a debt to a company within the meaning of s. 477(2A).[46] In exercising its discretion to provide its approval the Court "does not simply 'rubber stamp' whatever is put forward by a liquidator".[47] Liquidators and administrators may also seek directions from the Court in relation to compromising claims.[48]

(h) Proceedings may be brought seeking approval of a settlement in relation to a claim that has not yet been litigated by or against a person under a legal disability. The settlement of that claim can only be binding on the person if the Court approves the settlement.[49] Before approving a settlement, the Court must be satisfied that the settlement is reasonable and in the best interests of the person.[50]

(i) Where a settlement involves agreement that the parties will ask the Court to make particular orders by consent, the Court will always retain a discretion as to whether the make the orders sought.[51] As French J (as his Honour then was) observed in *ACCC v Real Estate Institute of Western Australia*:[52]

> "*Moreover the power of the Court to make orders is an exercise of power defined and conferred by public law. The Court, in exercising that power, does not merely give effect to the wishes of the parties. It exercises a public function and must have regard to the public interest in doing so. In consideration of the public interest, however, it must also weigh the desirability of non-litigious resolution of enforcement proceedings.*"

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45 *Corporations Act* 2001 (Cth), ss. 506(1A) and 511.

46 *Australian Securities and Investments Commission v Piggott Wood & Baker (a firm)* (2015) 104 ACSR 261 (FCA) at [34].

47 *Stewart, re Newtronics Pty Ltd* [2007] FCA 1375 at [26].

48 See ss. 447D, 479(3), 511, *Corporations Act* 2001 (Cth). And see generally *Re G B Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674.

49 See, e.g., *Civil Procedure Act* 2005 (NSW), s. 75.

50 *Yu Ge v River Island Clothing Pty Ltd* [2002] NSWSC 28.

51 *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia* (1999) 95 FCR 114.

52 (1999) 95 FCR 114 at [38].

At the very least, the Court will need to be satisfied that the orders sought are within power and appropriate.[53] In many categories of case the Court will need to be satisfied of some matter as a pre-condition to the exercise of the power to make an order by consent.[54]

(j) A particularly important example of the discretion that a Court retains in relation to the making of consent orders giving effect to a negotiated settlement is in the area of family law. Disputes of that nature may be resolved consensually in a variety of different ways, including by the making of consent orders.[55] In each case, however, the Court must be satisfied that it is appropriate that the order be made in the terms sought.

26. The considerations outlined above demonstrate that the encouragement, facilitation, approval, and effectuation of settlements are central aspects of the exercise of judicial power in quelling disputes. (Of course, the matters described above are limited to "formal" aspects of the interrelationship between the exercise of judicial power and the settlement of disputes. Needless to say, a range of informal pressures, exhortations, and indications also play a role.) As was observed in *D'Orta*, the aims of judicial power are "wider than, and more important than, the concerns of particular parties to the controversy in question, be they private persons, corporations, polities, or the community as personified in the Crown or represented by a Director of Public Prosecutions. ... [T]he community at large has a vital interest in the final quelling of that controversy".[56] It follows from this that the fact that a litigious dispute is quelled by, or by reason of, a negotiated settlement does not mean that the public interest in the finality of that resolution is not enlivened.

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53 *Telstra Corporation Ltd v Minister for Broadband, Communications and the Digital Economy* (2008) 166 FCR 64 at [43].

54 See, e.g., *Telstra Corporation Ltd v Minister for Broadband, Communications and the Digital Economy* (2008) 166 FCR 64 at [43]-[51] (before a consent order allowing an appeal will be made, the Court must be satisfied of the existence of appellable error); *Bartlett v Coomber* [2008] NSWCA 100 at [56], [58], [72] (before a consent order under s. 7 of the *Family Provision Act* 1982 (NSW), the Court must be satisfied that the pre-condition in s. 9(2) is satisfied).

55 See, e.g., *Family Law Act* 1975 (Cth), ss. 60CC(5), 65D, and 65DAA(6) (parenting orders); s. 74 (spousal maintenance); ss. 78 and 79 (declaration, and alteration, of property interests).

56 (2005) 223 CLR 1 at [32].

27. The Law Society thus submits that the immunity should be retained, in its present form, for the reasons given in *D'Orta*. The test for the application of the immunity, as stated in *Giannarelli* and *D'Orta*, appropriately reflects the "central and pervading tenet of the judicial system [that] controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances".[57]

*The Operation of the Immunity in Other Areas of Practice*

28. It is important to observe that neither the appellants nor the respondent submit that any distinction should be drawn between civil and criminal litigation (or any other categories of litigation) insofar as the existence or content of the immunity is concerned. With respect, that common position is correct, for the reasons given in *D'Orta* at [76]-[79].

29. Once it is recognized, however, that the immunity should apply indifferently to *all* types of litigation, the parties' focus on general civil litigation, although understandable given the particular facts of this case, is too narrow. The important role played by the immunity, and the consequences of its abolition, might be thought to appear more starkly in other fields of litigation, even if there is no conceptual difference between them.

30. That is to say, where an underlying dispute concerns (as here) an obligation to pay money, and the loss sought to be recovered by the negligence action is a monetary loss, it is easy to focus on the correlation or connection between the different monetary liabilities, and to minimize or ignore the significance of the exercise of judicial power in quelling the initial dispute.

31. Where the underlying dispute is of a non-monetary nature, however, it is less easy to ignore the centrality of the exercise of judicial power that is necessarily sought to be impugned. To take but the most obvious examples:

    (a) Actions in respect of the conduct of criminal litigation will, almost inevitably, involve a contention that a conviction or punishment imposed by a Court was wrong.

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[57] (2005) 223 CLR 1 at [34].

(b) Actions in respect of the conduct of family law litigation may involve a contention that an order concerning the custody or welfare of children was wrong.

(c) Actions in respect of the conduct of public law litigation may involve a contention that a failure to find a particular governmental decision or action unlawful was wrong.

32. In each case, the important role of the immunity in protecting the interests identified in *D'Orta* are, with respect, obvious. The suggestion that existing doctrines of abuse of process may serve as a sufficient protection of those interests is, with respect, flawed.

10 The decision of this Court in *Michael Wilson & Partners v Nicholls* demonstrates that there is no abuse of process merely by reason of the fact that different claims involve the same transactions and events.[58]

33. In the Law Society's submission, once the full spectrum of the circumstances calling for application of the immunity are considered, the reasons for its retention as expressed in *D'Orta* are irresistible.

**PART VI: ORAL ARGUMENT ESTIMATE**

34. The Law Society estimates that it will require no more than 20 minutes for the presentation of its submissions.

Dated: 19 October 2015

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58 (2011) 244 CLR 427 at [110].