HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

ANTHONY BOGAN & ANOR — APPLICANTS

AND

THE ESTATE OF PETER JOHN SMEDLEY (DECEASED) & ORS — RESPONDENTS

Bogan v The Estate of Peter John Smedley (Deceased)
[2025] HCA 7
Date of Hearing: 12 November 2024
Date of Judgment: 12 March 2025
M21/2024

ORDER

1. *The questions reserved for the consideration of the Court of Appeal of the Supreme Court of Victoria under s 17B(2) of the* Supreme Court Act 1986 *(Vic) and which have been removed into the High Court under s 40(2) of the* Judiciary Act 1903 *(Cth) by an order made on 7 March 2024 be answered as follows:*

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

   Answer: *Yes.*

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

(a) will the GCO made by the Supreme Court of Victoria on 3 May 2022 remain in force and be capable of being enforced by the Supreme Court of New South Wales, subject to any order of that Court?

Answer: No.

(b) if the GCO will remain in force, does the Supreme Court of New South Wales have power to vary or revoke the GCO?

Answer: Does not arise.

Question 3: Should this proceeding (S ECI 2020 03281) be transferred to the Supreme Court of New South Wales pursuant to s 1337H of the Corporations Act 2001 *(Cth), as sought in prayer 3 of the summons filed by the fifth defendant on 26 February 2021?*

Answer: No.

2. The respondents pay the applicants' costs of the proceeding in this Court, including the removal application.

Representation

J T Gleeson SC with S H Hartford Davis and M O Pulsford for the applicants (instructed by Banton Group)

T N Spencer Bruce SC with D P Farinha for the first to fourth respondents (instructed by Baker McKenzie)

P D Herzfeld SC with J L Roy and J G Wherrett for the fifth respondent (instructed by Ashurst Australia)

S P Donaghue KC, Solicitor-General of the Commonwealth, with S N Rajanayagam for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

CATCHWORDS

Bogan v The Estate of Peter John Smedley (Deceased)

Courts – State courts invested with federal jurisdiction – Powers – Exercise of powers – Where Supreme Court of Victoria uniquely empowered to make group costs order ("GCO") – Where s 1337H(2) of *Corporations Act 2001* (Cth) allows transferor court to transfer proceeding to another court if, having regard to interests of justice, it is more appropriate – Where s 1337P(2) of *Corporations Act* provides that if proceeding transferred then transferee court must deal with proceeding as if, subject to any order of transferee court, steps that had been taken for purposes of proceeding in transferor court, or similar steps, had been taken in transferee court – Where group proceeding commenced in Supreme Court of Victoria – Where plaintiffs applied for GCO – Where fifth defendant applied for transfer of group proceeding to Supreme Court of New South Wales – Where primary judge ordered transfer application be determined after GCO application – Where GCO made – Where considerable risk that group proceeding would not be able to continue without GCO – Whether fact of Supreme Court of Victoria having made GCO relevant to exercise of discretion under s 1337H(2) of *Corporations Act* to transfer proceeding – Whether GCO will remain in force and be capable of being enforced by Supreme Court of New South Wales if proceeding transferred to Supreme Court of New South Wales – Whether Supreme Court of New South Wales has power to revoke or vary GCO if it remains in force – Whether group proceeding should be transferred to Supreme Court of New South Wales pursuant to s 1337H of *Corporations Act*.

Words and phrases – "access to justice", "appropriate forum", "class action", "connecting factors", "contingency fee", "discretion", "federal jurisdiction", "group costs order", "group proceeding", "interests of justice", "jurisdiction", "removal", "similar steps", "statutory fiction", "steps", "stultification", "transfer", "transfer application", "transferee court", "transferor court".

Corporations Act 2001 (Cth), Pt 9.6A, Div 1.
Judiciary Act 1903 (Cth), s 79.
Civil Procedure Act 2005 (NSW), Pt 10.
Legal Profession Uniform Law (NSW), Pt 4.3, Div 4.
Legal Profession Uniform Law (Vic), Pt 4.3, Div 4.
Supreme Court Act 1986 (Vic), s 33ZDA.

1 GAGELER CJ, GORDON, GLEESON, JAGOT AND BEECH-JONES JJ. The charging by a law practice of a contingency fee, being an amount of legal costs calculated as a proportion of the amount recovered by a client in a proceeding, is prohibited in Victoria as it is in New South Wales and in other States and Territories.[1] Uniquely, the *Supreme Court Act 1986* (Vic) ("the Supreme Court Act") creates an exception to that prohibition in so far as it empowers the Supreme Court of Victoria to make a "group costs order" ("GCO") in a group proceeding commenced under Pt 4A of the Supreme Court Act. A GCO is an order that the legal costs payable to the law practice representing the plaintiff and group members in a group proceeding be calculated as a specified percentage of the amount of any award or settlement recovered in the proceeding and that liability for payment of those legal costs be shared amongst the plaintiff and group members.

2 The question now to be determined is whether the making by the Supreme Court of Victoria of a GCO in a group proceeding commenced under Pt 4A of the Supreme Court Act in a matter arising under the *Corporations Act 2001* (Cth) ("the Corporations Act") or the *Australian Securities and Investments Commission Act 2001* (Cth) ("the ASIC Act") is relevant to the Supreme Court of Victoria considering the exercise of its power to transfer the proceeding to the Supreme Court of New South Wales under s 1337H(2) of the Corporations Act.

3 The answer is that the making of a GCO by the Supreme Court of Victoria in a group proceeding is relevant to the Court's consideration of the exercise of the power conferred on it by s 1337H(2) of the Corporations Act. The fact that the Supreme Court of Victoria has made a GCO in the present group proceeding ("the Arrium class action") weighs decisively against transfer of the proceeding to the Supreme Court of New South Wales where the GCO could not operate, giving rise to a considerable risk that the proceeding would not be able to continue as it could not otherwise be viably funded and that the claims made in the proceeding would have to be abandoned.

4 The reasons for that answer are now explained.

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

Jurisdiction and transfer of proceedings in civil matters arising under the Corporations legislation

5 Enactment of the Corporations Act and the ASIC Act by the Commonwealth Parliament was accompanied by references of power by the Parliaments of referring States, which included Victoria and New South Wales.[2] Those references of power were designed to facilitate exercise by the Commonwealth Parliament of legislative power under s 51(xxxvii) of the Constitution. The Corporations Act makes clear, however, that its operation in the referring States is based foremost on the legislative powers that the Commonwealth Parliament has apart from s 51(xxxvii) of the Constitution.[3]

6 Together with associated rules of court, the Corporations Act and the ASIC Act are referred to in the Corporations Act as "the Corporations legislation".[4]

7 Part 9.6A of the Corporations Act is headed "Jurisdiction and procedure of Courts". Division 1 of Pt 9.6A, headed "Civil jurisdiction", deals with the jurisdiction of courts in respect of civil matters arising under the Corporations legislation[5] and operates to the exclusion of the whole of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) ("the Cross-vesting Act") and of s 39B of the *Judiciary Act 1903* (Cth) ("the Judiciary Act").[6]

8 Subdivision B of Div 1 of Pt 9.6A, headed "Conferral of jurisdiction", provides for the conferral or investiture of federal jurisdiction with respect to civil matters arising under the Corporations legislation. Pursuant to s 77(i) of the Constitution, s 1337B(1) confers federal jurisdiction with respect to such matters on the Federal Court of Australia. Pursuant to s 77(iii) of the Constitution, subject

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2 See *Corporations (Commonwealth Powers) Act 2001* (NSW); *Corporations (Commonwealth Powers) Act 2001* (Vic); *Corporations (Commonwealth Powers) Act 2001* (SA); *Corporations (Commonwealth Powers) Act 2001* (Qld); *Corporations (Commonwealth Powers) Act 2001* (WA); *Corporations (Commonwealth Powers) Act 2001* (Tas).

3 Section 3(1) of the Corporations Act.

4 See s 1337A(1)(a) and s 9 (definition of "Corporations legislation") of the Corporations Act.

5 Section 1337A(1)(a) of the Corporations Act.

6 Section 1337A(2) of the Corporations Act.

to an immaterial exception, s 1337B(2) relevantly invests federal jurisdiction with respect to such matters in the Supreme Court of each referring State. Pursuant to s 51(xxxix) of the Constitution and apart from s 51(xxxvii) of the Constitution, s 1337G requires courts having jurisdiction in civil matters arising under the Corporations legislation to act in aid of, and be auxiliary to, each other in all those matters.

9 Subdivision C of Div 1 of Pt 9.6A is headed "Transfer of proceedings". Pursuant again to s 51(xxxix) of the Constitution and again apart from s 51(xxxvii) of the Constitution, provision is made in subdiv C for the transfer between courts having jurisdiction under subdiv B both of proceedings with respect to civil matters and of applications in such proceedings arising under the Corporations legislation. An example of such an application is an application under s 471B for leave to proceed against a corporation that has become insolvent.

10 Section 1337H is within subdiv C of Div 1 of Pt 9.6A. Section 1337H(6) makes clear that nothing in s 1337H confers on any court, whether a transferor court or a transferee court, jurisdiction that the court would not otherwise have.

11 The relevant provisions of s 1337H are s 1337H(1) and (2). In so far as relevant, they provide:

> "(1) This section applies to a proceeding (the ***relevant proceeding***) in a court (the ***transferor court***) if:
>
> (a) the relevant proceeding is:
>
> (i) a proceeding with respect to a civil matter arising under the Corporations legislation; ...
>
> (ii) … and
>
> (b) the transferor court is:
>
> (i) the Federal Court; or
>
> (ii) a State or Territory Supreme Court.
>
> (2) … if it appears to the transferor court that, having regard to the interests of justice, it is more appropriate for:
>
> (a) the relevant proceeding; or

(b) an application in the relevant proceeding;

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

12 Section 1337M permits a court to decide under s 1337H(2) to transfer a proceeding or an application in a proceeding either on the application of any party made at any stage of the relevant proceeding or of the court's own motion. Section 1337L specifies three considerations to which a court "must have regard" in deciding whether or not to transfer the relevant proceeding or application under s 1337H(2). Those non-exhaustive mandatory considerations are: the principal place of business of any body corporate concerned in the proceeding or application; the place or places where the events the subject of the proceeding or application took place; and the other courts that have jurisdiction to deal with the proceeding or application.

13 Transfer of a proceeding under s 1337H(2) triggers the operation of each of s 1337N, s 1337P(2) and s 1337Q.

14 Section 1337N requires the proper officer of the transferor court to transmit to the transferee court all documents filed in the transferor court in respect of the proceeding or application. Section 1337N further requires the transferee court to proceed "as if": the transferred proceeding had been originally instituted in the transferee court; and the same proceedings had been taken in the transferee court as were taken in the transferor court.

15 Section 1337P(2), the construction and potential application of which are at the centre of the dispute concerning the operation of s 1337H(2) in the circumstances of the Arrium class action, provides:

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

16 Section 1337Q operates to confirm that a legal practitioner who is entitled to practise in the transferor court has the entitlement conferred by s 55B of the

Judiciary Act to practise in the transferee court in relation to the transferred proceeding.

17 Section 1337R also needs to be mentioned. By operation of s 1337R, no appeal lies from a decision of a court in relation to the transfer of a proceeding. The operation of s 1337R as an "exception" within the meaning of s 73 of the Constitution to preclude an appeal to this Court under s 73 of the Constitution from a decision of a transferor court under s 1337H(2) explains aspects of the unusual but not unprecedented procedural history of the Arrium class action recounted below.

Group and representative proceedings in civil matters arising under the Corporations legislation

18 Division 1 of Pt 9.6A of the Corporations Act has been observed "not to impose a direct federal and universal procedural regime" but instead to recognise the concurrent operation of s 79 of the Judiciary Act.[7] By operation of s 79 of the Judiciary Act, "except as otherwise provided" by the Constitution or a Commonwealth law, the text of a State law including a State law relating to procedure, which could not apply of its own force to govern the exercise of federal jurisdiction by a court, is picked up and applied as a Commonwealth law to govern the exercise of federal jurisdiction by a court in that State.[8]

19 The State laws relating to procedure, the texts of which are picked up and applied as Commonwealth laws by s 79 of the Judiciary Act to govern the exercise of federal jurisdiction in civil matters arising under the Corporations legislation, include Pt 4A of the Supreme Court Act and Pt 10 of the *Civil Procedure Act 2005* (NSW) ("the Civil Procedure Act"). These respectively provide for the commencement and regulation of the conduct of group proceedings in the Supreme Court of Victoria and of representative proceedings in the Supreme Court of New South Wales.

20 Part 4A of the Supreme Court Act and Pt 10 of the Civil Procedure Act substantially mirror Pt IVA of the *Federal Court of Australia Act 1976* (Cth) ("the Federal Court Act"), which provides for the commencement and regulation of the conduct of representative proceedings in the Federal Court, except relevantly for

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7 *Gordon v Tolcher* (2006) 231 CLR 334 at 345 [29], 348 [40]; *Grant Samuel Corporate Finance Pty Ltd v Fletcher* (2015) 254 CLR 477 at 483 [7].

8 *Rizeq v Western Australia* (2017) 262 CLR 1 at 26 [61], [63], 32-33 [81].

the provision that has been made in Pt 4A of the Supreme Court Act since 1 July 2020[9] for the Supreme Court of Victoria to make a GCO.

21 Like s 43(1A) of the Federal Court Act and s 181 of the Civil Procedure Act, which operate to prohibit the Federal Court and the Supreme Court of New South Wales from ordering costs against a person on whose behalf a representative proceeding has been commenced under Pt IVA of the Federal Court Act and Pt 10 of the Civil Procedure Act respectively, s 33ZD(1) of the Supreme Court Act operates to prohibit the Supreme Court of Victoria from ordering costs against a group member on whose behalf a group proceeding has been commenced under Pt 4A of the Supreme Court Act. Since 1 July 2020, however, s 33ZD(2) of the Supreme Court Act has provided that the prohibition in s 33ZD(1) is subject to s 33ZDA.

22 Section 33ZDA provides:

> "(1) On application by the plaintiff in any group proceeding, the Court, if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding, may make an order—
>
> (a) that the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being the percentage set out in the order; and
>
> (b) that liability for payment of the legal costs must be shared among the plaintiff and all group members.
>
> (2) If a group costs order is made—
>
> (a) the law practice representing the plaintiff and group members is liable to pay any costs payable to the defendant in the proceeding; and
>
> (b) the law practice representing the plaintiff and group members must give any security for the costs of the defendant in the proceeding that the Court may order the plaintiff to give.

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9 See *Justice Legislation Miscellaneous Amendments Act 2020* (Vic).

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

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

(5) In this section—

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

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

The general prohibition of contingency fees

23 Like the *Legal Profession Uniform Law* (NSW),[10] the *Legal Profession Uniform Law* (Vic)[11] defines "legal costs" to include "amounts that a person has been or may be charged by, or is or may become liable to pay to, a law practice for the provision of legal services"[12] and defines "client" to include "a person to whom or for whom legal services are provided".[13]

24 Division 4 of Pt 4.3 of each of the *Legal Profession Uniform Law* (Vic) and the *Legal Profession Uniform Law* (NSW) regulates a law practice entering into a costs agreement, enforceable as a contract, with a client or with a person under a legal obligation to pay the legal costs for legal services provided to a client.[14] Section 183 of each of the *Legal Profession Uniform Law* (Vic) and the *Legal Profession Uniform Law* (NSW) provides:

"(1) A law practice must not enter into a costs agreement under which the amount payable to the law practice, or any part of that amount, is

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10 See s 4 of the *Legal Profession Uniform Law Application Act 2014* (NSW).

11 Schedule 1 to the *Legal Profession Uniform Law Application Act 2014* (Vic), given force by s 4 of the *Legal Profession Uniform Law Application Act 2014* (Vic).

12 Section 6(1) (definition of "legal costs") of the *Legal Profession Uniform Law* (Vic).

13 Section 6(1) (definition of "client") of the *Legal Profession Uniform Law* (Vic).

14 See s 180.

calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates.

Civil penalty: 100 penalty units.

...

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

The Arrium class action

25 The Arrium class action is a group proceeding which was commenced in the Supreme Court of Victoria on 14 August 2020. The plaintiffs in the Arrium class action are Mr Bogan and Mr Walton, both of whom reside in New South Wales. They bring the proceeding on their own behalf and on behalf of members of a group defined as persons who or which acquired an interest in fully paid ordinary shares in Arrium Ltd ("Arrium") during the period from 19 August 2014 to 4 April 2016 ("the relevant period") and who or which have suffered loss or damage by reason of the alleged conduct of the defendants irrespective of where those persons were or are resident ("the represented class"). Members of the represented class are located throughout Australia and overseas.

26 Arrium, an ASX-listed company which had its principal place of business in Sydney during the relevant period, is now in liquidation. The liquidators and their legal representatives are based in Melbourne and in Sydney. Electronic copies of Arrium's books and records are managed by the liquidator's forensic technology team based in Sydney.

27 There are five defendants to the Arrium class action. The first to fourth defendants ("the director defendants") were directors of Arrium during the relevant period. The fifth defendant, KPMG, was retained by Arrium during the relevant period to audit its financial accounts for the financial years ended 30 June 2014 and 30 June 2015 and to review its financial accounts for the half year ended 31 December 2014. Two of the director defendants were or are resident in Victoria; a third resides in Queensland; the other in Western Australia. KPMG has offices in Sydney and Melbourne. All defendants are represented by national law practices each of which has offices in Sydney and Melbourne.

28 In the Arrium class action, the plaintiffs allege that conduct of each defendant during the relevant period contravened provisions of the Corporations Act,[15] the ASIC Act,[16] and the *Australian Consumer Law*.[17] The allegations concern financial statements published by Arrium, comprising its full year results for the financial years ended 30 June 2014 and 30 June 2015 and its half year results for the half year ended 31 December 2014, together with a capital raising conducted by Arrium in 2014, and centre around the adequacy of impairments and the carrying value of assets.

29 The contravening conduct is alleged to have occurred mainly in Sydney. The former Chief Financial Officer and the former Group Financial Controller of Arrium, who are likely to be key witnesses in the Arrium class action, both reside in New South Wales.

30 The law practice representing the plaintiffs in the Arrium class action is The Banton Group Pty Ltd ("Banton Group"), with whom the plaintiffs have entered into costs agreements in accordance with the *Legal Profession Uniform Law* (NSW). Banton Group has its principal place of business in Sydney and has an office in Melbourne.

31 Funding the plaintiffs in the Arrium class action is Equite Capital No 1 Pty Ltd ("the Funder"), which is registered in Singapore. The Funder has an agent which is registered in Singapore but a director of the agent is based in Sydney. The Funder has entered litigation funding agreements with the plaintiffs and with more than 200 members of the represented class located within Australia and overseas. The litigation funding agreements are expressed to be governed by the law of New South Wales.

32 The plaintiffs, Banton Group and the Funder originally intended to commence the Arrium class action as a representative proceeding in the Supreme Court of New South Wales under Pt 10 of the Civil Procedure Act. They later chose to commence it as a group proceeding in the Supreme Court of Victoria under Pt 4A of the Supreme Court Act. The inference to be drawn is that they did

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15 Sections 1041H and 1041E.

16 Section 12DA(1).

17 Section 18.

so in order to avail themselves of the possibility of a GCO being made under s 33ZDA of the Supreme Court Act.

33 Having commenced the Arrium class action as a group proceeding in the Supreme Court of Victoria on 14 August 2020, the plaintiffs on 2 February 2021 applied by summons for a GCO ("the GCO application"). By summons filed on 26 February 2021, KPMG applied for transfer of the Arrium class action to the Supreme Court of New South Wales ("the transfer application"). On 31 March 2021, Nichols J ordered that the transfer application be determined after the GCO application. KPMG neither asked for reasons for nor sought to appeal from that procedural order.

34 The GCO application was heard by Dixon J on 22 February 2022 and was determined by him on 26 April 2022.[18]

35 On 3 May 2022, Dixon J gave effect to his determination of the GCO application by ordering that the legal costs payable to Banton Group be 40% of the amount of any award or settlement that may be recovered in the Arrium class action and that liability for payment of those legal costs be shared among the plaintiffs and all group members ("the Arrium class action GCO"). His Honour made the Arrium class action GCO conditional on the Funder terminating its existing litigation funding agreements with the plaintiffs and with group members and undertaking not to seek to enforce any rights it may have accrued under them. The date for compliance with that condition has since been extended until after the final determination of the transfer application. Neither KPMG nor the director defendants sought to appeal from the Arrium class action GCO.

36 On 7 March 2023, on the application of KPMG, Nichols J ordered pursuant to s 17B(2) of the Supreme Court Act that certain questions arising on the transfer application in the Arrium class action be reserved for the consideration of the Court of Appeal of the Supreme Court of Victoria.

37 Adjusted to the nomenclature adopted in these reasons, the questions reserved for the consideration of the Court of Appeal as framed in the order made by Nichols J were as follows:

(1) In exercising the discretion to transfer proceedings to another court under s 1337H(2) of the Corporations Act, is the fact that the Supreme Court of

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

Victoria has made a GCO under s 33ZDA of the Supreme Court Act relevant?

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

(a) will the Arrium class action GCO remain in force and be capable of being enforced by the Supreme Court of New South Wales, subject to any order of that Court; and

(b) if the Arrium class action GCO will remain in force, does the Supreme Court of New South Wales have power to vary or revoke the GCO?

(3) Should the proceeding be transferred to the Supreme Court of New South Wales pursuant to s 1337H of the Corporations Act, as sought in the summons filed by KPMG?

38 The Court of Appeal (Ferguson CJ, Niall and Macaulay JJA) heard argument on the questions reserved on 27 July 2023 and delivered unanimous reasons for judgment on 26 October 2023 concluding that the questions reserved should be answered: (1) Yes; (2)(a) No; (2)(b) Does not arise; and (3) No.[19] To enable an application for removal to be made to this Court, the Court of Appeal refrained from making orders which embodied those answers.

39 On the application of KPMG, this Court on 7 March 2024 ordered that the whole of the cause pending in the Court of Appeal, being the questions reserved for the consideration of the Court of Appeal, be removed into this Court under s 40(2) of the Judiciary Act.

40 The cause having been removed, the parties have in this Court been styled applicants and respondents but can conveniently continue to be referred to as plaintiffs and defendants. The hearing before this Court was delayed by the plaintiffs choosing to raise a range of novel constitutional issues which had not been raised before the Court of Appeal, prompting intervention by the Attorney-General of the Commonwealth under s 78A of the Judiciary Act. In the result, it will not be necessary to address any of those novel constitutional issues.

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19 *Bogan v Estate of Smedley (Deceased)* (2023) 72 VR 394 at 424 [129], 428 [158], 432 [175].

41 The hearing of the cause removed into this Court ultimately proceeded on 12 November 2024 by reference to the same statement of agreed facts as was before the Court of Appeal on 27 July 2023. In addition to the facts which have already been recounted, those agreed facts include the following evaluative conclusions which were reached by Dixon J in determining the GCO application:[20]

- the Arrium class action "is complex, difficult and likely to consume time and resources" and "[a] successful outcome for the plaintiffs and group members is attended by risk, not just in terms of establishing liability and proving losses but also in terms of recovery and of any judgment that might be won";

- "[i]n the absence of a GCO, there is a considerable risk, indeed a probability, that the Funder … will not continue to fund the proceeding";

- "[a]n alternate funder is not a realistic prospect";

- "[i]f the proceeding is not viably funded, the plaintiffs will be unable to continue with [the Arrium class action] and it is probable that [the Arrium class action] will terminate without adjudication or other resolution on the merits"; and

- "[j]ustice cannot be done in [the Arrium class action] if the plaintiffs and group members are not able to pursue their claims through [the Arrium class action] and must abandon them".

42 For completeness, it should be noted that the agreed facts refer to other proceedings relating to Arrium which have been brought in the Supreme Court of New South Wales. They include proceedings brought by the liquidators of Arrium, when formerly administrators, to obtain the production of documents and to conduct examinations about the examinable affairs of Arrium as well as proceedings between other parties[21] which raised legal and factual issues overlapping with some issues in the Arrium class action, all of which have now been finalised. They also include an ongoing proceeding brought by Mr Bogan and Mr Walton, to which the decision of this Court in *Walton v ACN 004 410 833 Ltd*

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20 *Bogan v Estate of Smedley (Deceased)* (2023) 72 VR 394 at 403-404 [35], referring to *Bogan v The Estate of Peter John Smedley (Deceased)* [2022] VSC 201 at [105].

21 See *Anchorage Capital Master Offshore Ltd v Sparkes* (2023) 111 NSWLR 304.

(formerly Arrium Ltd) (In liq)[22] related, to obtain orders for the examination of a former director of Arrium and for production of documents previously produced by KPMG.

The issues in this Court

43 The whole of the cause pending in the Court of Appeal having been removed into this Court under s 40(2) of the Judiciary Act, it is for this Court to answer the questions that have been reserved in the exercise of the original jurisdiction conferred on it under s 76(ii) of the Constitution by s 40(2) of the Judiciary Act to hear and determine the cause removed.[23] In the exercise of that original jurisdiction, it is incumbent on this Court to consider for itself the correctness of the answers proposed by the Court of Appeal.[24]

44 Limitation of the jurisdiction of this Court to the hearing and determination of the questions that have been reserved and removed means that one argument put to this Court by KPMG on the hearing of the cause removed is simply not open to be entertained. The inadmissible argument is that the transfer application should have been determined before the GCO application. Had KPMG wanted to pursue such an argument, it could and should have sought to appeal to the Court of Appeal from the procedural order made by Nichols J on 31 March 2021 which resulted in the GCO application being heard and determined first by Dixon J. KPMG did not adopt that course and the opportunity to do so has long passed. The questions reserved were framed by Nichols J on 7 March 2023, and must now be determined by this Court, against the background of the GCO application having in fact been determined and the Arrium class action GCO having in fact been made.

45 Before this Court, it was common ground between the parties and the Attorney-General of the Commonwealth that the Arrium class action GCO was an order of a nature which the Supreme Court of New South Wales has no power to make.

46 Before this Court, it was also common ground that the Court of Appeal was correct to observe that the Arrium class action GCO, having regard to the form of

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22 (2022) 275 CLR 508.

23 *Attorney-General (NSW) v Commonwealth Savings Bank of Australia* (1986) 160 CLR 315 at 324-325.

24 *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 247, 256, 269, 281.

the order and the legislative context in which it was made, operates in its terms only in respect of the Arrium class action as constituted as a group proceeding in the Supreme Court of Victoria with the consequence that the Arrium class action GCO would cease to operate in its terms were the proceeding to be transferred to the Supreme Court of New South Wales.[25] The plaintiffs, KPMG and the Attorney-General were agreed that the Arrium class action GCO could have force and effect were the Arrium class action transferred to the Supreme Court of New South Wales only if s 1337P(2) of the Corporations Act would operate to give it that force and effect.

47 The plaintiffs contended in argument in this Court that the absence of power on the part of the Supreme Court of New South Wales to make the Arrium class action GCO means that the Supreme Court of New South Wales cannot meet the description in s 1337H(2) of the Corporations Act of "another court that has jurisdiction in the matters for determination in the ... proceeding" in the Supreme Court of Victoria and so cannot be a court to which the Arrium class action can be transferred regardless of the "interests of justice". That contention is readily rejected. Within the context of Div 1 of Pt 9.6A of the Corporations Act, there is no basis for construing the terms "jurisdiction" and "matters" in s 1337H(2) other than according to their constitutional signification. Jurisdiction in a matter or matters for determination in a proceeding is authority to decide the justiciable controversy or justiciable controversies between the parties to the proceeding; it is not power to make an order or orders in a proceeding.[26] The jurisdiction which the Supreme Court of New South Wales has in the matter or matters for determination in the proceeding in the Supreme Court of Victoria is the jurisdiction that is conferred on both Supreme Courts in identical terms by s 1337B(2) of the Corporations Act.

48 In this Court, as in the Court of Appeal, issue was otherwise joined between the parties both as to whether s 1337P(2) of the Corporations Act would operate to give the Arrium class action GCO force and effect were the Arrium class action transferred to the Supreme Court of New South Wales and, depending in part but not entirely on whether s 1337P(2) would so operate, as to the relevance of the

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25 *Bogan v Estate of Smedley (Deceased)* (2023) 72 VR 394 at 410 [60], 424 [132]. See also s 33ZDA and s 3(1) (definitions of "Court", "proceeding") of the Supreme Court Act and s 38 (definition of "Supreme Court") of the *Interpretation of Legislation Act 1984* (Vic).

26 *Rizeq v Western Australia* (2017) 262 CLR 1 at 34 [84]-[85].

Arrium class action GCO to the evaluation of the interests of justice for the purpose of s 1337H(2) of the Corporations Act.

49 KPMG argued, with the support of the Attorney-General, that s 1337P(2), on its proper construction, would operate to give the Arrium class action GCO force and effect if the Arrium class action were transferred to the Supreme Court of New South Wales. The consequence, according to the Attorney-General, is that the fact of the Arrium class action GCO having been made is to be treated as a neutral consideration in the evaluation of the interests of justice for the purpose of s 1337H(2) as the GCO would continue to have force and effect whether or not the Arrium class action is transferred from the Supreme Court of Victoria. KPMG and the director defendants went further than the Attorney-General in arguing that the Arrium class action GCO is wholly irrelevant to an evaluation of the interests of justice for the purpose of s 1337H(2). Even if s 1337P(2) would not operate to give the Arrium class action GCO force or effect were the Arrium class action transferred to the Supreme Court of New South Wales, they argued, the fact of the GCO having been made in the Supreme Court of Victoria can have no bearing on the interests of justice.

50 The plaintiffs argued that the Court of Appeal was correct to conclude that s 1337P(2), on its proper construction, would not operate to give the GCO continuing effect were the Arrium class action transferred to the Supreme Court of New South Wales.[27] The plaintiffs further argued that the Court of Appeal was correct to consider that the Arrium class action GCO is relevant to an evaluation of the interests of justice for the purpose of s 1337H(2)[28] and was correct to conclude that the GCO weighed decisively against transfer being in the interests of justice given the agreed facts that there is a considerable risk that the Arrium class action would not be able to continue in the absence of the GCO with the result that the claims of the plaintiffs and group members would have to be abandoned.[29]

51 Issue having been so joined in this Court, it is appropriate to depart from the sequence of the questions reserved and to consider whether s 1337P(2) would operate to give the GCO continuing legal force and effect were the Arrium class

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27 *Bogan v Estate of Smedley (Deceased)* (2023) 72 VR 394 at 428 [156].

28 *Bogan v Estate of Smedley (Deceased)* (2023) 72 VR 394 at 423-424 [124]-[125].

29 *Bogan v Estate of Smedley (Deceased)* (2023) 72 VR 394 at 431-432 [170]-[174].

action transferred to the Supreme Court of New South Wales before considering the interests of justice for the purpose of s 1337H(2).

The operation of s 1337P(2) of the Corporations Act

52 Section 1337P(2) of the Corporations Act, the text of which has already been set out in full,[30] is engaged upon the transfer under s 1337H(2) of a proceeding with respect to a civil matter arising under the Corporations legislation from the transferor court having jurisdiction under s 1337B(1) or (2) to a transferee court also having jurisdiction under s 1337B(1) or (2). Where and when it is so engaged, s 1337P(2) stipulates that "the transferee court must deal with the proceeding as if, subject to any order of the transferee court, the steps that had been taken for the purposes of the proceeding in the transferor court (including the making of an order), or similar steps, had been taken in the transferee court".

53 Important to the construction of s 1337P(2) are three features of the context of Div 1 of Pt 9.6A of the Corporations Act to which reference has earlier been made. The first is the federal jurisdiction that the transferor court and the transferee court must both have under s 1337B(1) or (2) in the matter or matters for determination in the proceeding for the transferor court to have transferred the proceeding to the transferee court under s 1337H(2). The second is the disparate procedural powers which the transferor court and the transferee court can have in the exercise of that common federal jurisdiction through the operation of s 79 of the Judiciary Act picking up and applying the texts of different State laws. The third is the requirement of s 1337N that the transferee court is to proceed "as if" the transferred proceeding "had been originally instituted in the [transferee] court".

54 Plainly enough, s 1337P(2) is not a conferral of power on the transferee court. Section 1337P(2) is a legislative direction to the transferee court as to how that court is to deal with the proceeding that has been transferred to it in the exercise of such powers as are otherwise conferred on it including through the operation of s 79 of the Judiciary Act.

55 The legislative direction in s 1337P(2) operates through the creation of a statutory fiction, connoted by the expression "as if".[31] To the statutory fiction

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30 See [15] above.

31 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 203 [115]; *Williams v Wreck Bay Aboriginal Community Council* (2019) 266 CLR 499 at 535 [101]; *H Lundbeck A/S v Sandoz Pty Ltd* (2022) 276 CLR 170 at 185 [26].

created by s 1337N requiring the transferee court to treat the transferred proceeding as if it had been originally instituted in the transferee court, s 1337P(2) adds a further statutory fiction which requires the transferee court to treat steps which were in fact taken for the purposes of the proceeding in the transferor court as if they were steps or similar steps taken in the transferee court.

56 By means of that further fiction, an order which was in fact made by the transferor court in the transferred proceeding is required to be treated as if it were an order or similar order that was made by the transferee court for the purpose of the transferee court making such further orders as the transferee court has power to make in relation to the transferred proceeding including by way of revocation, variation or enforcement of the order or similar order in question.

57 Like any other statutory fiction, that created by s 1337P(2) "cannot be taken to have a legal operation beyond that required to achieve the object of its enactment".[32] The object of s 1337P(2) is to allow the transferee court to exercise jurisdiction in the transferred proceeding without the transferee court needing to retake steps which have in fact been taken by the transferor court and which the transferee court might itself have taken had the proceeding in fact been instituted in the transferee court.

58 The acknowledgement in s 1337P(2) that steps in fact taken in the transferor court need not be treated as the same steps but can be treated as "similar steps" taken in the transferee court indicates that an order made by the transferor court that is to be treated as if it had been made by the transferee court need not be identical to an order the transferee court could have made had the transferred proceeding in fact been instituted in the transferee court, provided that it is of a similar nature to an order that the transferee court could have made had the transferred proceeding been so instituted.

59 Importantly, the same acknowledgement in s 1337P(2) also indicates that an order made by the transferor court which is not of a nature similar to an order the transferee court could have made had the proceeding been so instituted cannot be the subject of the fiction created by the provision.

60 What KPMG and the Attorney-General urged to be the "plain meaning" of s 1337P(2) – taking its reference to "the steps taken" to mean "all steps taken" –

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32 *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430 at 447 [51]. See also *Vunilagi v The Queen* (2023) 97 ALJR 627 at 645 [71]; 411 ALR 224 at 240.

fails adequately to account for that textual indication as to the limits of the fiction it creates. As the Court of Appeal observed, "[i]f every step that had been taken in one court is required to be treated as a step taken in the second court, there would be no need to refer to the notion of similar steps".[33]

61 Reliance on the so-called "plain meaning", moreover, would lead to a contradiction between the fiction created by s 1337P(2) and the fiction created by s 1337N. On the one hand, the transferee court would be required to proceed as if the transferred proceeding had been originally instituted in the transferee court. On the other hand, the transferee court could be required to proceed as if an order had been made in the transferred proceeding that could not have been made if the transferred proceeding had been originally instituted in the transferee court.

62 Added to that contradiction would then be the anomaly of the transferee court being required to treat as its own, and potentially to enforce, an order which it could never have made and which it might even have been prohibited from making. Taking the circumstances of the Arrium class action as an example, the so-called "plain meaning" would require the Supreme Court of New South Wales as the transferee court to treat the Arrium class action GCO as if it had been an order made by the Supreme Court of New South Wales, and so potentially to enforce the Arrium class action GCO against members of the represented class, despite the making of such an order against members of the represented class being prohibited by s 181 of the Civil Procedure Act.

63 Purpose, text, context and coherence therefore combine to compel rejection of the construction of s 1337P(2) of the Corporations Act advanced by KPMG and the Attorney-General. To be preferred is a construction which aligns with that advanced by the plaintiffs and adopted by the Court of Appeal.

64 On the proper construction of s 1337P(2) of the Corporations Act, the steps taken for the purposes of the transferred proceeding in the transferor court that are to be treated as having been taken in the transferee court are limited to those of a nature that could have been taken in the transferee court had the transferred proceeding been originally instituted in the transferee court. The orders made by the transferor court that are to be treated as having been made by the transferee court are accordingly limited to orders of a nature that could have been made by the transferee court had the transferred proceeding been originally instituted in the

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33 *Bogan v Estate of Smedley (Deceased)* (2023) 72 VR 394 at 426 [142].

transferee court. That is to say, the orders are limited to orders of a nature that the transferee court has power to make.

65 Legislative history confirms the appropriateness of that construction. The text of s 1337N reflects the original text of s 41 of the Judiciary Act, which, as enacted in 1903, provided that upon a cause being removed from a State court into the High Court under s 40 of the Judiciary Act, "the High Court shall proceed therein as if the cause had been originally commenced in that Court and as if the same proceedings had been taken in the cause in the High Court as had been taken therein in the Court of the State prior to its removal, but so that all subsequent proceedings shall be according to the course and practice of the High Court". Section 44(d) of the Judiciary Act added that "all injunctions orders and other proceedings granted made or taken in the cause before the removal shall remain in full force and effect until the High Court otherwise orders". Both of those sections of the Judiciary Act were modelled on provisions of an earlier Act of Congress which provided for the removal of causes from State courts into circuit courts of the United States.[34] Despite its unqualified language, the provisions of the earlier Act of Congress which were together the progenitor of s 44(d) have been[35] and have continued to be[36] interpreted by the Supreme Court of the United States as giving no force or effect to an order of a State court which a circuit court had no power to make.

66 The conclusion of the Court of Appeal that s 1337P(2) of the Corporations Act, on its proper construction, would not operate to give legal force to the Arrium class action GCO were the Arrium class action transferred to the Supreme Court of New South Wales was therefore correct. The evaluation of the interests of justice for the purpose of s 1337H(2) of the Corporations Act appropriately proceeds upon an acceptance of that conclusion.

The interests of justice for the purpose of s 1337H(2) of the Corporations Act

67 The argument of KPMG and the director defendants that the Arrium class action GCO is irrelevant to an evaluation of the interests of justice started with an attempt to equate the operation of s 1337H(2) of the Corporations Act with the operation of s 5(2)(b)(iii) of the Cross-vesting Act considered by this Court in *BHP*

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34 Act of 3 March 1875, 18 Stat 470, ss 4 and 6.

35 *Ex parte Fisk* (1885) 113 US 713 at 725.

36 *Granny Goose Foods Inc v Teamsters* (1974) 415 US 423 at 437-438.

Billiton Ltd v Schultz.[37] From there, the argument developed by attempting to extract from the reasoning in *Schultz* propositions said to confine the decision to transfer under s 1337H(2) to a determination of whether transfer is more appropriate having regard to the interests of justice and which would confine the interests of justice to a preponderance of "connecting factors". Excluded from consideration by a transferor court determining the interests of justice, so the argument went, are differences in the texts of State laws picked up and applied by s 79 of the Judiciary Act in the transferor court and in the transferee court, at least where those differences can be characterised as the product of different "policy choices" by different State Parliaments or can be seen to advantage one party to the corresponding disadvantage of another. Both of those exclusions were argued to be applicable.

68 Without needing to descend into a detailed examination of *Schultz*, the argument is to be rejected on the basis that its starting point is misconceived. The operation of s 1337H(2) of the Corporations Act cannot be equated to the operation of s 5(2)(b)(iii) of the Cross-vesting Act.

69 Section 5(2)(b)(iii) of the Cross-vesting Act and its cognate provisions in State cross-vesting legislation[38] are elements of "a system of cross-vesting of jurisdiction" between courts designed in relevant part to guarantee that "if a proceeding is instituted in a court that is not the appropriate court ... the proceeding will be transferred to the appropriate court".[39] To that end, s 5(2)(b)(iii) provides that "[w]here ... it appears" to the Supreme Court of a State in which any proceeding is pending that "it is ... in the interests of justice that the ... proceeding be determined by the Supreme Court of another State", the Supreme Court in which the proceeding is pending "shall transfer the ... proceeding to that other Supreme Court". Hence, the operation of 5(2)(b)(iii) is to require the Supreme Court in

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37 (2004) 221 CLR 400.

38 *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW), s 5(2)(b)(iii); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic), s 5(2)(b)(iii); *Jurisdiction of Courts (Cross-vesting) Act 1987* (SA), s 5(2)(b)(iii); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Qld), s 5(2)(b)(iii); *Jurisdiction of Courts (Cross-vesting) Act 1987* (WA), s 5(2)(b)(iii); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Tas), s 5(2)(b)(iii).

39 Preamble to the Cross-vesting Act.

which a proceeding is pending "to ensure" that the proceeding is "heard in the forum dictated by the interests of justice".[40]

70 The design of s 1337H(2) of the Corporations Act, in contrast, is both more narrowly focused and more flexible. The design is to facilitate the transfer of a proceeding, or of an application in a proceeding, with respect to a civil matter arising under the Corporations legislation between designated courts all of which have the same federal jurisdiction with respect to the matter under s 1337B(1) or (2) of the Corporations Act and each of which is bound in the exercise of that jurisdiction by the text of a law of the State in which the exercise of jurisdiction occurs as picked up and applied as a Commonwealth law by s 79 of the Judiciary Act except as otherwise provided by the Constitution or a Commonwealth law. To that markedly different end, s 1337H(2) provides that "if it appears" to one such court in which a proceeding with respect to such a matter is pending "that, having regard to the interests of justice, it is more appropriate for ... the relevant proceeding ... or ... application ... to be determined by another [such] court" then "the transferor court may transfer the relevant proceeding or application to that other court".

71 Far from requiring the Supreme Court of one State to ensure that the relevant proceeding or application is heard in the Supreme Court of another State if but only if the interests of justice "dictate" that it be heard in the Supreme Court of that other State, s 1337H(2) of the Corporations Act confers on the Supreme Court a discretion. The discretion is connoted by use of the expression "may transfer"[41] in contradistinction to the expression "shall transfer" in s 5(2)(b)(iii) of the Cross-vesting Act. The discretion is to transfer the proceeding or application to such other court, being the Federal Court or another Supreme Court, as might appear to the Supreme Court as the transferor court to be "more appropriate" to determine the proceeding or application "having regard" to the interests of justice and "having regard" as well to the mandatory considerations set out in s 1337L.

72 The requirement of s 1337H(2) of the Corporations Act that the transferor court "have regard" to the interests of justice in exercising the discretion to transfer the proceeding or application to another court requires the transferor court to consider the interests of justice and to treat the interests of justice as "a fundamental

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40 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 421 [14].

41 See s 33(2A) of the *Acts Interpretation Act 1901* (Cth), inserted by Sch 1 to the *Statute Law (Miscellaneous Provisions) Act 1987* (Cth).

element"[42] in exercising the discretion. The requirement does not confine the considerations able to be taken into account by the transferor court to the interests of justice.

73 Unquestionably, the discretion to transfer the proceeding or application conferred by s 1337H(2) of the Corporations Act would not properly be exercised contrary to the transferor court's evaluation of the interests of justice. Where the interests of justice are evaluated as neutral or equivocal, however, the discretion is open to be exercised by reference to more pragmatic considerations bearing on the appropriateness of transfer which can include convenience of the parties or the court.

74 Even if the consideration that the Arrium class action GCO would continue to have force and effect if the Arrium class action remained in the Supreme Court of Victoria but would have no force or effect if the Arrium class action was transferred to the Supreme Court of New South Wales is left to one side, there would be no basis upon which to conclude that the interests of justice compelled the exercise by the Supreme Court of Victoria of the discretion conferred by s 1337H(2) of the Corporations Act one way or the other. There is little in the agreed facts bearing on the extent to which transferring the proceeding to the Supreme Court of New South Wales would result in any inconvenience or practical problems for the parties, witnesses or legal representatives. The agreed facts, for example, do not detail the extent of travel that may be required for witnesses or parties, the extent to which evidence could be provided by audio-visual link, the availability of documents in electronic form or the relevance of the location of related proceedings.[43] The interests of justice being neutral or equivocal, reasonable minds might properly assess the appropriateness of transfer differently.

75 In the mandatory consideration of the interests of justice for the purpose of s 1337H(2) of the Corporations Act, however, the consideration that the Arrium class action GCO would have force and effect if the Arrium class action remained in the Supreme Court of Victoria but not if the Arrium class action was transferred to the Supreme Court of New South Wales cannot be ignored having regard to the facts which have been agreed.

76 This is not a case in which differences between the texts of Victorian and New South Wales laws picked up and applied as Commonwealth laws by s 79 of

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42 *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329.

43 *Bogan v Estate of Smedley (Deceased)* (2023) 72 VR 394 at 430-431 [166]-[169].

the Judiciary Act have been suggested to give rise to differences in the substantive law which would be applied by the Supreme Courts of Victoria and New South Wales in the resolution between parties of a civil matter or matters arising under the Corporations legislation.[44] Rather, it is a case in which differences between the texts of Victorian and New South Wales laws so picked up and applied have resulted in a proceeding with respect to such matters having been instituted and being able to continue in the Supreme Court of Victoria but being unlikely to be able to continue were it to be transferred to the Supreme Court of New South Wales.

77 The evaluation undertaken by Dixon J in considering for the purpose of s 33ZDA(1) of the Supreme Court Act whether the making of the Arrium class action GCO was "appropriate or necessary to ensure that justice is done" in the Arrium class action cannot simply be transposed to a consideration of the interests of justice for the purpose of s 1337H(2) of the Corporations Act. Given the similarity of the statutory criteria, however, it should be unsurprising that common facts bear on both statutory inquiries. To be recalled is that the parties are agreed that there is a "probability" that the Funder will not continue to fund the Arrium class action absent a GCO and that an alternate funder is not a realistic prospect. Together with the agreed fact that the plaintiffs cannot proceed with the Arrium class action without viable funding, these facts bear vitally on the interests of justice for the purpose of s 1337H(2) of the Corporations Act in so far as they bear on the capacity of the plaintiffs and group members to obtain access to justice. As is the case with an order for the provision of security for costs, whether a transfer order will "stultify" or frustrate proceedings that have been commenced is a relevant consideration.[45]

78 The Court of Appeal was correct to conclude that the Arrium class action GCO weighed decisively against transfer being in the interests of justice given the considerable risk that the Arrium class action would not be able to continue in the absence of the Arrium class action GCO with the result that the claims of the plaintiffs and group members would have to be abandoned.

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44 Compare *Masson v Parsons* (2019) 266 CLR 554 at 578 [38].

45 *M A Productions Pty Ltd v Austarama Television Pty Ltd* (1982) 7 ACLR 97 at 100; *Yandil Holdings Pty Ltd v Insurance Company of North America* (1985) 3 ACLC 542 at 545; *Madgwick v Kelly* (2013) 212 FCR 1 at 22-23 [99].

Conclusion and orders

79 There will be an order formally answering the questions arising on the transfer application, which have been reserved under s 17B(2) of the Supreme Court Act and removed under s 40(2) of the Judiciary Act, in the manner proposed by the Court of Appeal: (1) Yes; (2)(a) No; (2)(b) Does not arise; and (3) No.

80 There will be a further order that the defendants pay the plaintiffs' costs of the proceeding in this Court, including the removal application. No party sought remittal to the Court of Appeal under s 42 of the Judiciary Act to seek any order as to the costs of the hearing before it. In the absence of such an order, those costs are the parties' costs in the proceeding in the Supreme Court.[46]

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46 Rule 63.20 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic).

EDELMAN J.

Introduction

81 The applicants, acting personally and on behalf of members of a group, commenced a class action or "group" proceeding in the Supreme Court of Victoria against four former directors of a formerly ASX-listed company ("the Directors") and that company's former auditor ("KPMG"). That proceeding involves allegations of contraventions of various Commonwealth laws. In the Supreme Court of Victoria, the applicants obtained a group costs order ("GCO"). A GCO, presently unique to Victoria, is an order made by the Supreme Court, if "it is appropriate or necessary to ensure that justice is done in the proceeding", which requires, amongst other things, the representative plaintiff's legal costs to be calculated as a percentage of any award or settlement in the proceeding.[47] The power for the Supreme Court to make a GCO was first introduced into the Victorian Parliament in 2019,[48] as "an important access to justice reform" to "promote greater access to justice".[49] It became law in Victoria in 2020.[50]

82 The proceeding now brought in the original jurisdiction of this Court concerns a proposed transfer of the class action proceeding from the Supreme Court of Victoria to the Supreme Court of New South Wales under Div 1 of Pt 9.6A of the *Corporations Act 2001* (Cth). The Court of Appeal of the Supreme Court of Victoria heard argument concerning three questions reserved in relation to that transfer. The essence of those questions concerned: whether the GCO would remain in force if the class action proceeding were transferred to the Supreme Court of New South Wales; if not, whether the absence of a GCO in the Supreme Court of New South Wales was a relevant factor to consider in the determination of the transfer application; and whether the class action proceeding should be transferred. The Court of Appeal decided that the GCO would not remain in force in the Supreme Court of New South Wales in the event of the class action proceeding's transfer, that this absence was a relevant factor to consider in the determination of the transfer application, and that the class action proceeding should not be transferred. After the delivery of reasons by the Court of Appeal, but before the making of formal orders, the proceeding was removed from the Court of Appeal into this Court.

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47 *Supreme Court Act 1986* (Vic), s 33ZDA.

48 *Justice Legislation Miscellaneous Amendments Bill 2019* (Vic), cl 5.

49 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 27 November 2019 at 4590.

50 *Justice Legislation Miscellaneous Amendments Act 2020* (Vic), s 5.

83 There was no submission that this Court had no authority to decide the matter due to the contrived manner in which the application for removal was brought, potentially to subvert the Commonwealth Parliament's prohibition on appeals to this Court from decisions relating to a transfer of a proceeding under Div 1 of Pt 9.6A of the *Corporations Act*. It is not necessary in these reasons to express any concluded view on that issue, although that issue does inform the answer to some of the submissions that must be considered. Nor is it necessary to address many of the collateral issues raised by the parties. The essential questions raised by the proceeding removed into this Court reduce to three issues of statutory interpretation.

84 In a departure from the order in which the questions were presented, but addressing the issues in logical order, the issues are as follows: If the proceeding were transferred to the Supreme Court of New South Wales, would the GCO "remain in force and be capable of being enforced by the Supreme Court of New South Wales, subject to any order of that Court"? Is it a relevant consideration in the assessment of whether the proceeding should be transferred that the GCO does not remain in force or is not capable of being enforced? If the absence of the GCO remaining in force or being capable of being enforced is such a relevant consideration, then should the class action proceeding be transferred to the Supreme Court of New South Wales in circumstances where, in the absence of the GCO, it is probable that the action will no longer be able to continue?

85 In summary, the answers are as follows. First, a GCO does not remain in force in, and is not capable of being enforced by, a court (in this case, the Supreme Court of New South Wales) which has no power to make or enforce the GCO and which is not given any such power. Secondly, the GCO, as an order concerned with access to justice, is plainly relevant to an assessment of whether the proceeding should be transferred. Thirdly, if the proceeding in the Supreme Court of Victoria were transferred to the Supreme Court of New South Wales, the effect of the GCO not remaining in force would probably be to stultify the proceeding. In those circumstances, the weight to be given to the GCO in the assessment of whether to transfer the proceeding is decisive. The proceeding should not be transferred.

The contrived manner in which this proceeding came to this Court

86 If the Court of Appeal had made formal orders, then this Court would have had no jurisdiction to hear an appeal from such orders due to an "exception" to the appellate jurisdiction of this Court as permitted by s 73 of the *Constitution* and as prescribed by the Commonwealth Parliament in Div 1 of Pt 9.6A of the *Corporations Act*.[51] That exception proscribes appeals from a decision of a court "in relation to the transfer of a proceeding". The origins of the exception lie in s 58

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51 *Corporations Act 2001* (Cth), s 1337R.

of the *Corporations Act 1989* (Cth),[52] which, when introduced, was described in the Explanatory Memorandum as making a decision of a court about whether a proceeding should be transferred "non-justiciable".[53]

87 The application for removal of this matter into this Court was a device to circumvent the proscription by the Commonwealth Parliament of appeals to this Court by removing the matter into this Court before the making of final orders.[54] Hence, the matter was in the original jurisdiction of this Court although the focus of submissions was upon the correctness of the reasoning of the Court of Appeal. Indeed, the applicants relied upon a document described as "In the Nature of a Notice of Contention" to contend that the decision of the Court of Appeal should be "affirmed" on four additional grounds. In oral submissions the applicants simply referred to this as a "notice of contention".

88 KPMG (the applicant in the removal application and the fifth respondent to this proceeding) relied upon the decision in *O'Toole v Charles David Pty Ltd* ("*O'Toole*")[55] as supporting its circumvention device. In *O'Toole*, the applicant had taken the same approach of seeking to remove proceedings into this Court prior to formal orders being delivered due to a concern that this Court would not have had jurisdiction to hear an appeal. But any lack of jurisdiction in *O'Toole* would not have been the consequence of a proscription by the Commonwealth Parliament; the lack of jurisdiction depended upon nice questions concerning the presence of a "matter". Further, although this Court decided the removed proceeding in *O'Toole*, it did so in the context of six members of the Court expressing doubt as to the correctness of the previous authority which might have prevented an appeal on the basis of the absence of a matter.[56] On no view was the application in *O'Toole* a deliberate and contrived attempt to circumvent a proscription of the Commonwealth Parliament.

89 Perhaps because the possibility of removal of this proceeding was initially suggested by this Court during the hearing of an earlier (unsuccessful) removal application, no submission was made in response to KPMG's application to remove the present proceeding that this Court lacked the power to remove the proceeding

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52 Itself based on *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth), s 13.

53 Australia, House of Representatives, *Corporations Legislation Amendment Bill 1990*, Explanatory Memorandum at 63.

54 *Attorney-General (NSW) v Commonwealth Savings Bank of Australia* (1986) 160 CLR 315 at 324-325.

55 (1990) 171 CLR 232.

56 *O'Toole* (1990) 171 CLR 232 at 243-244, 280-285, 296-303, 309. See now *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 302-304, 327.

or that this Court should decline to exercise any such power because removal was a contrived device to circumvent a proscription by the Commonwealth Parliament. In the absence of any such submissions, the removal application was granted by all members of this Court.[57] Nor was any application made to remit this matter to the Court of Appeal without considering the issues raised by removal.[58] It is unnecessary, therefore, to say anything further about this issue other than in relation to costs.

The absence of power for the Supreme Court of New South Wales to make a GCO

The proceeding in the Supreme Court of Victoria

90 The class action in the Supreme Court of Victoria, concerning contravention of Commonwealth legislation, is in federal jurisdiction.[59] The authority of the Supreme Court of Victoria in federal jurisdiction, including its ability to adjudicate upon the rights and interests of the parties before it (whatever the source of those rights or interests) and its inextricable ability to make orders consequent upon that adjudication, is federal authority. But a gap arises in exercising that federal authority concerning the relevant common law, State legislation, and federal legislation. The gap arises because State laws cannot govern or regulate the manner in which federal authority is exercised. That gap is filled by s 79 of the *Judiciary Act 1903* (Cth):[60]

> "Section 79(1) of the *Judiciary Act* applies where there is a gap in the law governing the exercise of federal jurisdiction by picking up [those] State laws which regulate the exercise of State jurisdiction and applying them as Commonwealth laws governing the exercise of federal jurisdiction."

91 Part 4A of the *Supreme Court Act 1986* (Vic), including the ability to make a GCO,[61] concerns the manner in which the rights and interests of parties are adjudicated. Part 4A contains laws that regulate or govern the exercise or manner of exercising authority by adjudication of the rights of the parties.[62] When the

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57 *KPMG (a firm) v Bogan* [2024] HCASL 55.

58 See *Judiciary Act 1903* (Cth), s 42.

59 *Constitution*, ss 76(ii), 77(iii); *Judiciary Act*, s 39.

60 *Masson v Parsons* (2019) 266 CLR 554 at 564 [1].

61 *Supreme Court Act 1986* (Vic), s 33ZDA.

62 See *Masson v Parsons* (2019) 266 CLR 554 at 586-587 [59]; *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298 at 343-344 [219]-[224]; 408 ALR 684 at 738-739.

Supreme Court of Victoria exercises federal jurisdiction, s 79 of the *Judiciary Act* operates to "pick up", and apply, Pt 4A in the substantive proceeding, regulating the manner in which the dispute is to be resolved. But s 79 otherwise leaves, as s 79 finds it, the authority of the Supreme Court of Victoria to declare and resolve the rights and interests of parties, consequent upon the Court's adjudication of a dispute.

The provisions empowering transfer of the Victorian proceeding

92 The Attorney-General of the Commonwealth effectively submitted that the *Corporations Act* scheme was designed to ensure a seamless transfer of federal jurisdiction and its exercise from the courts of one State to the courts of another. The difficulty with that submission is that the seamless transfer of jurisdiction from the Supreme Court of one State to the Supreme Court of another would require the Supreme Courts of the two States always to operate in the same way. But that is not how s 79 of the *Judiciary Act* works. Section 79 regulates the manner in which State courts exercise their existing power to make orders consequent upon adjudication of the rights and interests of parties before them. It does not turn State courts into federal courts exercising power in the same manner.

93 So too, the scheme in Div 1 of Pt 9.6A of the *Corporations Act* does not attempt to transfer the powers of one State Supreme Court to another, but also takes the transferee court "as it finds it with all its incidents".[63] Within Div 1 of Pt 9.6A of the *Corporations Act*, the provision concerning transfer of proceedings is s 1337H. Section 1337H(6) provides that nothing in s 1337H "confers on a court jurisdiction that the court would not otherwise have". And s 1337A(3) relevantly provides that Div 1 of Pt 9.6A "does not limit the operation of the provisions of the *Judiciary Act 1903* other than section 39B". As this Court said in *Grant Samuel Corporate Finance Pty Ltd v Fletcher*,[64] "the *Corporations Act* does not directly impose a universal, federal procedural regime, but rather leaves s 79 of the *Judiciary Act* to operate according to its terms in the State or Territory concerned".

94 Putting to one side the different operation of the scheme in relation to specified federal courts, the scheme also operates differently in relation to State and Territory courts exercising jurisdiction in matters arising under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) involving or related to decisions made, or proposed or required to be made, under "Corporations legislation". In such circumstances, the scheme replaces the operation of s 79 of the *Judiciary Act* with a more flexible approach. Subject to specific corporations

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63 *Electric Light and Power Supply Corporation Ltd v Electricity Commission of New South Wales* (1956) 94 CLR 554 at 560.

64 (2015) 254 CLR 477 at 483 [7]. See also *Gordon v Tolcher* (2006) 231 CLR 334 at 348 [40].

rules of court established in the Supreme Court of the Australian Capital Territory,[65] s 1337P(1), read with s 1337P(3), provides that in such matters arising in State and Territory courts under the *Administrative Decisions (Judicial Review) Act*, the "rules of evidence and procedure to be applied in dealing with that matter are to be the rules that: (a) are applied in a superior court in Australia; and (b) the court considers appropriate to be applied in the circumstances".

95 Against this background of court powers, s 1337P(2) deals with historical steps that had been taken in a transferor court when proceedings are to be transferred under the scheme of Div 1 of Pt 9.6A. For instance, if a matter were transferred from the Supreme Court of Victoria to the Supreme Court of New South Wales, the scheme would *not* assume that the same laws that governed or regulated the exercise of jurisdiction in the Supreme Court of Victoria, and which were picked up by s 79 of the *Judiciary Act*, would govern or regulate the adjudication process in the Supreme Court of New South Wales. Rather, consistently with the assumption underlying Div 1 of Pt 9.6A of taking the transferee State court as the scheme finds it, when the proceeding is transferred to the Supreme Court of New South Wales Div 1 of Pt 9.6A operates on, and applies, the body of law applicable in New South Wales, including the laws that govern or regulate the exercise of jurisdiction by the Supreme Court of New South Wales.

96 Section 1337P(2) addresses the status of past orders made by a transferor court:

> "[T]he transferee court must deal with the proceeding as if, subject to any order of the transferee court, the steps that had been taken for the purposes of the proceeding in the transferor court (including the making of an order), or similar steps, had been taken in the transferee court."

Section 1337P(2) is not a cuckoo in the nest of Div 1 of Pt 9.6A. It is not a provision that departs from the assumption underlying the whole of Div 1 of Pt 9.6A that State courts are taken as they are found. Hence, where the transferee court is the Supreme Court of New South Wales, s 1337P(2) operates on the basis of the existing powers of the Supreme Court of New South Wales, including as those powers are regulated and governed, in respect of the exercise of federal jurisdiction, by other Commonwealth laws and by laws of New South Wales picked up by s 79 of the *Judiciary Act*.

97 The fiction in s 1337P(2) does not contradict the assumption underlying the whole of Div 1 of Pt 9.6A by creating entirely new court powers for a transferee State court that the court did not previously have. Instead, it treats steps taken by the transferor court as if those, or similar, steps had been taken by the transferee court in the exercise of the powers of the transferee court. As the Court of Appeal

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65 *Corporations Act*, s 1337T.

correctly explained, "[t]he evident purpose of s 1337P is to preserve steps taken in one court so they do not have to be duplicated in the transferee court".[66] The limited role for the fiction in s 1337P(2) is also confirmed by the legislative history and context of that provision. As the applicants submitted, part of the context of s 1337P(2) is s 1337N, which relevantly provides that the transferee court ("the other court") "must proceed as if ... the proceeding had been originally instituted in the other court; and ... the same proceedings had been taken in the other court as were taken in the transferor court". This provision was modelled upon the original terms of s 41 of the *Judiciary Act*, which, as the marginal note to that section provided when the *Judiciary Act* was first passed, was modelled upon United States legislation,[67] which had been held to prevent enforcement of an order of a transferor court if the "law governing the [transferee court] gave it no power to make or continue" that which had been ordered.[68]

98 Consistently with the assumption underlying Div 1 of Pt 9.6A, with the evident purpose of s 1337P(2), and with the legislative history and context of s 1337P(2), s 1337P(2) assumes that there are "steps ... or similar steps" that could be taken by the transferee court. Further, since the steps taken by the transferor court must be capable of being revoked by the transferee court (the transferor court's orders being "subject to any order of the transferee court"), this interpretation also avoids the need to engage in contorted verbal gymnastics that would contrive a further implied power in s 1337P(2) for the transferee court to revoke the exercise of a power that it does not have.

Is a transfer of the proceeding to the Supreme Court of New South Wales in the interests of justice?

99 For the reasons above, if the proceeding were transferred from the Supreme Court of Victoria to the Supreme Court of New South Wales, the proceeding would be required to continue without the benefit of the GCO because the Supreme Court of New South Wales has no power to make, or continue in force, a GCO and is prohibited from fixing costs by reference to "contingency fees".[69] The GCO was introduced by legislation in Victoria as "an important access to justice reform" to "promote greater access to justice", including in "class actions for silicosis, wage

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66 *Bogan v Estate of Smedley (Deceased)* (2023) 72 VR 394 at 427 [151].

67 *Jurisdiction and Removal Act of 1875*, ch 137, 18 Stat 470, s 6.

68 *Ex parte Fisk* (1885) 113 US 713 at 725. Approved in *Granny Goose Foods Inc v Teamsters* (1974) 415 US 423 at 437-438.

69 *Legal Profession Uniform Law* (NSW), s 183.

theft and corporate wrongdoing".[70] It follows that the effect of transfer of the proceeding would be to impair the access to justice policy initiative of the Victorian Parliament, as enacted through amendments to the *Supreme Court Act* and picked up by s 79 of the *Judiciary Act*.

100 The further issues necessary to decide in this proceeding are: (i) whether it is relevant to the application to transfer the proceeding that if the proceeding were transferred to the Supreme Court of New South Wales, then the proceeding would be required to continue without a GCO; and (ii) if so, the weight that such a consideration is to be given in the assessment of whether the proceeding should be transferred.

The scope of the "interests of justice"

101 Section 1337H(2) of the *Corporations Act* relevantly provides that, subject to exceptions, "the transferor court may transfer the relevant proceeding or application to [the transferee court]" if, "having regard to the interests of justice, it is more appropriate" for the proceeding to be determined by the transferee court. The "interests of justice" is an extremely broad expression, encompassing not merely matters relevant to the fair resolution of a dispute between parties but also systemic considerations of administration of justice, such as access to justice. Given the breadth of the considerations that arise from the interests of justice, it will be a rare case where a court cannot reach a definitive conclusion in the evaluative task of determining whether the interests of justice make another court more appropriate. In practice, therefore, the "may" in s 1337H(2) will almost always be a "must".[71]

102 In *BHP Billiton Ltd v Schultz*,[72] Gleeson CJ, McHugh and Heydon JJ described considerations relevant to the "appropriateness of a forum"[73] which fall to be considered when evaluating the "interests of justice" in s 5(2)(b)(iii) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) ("the Cross-vesting Act").[74] Those considerations include "matters of convenience and expense, such as availability of witnesses, the places where the parties respectively reside or carry

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70 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 27 November 2019 at 4590.

71 See *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 at 225; *Victorian Building Authority v Andriotis* (2019) 268 CLR 168 at 201 [108].

72 (2004) 221 CLR 400 at 421-422 [15].

73 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 426 [27].

74 See *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 439 [77], 463-464 [161]-[162].

on business, and the law governing the relevant transaction".[75] The expression "interests of justice" was used in the Cross-vesting Act in a broad sense which was plainly intended to encompass such considerations of convenience and expense.[76]

103 As with s 5 of the Cross-vesting Act, the evaluation required by s 1337H(2) of the *Corporations Act* of whether a transfer of a proceeding is "more appropriate", having regard to the "interests of justice", is plainly wide enough to accommodate such considerations of convenience and expense. These are matters which are almost universally considered by courts when issuing rules of court in attempts to progressively develop the interests of justice. At one extreme, considerations including convenience and expense which present only minor impediments or obstacles to access to justice will generally have only a marginal impact on the consideration of appropriateness of the forum. At the other extreme, considerations of great inconvenience might demonstrate an absence of access to justice itself. An example given by Gleeson CJ, McHugh and Heydon JJ in *BHP Billiton Ltd v Schultz*[77] as being "at the other extreme" is where "a plaintiff is near death, and has a much stronger prospect of an early hearing in one court than in another".

104 For this reason, and contrary to KPMG's enthusiastic submissions that the GCO is "utterly irrelevant", not only is the GCO relevant but, in this case, it is the most important and fundamental connecting factor in "the interests of justice". The statement of agreed facts in this proceeding, based upon findings by Dixon J,[78] records the "probability" that in the absence of a GCO the proceeding will not be funded, with the consequence that the applicants will be unable to continue with the proceeding and that "[j]ustice cannot be done in the proceeding". The likely inability of the applicants to access justice without a GCO is a fortiori an "extreme" example akin to that of the plaintiff who is near death and has a much stronger prospect of an early hearing in the court to which the transfer is proposed.[79]

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75 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 422 [18], citing *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 at 478.

76 New South Wales, *Jurisdiction of Courts (Cross-vesting) Bill 1987*, Explanatory Note at 1 [4]. See also Australia, House of Representatives, *Jurisdiction of Courts (Cross-vesting) Bill 1986*, Explanatory Memorandum at 2-3 [4].

77 (2004) 221 CLR 400 at 421 [15].

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

79 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 421 [15].

105 Despite the submissions of KPMG and the Directors, there is nothing in the decision of this Court in *BHP Billiton Ltd v Schultz*[80] that suggests the contrary. That case concerned a claim for wrongdoing brought in the Dust Diseases Tribunal of New South Wales, against BHP Billiton Ltd, by Mr Schultz, who was a resident of South Australia. The place of the wrongdoing was South Australia (and thus the lex loci delicti was the law of South Australia) and the prospective witnesses generally resided in South Australia, but the civil procedure in New South Wales was more generous for Mr Schultz. This Court held that the Supreme Court of New South Wales erred in concluding that it was not in the "interests of justice" to transfer the proceeding to the Supreme Court of South Australia under s 5(2)(b)(iii) of the Cross-vesting Act.[81]

106 The reasoning in *BHP Billiton Ltd v Schultz* concerning the "interests of justice" criterion in an application for transfer of proceedings under s 5(2)(b)(iii) of the Cross-vesting Act is equally applicable to the same criterion in s 1337H(2) of the *Corporations Act*. There are some differences in purpose, context, and expression between the two provisions. It is possible that in marginal cases these differences might lead to a different conclusion about whether a transfer is in the interests of justice. But the differences do not alter the considerations that are relevant to the central notion of the "interests of justice" in the transfer of proceedings. In other words, the different contexts in which the interests of justice are assessed might affect the weight to be given to different considerations of justice but justice itself is not an empty vessel waiting to be filled by judicial divination of its interests based upon statutory context and purpose.

107 KPMG and the Directors thus relied heavily upon the reasoning of this Court in *BHP Billiton Ltd v Schultz*[82] that the Supreme Court of New South Wales had erred in reasoning that in assessing the "interests of justice", a plaintiff's choice is not lightly to be overridden. In their dissenting reasons (although not on this point), in a passage relied upon by KPMG and the Directors, Gleeson CJ, McHugh and Heydon JJ said:[83]

> "If, in a particular respect, the first respondent's assumed advantage and the appellant's assumed disadvantage are commensurate, the one simply being the converse of the other, then that does not advance the matter. The scales are inappropriately weighted in favour of a plaintiff if a possibility of what

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80 (2004) 221 CLR 400.

81 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 444 [98], 467-468 [173]-[176], 468 [177], 492-494 [258]-[262].

82 (2004) 221 CLR 400 at 425 [25].

83 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 426 [26].

> might ultimately turn out to be a higher total award of damages is treated as a consideration of justice which argues against transfer and if, in addition, the plaintiff's choice of venue is treated as a matter not lightly to be overridden ... [T]he problem would be compounded if a judge were to become involved in comparing the respective merits of New South Wales and South Australian legislation. From whose point of view would those merits be judged? How could a judge form a preference between the public policy reflected in an Act of the Parliament of New South Wales and the public policy reflected in an Act of the Parliament of South Australia? If it came to that point, the appropriate course would be for the judge to draw back, and to consider the interests of justice by reference to more neutral factors."

108 The point being made by their Honours in this passage was the same as that made separately by Gummow J, who pointed out that the "interests of justice" are "even-handed",[84] and Callinan J, who described the role of courts as doing "equal justice".[85] A consideration of the interests of justice does not ordinarily include giving any weight to the preference of a plaintiff for one forum over another, as "an advantage to the plaintiff [arising from the plaintiff's choice of forum] will ordinarily give rise to a comparable disadvantage to the defendant", but subject always to the proviso "that the court is satisfied that substantial justice will be done in the available appropriate forum".[86]

109 In short, the treatment by KPMG of the "interests of justice" as excluding access to justice involves fundamental error. It confuses the need for judicial even-handedness in the adjudication of the rights and interests of parties with the ability of the parties to access those rights and interests. A defendant has no more a "legitimate interest in not wanting to be sued" by way of a plaintiff's recourse to access to justice provisions, to use KPMG's expression, than a defendant has a legitimate interest in denying another person access to justice by relying upon "certain arbitrary factors—such as class, race, gender, and wealth" to "play a distorting role in determining whether justice is done".[87]

110 This conclusion might also be thought sufficient to dispose of KPMG's cart-before-the-horse argument that the Supreme Court of Victoria should have determined the transfer application before it determined the application for a GCO. But that submission is not open to be made in any event. KPMG did not seek leave

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84 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 445 [100].

85 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 492 [258].

86 *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 at 482.

87 Wilmot-Smith, *Equal Justice: Fair Legal Systems in an Unfair World* (2019) at 9.

to appeal from the procedural decision that the application for a GCO should be determined before the application for transfer of the proceeding. That decision stands unchallenged. The analogy sought to be drawn by KPMG between a permissible "complain[t]" about an interlocutory order in an appeal from a final order and the challenge to the procedural order that KPMG makes before this Court is yet another example of subverting the command of the Commonwealth Parliament that there be no appeal from a decision of a court in relation to a transfer of a proceeding, by the institution of proceedings in the original jurisdiction of this Court.

Access to justice and other factors

111 Section 1337L of the *Corporations Act* provides for three non-exhaustive factors to which a court must have regard when deciding whether to transfer a proceeding under s 1337H: "(a) the principal place of business of any body corporate concerned in the proceeding or application; and (b) the place or places where the events that are the subject of the proceeding or application took place; and (c) the other courts that have jurisdiction to deal with the proceeding or application." The third mandatory factor includes consideration of the powers of the transferee court relating to access to justice, since the expression "jurisdiction to deal with" does not merely refer (redundantly) to the authority to decide but includes the powers that can be exercised by the transferee court in exercising that authority, thus echoing the reference in s 1337P(2) to the transferee court "deal[ing] with the proceeding".

112 KPMG and the Directors focused heavily upon factors (a) and (b) and matters related to those factors. They submitted that those factors favoured the Supreme Court of New South Wales as the more appropriate forum for the proceeding. For instance, the company about which the proceeding relates had its principal place of business in Sydney, with various officers, including its Chief Financial Officer and Company Secretary, based in Sydney and its "relevant" company meetings held in Sydney. The relevant KPMG partners and team were based in Sydney and continue to reside there. The liquidators of the company, and the company books and records, are located in Sydney. More group members (who have signed a retainer with the applicants' legal representatives) are located in New South Wales than in any other location. Two related proceedings have been decided in the Supreme Court of New South Wales. The litigation funding agreement has a choice of law clause nominating the law of New South Wales as the governing law.

113 The connecting factors to which KPMG and the Directors referred might, by themselves, support a conclusion that New South Wales is the more appropriate forum. However, the applicants did also point out that there are connecting factors with Victoria, including: (i) almost a quarter of the group members who have signed a retainer with the applicants' legal representatives residing in Victoria; (ii) two of the Directors residing in Victoria; (iii) KPMG having offices in

Melbourne; and (iv) KPMG and the Directors being represented by law firms with offices in Melbourne and by Victorian counsel.

114 Nevertheless, the factors in the assessment of the interests of justice which were relied upon by KPMG and the Directors do not outweigh the countervailing factor of the absence of the GCO continuing in force, or being enforceable, in the Supreme Court of New South Wales. Rather, those factors pale into insignificance in comparison. The absence of the GCO assumes fundamental importance in a case such as this where that absence would probably mean the denial of access to justice to the applicants and to the group that they represent.

115 In *Lungowe v Vedanta Resources plc (International Commission of Jurists intervening)*,[88] Lord Briggs said that "[i]f there is a real risk of the denial of substantial justice in a particular jurisdiction, then it seems to me obvious that it is unlikely to be a forum in which the case can be tried most suitably for the interests of the parties and the ends of justice". The obvious likelihood to which Lord Briggs referred becomes a near certainty that the jurisdiction will be a less appropriate forum where the denial of substantial justice is not merely a risk but a probable outcome.

Conclusion

Answers to questions

116 The Court of Appeal was correct in the answers it gave to the questions before it. Those questions should be answered in the original jurisdiction of this Court in the same way, as follows:

Question 1

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

Answer: Yes.

Question 2

If the proceeding[] [in the Supreme Court of Victoria (S ECI 2020 03281)] [is] transferred to the Supreme Court of New South Wales:

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88 [2020] AC 1045 at 1077 [88].

(a) will the GCO made by the Supreme Court of Victoria on 3 May 2022 remain in force and be capable of being enforced by the Supreme Court of New South Wales, subject to any order of that Court?

Answer: No.

(b) if the GCO will remain in force, does the Supreme Court of New South Wales have power to vary or revoke the GCO?

Answer: Does not arise.

Question 3

Should [the] proceeding (S ECI 2020 03281) be transferred to the Supreme Court of New South Wales pursuant to s 1337H of the *Corporations Act 2001* (Cth), as sought in prayer 3 of the summons filed by [KPMG] on 26 February 2021?

Answer: No.

Costs

117 The costs orders concerning the questions reserved in this proceeding would have been simple if the decision of the Court of Appeal had been capable of being appealed to this Court without the necessity of the contrived device of removal to avoid the Commonwealth Parliament's prohibition on appeals. The Court of Appeal would have made orders answering the questions reserved and costs orders in relation to the questions reserved. This Court would have dismissed the appeal and ordered that the unsuccessful parties, KPMG and the Directors, pay the costs of the applicants in this Court, including the costs of the special leave application.

118 The contrived nature of this proceeding has the effect that the costs orders are not so simple. Since the proceeding was removed from the Court of Appeal before any final orders had been made by the Court of Appeal, no order as to the costs of the questions reserved, or the costs of the summons filed by KPMG, was made in the Court of Appeal. One possible resolution would be for this Court to fill that gap and make the orders that would have been made by the Court of Appeal. But such a resolution of the issue would arguably make more blatant the contrived circumvention of Parliament's proscription against an appeal in a matter of this kind in circumstances where few submissions were made about costs. Apart from seeking its costs in this Court (including costs of the removal application), KPMG sought orders that the "matter should otherwise be remitted to the Court of Appeal to be dealt with in accordance with the reasons of this Court". Neither the applicants nor the Directors made any further submissions about costs or remitter.

119 Another efficient solution could be for this issue of costs in the Court of Appeal to be resolved in this Court, without any submissions from the parties and

without remitter, by making the common order, in general terms, to the effect that the applicants are entitled to costs in the proceeding[89] and by relying upon r 63.20 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) as granting the applicants their costs in the Court of Appeal. That rule makes the costs of an "interlocutory or other application" made in a proceeding in the Supreme Court of Victoria "the parties' costs in the proceeding" where no order is made on the application (or the order made is silent as to costs) and where the Court does not order otherwise. But even assuming that the questions reserved are an interlocutory or other application within the class action proceeding, rather than a separate proceeding,[90] it is at least arguable that orders have been made on the application, noting that orders have been made by this Court and orders were made by Nichols J stating the questions reserved for the Court of Appeal. And this Court's orders are not "silent as to costs". Further, there may be reasons that the Court of Appeal could have been asked to make an order other than an order that KPMG and the Directors jointly bear the applicants' costs of the proceeding in the Court of Appeal.

120 Without any submissions on these or any other points as to the costs of the proceeding in the Court of Appeal, and in circumstances in which the applicants appear to have a strong prima facie entitlement to their costs in the Court of Appeal, the better course is for the Court of Appeal to fill the gap itself upon the remittal of this proceeding to the Court of Appeal. The appropriate order in this Court is that KPMG and the Directors should pay the costs of the proceeding in this Court, including the costs of the removal application, and that the matter otherwise be remitted to the Court of Appeal to deal with the remaining issue of costs.

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89 See, eg, *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 34 [70], 80 [187]; *Clubb v Edwards* (2019) 267 CLR 171 at 210 [104], 215 [130], 241 [215], 292 [349], 310 [405]; *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 104-105 [53].

90 Compare *Supreme Court Act 1986* (Vic), s 17B(2); *Supreme Court (General Civil Procedure) Rules 2015* (Vic), r 1.13(1) (definition of "proceeding"); *Judiciary Act*, s 40(2).

121 STEWARD J. I very gratefully adopt the facts set out in the reasons of Gageler CJ, Gordon, Gleeson, Jagot and Beech-Jones JJ and agree with the conclusion concerning the operation of s 1337P of the *Corporations Act 2001* (Cth) ("the Corporations Act"). I otherwise respectfully disagree with the contention that the Court of Appeal of the Supreme Court of Victoria, in determining that the proceeding should *not* be transferred to the Supreme Court of New South Wales pursuant to s 1337H of the Corporations Act, was correct to take into account, in the exercise of that power, the fact that a contingency fee order, known as a group costs order ("GCO"), had been made by Dixon J[91] in favour of the representative plaintiffs. In circumstances where the GCO is not a factor relevant to the exercise of power under s 1337H of the Corporations Act, and New South Wales is the more appropriate forum, it is, respectfully, in "the interests of justice" that it be so transferred.

122 Lurking in the background of this matter are two propositions. The first is that it is well-recognised that forum shopping is "an evil".[92] Below, the Court of Appeal of the Supreme Court of Victoria decided that, but for the issue of the GCO, there were more factors that connected this proceeding to New South Wales than Victoria, and that accordingly, New South Wales was otherwise the more appropriate forum to hear the case.[93] That assessment of the other connecting factors was plainly correct.

123 The second proposition is that the law has long eschewed contingency fee arrangements. That is because of the clear conflict of interest such an arrangement poses for instructing solicitors. That conflict undermines the administration of justice, and is especially invidious in the area of representative actions, where the possibility for "greed and avarice" on the part of lawyers is ever-present.[94] By Acts of Parliament, the practice is thus nationally banned, save in one statutory instance.[95] In Victoria, for example, pursuant to s 183(1) of Sch 1 to the *Legal*

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

92 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 478 [217].

93 *Bogan v Estate of Smedley (Deceased)* (2023) 72 VR 394 at 430 [164], 431 [170].

94 Bell, "Opening Keynote Address to Association of Litigation Funders of Australia", 13 August 2024 at [36]; see also *Bolitho v Banksia Securities Ltd [No 18]* (2021) 69 VR 28 at 93-96 [1356]-[1366].

95 *Legal Profession Uniform Law* (NSW), s 183; *Legal Profession Uniform Law Application Act 2014* (Vic), Sch 1, s 183; *Legal Practitioners Act 1981* (SA), Sch 3, cl 27; *Legal Profession Act 2007* (Qld), s 325; *Legal Profession Uniform Law* (WA), s 183; *Legal Profession Act 2007* (Tas), s 309; *Legal Profession Act 2006* (NT), s 320; *Legal Profession Act 2006* (ACT), s 285.

Profession Uniform Law Application Act 2014 (Vic) a "law practice must not enter into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates". A contravention of this provision is "capable of constituting unsatisfactory professional conduct or professional misconduct on the part of" the lawyers involved.[96]

124 However, as already mentioned, in one instance this principle has been overturned by statute. That one instance arises in Victoria, and only in respect of representative actions. The provisions which reverse the usual rule, and render the State of Victoria an outlier, are described in the reasons of Gageler CJ, Gordon, Gleeson, Jagot and Beech-Jones JJ[97] and need not be repeated.

125 In the foregoing circumstances, the only issue for determination is whether the Court of Appeal was correct in concluding that it was not in the interests of justice, for the purpose of s 1337H, to transfer this matter to New South Wales because a GCO had been made. The Court of Appeal considered the GCO a decisive factor because, without it, "the probability is that the proceeding will not continue".[98] In other words, by reason of the risk of stultification, the Court of Appeal found that it was not in the interests of justice to transfer the proceedings to New South Wales. For the reasons given below, that conclusion favoured the interests of the representative plaintiffs *only* and should not have been reached.

Competing advantages

126 Even without the assistance of authority, the role of the GCO in this proceeding should not have weighed in the balance of the factors to be considered for the purposes of s 1337H of the Corporations Act. In that respect, it was not in dispute that it will be in the interests of justice to transfer a proceeding to another forum where that other forum is the "more appropriate" venue.[99] That issue is tested by a consideration of the "connecting factors" between the cause of action and the forum in issue.[100] Here, the factors, other than the GCO, are described in

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96 *Legal Profession Uniform Law Application Act 2014* (Vic), Sch 1, s 183(3).

97 See the reasons of Gageler CJ, Gordon, Gleeson, Jagot and Beech-Jones JJ at [1], [20]-[22].

98 *Bogan v Estate of Smedley (Deceased)* (2023) 72 VR 394 at 431 [171].

99 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 421 [14]; see also 429-430 [42], 436 [69], 468 [177].

100 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 422 [18], 464 [163].

the reasons of Gageler CJ, Gordon, Gleeson, Jagot and Beech-Jones JJ[101] and, again, it is unnecessary to repeat them.

127 Where, however, a connecting factor is an advantage for one of the parties, whether it be legal or otherwise, which is offered or made available in only one forum and not the other, it would ordinarily be in the "interests of justice" that it be set aside from consideration. That is because, generally speaking, what is an advantage to one party may well be an equivalent disadvantage to the other. In such a case, it is no part of the court's function, at a point prior to final adjudication, to be favouring the interests of one party over another. It should not play favourites. Nor should it adjudge the merits of different policy choices and legislative models made by different jurisdictions which address the same issue. It is as simple as that.[102]

128 Here, the State of Victoria offers the representative plaintiffs a real advantage which is not offered in the State of New South Wales. That advantage is the issue of a GCO. In New South Wales it is illegal for a solicitor to enter into a contingency fee arrangement of that nature with a client.[103] It was accepted by the parties that, in the absence of a GCO, there is "a considerable risk, indeed a probability", that the funder of the representative plaintiffs' case will conclude that the funding agreement it has entered into "is not financially viable for it and it will not continue to fund the proceeding".[104] It was not, however, contended that it would have been impossible to obtain alternative funding in New South Wales. Avoiding the risk that the funder would cease to fund the proceeding – which inferentially arises at least in part from the funder's assessment of the likelihood of success in a proceeding described as "complex"[105] – is an advantage to the representative plaintiffs. But it is also a countervailing and corresponding disadvantage to the defendants. In every other Australian jurisdiction the risk of carrying on proceedings which have not been assessed as having sufficiently high prospects to justify funding, which is now avoided in Victoria, would otherwise have to be faced by the plaintiffs; it is only eliminated in Victoria because of a law found nowhere else. If these proceedings are permitted to remain in Victoria, the defendants will thus suffer this disadvantage. They will be exposed to the cost and

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101 See the reasons of Gageler CJ, Gordon, Gleeson, Jagot and Beech-Jones JJ at [25]-[31].

102 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 422 [16], 425-426 [26].

103 *Legal Profession Uniform Law* (NSW), s 183(1).

104 *Bogan v Estate of Smedley (Deceased)* (2023) 72 VR 394 at 403 [35].

105 *Bogan v The Estate of Peter John Smedley (Deceased)* [2022] VSC 201 at [105(i)]; *Bogan v Estate of Smedley (Deceased)* (2023) 72 VR 394 at 403 [35].

inconvenience of being sued in a case which otherwise lacks viability in all other Australian jurisdictions. The question is: why should that be so?

129 The evidence is that retainers issued up to January 2021 by the representative plaintiffs' solicitors anticipated that proceedings would commence in New South Wales. The GCO provisions in the *Supreme Court Act 1986* (Vic)[106] commenced on 1 July 2020. This proceeding was filed in the Supreme Court of Victoria a month and a half later. The evidence of the funder was that it supported the decision to commence proceedings in Victoria "[g]iven the recent enactment of the Group Cost Order provisions" in that State. No other reason for commencing the proceeding in Victoria was proffered. In such circumstances, it should plainly be inferred that the proceeding – which otherwise has more connecting factors with New South Wales (as found by the Court of Appeal below), and which was begun by a law firm that was initially Sydney-based – was commenced in Victoria to take advantage of the availability of GCOs in that jurisdiction. The law should be slow to endorse this type of conduct.

BHP Billiton Ltd v Schultz

130 The foregoing is mandated by a recent authority of this Court. *BHP Billiton Ltd v Schultz* concerned an application in the Supreme Court of New South Wales to transfer a pending proceeding in the Dust Diseases Tribunal of New South Wales to the Supreme Court of South Australia pursuant to s 5(2)(b)(iii) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW). This required, amongst other things, the "interests of justice" to be taken into account in deciding whether to transfer a matter. Mr Schultz was a resident of South Australia and claimed that he had been exposed to asbestos whilst working for BHP Billiton Ltd in one of its shipyards in that State. He sued BHP Billiton Ltd, alleging negligence, breach of contract, and breach of statutory duty. It was not in dispute that the *lex causae* for the tort claim was the law of South Australia.[107]

131 Section 11A of the *Dust Diseases Tribunal Act 1989* (NSW) ("the Tribunal Act") conferred on the Dust Diseases Tribunal a unique power to award damages in stages. In that respect, Mr Schultz had sought from the Tribunal an order preserving his right to make a future and additional claim for damages should he develop any of the conditions of asbestos-induced lung cancer, asbestos-induced carcinoma of any other organ, pleural mesothelioma, or peritoneal mesothelioma.[108] In refusing to transfer the proceedings to South Australia, a judge of the Supreme Court observed that it was "important ... to keep open to Mr Schultz

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106 Pt 4A, Div 6.

107 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 418 [2]-[4], 449 [114], 470 [183].

108 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 418-419 [6].

the very unusual advantages that are conferred by s 11A of the Tribunal Act".[109] In contrast, a possible analogue of s 11A – s 30B of the *Supreme Court Act 1935* (SA) – was perceived to possibly favour the interests of BHP Billiton Ltd if the matter were to be tried in South Australia.[110]

132 All of the judges of this Court agreed that the primary judge had erred in taking into account the advantage conferred on Mr Schultz by s 11A, and a majority decided that the proceeding should be transferred to South Australia.[111] In this matter, no party contended that *BHP Billiton Ltd v Schultz* was wrongly decided or that this Court was wrong in deciding that s 11A should not have been taken into account by the primary judge.

133 Gleeson CJ, McHugh and Heydon JJ, whilst in dissent on the ultimate result, expressed the general principle to be applied in a transfer application where one forum, and not the other, confers an advantage on one party only. They observed:[112]

> "[T]here may be conflicting interests of such a kind that justice would not attribute greater weight to one rather than the other. The advantage which a plaintiff might obtain from proceeding in one court might be matched by a corresponding and commensurate disadvantage to a defendant. The reason why a plaintiff commenced proceedings in one court might be the same as the reason why the defendant seeks to have them transferred to another court. In such a case, justice may not dictate a preference for the interests of either party."

134 The general principle was expressed again in the following language:[113]

> "If, in a particular respect, the first respondent's assumed advantage and the appellant's assumed disadvantage are commensurate, the one simply being the converse of the other, then that does not advance the matter."

135 Consistently with the foregoing expression of principle, Gleeson CJ, McHugh and Heydon JJ decided that there was no warrant for concluding that the interests of justice dictated that Mr Schultz should be given, as against

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109 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 425 [23].

110 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 440 [79].

111 The majority comprised Gummow, Kirby, Hayne and Callinan JJ.

112 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 422 [16].

113 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 426 [26].

BHP Billiton Ltd, the benefit of s 11A, or that s 11A should be favoured over s 30B of the *Supreme Court Act 1935* (SA).[114] In that respect they noted:[115]

> "They are different approaches to a similar problem by two legislatures within the Australian federation."

136 Their Honours noted that taking into account a policy choice made by one State as against another would wrongly require a judge to consider the respective merits of those choices. They said:[116]

> "From whose point of view would those merits be judged? How could a judge form a preference between the public policy reflected in an Act of the Parliament of New South Wales and the public policy reflected in an Act of the Parliament of South Australia? If it came to that point, the appropriate course would be for the judge to draw back, and to consider the interests of justice by reference to more neutral factors."

137 Gummow J, with whom Hayne J agreed,[117] was also of the view that the primary judge erred in taking into account s 11A.[118] Taking into account the benefit it conferred, without considering the operation of s 30B upon the interests of both parties, "was to give further effect to the false notion of Mr Schultz's 'venue privilege'".[119] That privilege – that a plaintiff's own choice of forum ought not lightly to be overridden – was also found to be incorrect.[120] Gummow J further concluded that a plaintiff cannot obtain an advantage simply by picking the jurisdiction with the most favourable law.[121] His Honour referred to the following observation of Gibbs CJ, Wilson and Brennan JJ in *Pozniak v Smith*:[122]

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114 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 425-426 [26].

115 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 426 [26].

116 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 426 [26].

117 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 468 [177].

118 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 440 [80].

119 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 440 [80].

120 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 437 [72], 440 [80].

121 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 445 [100].

122 (1982) 151 CLR 38 at 47.

> "The only safe course, in a case where the relevant law in the competing jurisdictions is materially different in its effect on the rights of the parties, is to remit to the State whose law has given rise to the cause of action."

138 In the same case Mason J said:[123]

> "I would resist the notion that in determining which court shall hear the case when there is a material difference in the laws of the States we should give effect to the so-called right of the plaintiff to select the place of hearing, subject only to the balance of convenience. It is inconsistent with a just result that the plaintiff should be able to select the forum which applies the law most favourable to his cause, so long as he is not 'forum shopping'."

139 Callinan J observed that the Tribunal Act contained a "very special and largely unique regime for the assessment and recovery of damages by particular plaintiffs".[124] But, his Honour noted, it was one thing "for one State to establish such a regime to govern the recovery of damages, and thereby affecting commerce, insurance and other activities and events occurring within it, but altogether a different matter to seek to impose it upon other States".[125] Callinan J expressly warned against a plaintiff seeking in a "non-natural forum" to take advantage of "ambitious long-arm legislation" and "the powers of another court of the same polity".[126] In rejecting the relevance of s 11A, Callinan J, consistently with the expression of principle set out above, also warned against a court favouring one party over another in cases of this kind. His Honour said:[127]

> "[O]ne person's legitimate advantage is another person's disadvantage. There should be no presumption in litigation in favour of any party. Courts are required to do equal justice. It is wrong to say that proceedings should be conducted in the, or indeed any Tribunal because a plaintiff, or for that matter a defendant, is likely to have a better chance of winning or more easily winning there. It seems that here, and the trial judge at first instance accepted, that the first respondent's professional advisers who had had considerable experience with the Tribunal, thought their client had better prospects as to liability and damages in the Tribunal than elsewhere. To give effect to that view if it be correct would not be to do equal justice in the cross-vesting application. Even if it be the case that the legislature of

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123 *Pozniak v Smith* (1982) 151 CLR 38 at 51.

124 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 488 [241].

125 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 488 [241].

126 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 493-494 [261].

127 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 492 [258].

> New South Wales were to think a claimant's advantage over a defendant a legitimate end, that could provide no basis for its imposition on other States and those entitled to litigate in the courts of them."

140 The foregoing passage is, with respect, entirely apt and is applicable here.

Stultification of proceedings

141 In making the GCO in the present proceeding, Dixon J observed that "[j]ustice cannot be done in the proceeding if the plaintiffs and group members are not able to pursue their claims through the proceeding and must abandon them".[128] That, with respect, perhaps overstates matters. It must otherwise be accepted that if the proceeding does not remain in the Supreme Court of Victoria, with the benefit of the GCO, there is a clear risk that the proceeding may be stultified. It is worth noting that whether that risk is realised turns on commercial decisions which may be made by the funder – the cause of action will otherwise remain entirely intact. But, for a number of reasons, the potential for the stultification of proceedings is not, in the circumstances of this matter, a decisive consideration relevant to the exercise of power under s 1337H of the Corporations Act.

142 In the first instance, and for the reasons set out above, Dixon J's conclusion favours the interests of the representative plaintiffs and group members *over* the interests of the defendants. In other words, an advantage that the defendants would have enjoyed in New South Wales – the natural forum – is equivalently stultified. In any jurisdiction but Victoria, the defendants might have avoided the cost and inconvenience of being sued in circumstances where the prospects of success of the plaintiffs' claims are such that, in all other jurisdictions where GCOs are not available, including New South Wales, it is likely that no one could have been persuaded to fund the proceeding.[129] Indeed, inferentially, prior to 1 July 2020, it might not have been possible to commence the proceeding in any jurisdiction. Issues about the concept of access to justice should not be distorted because one jurisdiction has now passed "ambitious long-arm legislation". As this is a case where the plaintiffs' assumed advantage and the defendants' assumed disadvantage are commensurate, the issue of the GCO should have played no part in the reasoning of the Court of Appeal.

143 By taking into account the GCO as the decisive factor against transfer, the Court of Appeal has effectively chosen the legislative regime favoured in Victoria in competition with the legislative regime in New South Wales. Necessarily embedded in the observation that without the GCO the proceedings might cease is a preference for the law in Victoria only because it increased the possibility of

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

129 *Bogan v Estate of Smedley (Deceased)* (2023) 72 VR 394 at 403 [35].

success for the representative plaintiffs and group members. Such choices, for the reasons given above, should never have been made. Section 1337H should have been applied by reference to the usual connecting factors without any regard to the issue of the GCO and to the effect on the plaintiffs' case if the proceeding were to be transferred to a forum where such an order cannot be made.

144 Of course, the general principle, as expressed above, will be acutely engaged where the advantage and disadvantage are commensurate. But there will be cases where that is not so. And there will also be cases where – even when the benefit and detriment correspond – it may nonetheless be appropriate to take into account the advantage conferred by one forum as a factor. Ultimately, everything turns upon the interests of justice for the purposes of s 1337H. As Lord Goff of Chieveley wrote in *Spiliada Maritime Corporation v Cansulex Ltd*:[130]

> "If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction".

145 This is not a case where the plaintiffs cannot obtain justice in New South Wales. This is not a case like *Lungowe v Vedanta Resources plc*, where Lord Briggs JSC in the Supreme Court of the United Kingdom concluded that substantial justice would be unavailable in Zambia, because, amongst other things, there was an absence "within Zambia of sufficiently substantial and suitably experienced legal teams".[131] Here, New South Wales did not cease to be a place where the plaintiffs could obtain substantial justice merely because, from 1 July 2020, Victoria introduced laws permitting contingency fee arrangements. Bearing in mind the national ban on such arrangements, it cannot and should not be concluded that all of those jurisdictions that have adhered faithfully to that ban are not suitable forums for the pursuit of class actions.

146 Nor is this a case where there are any other factors in play that might tilt the balance in favour of Victoria. This is not a case where the need to secure a remedy is compelling. No claim was made that either of the representative plaintiffs, or any group member, is suffering egregiously because of losses incurred from

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130 [1987] AC 460 at 478, cited with approval in *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 422-423 [18], 426 [27], 463 [161].

131 [2020] AC 1045 at 1077 [89], 1079 [94], 1080 [98], 1081 [102].

investing in Arrium Ltd during the relevant period. This is not a case where any person has been physically injured, nor is it a case where the plaintiff is suffering from a terminal illness. This is a class action which alleges misleading and deceptive conduct concerning a capital raising and the contents of financial statements. If the group members are successful, the solicitors will become entitled to 40% of the amount of any award or settlement that may be recovered inclusive of GST. At least in part from their perspective, and certainly wholly from the outlook of the funder, this proceeding is nothing less than an investment from which they seek to profit. This vivid commercialisation of class actions should be steadily borne in mind when addressing the more noble issue of access to justice.[132]

Disposition

147 I would answer the first question reserved before the Court of Appeal and removed into this Court as follows: No. I would otherwise give the same answers to question 2 as proposed by Gageler CJ, Gordon, Gleeson, Jagot and Beech-Jones JJ. I would remit consideration of question 3 to the Court of Appeal to determine the application for transfer in accordance with these reasons. The plaintiffs should pay the costs of the defendants.

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132 The courts should be wary of those class action lawyers and funders who earn profits by "fomenting disputes which ... might never flare into controversy": *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 at 625 [127].