Supreme Court

New South Wales

Case Name:	Komlotex Pty Ltd v AMP Ltd
Medium Neutral Citation:	[2020] NSWSC 504
Hearing Date(s):	30 April 2020
Date of Orders:	8 May 2020
Decision Date:	8 May 2020
Jurisdiction:	Equity
Before:	Ward CJ in Eq
Decision:	1. Dismiss the Notice of Motion filed 21 April 2020 by Ms Wigmans. 2. Reserve the question of costs.
Catchwords:	REPRESENTATIVE PROCEEDING – CIVIL PROCEDURE – multiplicity of proceedings – whether representative proceeding ought to be effectively stayed pending appeal from decision staying duplicative proceeding CIVIL PROCEDURE — Stay of proceedings — where orders sought an effective stay pending appeal
Legislation Cited:	Civil Procedure Act, ss 56, 58, 61(1), 157, 159, 162, 163, 173, 177, 179, 182, 183, Pt 10 Federal Court Act 1976 (Cth), ss 33V, 33ZB Federal Court of Australia Act 1976 (Cth), s 50 High Court Rules 2004, r 42.09 Supreme Court Act 1986 (Vic), Pt 4A Uniform Civil Procedure Rules 2005 (NSW), r 2.1
Cases Cited:	Advanced Building Systems Pty Ltd v Ramset Fasteners (Aust) Pty Ltd [1997] HCA 24; (1997) 71 ALJR 814 Alexander v Cambridge Credit Corporation Ltd (1985) 2

NSWLR 685
Australian Broadcasting Commission v Parish [1980] FCA 33; (1980) 43 FLR 129
BMW Australia Ltd v Brewster [2019] HCA 45; (2019) 374 ALR 627
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25
Courtney v Medtel Pty Ltd [2001] FCA 1037
Federal Commissioner of Taxation v Myer Emporium Ltd (1986) 160 CLR 220; [1986] HCA 13
Gerah Imports Pty Ltd v The Duke Group (in Liq) [1994] HCA 3; (1994) 68 ALJR 196
Haselhurst v Toyota Motor Corporation Ltd t/as Toyota Australia [2020] NSWCA 66
Inabu Pty Ltd v CIMIC Group Ltd [2020] FCA 510
Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 1) (1986) 161 CLR 681; [1986] HCA 84
Johnson Tiles Pty Ltd v Esso Australia Ltd [1999] FCA 56; (1999) ATPR 41-679
Jones v Treasury Wine Estates [2017] FCA 296
Kalifair Pty Ltd v Digi-Tech (Australia) Ltd (2002) 55 NSWLR 737; [2002] NSWCA 383
King v GIO Australia Holdings Ltd [2001] FCA 270
Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd (2017) 252 FCR 1; [2017] FCAFC 98
Mobil Oil Australia Pty Ltd v Victoria (2002) 211 CLR 1; [2002] HCA 27
Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 2] [1998] HCA 32; (1998) 72 ALJR 869
Perera v GetSwift Ltd (2018) 263 FCR 1; [2018] FCA 732
Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 4) [2010] FCA 749
Rinehart v Welker (2011) 93 NSWLR 311; [2011] NSWCA 403
Rinehart v Welker (2012) 83 NSWLR 347; [2012] NSWCA 1
Rodger v Comptoir d'Escompte de Paris (1871) 3 LR PC 465
Smith v New South Wales Bar Association [1991] HCA 59; (1991) 66 ALJR 219

	Temwork Holdings Pty Ltd v Western Australian Planning Commission [2004] WASCA 65; (2004) 132 LGERA 439 Wigmans v AMP Ltd [2019] NSWCA 243; (2019) 373 ALR 323 Wigmans v AMP Ltd [2019] NSWSC 603
Texts Cited:	V Morabito, "Class Actions Instituted Only for the Benefit of the Clients of the Class Representative's Solicitors" (2007) 29 Sydney Law Review 5
Category:	Procedural and other rulings
Parties:	Komlotex Pty Ltd (First Plaintiff) Fernbook (Aust) Investments Pty Ltd (Second Plaintiff) AMP Limited (First Defendant) Marion Antoinette Wigmans (Applicant)
Representation:	Counsel: CA Moore SC with A d'Arville (Plaintiffs) EA Collins SC with IJM Ahmed (Defendant) A Hochroth (Applicant) Solicitors: Maurice Blackburn Lawyers (Plaintiffs) Herbert Smith Freehills (Defendant) Quinn Emanuel Urquhart & Sullivan (Applicant)
File Number(s):	2018/00310118
Publication Restriction:	Nil

JUDGMENT

1 **HER HONOUR**: Before me for hearing on 30 April 2020 were two notices of motion, in effect seeking competing orders in relation to the steps (if any) to go forward in the present proceeding (the Komlotex proceeding), that being an open class representative proceeding against AMP Limited (AMP), pending the hearing and determination of an appeal to the High Court from an earlier decision to stay other proceedings (including the Wigmans proceeding) (to which I refer below).

2 The first of those two notices of motion (the Wigmans motion) was filed on 21 April 2020 by Ms Wigmans. Ms Wigmans is the lead plaintiff in a competing

class action against AMP which has been permanently stayed (the Wigmans proceeding, see further below). Ms Wigmans is also, as emphasised by Senior Counsel for the plaintiffs in the Komlotex proceeding (Komlotex Pty Ltd and Fernbrook (Aust) Investments Pty Ltd, to whom I will refer as Komlotex and Fernbrook, respectively), someone falling within the definition of group member in the Komlotex proceeding and thus, perhaps ironically, a group member in whose interests the Komlotex proceeding is presently being conducted.

3 Relevantly, in her notice of motion, Ms Wigmans seeks an order, pursuant to ss 61(1) and/or s 183 of the *Civil Procedure Act 2005* (NSW) (*Civil Procedure Act*), r 2.1 of the Uniform Civil Procedure Rules 2005 (NSW) and/or the Court's inherent jurisdiction, that certain of the orders made on 12 March 2020 and 9 April 2020 in the Komlotex proceeding (to which I refer in due course) now be vacated.

4 Counsel for Ms Wigmans emphasises that Ms Wigmans does not here seek a stay of the Komlotex proceeding; rather, she seeks the deferral of the taking of particular steps in the litigation (relevantly, the issue of opt out notices and the holding of a mediation) pending the determination of Ms Wigmans' appeal to the High Court in relation to the permanent stay of the Wigmans proceeding.

5 The second of the competing notices of motion (the Komlotex motion) was filed on 27 April 2020 by Komlotex and Fernbrook seeking more extensive relief (in relation, *inter alia*, to registration of group member claims, the issue of opt out notices and the preparation of the matter for mediation – those being the very steps that Ms Wigmans says should not take place pending the High Court appeal).

Background

6 The background to the present application has been set out in various decisions both in this Court and in the Court of Appeal. It can be briefly stated as follows.

7 The Komlotex proceeding was commenced following the making of certain disclosures by AMP executives during evidence given on 16 and 17 April 2018 at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry after which AMP's share price fell sharply.

Allegations are made in the Komlotex proceeding that AMP contravened its continuous disclosure obligations and statutory prohibitions on misleading or deceptive conduct by failing to disclose to the market that it had deliberately charged its customers fees for ongoing financial advice and related services where no such services were provided; and had misled the regulator, Australian Securities and Investments Commission, as to the nature and extent of that misconduct over an extended period. (I interpolate to note that very similar allegations were made in the Wigmans proceeding.)

8 At the time it was commenced, the Komlotex proceeding was only one of a number of competing sets of representative proceedings (some or all of which might well be said to have been commenced in an unseemly scramble either to obtain the so-called "first mover advantage", to which reference has been made in other cases, or to jump onto the class action "bandwagon", so to speak). Each of those competing representative proceedings arose out of substantially the same factual background and, to a large extent, brought the same or much the same claims for the same or much the same set of group members. Indeed, the contention of Ms Wigmans when the multiplicity or carriage motions to which I refer below were before me (as I understand was also her contention in the more recent High Court special leave application) was that each of the subsequent proceedings was "essentially duplicative" of her own (first commenced) proceeding.

9 The first of the competing representative proceedings (the Wigmans proceeding) was commenced in this Court. The following four sets of proceedings, in strict order of commencement (though it may be noted that in the case of the second set of proceedings this was only by a number of hours), to which I have elsewhere referred as the Wileypark, Georgiou, Fernbrook and Komlotex proceedings, were commenced in the Federal Court of Australia.

10 After a number of unedifying interlocutory skirmishes as to the forum in which any one or more of the respective proceedings should continue, a number of interlocutory applications (the multiplicity or carriage motions) brought in the respective proceedings were heard by me on 6 and 7 December 2018. For reasons published on 23 May 2019 (see *Wigmans v AMP Ltd* [2019] NSWSC

603 – the Stay Judgment), I ordered, *inter alia*, that the Komlotex and Fernbrook proceedings be consolidated (into what I am here referring to as the Komlotex proceeding) and I permanently stayed the remaining sets of proceedings, including the Wigmans proceeding. In simple terms, I allowed the Komlotex proceeding to go ahead and I permanently stayed the Wigmans proceeding. In so doing, I had concluded that the continuation of more than one of the competing representative proceedings would be inimical to the facilitation of the just, quick and cheap resolution of the real issues in these proceedings and would, adapting the words of Lee J in *Perera v GetSwift Ltd* (2018) 263 FCR 1; [2018] FCA 732 (*GetSwift*) (at [309]), "involve an element of vexation to be occasioned to [AMP] when there is no justifiable reason why it should face [four] open class actions rather than one" (see at [347] of the Stay Judgment).

Special leave to appeal to the High Court of Australia

11 Since the stay of the other representative proceedings, I have continued to case manage the ongoing conduct of the Komlotex proceeding. The most recent orders, relevantly, in that proceeding were orders made on 12 March 2020 and 9 April 2020 in relation, *inter alia*, to the issue of opt out notices to group members (those orders being the subject of the present applications).

12 Meanwhile, however, Ms Wigmans, whose Counsel on the present applications emphasised her subjective wish to conduct her "own" class action "against AMP with the lawyers, the funder and the pleading of her choice", in the context of emphasising Ms Wigmans' relevant interest in the present High Court appeal (see T 64.43 and see also T 25), brought an application for leave to appeal from the permanent stay of her proceeding. That application was heard, concurrently with the appeal itself, in October 2019. The Court of Appeal (comprised by Bell P, Macfarlan, Meagher, Payne and White JJA) granted leave to appeal in respect of one ground of the draft notice of appeal, refused leave in respect of the remaining grounds of the draft notice of appeal, and dismissed the appeal (see *Wigmans v AMP Ltd* [2019] NSWCA 243; (2019) 373 ALR 323 (the Court of Appeal Decision)).

13 Ms Wigmans then sought, and on 17 April 2020 obtained, special leave to appeal to the High Court from the Court of Appeal Decision. The proposed grounds of appeal were framed by Ms Wigmans in her special leave application (a copy of which was exhibited to her solicitor's affidavit on the present application) as follows:

> 1. The Court of Appeal erred in failing to find that Part 10 of the *Civil Procedure Act 2005 (NSW)* (**CPA**) did not authorise the approach taken by the primary judge to the determination of the cross-stay applications between the Applicant and the Second Respondent [Komlotex] concerning multiple, duplicative open class actions.
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> 2. The Court of Appeal erred in refusing to grant leave to appeal in respect of whether the primary judge erred by acting upon the assumption that the proceedings by each of the Applicant and the Second Respondent against the First Respondent [AMP] had an equal probability of achieving each possible settlement or judgment outcome within the range of possible outcomes, and should have found that in so doing the primary judge had erred.

14 On the present applications, I was taken to the transcript of the special leave application. It was emphasised by Counsel for Ms Wigmans that there was no limitation placed by the High Court (Nettle and Gordon JJ) on the grounds for which special leave to appeal was granted (see T 17; T 19).

15 The special leave questions, as posed in the application for special leave, were as follows:

> 1. Does Part 10 of the *Civil Procedure Act 2005 (NSW)* (**CPA**) authorise the filing of multiple, duplicative open class action proceedings as the premise for the Court thereafter conducting a hearing derived from United States/Canadian style "carriage" and "certification" motions, so as to determine which matter is likely to produce the largest settlement or judgment sum against the defendant and the highest net return for group members?
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> 2. If, contrary to the Applicant's contention, such a process is authorised by Part 10 of the CPA, when a court is faced with competing, duplicative open class proceedings being conducted on the basis of differing funding models with differing incentives, disincentives and risk profiles, is it permissible for the Court simply to assume, without findings in the evidence, that each of the proceedings, if conducted by experienced legal representatives, has an equal probability of achieving each possible settlement or judgment outcome within the range of possible outcomes?

16 There was some debate on the present applications as to whether, in the course of the special leave argument, there had been a crystallisation or refinement of the issues the subject of the draft grounds of appeal but, as noted above, Counsel for Ms Wigmans made clear that there was no limiting of the special leave grounds so that, in his submission, "all [is] in play". In

particular, it was said (see T 17; T 19) that there had been no abandonment of Ms Wigmans' vexation and oppression or abuse of process argument (the so-called vexation or oppression ground) on which it was contended that the Komlotex proceeding should have been stayed (the Wigmans proceeding being the first in time and the other proceedings having no relevant juridical advantage) but that, even on the ground relating to the factors that the Court could properly take into account (i.e., going to the multifactorial analysis which was the approach adopted in *GetSwift* and in which I had, over Ms Wigmans' opposition, engaged), the Komlotex proceeding should still have been stayed. Ms Wigmans' position is that the original decision (in the Stay Judgment) staying her proceeding was affected by an error of law and should not have been made (see T 18) and she maintains that Komlotex and Fernbrook are here seeking to take advantage of that putative error by progressing the Komlotex proceeding to the stage of the opt out process (and proposed mediation) (see T 20).

Orders made on 12 March 2020 and 9 April 2020

17 Relevantly, the orders made on 12 March 2020, which Ms Wigmans initially sought by motion wholly to have vacated, were:

> 3. On or before 8 May 2020, the Defendant is to provide discovery of a second and final tranche of the documents described in Schedule A.
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> …
>
> 8. Pursuant to section 162 of the Civil Procedure Act 2005 (NSW) (the Act), 4:00pm (AEDT) on 5 June 2020 (the Class Deadline) be fixed as the date before which a Group Member (as defined in the Amended Commercial List Statement filed on 5 August 2019) may opt out of the proceeding.
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> …
>
> 11. Subject to order 13 below, pursuant to section 183 of the Act, any Group Member who wishes to participate in the distribution of any amount agreed in settlement of this proceeding must, by the Class Deadline, register their claim by:
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> a. submitting a completed registration form in a form set out in the opt out and registration notice approved by the Court at the hearing referred to in order 10 above (Registration Form) through the 'AMP Shareholder Class Action Claims Registration' webpage established on the website of the plaintiffs' solicitors; or
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> b. completing a hard-copy Registration Form and returning it to the plaintiffs' solicitors at Level 8, 179 North Quay Brisbane Qld 4000 (New Registered Members).

12. In completing the Group Member Registration Form, and in order to register for the purpose of Order 11 above, each Group Member will be required to submit:

a. the Group Member's name and address and/or email address;

b. any relevant Holder Identification Number (HIN) or Security Reference Number (SRN), if available;

c. the number of AMP securities held by each Group Member immediately prior to the commencement of trade on 10 May 2012;

d. for each acquisition:

i. transactional information consisting of the date of acquisition and quantity of securities acquired regarding AMP securities acquired from 10 May 2012 to 13 April 2018 (inclusive); and

ii. total amount paid (net of brokerage) in respect of the acquisition, if available;

e. for each sale:

i. transactional information consisting of the date of sale and quantity of securities sold regarding AMP securities sold from 10 May 2012 to 13 April 2018 (inclusive); and

ii. total amount received (net of brokerage) in respect of the acquisition, if available.

13. A Group Member will be deemed to have complied with Order 11 above if, by the Class Deadline:

a. that Group Member has retained Maurice Blackburn in writing to act for that group member in connection with this proceeding (Existing Registered Group Members); and

b. to the extent they have not already done so, that Group Member provides to Maurice Blackburn the same information as New Registered Group Members are required to submit pursuant to Order 12 above.

14. By 4:00pm AEDT on 17 July 2020, the Plaintiffs must deliver to the solicitors for the Defendant (in electronic form), a de-identified version of the information referred to in order 12 in respect of each of the Existing Registered Group Members and New Registered Group Members.

15. Pursuant to section 183 of the Act, and subject to any further order of the Court, any Group Member who by the Class Deadline does not opt out and who is not a New Registered Group Member or Existing Registered Group Member:

a. will remain a group member for all purposes of this proceeding, including for the purpose of being bound by any judgment in this proceeding and being entitled to participate in any award of damages by the Court if this proceeding does not settle at the first mediation scheduled in this matter, or within the period between the first day of that mediation and the first of the following to occur:

i. the date that is 6 months after the first day of the mediation; or

ii. the first day of the hearing on liability in these proceedings.

b. shall not, without leave of the Court, be permitted to seek any benefit pursuant to any Court approved settlement of this proceeding reached at the first mediation scheduled in this matter, or within the period between the first day of that mediation and the first of the following to occur:

i. the date that is 6 months after the first day of the mediation; or

ii. the first day of the hearing on liability in these proceedings (Mediation Class Closure Order).

16. If no in principle settlement of this proceeding is reached at the first mediation scheduled in this matter, or within the period between the first day of that mediation and the first of the following to occur (i) the date that is 6 months after the first day of the mediation, or (ii) the first day of the hearing on liability in these proceedings, and if the parties intend to conduct a further mediation and seek to extend the operation of the Mediation Class Closure Order, either party may approach the Court seeking such orders. At that point either party may propose such regime for notification of group members that the party considers reasonable and appropriate in the interests of group members, including by proposing that group members not be provided with further notification.

Mediation

17. Mediation in this matter is to be conducted no later than 9 October 2020. In the absence of agreement by the parties as to a mediator, the mediation shall be conducted by a person to be appointed by the Court.

18 Pausing here, Ms Wigmans now does not seek to set side order 3 (the discovery order); nor would she complain as to the taking of steps for the preparation of expert evidence in advance of the High Court's determination of her appeal. Rather, her complaint is as to the making of orders in relation to the fixing of the Class Deadline and the orders in relation to claim registration and mediation (broadly speaking, as to the opt out process and mediation taking place in advance of the High Court's determination of her appeal).

19 The orders made on 9 April 2020, relevantly, extended the time for the Class Deadline (to 7 July 2020) and the orders in relation to the opt out procedure; and made provision for the service of expert evidence. Those orders included:

Evidence and Opt Out Orders

1. Order 5 made on 12 March 2020 be amended such that by 4.00pm on 11 August 2020 the Plaintiffs serve any material on quantum and materiality upon which it intends to rely at mediation on a without prejudice basis.

2. Order 6 made on 12 March 2020 be amended such that by 4.00pm on 7 October 2020 the Defendant serve any material on quantum and materiality upon which it intends to rely at mediation on a without prejudice basis.

3. Order 8 made on 12 March 2020 be amended such that 4.00pm (AEDT) on 7 July 2020 (Class Deadline) be fixed as the date on or before which a

Group Member (as defined in the Amended Commercial List Statement) may opt out of the proceeding.

4. Order 14 made on 12 March 2020 be amended such that, by 4.00pm (AEDT) on 11 August 2020, the Plaintiffs must deliver to the solicitors for the Defendant (in electronic form), a de-identified version of the information referred to in order 12 made on 12 March 2020.

5. Pursuant to s 176(1) of the Civil Procedure Act 2005 (NSW) (the Act), the form and content of the notice (Notice to Group Members) in Schedule A and the abridged notice (Abridged Notice) in Schedule B be approved.

6. Pursuant to s 183 of the Act, the notice set out in Schedule C to this Order that is a modification of Form 115 (Opt Out Notice) be approved for this proceeding for the purpose of r 58.2(1) of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR).

7. Pursuant to s 176(2) of the Act, notice is to be given to group members by no later than 4pm on 28 April 2020 according to the following procedure:

(a) the plaintiffs are to display the Notice to Group Members and Opt Out Notice on the plaintiffs' solicitor's website, www.mauriceblackburn.com.au, continuously until the Class Deadline;

(b) the plaintiffs are to deliver the Notice to Group Members and the Opt Out Notice to the contact email address where an email is available, or failing that, by ordinary mail, to each group member who is a client of the plaintiffs' solicitors or whom they are otherwise aware;

(c) the defendant is to cause the Notice to Group Members and the Opt Out Notice to be sent to each person or entity listed in the defendant's share register as having purchased shares in the defendant between 10 May 2012 and 13 April 2018 inclusive, such notices to be sent by email where an email address is available, or failing that, by ordinary mail;

(d) the plaintiffs are to cause an advertisement in the terms of the Abridged Notice (Schedule B) to be published in the legal notices or equivalent section in one week day edition of The Australian Financial Review.

8. The defendant will provide to the plaintiffs an estimate of the disbursement costs of the defendant in complying with Order 7(c) above, and the costs shall be paid by the plaintiffs in the first instance but shall be costs in the cause.

9. Pursuant to s 162(2) of the Act and r 58.2(1) of the UCPR, any group member who wishes to opt out of this proceeding must, on or before the Class Deadline, deliver an Opt Out Notice to the Registry of the New South Wales Supreme Court.

10. If, on or before the Class Deadline, the solicitors for any party receive a notice purporting to be an opt out notice referable to this proceeding, those solicitors are to file such notice in the Registry of the Supreme Court of New South Wales within 7 days of receiving it and the notice shall be treated as an Opt Out Notice received by the Court at the time when it was received by the solicitors.

11. The solicitors for the plaintiffs and the defendant be granted leave to inspect the Court file and to copy any opt out notices filed by group members.

Claim Registration

12. The form and content of the Registration Form referred to in order 11 of the order made on 12 March 2020, be approved in the form of Schedule D to these Orders.

13. The Notice to Group Members, the Abridged Notice, the Opt Out Notice and the Registration Form approved pursuant to Orders 3, 4 and 10 above, may be amended by the plaintiffs before they are emailed, posted, displayed or published in order to correct any website or email address or telephone number or other non- substantive error.

Mediation

14. Order 17 made on 12 March 2020 be amended such that mediation in this matter is to be conducted by no later than 20 November 2020.

…

20 Again, Ms Wigmans would now not complain as to the service of expert evidence, her position simply being, as I understand it, that this should not be part of a regime for mediation prior to the High Court appeal being determined. AMP, along with Komlotex and Fernbrook, for their part say that the orders for the provision of expert evidence are part of a "package" of orders agreed between them for the conduct of the proceedings and resist the suggestion that those be made in the absence of the balance of that "package". As I explain below, AMP submits that the utility of orders for the provision of expert evidence is diminished if that takes place prior to completion of the opt out process.

21 Komlotex and Fernbrook, by their motion, now seek to have orders 11-17 made on 12 March 2020 and order 4 made on 9 April 2020 vacated (in light of recent developments) and AMP consents thereto. To that extent, there is no issue between Komlotex and Fernbrook on the one hand and Ms Wigmans on the other (or, for that matter, AMP).

22 However, what Komlotex and Fernbrook in effect seek is a variation of the registration and opt out regime that was previously ordered (without admission as to the challenge here raised by Ms Wigmans thereto) so as to avoid any doubt, in light of the intervening Court of Appeal decision in *Haselhurst v Toyota Motor Corporation Ltd t/as Toyota Australia* [2020] NSWCA 66 (*Haselhurst*) (as to which, see further below), as to whether there was power to make certain of the orders of 12 March 2020. Ms Wigmans opposes this.

Ms Wigmans' submissions

23 Ms Wigmans maintains, as adverted to above, that on a proper application of principle the Komlotex proceeding ought to have been found to be an abuse of process. Her position is that, if successful in her appeal to the High Court, she will seek an order that the stay in respect of the Wigmans proceeding be lifted and that the Komlotex proceeding be stayed. In the alternative, if her appeal is successful, Ms Wigmans will seek orders for the stay in respect of the Wigmans proceeding to be lifted and for both proceedings (the Wigmans and Komlotex proceedings) then to be remitted to the Equity Division of this Court for determination of the cross-stay applications according to law. Ms Wigmans recognises that, in the event that the alternative form of relief is granted, it may be necessary for this Court again to undertake a multifactorial analysis of the kind previously conducted (albeit one not affected by the error of law that would have, on this hypothesis, been found to have been made) (see T 18-9), although she appears to contemplate that there might also be some scope for "negotiation" at that stage which might affect that course. Furthermore, Counsel for Ms Wigmans would not foreclose the possibility that an argument might in that event be made that both proceedings should run at the same time (see T 19.8) (a course that AMP would no doubt, consistent with its previous position, oppose).

24 Although Ms Wigmans emphasises that she is not here seeking a stay of the Komlotex proceeding, she accepts that the orders she seeks will cause some delay in the preparation of the matter for mediation and she accepts that the principles applicable when considering applications for a stay pending leave to appeal or an appeal (to which I refer in due course) are an instructive guide on her present application.

25 In essence, Ms Wigmans says that the making of opt out orders or orders for mediation in the Komlotex proceeding should be deferred because: her High Court appeal raises serious issues for determination by the High Court; there is a real risk of prejudice or damage if a stay (in the manner here sought) is not granted; the prejudice to other parties to the litigation does not outweigh this risk (in circumstances where what is not sought is a complete stay of the Komlotex proceeding); and she has not delayed in seeking this relief.

26 It is noted that what must here be balanced is the risk of prejudice to Ms Wigmans (and third party interests, namely group members in her proceeding) if the orders sought by Komlotex and Fernbrook are made, and Ms Wigmans is ultimately successful in the High Court appeal, against the risk of prejudice to the parties and relevant interests in the Komlotex proceeding if the making of the orders here sought by Komlotex and Fernbook is deferred, and Ms Wigmans is unsuccessful in the High Court appeal.

27 As to the former prejudice (if the opt out, registration and mediation orders are made and Ms Wigmans is successful on the appeal), this is identified as being threefold: the impact that the orders would have on the High Court's processes and the exercise of Ms Wigmans' appeal rights; potential confusion for group members (which it is said, in itself or in conjunction with these other matters, has the capacity to bring the administration of justice into disrepute); and wasted cost and expense (see at T 15).

28 Ms Wigmans contends that there is a risk that the administration of justice will be brought into disrepute if group members are "told to opt out and register for a mediation taking place in December 2020, only to be later told that their previous opt out or registration was legally ineffective, as was any mediation".

29 In terms of that prejudice that may be suffered by Komlotex and Fernbrook if the orders sought by Komlotex and Fernbrook are not now made, it is submitted by Ms Wigmans that the purported benefit to group members by the making of the orders is limited. It is said that, at best, the orders might result in a settlement with AMP "some months" earlier than might otherwise be the case (on the assumption that Ms Wigmans does not ultimately succeed in the High Court). It is submitted that the potential detriment (in terms of wasted cost, confusion and the potential subversion of the High Court appeal) far outweighs that benefit.

30 Further, Ms Wigmans argues that the proposed orders are beyond power in that they impermissibly invite group members to register to participate in any settlement of the Komlotex proceeding against the *in terrorem* threat of later being shut out of the settlement; or, at the least, that the proposed orders are inconsistent with the legislative scheme provided for in relation to

representative proceedings and therefore ought not be made (relying upon *Haselhurst*). Although, initially, this submission was coupled with the complaint as to group members having their rights against AMP extinguished if they do not register, the proposed variation of the orders now put forward by Komlotex and Fernbrook, albeit without admission that the initial orders were without power, removes the foundation for that particular complaint.

31 Ms Wigmans says that she recognises the potential prejudice to group members (in the event that the High Court appeal is ultimately dismissed), if no further steps were to be taken in the Komlotex proceeding pending the High Court appeal and, therefore, she (now) does not say that no steps at all should be taken in the Komlotex proceeding pending the decision of the High Court. However, she submits that such steps as are taken should not unduly interfere with the High Court proceedings or have the potential to prejudice group members in the event that the appeal succeeds. In this regard, as already noted, Ms Wigmans now does not resist the making of orders in relation to discovery (nor would she resist orders as to the provision of expert evidence – as contemplated by the proposed orders she has herself put forward in this regime) (see T 12) but (as noted above) she maintains her opposition to orders in relation to opt out notices, registration and mediation of the dispute.

32 It is noted by Ms Wigmans that the directions made by the High Court on 17 April 2020 with respect to the appeal provide for all pre-hearing steps to be completed by 7 August 2020. Ms Wigmans' solicitor, Mr Damian Scattini, has estimated that the appeal will be heard in September, October or November 2020 (although he says that in light of the current COVID-19 pandemic there is some uncertainty as to timing).

33 Ms Wigmans notes that her appeal to the Court of Appeal (as was her application for special leave to the High Court) was formally constituted as an appeal from the orders made in the Wigmans proceeding, rather than those made in the Komlotex proceeding, but argues that that procedural matter should not assume any significance (nor have the opposing parties here suggested otherwise). As noted above, ultimately, Ms Wigmans will seek an order, if the appeal is allowed, staying the Komlotex proceeding. Thus it is

argued that, as a matter of substance over form, the matter should be approached as if there was on foot a High Court appeal against the decision to refuse to stay the Komlotex proceeding. As no procedural point is here taken by the parties, nothing turns on this.

First identified prejudice – that exercise of appeal rights or appeal process would be rendered nugatory

34 Ms Wigmans' submission (that it is not appropriate for this Court to "sanction" a process designed to move the Komlotex proceeding to a mediation by 11 December 2020, a time at which the High Court appeal "may not even have been heard, let alone determined") is made for the following reasons. Ms Wigmans invokes in this context the approach of the Western Australian Court of Appeal in *Temwork Holdings Pty Ltd v Western Australian Planning Commission* [2004] WASCA 65; (2004) 132 LGERA 439 (*Temwork*) (a decision to which I will come in due course).

35 Ms Wigmans argues, first, that the orders have the significant potential to render nugatory, or at least significantly to interfere with, Ms Wigmans' appeal to the High Court. In that appeal, Ms Wigmans says she will contend, first, that the Court does not have a protective jurisdiction to stay a first filed action in favour of a second filed duplicative action on the basis of a forward looking prediction that the second filed duplicative action might yield a higher return for group members (on a gross or net basis); second, that a second or later duplicative action should be regarded as prima facie vexatious or oppressive and liable to be stayed unless it can point to a traditional juridical advantage which the courts are well capable of assessing and which outweighs the prima facie vexation or oppression; and third, that, even if the courts have power to engage in predictive assessments of likely future returns of competing class actions, where the differing actions have differing funding models with differing incentives and disincentives attached to them, that power cannot be exercised on the basis of a standardised assumption that each action will achieve the same gross return.

36 It is noted that the High Court may accept these contentions, allow the appeal and order that the Komlotex proceeding be stayed but that it is also possible that the appeal may be allowed and the cross-stay applications brought by

Ms Wigmans and Komlotex remitted to this Court for redetermination. It is said that, in the latter event, if the orders proposed by Komlotex and Fernbrook are now made, it is possible that by the time the cross-stay applications are remitted to this Court a mediation will have been conducted and potentially a settlement reached; and it is said that, even if that has not yet happened, Komlotex and Fernbrook would no doubt argue on remittal that they are ready to proceed to mediation without the need for any further opt out or registration process whereas Ms Wigmans is not. It is said that either possibility would substantially deprive Ms Wigmans of her success in the High Court through orders which had been made on the basis, since found to be unlawful, of the stay of the Wigmans proceeding.

37 The submission that is here made (see at T 20) is that the prejudice to the High Court appeal, or to the High Court's processes, arises precisely because of the possibility of remittal (which, Ms Wigmans notes, is considered by Komlotex and Fernbrook in their submission on the present applications to be the more likely outcome if the appeal were to succeed). It is said (see at T 20) that:

> On this hypothesis, the Wigmans proceeding would have been stayed through an error of law. So the Wigmans proceeding right now on this hypothesis would be stayed in error, and what the plaintiffs seek to do in that scenario is take advantage of that putative error of law and the steps that have been taken in these proceedings on the basis of the state of affairs created by that error, namely that these proceedings are continuing and the Wigmans proceeding is not, and deploy those matters to its advantage, to their advantage, on any remitter. And this would substantially deprive Ms Wigmans of her success in the High Court on the assumption that she has been successful.

38 What is apparently here contemplated is that, if the stay on the Wigmans proceeding is lifted and the matter is remitted to this Court and there is a question about which proceeding should be permitted to go ahead (assuming there was only to be one), Ms Wigmans might be met by an argument by Komlotex and Fernbrook that the Komlotex proceeding should not be stayed (and conversely that the Wigmans proceeding should be stayed) because of the stage of preparedness of the Komlotex proceeding (i.e., if by then the opt out and registration processes have already been completed and, perhaps, there has been an agreement in principle reached for settlement). It is submitted that reference in the authorities to an appeal being rendered nugatory or abortive is a reference to the situation where events are allowed to

move on in the underlying proceedings to a point where the appeal will be incapable of bringing about the result that the appellant seeks. It is said that this is precisely the risk in the present case. In that regard, reliance is placed on the statements of principle in *Gerah Imports Pty Ltd v The Duke Group (in Liq)* [1994] HCA 3; (1994) 68 ALJR 196 (*Gerah Imports*), *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 2]* [1998] HCA 32; (1998) 72 ALJR 869 (*Patrick Stevedores*) and *Advanced Building Systems Pty Ltd v Ramset Fasteners (Aust) Pty Ltd* [1997] HCA 24; (1997) 71 ALJR 814 at 815 (*Advanced Building Systems*).

39 Indeed, it is further contended that the making of the proposed orders and their being carried into effect may have an even more direct effect on the High Court proceedings in the event that the Court is deliberating about whether to remit the matter to this Court or not. It is here said that Komlotex and Fernbrook may submit in the High Court that it should not stay the Komlotex proceeding but should instead remit the matter, precisely because of the steps since taken in the Komlotex proceeding towards opt out, registration and mediation.

40 It is submitted by Counsel for Ms Wigmans that the risk is "even more stark" insofar as the progress of the matter might be relied upon when the matter is before the High Court as relevant to the exercise of discretion as to the relief that ought be granted if Ms Wigmans is successful (see T 21). It is submitted that it would "make a mockery" (see T 22) of the appeal process if it were open to Komlotex and Fernbrook to be able to conduct the proceeding to resolution while the High Court appeal is pending.

41 Ms Wigmans says that this course should not be countenanced and that she, like any litigant, is entitled to exercise her rights of appeal. It is further said in this respect that she has exercised those rights and has obtained a grant of special leave to appeal; and that her appeal rights should not be undermined by the taking of steps in the proceedings below on the basis of the very state of affairs she says has come about unlawfully.

42 Insofar as Ms Wigmans has not advanced submissions in the High Court against various of the conclusions reached in the multifactorial analysis (that she says was wrongly conducted) in the Stay Judgment, it is said that this does

not mean that there is no disadvantage to her in the conduct of the Komlotex proceeding (cf the contention by Komlotex and Fernbrook that she cannot point to any disadvantage or detriment in the conduct of the proceeding pending determination of the High Court appeal). It is said (see at T 25) that:

> Ms Wigmans commenced her proceeding exercising the right conferred upon her by s 157 of the Civil Procedure Act to do so on behalf of group members as lead plaintiff with lawyers, funders and pleading of her choice. If she succeeds on appeal, if she succeeds in the High Court appeal, the result will be that those rights have been taken away from her through an error of law and that is what Ms Wigmans seeks to reclaim through the appellate process. If her appeal rights in that respect are rendered nugatory, that, in my respectful submission, is prejudice. …
>
> … Just because no point is being run in the High Court to the effect that the High Court should find Ms Wigmans' proceedings are better or more likely to result in a greater outcome, because we say that's an assessment which courts simply are not well placed to make, and just because no ground of appeal has been advanced on the basis that the Court could make an assessment, that one set of lawyers is more competent than the other set of lawyers, does not mean that Ms Wigmans therefore has no legitimate interest in pursuing the appeal in the High Court or for that matter in pursuing this proceeding. And it does not mean that rendering Ms Wigmans' appeal right nugatory does not count as prejudice, remembering that the effect of the authorities is prima facie - the ordinary course is that if someone's appeal rights are going to be rendered nugatory you would grant a stay. That's the position in Cambridge Credit, for example, my learned friends rely upon.

Second identified prejudice - confusion

43 Ms Wigmans argues that the proposed opt out notice (Schedule A to the Komlotex motion) is inadequate and prejudicial in how it describes the Wigmans proceeding and the extant High Court appeal. Specifically, complaint is made that the notice does not mention the Wigmans proceeding until the bottom of the fourth page of the notice; that there is no heading or other prominent indication of the subject matter; rather, the Wigmans proceeding is addressed at the end of a section titled “What is the AMP Shareholder Class Action?” (where “AMP Shareholder Class Action” is defined on the first page of the notice as the action commenced by Komlotex and Fernbrook).

44 It is noted that the proposed opt out notice (at [18]) summarises the Stay Judgment with the single sentence “On 23 May 2019 the Supreme Court of New South Wales found that the best and most efficient result for group members and fairness to the defendant was for the AMP Shareholder Class Action brought by Komlotex and Fernbrook (in which Maurice Blackburn act as

solicitors) to proceed and for the Wigmans Proceedings to be stayed". Further, complaint is made that:

> While that sentence accurately records AMP's characterisation of the Court's task, recorded in the Stay Judgment at [349], it hardly captures the complex task that was before this Court. No mention is made of the fact that the Wigmans proceeding was commenced nearly a month before the Komlotex proceeding. Expressing the matter in this way may give group members the impression that the Court found that the Wigmans proceeding was inefficient or involved unfairness, when, of course, no such finding was made by the Court.

45 Insofar as the proposed opt out notice states "[i]t is not known when the High Court hearing will occur, and it may not be until 2021" (at [20]), it is said that this is misleading by reference to Mr Scattini's present best estimate (being that the High Court hearing will be in September, October or November of this year).

46 It is also said that the description (at [20a]-[20e]) of what may happen if Ms Wigmans is successful on appeal is apt to mislead group members in the following respects.

47 First, insofar as it states that "the AMP Shareholder Class Action brought by Komlotex and Fernbrook may be stayed and the Wigmans Proceedings allowed to proceed", it is said that no explanation is given as to what it would mean for the Komlotex proceeding to be "stayed" (this being said to be a legal term of art the meaning of which may not be apparent to a member of the general public); and that nowhere is it clearly stated that a stay of the Komlotex proceeding will mean that the opt out process is legally ineffective, any mediation will either not take place or will have been ineffective and any settlement reached will not be carried into effect.

48 Second, it is said that the statement that that "may, or may not, affect steps that have been taken up until that point in the AMP Shareholder Class Action brought by Komlotex and Fernbrook" is plainly incorrect. It is said that, if the Komlotex proceeding is stayed, that will undoubtedly affect steps taken up until that point in that proceeding.

49 Third, the statement that "you may be a group member of the Wigmans Proceedings, unless you opt out (or have already opted out) of the Wigmans

Proceedings (and possibly even if you have opted out of these proceedings brought by Komlotex and Fernbrook)" is said to be misleading and incorrect. It is said that group members in the Komlotex proceeding will (not "may") be members of the Wigmans proceeding unless they opt out and whether or not they have opted out of the Komlotex proceeding is irrelevant to whether they will be a group member in the Wigmans proceeding.

50 Fourth, insofar as reference is made to the different funding arrangements in the Wigmans proceeding and it is stated "[t]hat may result in a different amount being deducted from any amount payable by AMP, either from a judgment or a settlement", it is said that, "[w]hile correct at an abstract level, it is hardly information of any use to group members expressed at that level of generality".

51 Fifth, it is said that the statement that "there may be other effects on the conduct of the class action against AMP" leaves "entirely obscure" what is meant by the opt out notice.

52 Further complaint is made that the proposed opt out notice "entirely fails" to draw group members' attention in a prominent way to the fact that they are being asked to opt out in circumstances where there remains on foot a live debate about which class action should proceed against AMP, which debate once resolved could result in the entirely opt out process being rendered legally ineffective. It is said that no attempt is made in the opt out notice to explain why group members are being asked to make this important decision in these circumstances.

53 It is also said (see at T 32) that the opt out notice does not clearly state (in plain English to non-legally trained group members) that if Ms Wigmans succeeds on appeal and the Komlotex proceeding is stayed then: the Komlotex proceeding will not go forward; any opt out in the Komlotex proceeding will be of no effect; any registration by group members in the Komlotex proceeding will be of no effect; if any mediation has been conducted in the proceedings any settlement reached at that mediation will not bind anyone; and (see at T 33) opt out in the Komlotex proceeding will have no effect on the Wigmans proceeding.

54 It is submitted that the abridged form of opt out notice (Schedule B to the Komlotex notice of motion) is "even more inadequate" because it fails even to

mention that Ms Wigmans has been granted special leave to appeal by the High Court and that a result of the appeal may be the stay of the Komlotex proceeding (stating only that if the appeal is successful "it may have an effect on the conduct of the class action against AMP").

55 From a practical perspective, it would seem that the principal, if not sole, complaint by Ms Wigmans as to the orders proposed is as to the course of issuing opt out notices pending the High Court's determination of her appeal (since she appears to accept that, were the parties to be inclined to proceed to mediation at this stage, they could do so without any basis for complaint by her).

56 In that respect, Ms Wigmans points to the authorities (not disputed by the other parties) to the effect that opt out orders ought not be made when there is still a live controversy as to which of a number of overlapping representative proceedings is going to proceed. Reference is made to *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 56; (1999) ATPR 41-679 (*Johnson Tiles*) where Merkel J said (at [14]) that "[p]lainly, the Court will seek to avoid a situation of ordering the giving of the opt out notice in respect of a proceeding which may not be an, or the, appropriate representative proceeding". Reference is also made to *King v GIO Australia Holdings Ltd* [2001] FCA 270 at [15] (per Sackville, Hely and Stone JJ) as to the importance that any decision made concerning opting out of the proceedings not be based on a notice that is apt to mislead and to *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 4)* [2010] FCA 749 (*Pharm-a-Care*) where Flick J (at [18]) considered that it may be appropriate to defer the giving of any notice until after any notices of motion seeking to have a proceeding stayed or dismissed is resolved, noting that to do so may limit the extent to which further notices to group members may be required. Ms Wigmans says that the undesirability of having successive opt out notices issued, particularly where the group is very large, is obvious.

57 In making a number of criticisms as to the content of the proposed (revised) opt out notice, Ms Wigmans points out that an opt out notice "must be readily

comprehensible by non-lawyers" and "written in plain English" (citing *Courtney v Medtel Pty Ltd* [2001] FCA 1037 at [10] per Sackville J).

58 As to the second (and third) categories of identified prejudice (confusion and wasted costs), while Counsel for Ms Wigmans ultimately accepted that one could not say there was no possible benefit in having held a mediation in advance, it is submitted that it is more difficult to see how that benefit can later be "picked up" (see at T 26) for the benefit of group members in the Wigmans proceeding in the case of a mediation held without Ms Wigmans' lawyers having been a part of that process (and that this too would risk bringing the administration of justice into disrepute). It is submitted that it would be confusing and extremely costly (including the cost of dealing with opt out and registration notices and the like) (see T 26).

59 In this regard, it is noted that the undesirability of issuing opt out notices at a time when the ultimate vehicle for prosecution of group members claims has not finally been resolved was recognised by the solicitor for Komlotex (now acting for both Komlotex and Fernbrook), Mr Andrew Watson, at a time when the initial disputes as to the jurisdiction in which the competing class actions should proceed was before the Court. Reference is made to what was said by Mr Watson at that time in his affidavit in support of Komlotex' position that no opt out notices should be published prior to resolution of the multiplicity of proceedings, namely that:

> … if this Court were to make orders for the undertaking of any further steps in this proceeding (including, in particular, for the distribution of any notices to group members) in advance of the resolution of the Transfer Applications and the Case Management Issues, it is possible that such steps will need to be repeated and/or revised in the future depending on the outcome of the Transfer Applications and the resolution of the Case Management Issues. The revision or repetition of such steps is, in my opinion, highly undesirable due to the likelihood of confusing group members and incurring significant unnecessary costs.

60 It is noted that Komlotex submitted at about the same time that:

> Further, if there are to be any orders made in relation to the multiplicity of overlapping actions then this needs to be resolved before any orders are made for opt out, a common fund, or class closure. Any other approach may lead to notices being sent to group members on a false or misleading basis, and the need to attempt to unscramble the resulting position at very considerable cost and trouble.

Third identified prejudice - wasted costs

61 Third, it is said that requiring group members to opt out now has the potential to cause significant wasted costs and expense. It is said, in this regard, that this expense will include the costs of administering the process of distributing opt out notices to group members. It is said that, even if the parties are willing to bear that expense at their own risk in the event that the Komlotex proceeding is ultimately stayed, theirs is not the only relevant interest. Rather, given that opt out notices are to be provided to the Court and are managed on the Court file by Court staff, and although the proposed opt out notice contains (as is standard) a warning not to direct questions to the Court, such warnings are necessary precisely because it is commonplace for Court staff to receive such queries. It is said that the Court's resources should not be burdened by the need to undertake an opt out process twice.

62 Ms Wigmans contends that the combination of the confusion to group members (the second identified prejudice) and wasted costs of two successive opt out processes (the third identified prejudice), as adverted to above, is such that, in the event that the proposed orders are made and the Komlotex proceeding is subsequently stayed, there is a danger that the administration of justice will be brought into disrepute.

63 Ms Wigmans says that the comments by Mr Watson that I have referred to above (made at a time prior to any determination having been made about which proceeding should go ahead against AMP) as to the undesirability and wasted expense of trying to "unscramble" the position if opt out notices are given to group members ahead a final resolution of multiplicity are equally applicable to the situation where notices are given in the Komlotex proceeding if it is later stayed.

64 It is submitted (see T 27(34)) that once opt out notices have been issued it is "difficult and costly to unscramble the egg"; and that this is an obvious risk of prejudice if the orders are made but Ms Wigmans is ultimately successful in the High Court. In this regard, it is submitted that the reliance placed by AMP on the approach that was adopted in *Jones v Treasury Wine Estates* [2017] FCA 296 (*Jones*) (as to which, see below) is not apt since that case raised different

issues and there was no suggestion that if the relevant decision was overturned that would lead to a permanent stay of the Jones proceeding such that that there would still have been a need for opt out orders in any event (see T 27-28).

Prejudice if Komlotex orders not made

65 As to the prejudice on the other side of the ledger, as adverted to above, it is accepted that if the proposed orders are not made, and Ms Wigmans fails on the appeal, this would result in a delay as to when a mediation would occur (on the assumption that the parties do not wish to mediate until after the opt out procedure has been completed). Apart from expressing scepticism as to whether a mediation by 11 December 2020 will in fact take place in any event (see T 29), as already noted Ms Wigmans maintains that the delay will only be in the order of two to three months (at least if the expert evidence is prepared in the interim). It is said that a delay of a few months in the context of a large commercial dispute which, if it went to trial would not be resolved for some time, should not be overstated (see T 29).

66 It is said that the extent of such delay should not be overstated and that:

> Even if opt out and registration orders are made, it may be doubted that AMP would be willing to mediate with the High Court appeal hanging over its head. It may be that any mediation would need to await the High Court's decision. If the opt out and registration orders are not made, Ms Wigmans does not oppose the parties taking such steps as they can at their own cost risk, such as the service of without prejudice evidence, so as to be prepared to go to mediation as soon as possible if she is unsuccessful in the High Court. If the appeal is dismissed, the Court could then make orders for opt out and registration with a view to the parties proceeding to mediation as soon as practicable.

67 Further, it is observed that a delay in mediating might, or might not, substantially delay the final resolution of these proceedings. Any settlement would, in any event, need to be approved under s 173 of the *Civil Procedure Act,* which could not occur until after the High Court's decision in any event. It is said that, if the matter does not settle, a final hearing and determination of these proceedings may be years away and in the context of a large, multi-year dispute, a delay of several months, while undesirable, does not create undue prejudice.

68 In summary, it is said (at T 29.34-42) that:

> Balancing the prejudice, … the risks are far greater on the side of the ledger where your Honour makes the orders. If your Honour makes the orders and we succeed on appeal, the prejudice which I've outlined to your Honour, first of all involves the integrity of the appellate process. Secondly, it involves the clarity and integrity of the opt of process, which is essential to the operation of pt 10. Thirdly, it could involve widespread confusion and significant waste of costs of third parties, we're referring there to third parties being primarily the group members

Haselhurst

69 A further reason put forward by Ms Wigmans against the orders now proposed by Komlotex and Fernbrook is that the registration orders sought are beyond power because they are an attempt to achieve, by another means, the type of "class closure" found by the Court of Appeal to be beyond power in *Haselhurst*.

70 The impugned order the subject of *Haselhurst* (referred to as a "soft" class closure) was as follows:

> 16. Pursuant to s 183 of the Act, any Group Member who neither opts out in accordance with Order 12 nor registers in accordance with Order 15 on or before the Class Deadline shall remain a Group Member for the purposes of any judgment or settlement but, in the event that an in-principle settlement is reached before the commencement of the trial on the common issues and that settlement is ultimately approved by the Court, shall be bound by the terms of the settlement agreement *and barred from making any claim against the Defendant in respect of or relating to the subject matter of this proceeding, including participating in any form of compensation or otherwise benefiting from any relief that might be ordered or agreed*.
>
> [Emphasis added]

71 Ms Wigmans points to two aspects of the impugned order that she says were there found to be problematic: the fact that it effected a contingent extinguishment of group members' rights and that this would be "even though hitherto they have taken no active part in the proceedings, and their rights against the relevant defendant have benefited from s 182 of the *Civil Procedure Act* suspending time from running for the purposes of a limitation defence" (see *Haselhurst* at [47] per Payne JA).

72 Relevantly, the context in which the power to make such an order was being considered was where the order had been made prior to any mediation having been held and, for the impugned order to be within power pursuant to s 183 of the *Civil Procedure Act*, it would need to be shown that it was necessary to ensure or attain justice.

73 Ms Wigmans emphasises that the Court of Appeal in *Haselhurst* considered the scheme of the legislation and, in particular, Ms Wigmans says that the order was "problematic" not just because "[g]roup members who fail to register are not entitled to participate in a distribution of settlement proceeds and yet are 'barred from making any claim against the Defendant'" (Payne JA at [52]) but also because it was recognised that the scheme of the class order processes under the legislation was that, up to the point of settlement or judgment, "[g]roup members need take 'no positive step' in the prosecution of the proceeding to judgment to gain whatever benefit its prosecution may bring, whether that benefit arises by a settlement (s 173) or a judgment (s 177)" (see *Haselhurst* at [54] per Payne JA). Ms Wigmans goes so far as to submit that this is an "entitlement" or right on the part of group members under the statutory regime.

74 Thus, even though the orders now proposed by Komlotex and Fernbrook do not provide for the contingent extinguishment of group members' causes of action, Ms Wigmans says that the stated intention, if settlement in principle be reached at mediation, to seek an order precluding those who have not registered from participating in the settlement is inconsistent with the recognition by the Court of Appeal that a group member is "entitled" (to use Ms Wigmans' language) to do nothing until the point of settlement or judgment in order to take the benefit of the cause of action.

75 Ms Wigmans points in that regard to the following observations made by Payne JA (with whom all members of the Court of Appeal agreed).

76 First, (at [87]) that:

> … A Group Member bombarded with detailed information about the proceedings need take no positive step in the prosecution of the proceeding to judgment or settlement to gain whatever benefit its prosecution may bring. Once there is an amount of money available, whether by judgment or settlement, the Group Member will then have to take a positive step to share in the proceeds …

77 Second, (at [105]) that the power to bar a claim held by a group member is one that arises at the conclusion of a representative proceeding. It is noted that Payne JA considered that there were permissible ways to close the class other than as contemplated by the impugned order 16: for example, by amending the

originating process to narrow the class definition to those who in addition to having a claim against the defendant had also registered themselves or had retained the same firm of solicitors or agreed to a funding agreement with an external funder (see at [67]).

78 Ms Wigmans places emphasis on the recognition by his Honour (at [120]) that a class closure order would have:

> … the effect that the appellants and their legal advisors will necessarily face an insoluble conflict of interest in any mediation or settlement discussion. It is in the interests of all Group Members who have registered to achieve a favourable settlement. It is in the interests of Group Members who have not registered for the proceedings not to settle regardless of the terms offered. This is because order 16 has the effect that they will recover nothing should the matter settle but should the matter proceed to hearing they may be entitled to damages.

79 It is noted that his Honour concluded (at [122]) that the impugned order "[struck] at the heart" of the Part 10 regime "by setting up an alternative regime of extinguishment of Group Members' rights of action for the purpose of encouraging the parties towards a pre-trial settlement".

80 Ms Wigmans also refers to the judgment of Bell P, where his Honour considered that it was not difficult to conceive that any uncertainty in the number or identity of group members could be addressed by structuring a settlement on a pro rata basis to accommodate the uncertainty (see at [16]). His Honour also considered that:

> … if registration was sought as a condition of mediation (without the fatal consequences of non-registration which order 16 mandates), it could be sought with a view to amending the class definition so that any settlement only applied to those members who had registered. This would avoid the risk of the respondents 'overpaying' in any settlement, if that risk represents their genuine concern. Settlement of the claims of those consumers who had manifested their concern by taking an active step of registration could at least be achieved, without those who had neither opted out nor registered losing their causes of action.

81 Ms Wigmans says that the effect of the class closure order made in the present proceeding (order 15 made on 12 March 2020, as extracted earlier) is relevantly the same as in *Haselhurst*: to effect a contingent extinguishment of the rights of group members who do not opt out or register in the event that the proceedings settle at or soon after mediation; and that the purpose of the orders made for opt out notices and registration is also "plainly the same as in

Haselhurst" (that is, to encourage group members to register by providing for a consequence if they do not).

82 As to the proposed varied opt out regime, Ms Wigmans says that this "is an attempt to achieve, through an elevation of form over substance, what the Court of Appeal in *Haselhurst* has found to be beyond power and a subversion of the opt out regime" in Pt 10 of the *Civil Procedure Act*. Ms Wigmans maintains that what is here proposed is similarly beyond power and, even if that not be the case, Ms Wigmans maintains that the Court should not make orders inconsistent with the legislative regime. To the proposition that it would be for the Court at a later time to approve any extinguishment of rights consequent upon a failure to register at this stage, it is said that such orders would not (ever) be made and hence the Court should not now approve an opt out regime which contemplates that this would be the case (see at T 40).

83 Ms Wigmans says that the opt out regime now proposed shares an essential impermissible feature of the orders held invalid in *Haselhurst*, namely that group members would be required to take a "positive step" prior to any settlement or judgment in order to participate in the fruits of the proceeding. Ms Wigmans says that the purpose and effect of the proposed orders, notation and opt out notice is the same as that in *Haselhurst*, namely to effect a contingent extinguishment of group members' rights based upon actions which they took, or failed to take, prior to any settlement or judgment; and that, for those reasons, the proposed regime (as did that in *Haselhurst*) "strikes at the heart of the Part 10 regime, by setting up an alternative regime of extinguishment of Group Members' rights of action for the purpose of encouraging the parties towards a pre-trial settlement" (in the words of Payne JA at [122]).

84 Ms Wigmans says that, for the reasons explained in *Haselhurst*, the proposed regime cannot be justified on the basis that it is a practical necessity in order to achieve a settlement; and that the proposed regime would create the same "insoluble" conflict of interest in the course of settlement discussions as that identified in *Haselhurst*. It is said that, having announced a commitment to seek orders post-settlement extinguishing the claims of non-registrants, the plaintiffs and their legal advisors "would be caught in a conflict between the interests of

registered group members and the interests of other group members who had not registered".

85 It is further submitted that the future order which is contemplated by the notation and the opt out notice is not an order that could ever be made. It is said that it could not, consistent with the views expressed in *Haselhurst*, be "just" within the meaning of s 173(2) of the *Civil Procedure Act* for orders to be made after settlement extinguishing the claims of group members on the basis of steps that they took or failed to take pre-settlement; just as such an order could not be thought to be "necessary to ensure that justice is done in the proceedings" within the meaning of s 183. Nor, it is said, for the purposes of settlement approval under s 173(1) could such a settlement be thought to be fair and reasonable in the interests of group members as a whole, having regard to what is said in *Haselhurst*.

86 Ms Wigmans says that it is notable that what is now proposed by Komlotex and Fernbrook is not one of the options identified by the Court of Appeal in *Haselhurst* as a permissible "class closure" regime. That is, the Court of Appeal there adverted to two such options: inviting registration pre-settlement and seeking to narrow the class definition to include only those group members who register (leaving non-registrants free to pursue their claims); or, making an order requiring group members to register to participate in a settlement that has already been reached or judgment that has been handed down. The complaint here made is that the proposed orders contemplate the extinguishing of the claims of group members for failing to take a positive step prior to settlement.

87 It is also submitted that, while not a matter of power, there is no sensible means of explaining to group members the fine distinction between an order made now which contingently extinguishes their rights if they neither opt out nor register and an order that will be sought later which will extinguish their rights in the same event. It is submitted that a group member reading the proposed opt out notice would have the impression that if they fail to register they will be at risk of their rights being extinguished (which Ms Wigmans says is precisely the impression which is intended to be conveyed).

88 Thus it is argued that, even if not beyond power, the proposed orders are inappropriate as they subvert the regime of Pt 10. As to the reliance here sought to be placed by Komlotex and Fernbrook on the decision of Jagot J on 28 April 2020 in *Inabu Pty Ltd v CIMIC Group Ltd* [2020] FCA 510 (*CIMIC*), Ms Wigmans says (see at T 74) that the proceeding before Jagot J was by consent; and notes, particularly, that there is no indication (from the reasons which were delivered *ex tempore*) of any group member making any submission that settlement should not be approved because the extinguishment would thereby be affected (albeit inconsistent with the decision in *Haselhurst*). It is further said, specifically as to *Haselhurst*, that the only submissions that appear to have been made to her Honour in relation to that decision was that the reasoning of the Court of Appeal supported the proposition that the Court could make an order extinguishing a group member's claim under ss 33V and 33ZB of the *Federal Court Act 1976* (Cth) at the time of approving a settlement (contra Ms Wigmans' submissions made before me on the present applications).

Delay

89 Ms Wigmans' rejects any criticism of delay on her part in making the present application. Her rejection of such criticism is based on the following: first, that Ms Wigmans does not now seek a stay; and second, in any event, that Ms Wigmans cannot be criticised for failing to make this application at an earlier stage in the proceedings when the only steps then contemplated were the completion of pleadings, the service of lay evidence and conferral with respect to discovery. It is noted that no notice was provided to Ms Wigmans that the orders made on 12 March 2020 or 9 April 2020 would be sought; and it is said (and I accept) that Ms Wigmans moved promptly, after she became aware of the orders and after the outcome of her special leave application on 17 April 2020, to seek the relief she is now seeking. (I do not consider that there is any relevant delay on Ms Wigmans' part in seeking the relief she now seeks.)

Ms Wigmans' proposed orders

90 Ms Wigmans contends that the orders which she has now proposed: do not disturb the orders previously made for discovery by the parties; but would

vacate the orders previously made in respect of opt out, registration, class closure and mediation; would also vacate the orders previously made in respect of the service of "material on quantum and materiality" by the parties (but only because those orders as framed refer to reliance upon such material for the mediation set down by the orders; and would have the matter re-listed following the determination of the High Court appeal, but with liberty to apply reserved to the parties (as well as Ms Wigmans)).

91 Ms Wigmans says she does not seek to prevent Komlotex and Fernbrook and AMP from serving such materials on a without prejudice basis to be relied upon at a mediation that may be ordered in the future (and Ms Wigmans has framed orders on that basis). Ms Wigmans says that she takes that position notwithstanding that such orders would allow the plaintiffs to "catch up" with Ms Wigmans in terms of case preparation (which may be relevant in the event that Ms Wigmans succeeds in the High Court but the cross-stay applications are remitted to this Court). In that respect, Ms Wigmans says she recognises that there is a balance which must be struck short of enjoining any further steps being taken in these proceedings.

92 It is also said that, should the parties consider that there are further steps which might be taken in the proceedings (which will not interfere with the High Court appeal or create a risk of prejudice, such as opt out, registration and mediation orders), they would be free to seek orders in relation to those matters.

Komlotex and Fernbrook submissions

93 The submissions of Komlotex and Fernbrook may be summarised as follows.

Opt out notice and related issues

94 The complaint made by Komlotex and Fernbrook as to Ms Wigmans' application is that Ms Wigmans, not having applied for a stay of the orders made on 23 May 2019 permanently staying her proceedings and permitting the consolidated Komlotex proceeding to proceed, now "belatedly" seeks to interfere with the conduct of this proceeding by setting aside orders of this Court providing for the further progress of the matter. Komlotex and Fernbrook say that the orders that Ms Wigmans now proposes (as set out in Exhibit B on

the present applications at pp 108 and 109) would have the practical effect of staying a substantial part of the ongoing conduct of this proceeding, particularly interfering with the steps towards and conduct of an early mediation in the present proceeding (noting that an early mediation with AMP was the very thing that Ms Wigmans had sought to do in her own proceeding).

95 Komlotex and Fernbrook maintain that the present proceeding is being advanced for Ms Wigmans' benefit (she being a group member in the present proceeding) and that Ms Wigmans cannot demonstrate a real risk that she will suffer prejudice or damage (which will not, or cannot, be redressed by a successful appeal) if the orders sought by her are not granted. In this regard, Komlotex and Fernbrook seek here to emphasise that the orders sought by Ms Wigmans would cause her prejudice by substantially delaying the proper prosecution of the proceedings against AMP and delaying the potential resolution of the proceedings. Komlotex and Fernbrook contend (and, I note, that the very making of this contention was met with vehement objection by Counsel for Ms Wigmans) that the only prejudice that could conceivably be caused by the continuation of the present proceeding would be to Ms Wigmans' solicitors and the funder of her proceeding. It is submitted that the motion filed on behalf of Ms Wigmans is transparently for their benefit, rather than that of Ms Wigmans.

96 Komlotex and Fernbrook also emphasise that, not only was no appeal brought in relation to the findings as to the comparative advantages of the respective proceedings in the Stay Judgment, but that, in the High Court proceeding, Ms Wigmans argues that it would be inappropriate for the Court to engage in any such assessment. It is noted, in this regard, that Ms Wigmans likewise accepts that the respective legal teams are equally competent. It is submitted that the basis of Ms Wigmans' appeal to the High Court is that the proceedings are essentially duplicative. Hence it is argued that no purpose, for the benefit of Ms Wigmans, is served by the orders now sought; and that they would only serve to cause delay.

97 Insofar as Komlotex and Fernbrook now seek, in effect, to vary the orders previously made in relation to the opt out regime, it is said that this is for

abundance of caution in light of *Haselhurst*. Komlotex and Fernbrook say that the orders made on 12 March 2020 and 9 April 2020 were not orders which had the "problematic" effect of the impugned order considered by the Court of Appeal in *Haselhurst* and they point out that, in *CIMIC*, Jagot J made orders approving a settlement and making final orders limiting participation in the settlement to persons who had registered some 18 months earlier and prior to the commencement of a mediation process. It is said that the registration orders in *CIMIC* were similar to orders 11 to 15 made in the present proceeding on 12 March 2020 and it is noted that Jagot J held that nothing in the *Haselhurst* decision was a barrier to the making of the orders giving effect to the earlier registration orders (by excluding from participation in the settlement those who had not registered).

98 Komlotex and Fernbrook say that the proposition advanced by Ms Wigmans has "shifted" somewhat in the course of seeking special leave. In particular, it is submitted that, in the course of the oral submissions on the application for special leave, Senior Counsel for Ms Wigmans accepted that first in time is not determinative and that the Court may properly have regard to a range of matters pursuant to s 58 of the *Civil Procedure Act*. There was debate before me as to how, if at all, that argument crystallised in the course of the special leave hearing (as a result of which Komlotex and Fernbrook say that Ms Wigmans cannot here rely upon any alleged advantage her proceeding would have over the present proceeding in which her interests are being advanced by the continuation of the proceeding).

99 Komlotex and Fernbrook here argue that, given that Counsel for Ms Wigmans accepts that it would be appropriate to take into account a number of considerations, which Komlotex and Fernbrook says must include security and the stage at which the proceedings sought to be stayed had reached, even if Ms Wigmans succeeds on her argument in the High Court, the most likely outcome is that the matter will be remitted for further consideration in light of that decision. In this regard, Komlotex and Fernbrook says that this would not necessarily ("or even likely") result in the present proceeding being stayed. Further, it is said that even if the present proceeding were to be stayed, it is likely that orders would be made such that group members have the benefit of

steps (such as pleadings, discovery and evidence) that had been taken in the present proceeding.

100 Komlotex and Fernbrook say that the practical effect of the orders that Ms Wigmans seeks will be to frustrate the conduct of the present proceeding by interfering with the next step which those acting in these proceeding believe to be in the best interests of group members (namely, to prepare for and proceed to a mediation). Insofar as Ms Wigmans' position is that she does not wish to prevent the discovery (for mediation purposes) and preparation of evidence (for mediation purposes) but does object to other steps leading to mediation (opt out notices; registration and the mediation itself), Komlotex and Fernbrook (and, I interpolate to add, AMP) object to Ms Wigmans, in effect, attempting to dictate the manner in which preparation for mediation is proposed. In that regard, AMP says that the proposed orders comprise a "package" of orders that have been the result of discussion and negotiation between the representatives for AMP and Komlotex and Fernbrook. Hence, as I understand it, there is objection to the notion put forward by Ms Wigmans that the preparation of expert evidence should be required to be undertaken prior to the issue of opt out notices.

101 Komlotex and Fernbrook thus emphasise the essentially duplicative nature of the respective proceedings and argue that there is no disadvantage to Ms Wigmans by permitting the present proceeding; and that the advantage in so doing is that it progresses her claim and prevents it from being unnecessarily delayed for what Komlotex and Fernbrook say could be a year or even more. Komlotex and Fernbrook say that there is a disadvantage to group members if, and where, the proper conduct of the proceeding is substantially delayed.

102 Komlotex and Fernbrook further say that putting the proceedings "on hold" for an indeterminate period of time is not consistent with the just, quick and cheap resolution of proceedings (see s 56 of the *Civil Procedure Act*), particularly for proceedings in the Commercial List of this Court. Komlotex and Fernbrook note the recognition, judicially, that the passage of time brings about more substantial difficulties for the running of the case (citing in this regard *Brisbane*

South Regional Health Authority v Taylor (1996) 186 CLR 541 at 551-552; [1996] HCA 25 per McHugh J).

103 Komlotex and Fernbrook thus maintain that Ms Wigmans cannot say that the orders would deprive her of the benefit of her appeal (given that she does not identify any relevant difference between the respective proceedings) and they say that there is nothing in the High Court appeal that would affect the way the proceedings are conducted.

Haselhurst

104 As to the impact of *Haselhurst*, Komlotex and Fernbrook submit that no difficulty arises with the now proposed registration procedure in light of that decision.

105 It is noted that in *Haselhurst* the Court of Appeal determined that s 183 of the *Civil Procedure Act* cannot be used to make an order that extinguishes a group member's claim or an order that a group member be bound by the terms of a settlement deed; and that such orders can only be made as part of a settlement approval or judgment under ss 173, 177 and 179.

106 More specifically, Komlotex and Fernbrook say the problematic aspect of the impugned order in *Haselhurst* was that any group member who neither opted out nor registered by the relevant class deadline "shall be bound by the terms of the settlement agreement and barred from making any claim against the Defendant in respect of or relating to the subject matter of this proceeding" (see at [49]-[55]) because that order had the effect: first, of binding unregistered group members to a settlement agreement; and second, of contingently extinguishing the claim of unregistered group members in the event that a settlement were reached before trial (see at [51], [52] and [61]). It is here submitted that the Court of Appeal drew a clear distinction between the power to make such an order pursuant to s 183 and the power to make such an order pursuant to different provisions at a later stage in the proceeding (referring to the Court of Appeal Decision at [53], [65], [66], [81], [87], [105]).

107 It is noted that, at a settlement hearing, a court could make orders that only persons who have registered their interest will participate in the settlement. Komlotex and Fernbrook submit that a court can, likewise, make orders prior to

settlement for that process of registration to occur (so that the legal representatives hold the relevant information and know the value of the claim). It is submitted that there is nothing in the *Haselhurst* decision that prevents a court from making an order providing for the "mechanics of a registration process"; and that it would then be for the court at a later date, and exercising an entirely different power (for example under s 173) to determine whether settlement should be approved on the basis that only persons who have registered will participate in the settlement.

108 Komlotex and Fernbrook further note that in the *CIMIC* proceeding, Jagot J had made orders in 2018 which specified that, subject to later order of the Court, only persons who had registered would be entitled to participate in a settlement but that, at the time her Honour approved the settlement, her Honour was exercising a power to determine whether only persons who had registered should be entitled to participate. Her Honour made that determination, and held that there was nothing in the *Haselhurst* decision that prevented her from doing that or raised any difficulty in relation to the earlier order. Komlotex and Fernbrook say that *Haselhurst* was concerned with quite a different order to the present (or to that in *CIMIC*), being one that purported to extinguish claims and purported to bind people to a settlement deed that had not even come into existence (in purported reliance on the power in s 183 contra an order pursuant to the power in s 173).

109 It is said that in the present case, the form of order made on 12 March 2020 was in virtually identical terms to the order made by Jagot J in *CIMIC* in 2018, and which her Honour found did not give rise to difficulties. However, as adverted to above, for the abundance of caution, Komlotex and Fernbrook have sought (by their notice of motion dated 27 April 2020) an amended form of order which simply provides for a registration process but which does not purport to make any order as to the effect of the failure to register. In this regard, I note that, in the revised form of notice to group members, group members are told that it is the intention of the parties to seek an order in due course that only persons who have registered will be entitled to participate in any resulting settlement. Komlotex and Fernbrook submit that this is "entirely

orthodox" and does not involve any problem of the kind identified by the Court of Appeal in *Haselhurst*.

AMP's submissions

110 As indicated, AMP opposes the orders sought in the Wigmans motion and consents to the orders sought by Komlotex and Fernbrook. As to the latter, as adverted to above, it is said that this is to implement a course of action negotiated and agreed between the parties to the Komolotex proceeding (taking into account recent developments).

111 AMP says that, over a period of some months, the parties to the Komlotex proceeding have carefully negotiated a regime for the future conduct of the proceedings which regime involves, in substance, the production by AMP of "targeted" categories of documents so as to facilitate the preparation of expert evidence to be exchanged for the purposes of a mediation; and also a registration and opt out process, which the parties agree is necessary to enable the parties to engage in any meaningful settlement discussions (referring to the affidavit sworn by the solicitor acting for Komlotex and Fernbrook, Mr Andrew Watson, at [15]). AMP submits that the agreement reached between the parties as to the best and most appropriate way forward is a matter entitled to some weight.

112 AMP, as do Komlotex and Fernbrook, submits that the practical effect of the orders sought by Ms Wigmans would be to effect a stay of the Komlotex proceeding. AMP submits that a stay is not appropriate where the judgments in relation to the carriage motions (the Stay Judgment and the Court of Appeal Decision) are entitled to be treated as valid. It is said that the presumptive position is that those judgments are valid and binding (noting, in this regard, r 42.09 of the High Court Rules 2004 and the authorities that recognise that a judgment is entitled to be treated as valid, unless an appeal is allowed from it – see *Federal Commissioner of Taxation v Myer Emporium Ltd* (1986) 160 CLR 220 at 222; [1986] HCA 13 where Dawson J referred to "the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal").

113 AMP says that the fact that Ms Wigmans now supports orders being made as to the service of expert evidence on quantum and materiality by the parties intended to be relied upon at any mediation that may be ordered in these proceedings (proposed orders 2 and 3) does not alter the proper characterisation of her application (as being to stay the ongoing conduct of the proceeding) given that, after the service of such evidence, Ms Wigmans proposes that the only thing to happen is for the Komlotex proceeding to be listed for further directions on a date to be fixed following the determination of the appeal by the High Court. AMP says that it considers the utility of the proposed expert evidence is likely to be greatly diminished without the anterior steps previously agreed and ordered, namely, registration and opt out (pausing here, as adverted to above, Ms Wigmans says that there is no evidence to support that proposition – see T 68-69)

114 AMP contends that it cannot be said that, absent a stay, the High Court appeal would be rendered nugatory or that there is a real risk that it will not be possible for a successful appellant to be restored substantially to its former position. It is submitted that none of the steps the subject of the orders that are proposed in the Komlotex motion (for notice to be sent to group members, for the matter to be made ready for a mediation and for a mediation to occur, subject to any further order of the Court) will detrimentally affect the rights of group members in the Wigmans proceeding or prevent Ms Wigmans, if necessary, being restored as the lead plaintiff in the proceeding.

115 In that regard, AMP says that the proposed opt out notice that is to be sent to group members makes clear that there is a pending appeal in the Wigmans proceeding and provides detail in relation to it; and says that any opt out in the Komlotex proceeding would not effect an opt out in the Wigmans proceeding. It is said that any suggestion that the promoters of the Wigmans proceeding (the funder and the solicitors) will be prejudiced by the Komlotex orders is clearly irrelevant (citing the Court of Appeal Decision at [62] per Bell P and at [104] per Payne JA; and *BMW Australia Ltd v Brewster* [2019] HCA 45; (2019) 374 ALR 627 (*Brewster*) at [55] per Kiefel, Bell and Keane JJ).

116 AMP further says that the orders that are sought in the Komlotex motion are consistent with authority, pointing to the decisions in *Jones* and *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2017) 252 FCR 1; [2017] FCAFC 98 (*Melbourne City*). It is noted that, in *Jones,* Foster J considered an application to approve and send out opt out notices to group members (having, prior to that application, stayed a competing and overlapping class action). The applicant in the action that had been stayed then applied to set aside that stay decision. Thus, the circumstances that his Honour considered in *Jones* involved sending out an opt out notice where there was a pending application to set aside a stay order and a possible appeal against that decision. His Honour noted (at [15]-[17]) that he agreed with the submission that the fact that there was an application to set aside a stay order did not mean that sending out an opt out notice should be delayed until the determination of that application and any appeal from it. It was noted (at [17]) that the parties had agreed that it was appropriate to make some reference in the notice to the existence of the stayed proceeding and, perhaps, its current status.

117 It is further noted by AMP that an application for leave to appeal against *Jones* was brought in *Melbourne City*, in part on the basis that the opt out notice was misleading. Although the application for leave did not specifically consider whether it was appropriate to send out an opt out notice in circumstances where there was a pending application or appeal, AMP notes that no criticism was made of that approach and the Full Court of the Federal Court (Jagot, Yates and Murphy JJ) endorsed the terms of the notice (see at [59]-[60] and [81]) and which, it is said, are substantially in accordance with the approach adopted in the Komlotex motion. AMP submits that nothing in the decision of the Court of Appeal in *Haselhurst* suggests that this part of the Full Court's reasoning ought not be followed.

118 AMP says that the regime for registration in the Komlotex motion has been tailored to take into account the decision in *Haselhurst*, noting that the proposed regime is that group members will be asked to register their claims but no order will be made now that has the effect of extinguishing or contingently extinguishing any rights. It is noted that in *Haselhurst*, Payne JA (with whom the other members of the Court agreed) noted (at [104]) that

"section 183 [of the *Civil Procedure Act*] permits orders such as registration in the present case to be made". AMP says that it follows that registration, as a process, is permissible and within the ambit of s 183 of the *Civil Procedure Act*.

119 It is also noted that Payne JA went on to identify (at [105]) that the difficulty with the impugned orders was that the orders for registration were coupled with an order that had the effect of contingently extinguishing group members' rights at that point in time. AMP says that the orders proposed in the Komlotex motion do not purport contingently to extinguish group members' rights; rather, group members are asked only to register for the proceeding. AMP says that, while the notation to the orders in the Komlotex motion and paragraph 1 of "Section 2" of the notice specify that, if a settlement is reached, the plaintiffs and AMP intend to seek an order that only those group members who have registered should seek a benefit under the settlement, this does not run into the difficulty identified in *Haselhurst* since no extinguishment of group members' rights is effected now; rather, an intention to seek an order at some point in the future is signalled.

120 Finally, it is said that the foreshadowed use of the Court's power at the time of any settlement which may be negotiated is consistent with the observations in *Haselhurst* (at [105]) that orders extinguishing group members' rights are more properly dealt with under s 173 or s 177 of the *Civil Procedure Act*, either at the time of settlement or judgment. AMP says that whether the Court will ultimately make such an order is a matter to be determined at some point in the future, having regard to the circumstances that exist at the time any application is made.

Determination

121 It is convenient first to outline some of the general principles relevant to the disposition of the matter presently before me.

Some relevant general principles

122 As noted, the parties accept that the principles applicable when considering a stay of orders pending appeal or an application for leave to appeal are instructive in the disposition of the present applications (notwithstanding that

Ms Wigmans is not here, at least as a matter of form if perhaps not of substance, seeking a stay).

123 In the context of a stay of orders pending an application for special leave, the test applied by the Court of Appeal (see *Rinehart v Welker* (2012) 83 NSWLR 347; [2012] NSWCA 1 at [42]-[49] following what was said by Brennan J, as his Honour then was, in *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 1)* (1986) 161 CLR 681; [1986] HCA 84 (*Burgundy Royale*)) involves consideration of: whether there is a substantial prospect that special leave will be granted; whether the applicant has failed to take whatever steps are necessary to seek a stay from the court in which the matter is pending; whether the grant of a stay will cause loss to the respondent; and where the balance of convenience lies (see *Burgundy Royale* at 684).

124 Here, of course, special leave has been granted such that any requirement to show exceptional circumstances would no longer be applicable in any event (see *Smith v New South Wales Bar Association* [1991] HCA 59; (1991) 66 ALJR 219 at 220 per Mason CJ; *Advanced Building Systems* at 815 per McHugh J).

125 Both Ms Wigmans, and Komlotex and Fernbrook, have referred to the principles articulated in *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685 (*Cambridge Credit*), which are applied when considering a stay pending appeal to the Court of Appeal. There it was said (at 694-695) that:

> In our opinion it is not necessary for the grant of a stay that special or exceptional circumstances should be made out. It is sufficient that the applicant … demonstrates a reason or an appropriate case to warrant the exercise of discretion in his favour …The Court has a discretion whether or not to grant the stay and, if so, as to the terms that would be fair. In the exercise of its discretion, the Court will weigh considerations such as the balance of convenience and the competing rights of the parties … Two further principles can be mentioned. The first is that where there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted, courts will normally exercise their discretion in favour of granting a stay … where it is apparent that unless a stay is granted an appeal will be rendered nugatory, this will be a substantial factor in favour of the grant of a stay.

126 They also referred to *Kalifair Pty Ltd v Digi-Tech (Australia) Ltd* (2002) 55 NSWLR 737; [2002] NSWCA 383 where the Court of Appeal (at [17]-[18]) recognised that the principles are similar to those applicable to the question of

interlocutory relief before trial to protect the status quo and that the Court has regard to the following specific factors: whether the appeal raises serious issues for the determination of the appellate court; whether the applicant has demonstrated a real risk of prejudice or damage if a stay is not granted which will not be redressed by a successful appeal; and, where these conditions are satisfied, where the balance of convenience lies; and whether there has been any relevant delay in applying for a stay. The Court there also made reference (at [19]) to the decision of Lord Cairns in *Rodger v Comptoir d'Escompte de Paris* (1871) 3 LR PC 465 (at 475) in articulating the need to consider the effect that the stay would have on the other parties to the litigation (in particular, that the applicant must demonstrate that any stay will be fair as between the interests of the parties to the litigation).

Application to the present motions

127 As Ms Wigmans notes, in *Gerah Imports*, Dawson J recognised (at 197) that exceptional circumstances "may arise where the subject matter of the proposed appeal will be lost without a stay, with the result that the application for special leave and any subsequent appeal will be nugatory". As adverted to above, reference is also made by Ms Wigmans to *Patrick Stevedores* (at [3]) where Hayne J said that "the jurisdiction can be invoked, if to grant a stay is necessary to prevent the exercise of rights of appeal being rendered futile or their exercise in circumstances where restoration of the status quo cannot be achieved".

128 In essence, the force of Ms Wigmans' position on the current applications turns on whether there is acceptance of her proposition that, if the orders sought by Komlotex and Fernbrook are made, her appeal to the High Court will be rendered nugatory. In that regard, Ms Wigmans notes, pointing to the observation of McHugh J in *Advanced Building Systems* (at 815) that the High Court "[will not] hesitate to grant a stay where the refusal of a stay could create practical difficulties in terms of the relief which this Court could grant", that it is not necessary to establish the absolute futility of the appeal in the sense that the appeal will lack any utility if a stay is not granted.

129 Thus, Ms Wigmans' argument that the making of the orders sought by Komlotex and Fernbrook would, in effect, render nugatory her appeal to the High Court was broadened to an argument that the making of such orders would, or might, pose practical difficulties for the High Court in determining the relief to be granted in the event that she is successful in her appeal. For the avoidance of doubt, in disposing of this matter, I proceed on the basis that it is sufficient, for the purposes of granting Ms Wigmans the relief which she here seeks, for Ms Wigmans to establish relevant prejudice (contra rendering the appeal nugatory which is, of course, a higher threshold).

130 I accept that, were there to be a real risk that the making of the orders sought by Komlotex and Fernbrook would render Ms Wigmans' appeal nugatory or otherwise give rise to the risk of relevant prejudice (including, in some way practically fettering the discretion, or ability, of the High Court as to the relief it may order if Ms Wigmans' appeal is successful), this would militate strongly, if not indeed be determinative, against the making of the orders sought by Komlotex and Fernbrook in the Komlotex motion. Although, I also note that this would not necessarily lead to the whole of the relief which Ms Wigmans here seeks (at least insofar as the orders now proposed by Ms Wigmans would appear to dictate the steps, or the order of the steps, now to be taken in the Komlotex proceeding pending the hearing and determination of her appeal).

131 As she emphasised more than once, Ms Wigmans does not here seek a stay of the Komlotex proceeding. However, it cannot be disputed (and Ms Wigmans, at least to some extent, acknowledges this) that the practical effect of the relief sought by Ms Wigmans, if granted, would be to delay the prosecution of the Komlotex proceeding (by preventing the implementation of the opt out regime). I accept that, in circumstances where at least AMP is of the view (albeit one not shared by Ms Wigmans) that there is little or no utility in proceeding with the preparation of expert evidence in advance of the opt out/registration procedure, this would have the effect that, as submitted by Komlotex, a substantial part of the Komlotex proceeding could not meaningfully be proceeded with (and hence the orders sought by Ms Wigmans would be tantamount to a stay of the proceeding).

132 In this regard, while Ms Wigmans complains that there is no evidence to support the submission by AMP as to its view of the utility of proceeding with the preparation of expert evidence in advance of the opt out regime, it seems to me that I can infer from the fact that the parties to the Komlotex proceeding (represented as they are by experienced Counsel and solicitors, who of course bear professional and ethical obligations as officers of the Court) have agreed to a particular regime (as outlined in the orders here sought) because they perceive that regime to be in the best interests of their respective clients (and, in the case of Komlotex and Fernbrook, the group members they represent). In those circumstances, I cannot see any basis not to accept the submission put on behalf of AMP that it does not see utility in the preparation of expert evidence in advance of the opt out regime. In any event, I do not see that Ms Wigmans should be permitted, in effect, to dictate the order of steps to be followed in the ongoing prosecution of the Komlotex proceeding (as her proposed orders, to the extent that they contemplate expert evidence in advance of the opt out regime, would do).

133 It is convenient next to consider the decisions, as relevant, on which Ms Wigmans relies as to the question whether her appeal to the High Court would be rendered nugatory.

134 *Gerah Imports* concerned an application to stay the operation of orders made by a Master of the Supreme Court of South Australia for the summoning of the applicants for examination and the production of documents in relation to the examinable affairs of the respondent corporation. Relevantly, the applicants had appealed to the Full Court of the Supreme Court of South Australia alleging that the purpose of the examination was beyond power and, in particular, that at least some of the matters to be subject of examination and production of evidence were not “examinable affairs” of the corporation. The Full Court dismissed that appeal. Subsequently, the Master (again) varied the orders and set down a date for the examination. The applicants then applied to Debelle J for a stay of the Master’s orders pending an application for special leave to appeal to the High Court. Debelle J granted a stay. The liquidator then successfully appealed and the Full Court (King CJ dissenting) removed the stay. In the meantime an application for special leave to appeal had been filed.

135 The applicants then sought a stay of the order (for the examination) of the Master pending the hearing of their application for special leave to appeal. In the events that happened, if the stay were not granted, the applicants would have been required to attend an examination around one month prior to the hearing of the special leave application. Most relevant to the applications before me, Dawson J observed (at 197) that:

> Exceptional circumstances may arise where the subject matter of the proposed appeal will be lost without a stay, with the result that the application for special leave and any subsequent appeal will be nugatory. *Clearly, in the present case, the subject matter of the litigation — the immunity of the applicants from examination and from the production of documents concerning the matters in contention — will have disappeared before the application for special leave is heard if the application for a stay is refused*. Having regard to the date of the proposed examinations, in the absence of a stay the questions will have been asked and answered and the documents produced before the application for special leave is heard.
>
> [Emphasis added.]

136 To my mind, the matter before me is readily distinguishable: it cannot be said that the subject matter of the litigation, and Ms Wigmans' appeal, will be rendered nugatory in the same sense as the applicants' immunity from examination in *Gerah Imports*.

137 Also relevant are Dawson J's observations (at 198) that:

> In the present case, the application for special leave has been instituted by the applicants and is *likely to be heard and determined within five weeks. Clearly, when one balances that relatively short delay against the loss of immunity which the applicants seek to avoid by an appeal, the balance of convenience lies in granting the application. No financial loss during that time to the respondent or any other interested party, if a stay is granted, has been demonstrated.* The applicants have fully pursued their opportunity to obtain a stay in the court below, having been granted a stay at first instance, which they lost, by a majority, on appeal to the Full Court.
>
> [Emphasis added.]

138 Those factors which I have sought to emphasise by way of italicisation above are particularly apposite to the matter presently before me. First, it is, as I understand it, common ground between the parties that the appeal will not be heard by the High Court until, it is likely, at least towards the end of this year with the likelihood of there being a period thereafter in which the High Court will be reserved on its judgment (contra the mere five weeks in which the special leave application would be heard and determined in *Gerah Imports*). Second,

as to possible financial loss, while not in itself a 'loss', to my mind, the just, quick, and cheap resolution of the real issues in dispute militates strongly toward the Komlotex proceeding progressing so that issues can be identified and meaningful steps taken towards the ultimate resolution of the dispute.

139 Dawson J ultimately refused a stay in *Gerah Imports*. However, this was on the basis that his Honour considered that the applicants had not discharged the onus of demonstrating that the application for special leave enjoyed a substantial prospect of success (see at 198).

140 Next is the decision of McHugh J in *Advanced Building Systems*. That decision concerned an application for the stay of two cost orders in the aggregate sum of approximately $1.2 million. McHugh J refused to grant a stay on the basis that his Honour was not satisfied that the appellant could not raise the funds to pay the debt and his Honour indicated that he had little difficulty accepting that, if the appeal ultimately succeeded, the respondent would have no difficulty repaying the amount of the costs (see at 816-817).

141 *Patrick Stevedores* also concerned an application for a stay pending the hearing for an application for special leave. The orders sought to be stayed concerned various contractual restraints and other such relief. Relevantly, it was submitted (see at [14]) that "if the operation of the orders made by [the primary judge], as varied by the Full Court, is not stayed, and if [the] application for special leave to appeal … [were] granted and the appeal allowed, it [would] not be possible to restore … the position that existed before the impugned orders were made". In this regard, Hayne J, in staying the orders, relevantly observed (at [23]) that "I consider that there is a real risk that it would not be possible for the present applicants, if ultimately successful in an appeal to this Court, to be restored substantially to their former position if the orders made by [the primary judge] were now to be executed".

142 As I have sought to indicate in these reasons (to which, see further below), I do not consider this to be the case here. Relevantly also, as in *Gerah Imports*, the time period between the grant of the stay and the hearing of the application for special leave was only a matter of weeks (see at [23], [26]).

143 Next is the decision of the Court of Appeal in *Cambridge Credit*. That case relevantly concerned a stay on the execution of a judgment in the sum of $145 million. The Court of Appeal (Kirby P, Hope and McHugh JJA) described (see at 696-697) as "powerful reasons for the grant of a stay" the following matters:

> … that premature enforcement of the judgment, to the full extent of the assets of the opponents, would do *irreparable harm to the opponents*. It could render them *liable to proceedings in bankruptcy, deprive them of the control F over the litigation and effectively deprive them of their right to appeal*, although it has been conceded that the appeal is an arguable one … Furthermore, bankruptcy would *threaten the livelihood of the opponents, their membership of professional associations and their entitlement to perform their professional duties*. In such circumstances, *consequences so drastic should not be visited upon them until necessary, at the completion of the litigation. It would inflict upon them such a serious injury both in their professional and domestic lives that could not effectively be undone if the appeal were to succeed*. A stay should be granted to avoid such a result.
>
> [Emphasis added.]

144 It is readily apparent from the above observations that the present matter is quite different from that being considered by their Honours in *Cambridge Credit*.

145 Finally there is the decision of the Western Australian Court of Appeal in *Temwork*. That case concerned, amongst other things, a dispute over a requirement, imposed by the Planning Commission on certain subdivision applications, that certain land be ceded to the Crown at no cost; the Court of Appeal held void that condition and, while an application for special leave to appeal from that decision was pending, the developer sought development approval the refusal of which triggered a right of the developer to compensation which was to be determined in arbitration. The Court of Appeal granted a stay of the further proceedings commenced by the developer in the Supreme Court of Western Australia seeking the appointment of an arbitrator on the basis that those proceedings would be rendered futile or nugatory if the High Court allowed the appeal and (at [50]) that there would be "a duplication of costs and effort if the two proceedings which are fundamentally inconsistent are allowed to proceed at the same time". To my mind, this decision is relevantly distinguishable and is of little assistance to Ms Wigmans. I say this not least for the following reasons.

146 As to the observations of the Court of Appeal (at [48]) that the appointment of an arbitrator would be rendered futile or nugatory if the High Court allowed the appeal, there is not here the same "fundamental inconsistency" of the kind identified by the Court of Appeal in *Temwork* such that it can be said that the sending of the opt out notices and the progression of the Komlotex proceeding would be rendered futile of nugatory. Rather, even if the High Court found error, allowed the appeal and ordered that the Wigmans proceeding proceed, the progression of the Komlotex proceeding in that *lacuna* period would, to my mind, itself be (or at least potentially be) of utility in the Wigmans proceeding. In that regard, it must be emphasised that the Wigmans proceeding and Komlotex proceeding are essentially duplicative (see Stay Judgment at [347] and Court of Appeal Stay Judgment at [6] per Bell P). Having said this, I do accept that there may be some duplication of costs (though, that is of course a different matter entirely to one of futility). Meanwhile, in *Temwork*, the situation was simply that, if the High Court allowed the Planning Commission's appeal, there would be no relevant right to compensation (at least on the extant proceeding) and therefore no need whatsoever to have appointed an arbitrator.

147 As to the observations of the Court of Appeal (at [50]) as to a "fundamental inconsistency" between the two proceedings, as I have just said, I do not see any such inconsistency here.

148 I now turn to consider squarely the issue whether, in the present case, the High Court appeal will be rendered nugatory if the orders sought by Komlotex and Fernbrook are made; or whether, to adopt the language used by Hayne J (at [3]) in *Patrick Stevedores*, refusal to make those orders is "necessary to prevent the exercise of rights of appeal being rendered futile or their exercise in circumstances where restoration of the status quo cannot be achieved".

149 In determining this question, it is relevant to bear in mind the relief that Ms Wigmans is seeking in her appeal to the High Court. As explained in the course of the present applications, the principal contention of Ms Wigmans in her appeal will be that her proceeding should not have been stayed. The error that Ms Wigmans contends was made, as I understand it, is that in the circumstances where the subsequent proceedings were essentially duplicative

of her proceeding the commencement (or continuation) of those proceedings was an abuse of process and hence the Komlotex proceeding should have been stayed and there should have been no stay of the Wigmans proceeding (albeit that the first in time factor is not determinative). The error identified in the course of the multifactorial analysis that was carried out – of taking into account a factor that Ms Wigmans maintains should not have been taken into account – is the alternative basis on which the appeal is brought.

150 As indicated above, assuming for present purposes that Ms Wigmans succeeds in her appeal, the relief that she seeks is, first, that the stay of her proceeding be discharged and that, instead, there be a stay of the Komlotex proceeding (the principal relief); and, in the alternative, that the stay of her proceeding be discharged and both proceedings (the Wigmans proceeding and the Komlotex proceeding) be remitted to this Court for determination of the cross-stay applications in accordance with the reasons of the High Court (the alternative relief) (the latter being a course that Counsel for Ms Wigmans accepts might involve a fresh "beauty parade" as between those proceedings but which, it was said, might not necessarily involve this – see T 17-18). In this regard, Counsel for Ms Wigmans indicated that he considers it highly unlikely that the High Court would itself entertain a "beauty parade" in order to determine which of the competing proceedings should be stayed. However, Counsel for Ms Wigmans did not rule out a position being taken on any such remittal that both sets of class action proceedings might be permitted to continue at the same time (though it is accepted that AMP would not unreasonably take objection to such a course).

151 As to the principal relief sought by Ms Wigmans, it is difficult to see how the making of the orders now sought by Komlotex would render any such relief, and in that way her appeal, nugatory. On this hypothesis, even if by the time of the determination of the High Court appeal a mediation had taken place, any agreement in principle reached at the mediation for the settlement of the Komlotex proceeding would require Court approval and it is unrealistic in the extreme to postulate that such approval would be given if the High Court appeal remained undetermined. While it is true (as Counsel for Ms Wigmans points out) that the parties to a mediation might contractually bind themselves

to taking certain steps to obtain approval of the settlement reached at the mediation even then it is more likely that any in principle agreement would remain just that - an agreement that did not have contractual force - or that any agreement reached would be conditional on court approval. In other words, there would seem to me to be little difficulty in putting the parties back in the position, 'vis-à-vis' any agreement in principle to settle the Komlotex proceeding, as if no such agreement had been reached. It would then be a matter for Ms Wigmans to prosecute her class action proceeding (which on this hypothesis would be the only one permitted to go forward) and it may well be the case (although Counsel for Ms Wigmans did not embrace this proposition with any real enthusiasm) that there would be an advantage, or at least no disadvantage, arising from the fact that there had already been a first mediation (albeit one in which her chosen legal representatives had not participated).

152 In other words, I cannot see that, if Ms Wigmans were to succeed on her appeal and the principal relief were to be granted, the fact that an opt out regime and mediation had taken place in the Komlotex proceeding would render her success on the appeal nugatory (let alone rendering her appeal rights nugatory). Additionally, I note that any question as to the Court's approval of an in principle settlement is one that would fall be determined at a time much later than the present.

153 As to the alternative relief, what appears to be of concern to Ms Wigmans is that it might be said that steps taken in the Komlotex proceeding (pending the determination of the High Court appeal) would have the potential significantly to interfere with any decision to be made, whether in the exercise of a discretion or otherwise, as to whether the matter should be remitted to this Court in the event that Ms Wigmans' appeal succeeds. Particularly, Ms Wigmans' concern appears to be that, if the orders here sought by Komlotex and Fernbrook are made, then by the time of the determination of the High Court appeal it is possible that a mediation will have been conducted (and potentially a settlement reached). In that event, it is suggested that Komlotex and Fernbrook might argue before the High Court on the exercise of its

discretion as to the relief to be granted that the steps that have been taken in the interim have bearing on the relief to be granted by it.

154 Similarly, Ms Wigmans appears to be concerned that, if the High Court were disposed to remit both matters to this Court (as Komlotex and Fernbrook maintains would be the more likely relief to be granted if the appeal is successful), then Komlotex and Fernbrook might be in a position to argue that it is in a better position to proceed given that its case is by then more advanced than that of Ms Wigmans (for example, by it not having to undertake a further opt out or registration process).

155 Ms Wigmans' concern in this regard may in part be driven by the submissions made on her behalf in the original multiplicity/carriage motions to the effect that her proceeding was, at that stage, the most advanced in terms of preparation (this being a factor that was said to favour her proceeding over the competing proceedings). That this is at least part of Ms Wigmans' concern seems illustrated by the reference in Ms Wigmans' submissions to the orders proposed by her permitting Komlotex and Fernbrook to "catch up" in terms of case preparation.

156 Such a concern might, on one view, be able to be addressed if it were to be a condition of the making of the orders sought by Komlotex and Fernbrook that they not be permitted (on any re-consideration of the cross-stay applications) to rely upon steps taken by them in advance of the determination of the High Court appeal as a factor warranting the stay of the Wigmans proceeding and allowing the Komlotex proceeding to continue; or if an undertaking of that kind was proffered. No such undertaking was proffered by Komlotex and Fernbrook (though, it must fairly be said that none was sought). I did, however, seek in oral argument to test what their position would be on remittal in this regard (see T 47-49).

157 In a very real sense, however, it is difficult to see how such an undertaking or condition would necessarily be in the best interests of the class members. That is to ask, why should such a matter be precluded from later being considered if it is felt to be in the best interests of the class members (particularly where it cannot here be said to be *ipso facto* determinative)? Unless and until the High

Court appeal succeeds, Komlotex and Fernbrook have the benefit of a presumptively valid judgment. Insofar as steps taken in the interim might be relevant to be considered in the event that the High Court appeal succeeds, it seems to me to be presumptuous in the extreme for it to be suggested that the High Court should be fettered by some form of undertaking imposed on the parties as to what factors should then be taken into account in granting relief. Relevantly, I cannot see how the High Court would be constrained in approaching the question of relief by the mere fact that steps have been taken to progress the underlying substantive dispute (which must surely be in the interests of all group members even those, such as Ms Wigmans, who have a strong view that the dispute should be conducted by their own lawyers and funders and on their own pleadings) in the interim.

158 As to the proposition that the proposed orders in the Komlotex motion have the potential to confuse and mislead group members now and in the event that Ms Wigmans is successful on appeal and the Komlotex proceeding is stayed, this was not put squarely as one going to the proposition that the orders sought would render nugatory Ms Wigmans' appeal. However, it seems to me to fall within the compass of that broader submission. This is because any perceived confusion, and like considerations, might conceivably be pressed as a submission (either in the High Court or in this Court on remittal) as to why the Komlotex proceeding should not be stayed. In this way, as can be seen, this proposition is one that is anterior to, or within, the broader submission that the proposed orders, if made, would render nugatory Ms Wigmans' appeal.

159 As noted above, Ms Wigmans relied on various authorities concerning the sending of opt out notices in circumstances where there remains a live controversy, or controversies, as to which of several representative proceedings ought to proceed (including *Johnson Tiles* and *Pharm-a-Care*).

160 Ms Wigmans contends (and there can be no cavilling with this proposition) that it is important that any decision made by group members concerning opting out of the proceedings not be based on a notice that is apt to mislead members of the represented group. Similarly, she points to the recognised need for an opt

out notice to “be readily comprehensible by non-lawyers” and “written in plain English”. In relation to this, I make the following observations.

161 First, there is to my mind a material difference between the need for an opt out notice to be readily comprehensible by non-lawyers, including that it be written in plain English, and the sending of notices (at a time where it is necessary in order meaningfully to progress the matter) in circumstances where there is the possibility, on an extant appeal, that the representative plaintiff may change. I accept that there is, in the usual circumstances, an undesirability of sending several notices because, if nothing else, to do so may tend to confuse. That said, the present is hardly a usual circumstance (the Stay Judgment was handed down almost a year ago and has already been the subject of appellate review) and there are considerations which tell strongly, in my view, in favour of the sending of the opt out notice now, including the desirability meaningfully to progress the matter having regard to the overriding statutory mandate for the just, quick and cheap resolution of the real issues in dispute.

162 In any event, any feared confusion can be adequately avoided by careful drafting of the notice and, in the event that it is necessary in the future, the distribution of another notice. That is to say, any such confusion (which in my opinion is more feared than real) is not, to my mind, a material matter in the sense rendering nugatory Ms Wigmans’ right to appeal. Put simply, any potential for confusion can be readily dealt with now and, in the event that Ms Wigmans succeeds, in the future.

163 Again, while this is never the preferable course, it is to my mind preferable to staying the proceeding effectively for, perhaps, a year or more.

164 Second, to my mind the observation of Flick J in *Pharm-a-Care* (referred to at [56] above) seems to go some way in answering the difficulty here being considered. That is, it is readily contemplated in representative proceedings of this kind that further opt out notices may need to be distributed, including where a proceeding is subsequently stayed. Again, at risk of belabouring the point, while I accept that this is undesirable, the point is that it is recognised as being possible in any event (even leaving aside circumstances of the kind now in play). I do not accept that Ms Wigmans’ appeal would be rendered nugatory

or otherwise relevantly prejudiced if the notice were now sent, simply because a further notice might later need to be issued. I set out in due course below my conclusions as to the aspects of the notice that Ms Wigmans contends are confusing.

165 Third is the proposition that the orders ought not be made because requiring group members to opt out at this point has the potential to cause significant wasted costs and expense. Again, while this proposition is not put squarely as one going to the orders rendering nugatory Ms Wigmans' appeal, I consider that this is a proposition that goes to, or is encompassed within, that broader submission. It is convenient here to recall the purported costs identified Ms Wigmans as costs that would be wasted costs. As adverted to above, it is asserted, essentially, that these costs are twofold: first, the cost of administering the process of distributing notices to group members (Ms Wigmans indicates in submissions that, in the event that opt out is here ordered and she subsequently succeeds in the High Court, these costs should not be borne by class members); and second, some burden to the resources of this Court (because, it is said, of the tendency of some potential members to direct questions and queries to the Court). There was also reference in oral submissions to the costs that group members might incur in seeking advice as to the opt out notices (which might end up having to be incurred again if the opt out regime proved to be ineffective and the advice needed to be sought again in relation to subsequent opt out notices).

166 As to the first of these costs, it is relevant to note how the costs of the Komlotex proceeding are to be borne. As explained in the Stay Judgment (see [57]ff), in the Komlotex proceeding a "no win, no fee" funding model (without a third party funder) was put forward as the preferable funding model. On a successful resolution of the proceedings (but provided the resolution sum exceeds an identified figure), Maurice Blackburn will (subject to Court approval): charge an uplift fee of 25% on its professional fees; and it was proposed that it would recover the costs of obtaining "after-the-event" (ATE) insurance (the cost of which it estimates at $1.25 million). Komlotex and Fernbrook also agreed to match the security for costs amount that had been paid in the Wigmans proceeding ($5 million).

167 As part of the arrangement reached with Fernbrook for consolidation with the Fernbrook proceeding, it was agreed that Maurice Blackburn will make payments of $250,000 each to Fernbrook's solicitors (Slater & Gordon) and to its funder (Therium Litigation Finance (Australia) Limited (Therium)) in the amount of $500,000; that Fernbrook and Komlotex will apply for orders approving payment from the resolution sum of up to $350,000 in respect of legal costs and disbursements incurred by Slater & Gordon and/or Therium in conducting the Fernbrook proceeding prior to consolidation; and Maurice Blackburn will indemnify Therium against any adverse costs order made against Therium in the Fernbrook or Wigmans proceedings, and will indemnify Therium against any liability it has to indemnify Fernbrook (see affidavit of Fernbrook's solicitor, Mr Hardwick of 20 November 2018, referring to a Deed of Cooperation setting out those arrangements). Only the second of those amounts (i.e., the sum of up to $350,000) is to be the subject of an application for payment out of the ultimate resolution sum (see [58] of the Stay Judgment).

168 Therefore, the cost to group members of proceeding in the interim with the steps now proposed will, at least in the first instance, be borne by Maurice Blackburn. For those costs to be borne ultimately by the group members out of any settlement sum or judgment would depend on Court approval at the relevant time.

169 As to the second of these "costs", while I am acutely conscious of the burden placed on the resources of this Court by matters of this kind, those are not costs borne by group members (they are, to the contrary, costs to the overall administration of justice particularly insofar as they may lead to delay in hearing or dealing with other litigants). While the burden on the resources of this Court (and other courts) of proceedings of this kind is not to be understated, I do not consider that this is a matter which militates toward the staying of the Komlotex proceeding. The function of the Court is to resolve disputes; that brings with it administrative and other costs and burdens on the Court's resources. It is not a reason for not progressing with the just, quick and cheap resolution of the real issues in dispute (nor for delaying the conduct of proceedings in general) simply because they may be burdensome and

because, due to external factors such as the outcome of a pending appeal, those costs might at the end of the day otherwise not have been incurred.

170 As to the impact on the administration of justice, it is equally open to argue that justice is not done by effectively staying the Komlotex proceeding for what seems likely to be at least six months and perhaps up to one or two years (in the remittal scenario) in circumstances where the parties could in the meantime meaningfully be progressing the resolution of the dispute and taking steps the benefit of which might ultimately be able to be enjoyed for the benefit of those in the Wigmans proceeding if that be the proceeding that is finally permitted to proceed to settlement or judgment.

171 As to the additional cost of obtaining more than one set of advice in relation to the opt out notices, that seems to me to be little more than speculation (bearing in mind that the advice sought on the first opt out notice would presumably encompass the possibility adverted to in that opt out notice that another one might later be issued if the Komlotex proceeding is stayed and the Wigmans proceeding is stayed). In any event, weighed against the potential prejudice of delay, it seems to me that this does not outweigh the prejudice of not making the orders here sought.

172 Fourth, and perhaps related to the above point, is the proposition that by the combination of the preceding two matters (that is, confusion to group members and wasted costs), in the event Komlotex' proposed orders are made and the Komlotex proceeding subsequently stayed, the administration of justice may be brought into disrepute. Again, as above, while this proposition is not put squarely as one going to the orders rendering nugatory Ms Wigmans' appeal, I consider that this is a proposition that goes to, or is within, that broader submission (this being a consideration that might tell against staying the Komlotex proceeding, whether in the High Court or on remittal).

173 As Bathurst CJ and McColl JA observed in *Rinehart v Welker* (2011) 93 NSWLR 311; [2011] NSWCA 403 (at [39]), "[t]he concept of the administration of justice is multifaceted". Their Honours there quoted the judgment of Bowen CJ in *Australian Broadcasting Commission v Parish* [1980] FCA 33; (1980) 43 FLR 129 (*Parish*) where his Honour said (at 133), in relation to s 50 of the

Federal Court of Australia Act 1976 (Cth) that "[i]t is … a reference to … the public interest that the court should endeavour to achieve effectively the object for which it was appointed: to do justice between the parties".

174 In this regard, I repeat the following observations made in the Stay Judgment (at [3]):

> The suggestion (see Ms Wigmans' submissions in chief) that this process has led to an "unseemly debacle" apt to lead the administration of justice into disrepute does not in my opinion sufficiently take into account the need for close consideration to be given to the comparative merits of the respective proceedings (and, in particular, the proposed funding models put forward by the competing representative plaintiffs) with a view to selecting the most suitable vehicle(s) to prosecute group members' claims. Nor can it be accepted that there will be no ultimate benefit to the group members, going forward, *from the focus that has been paid by the respective legal teams in the course of these applications on issues such as the ambit of the claims to be made against AMP (and, hence, the scope of the relevant representative class). That process has, in fact, already led to clarification of aspects of various of the parties' allegations and to a refinement (and in the case of the Komlotex proceeding substantial revision) of the respective funding proposals; matters which ultimately must be in the interest of the group members*….
>
> [Emphasis added]

175 As I have sought to indicate by my emphasis above, the point of present relevance is that there is a benefit, to the administration of justice, in proceedings progressing in order that the real issues in dispute may be identified and resolved (whether by way of a mediated settlement or judgment). Similarly, and quite contrary to Ms Wigmans' position in this regard, to my mind there is a risk that the administration of justice may be brought into disrepute if a party, having not succeeded at first instance and on appeal to an intermediate appellate court, could now be permitted effectively to frustrate the meaningful progression of the proceeding that must at this stage still be seen to be in the interests of group members (noting, in this regard, the presumptive validity of the Stay Judgment and Court of Appeal Decision).

176 Moreover, if the appeal by Ms Wigmans succeeds and it is necessary to "unscramble the egg", rather than bringing the administration of justice into disrepute, to my mind that would only demonstrate the integrity of the appellate process and serve to reinforce confidence in the independence of our ultimate appellate court.

177 Fifth is the proposition that any actual, potential or perceived prejudice to group members from deferring orders for opt out, registration and mediation until after the High Court decision is outweighed by the potential prejudice to Ms Wigmans' identified above.

178 Putting aside whether the determination which I am here making is properly conceived as an evaluative or balancing exercise (between the interests of Komlotex and those of Ms Wigmans), I have thus concluded that the potential prejudice to Ms Wigmans does not outweigh the potential prejudice to group members from deferring orders for opt out, registration and mediation until after the High Court decision.

Content of proposed opt out notice

179 As to the criticisms made in respect the proposed revised opt out notice, in the main they seem to me to be a complaint as to the lack of prominence given to the Wigmans proceeding (one might be forgiven for seeing this as suggestive of fault-finding or a complaint as to form over substance – colloquially, perhaps, "sour grapes"). I consider that drafting in an attempt to produce any consensus by Ms Wigmans, or acceptance by her as to the content of the notice, is hardly likely to be productive. I have concluded as follows as to the complaints that she has made, taking them seriatim.

180 I do not accept the complaint that the proposed opt out notice is inadequate and prejudicial in how it describes the Wigmans proceeding (whether as to the fact that the proceeding is not mentioned until the fourth page of the notice or that it has no eponymous heading or other prominent indication referable to the Wigmans proceeding or that it is addressed at the end of the section dealing with what is the "AMP Shareholder class action"). In particular, the fact that it is described as "another" class action and not by reference to the fact that it was filed first does not seem to me to be misleading and I do not consider that it conveys any impression as to the efficiency or fairness otherwise of the Wigmans proceeding (and certainly not anything that would not be met by reading the Stay Judgment itself, to which there is a link, which makes clear the basis on which the Wigmans and other competing proceedings were stayed and explains the reasons for the conclusion that AMP should not be

vexed by competing and “essentially duplicative”, to use Ms Wigmans’ words, class actions).

181 I consider that it is an accurate summary of the state of affairs to outline (as the draft opt out notice does) that it is not known when the hearing of the appeal to the High Court will occur. As far as I am aware, the hearing has not yet been given a listing. As to the statement that the hearing “may not be until 2021”, that too is accurate. I do not consider that there is any real issue as to the opt out notice being misleading (because it does not advert to the possibility that the matter will be heard later this year). I note that what is left open on either formulation is when the appeal is likely to be determined and that too is unknown.

182 I do not accept the criticism that the opt out notice is apt to mislead group members as to what may happen if Ms Wigmans succeeds in her appeal. First, as to the complaint that reference to the proceeding being “stayed” might be confusing to a lay reader, while I consider it unlikely, any such possibility for confusion can easily be avoided by adding the words “(i.e, will not proceed)”, particularly if there be added a statement at some appropriate place to the effect (as discussed in oral submissions) that, if the High Court appeal is successful and the Komlotex proceeding is stayed (i.e., the High Court determines that that proceeding will not proceed), then the opt out process will be ineffective and any settlement in principle reached at a mediation in the meantime may not have any ultimate effect.

183 Second, as to the complaint in relation to the statement to the effect that a stay of the Komlotex proceeding “may, or may not affect steps that have been taken up until that point”, it seems to me that this is wholly unobjectionable. There are some steps that, on any view of the matter, would be likely to have some effect. This would include, for example, the provision of discovery in the interim which would not be likely to be affected by a subsequent stay of the Komlotex proceeding. Even if further discovery were to be ordered, any suggestion that the whole process would need to be re-done would not be consistent with the just, quick and cheap resolution of the dispute and could not on the face of it be justified. By the same token, some steps may well be affected by the stay, for

example, possibly the issue of opt out notices. The recognition that some steps "may" be affected (in the context of the recognition that some may not) is not in my opinion incorrect, incomplete or misleading, as Ms Wigmans has here suggested. Moreover, Ms Wigmans herself acknowledges the possibility that one outcome of a successful High Court appeal is that both proceedings might be remitted to this Court (in which case the effect of the appeal on steps taken in the interim is difficult to predict).

184 As to the accuracy of the statement that "you may be a group member of the Wigmans Proceedings, unless you opt out (or have already opted out) of the Wigmans Proceedings (and possibly even if you have opted out of these proceedings brought by Komlotex and Fernbrook)", the criticism made by Ms Wigmans, as I understand it, is premised on all group members in the Komlotex proceeding being group members in the Wigmans proceeding (i.e., that there is a complete congruity between the respective classes in that respect, even though the class in the Wigmans proceeding itself is said to encompass additional group members). I consider that the complaint as to this statement is not one of substance. If the issue is that all group members of the Komlotex proceeding must, by definition almost, be members of the class the subject of the Wigmans proceeding then of course, unless they have opted out from that proceeding (and opt out had not yet taken place by the time the proceeding was stayed), they will be group members in both proceedings.

185 Whether or not opt out of the Komlotex proceeding is (as Ms Wigmans maintains) irrelevant to whether someone is a group member of the Wigmans proceeding (which is currently stayed), it seems to me that it would likely be more confusing to entertain all permutations of the respective class memberships in what is on its face a general notification to the effect that a group member of the Komlotex proceeding may also be a group member of the Wigmans proceeding unless that group member opts out (or has opted out) of the Wigmans proceeding; and the statement in parentheses in the proposed draft does not to my mind render that misleading. In my view, the important fact to convey is that a group member may be a member of both groups (accepting, as I do, that Ms Wigmans' position is that there is no doubt about this) since

that is presumably relevant to a decision whether to opt out of one or the other or both (if that position in due course arises).

186 As to the reference to the different funding arrangements (and that this may result in a different outcome either from a judgment or settlement), the fact that Ms Wigmans accepts that this is correct at "an abstract level" is sufficient, in my opinion, to dispose of the complaint. A group member who wishes to obtain more information as to the different funding arrangements would readily be able to obtain it.

187 As to the abridged form of the notice, I consider the complaint to be unfounded. Importantly, it does make clear that if Ms Wigmans' appeal is successful it may have an effect on the conduct of the class action against AMP.

188 I accept the need for an opt out notice to "be readily comprehensible by non-lawyers" and "written in plain English". I also accept that one would not approve the publication of an opt out notice that was apt to mislead. In my opinion, with the amendments contemplated above and discussed in the course of argument on the present applications, I consider that the proposed revised opt out notice (a further version of which was provided following the hearing of the applications) satisfies the requirements of an opt out notice in this respect. I will however, when these reasons are published, consider whether the parties seek an opportunity to make final revisions to that notice before making final orders in that regard.

Are the orders beyond power in light of Haselhurst?

189 Payne JA in *Haselhurst* set out (from [34]) the statutory scheme of Pt 10 of the *Civil Procedure Act* and it is not necessary here to extract the relevant sections of the Act. His Honour identified the critical parts of that scheme, for present purposes there before the Court of Appeal as, *inter alia*, ss 157, 159, 162, 163 and 182. His Honour noted, relevantly, that consent is not required to be a group member (at [35]) and that the running of the limitation period that applies to the claim of a group member to which the proceedings relate is suspended by operation of s 182. His Honour noted that concomitant with the scheme not requiring the consent of a group member to participate is the right of a group member to "opt out" of the representative proceedings (see at [37]

and see s 162) and that there is a specific power to alter the definition of group members (see at [38] and s 163). His Honour identified that the provision at the "heart of [the] appeal" in *Haselhurst* was s 183, which empowers the Court to make orders that the Court "thinks appropriate or necessary to ensure that justice is done in the proceedings" (see at [43]). (I interpolate to observe that s 183 is not similarly at the heart of the present application, although the submissions at times suggested that it was.) Pausing here, I note that his Honour also referred (at [45]) to the vice of labels used to describe class "closure" orders as if the label, or labels, sufficiently delineated the order.

190 His Honour (at [46]-[47]) described the impugned order as follows:

> 46. Order 16 deals with Group Members who neither opt out nor register following a three month period of advertisement. The order applies in two distinct ways to such persons. First, it provides that they "shall remain a Group Member for the purposes of any judgment or settlement". That is entirely superfluous. The *Civil Procedure Act* provides that Group Members are all persons so defined by reference to the pleadings who have not opted out. It is clear from s 163(1) of the *Civil Procedure Act* that there is power to alter the description of the group as the litigation progresses. The class of persons who are Group Members may vary from time to time following (a) an amendment to the group description and/or (b) the exercise of the right to opt out.
>
> 47. The second way the order applies to Group Members who neither opt out nor register following a three month period of advertisement is to extinguish the rights of those Group Members – even though hitherto they have taken no active part in the proceedings, and their rights against the relevant defendant have benefited from s 182 of the *Civil Procedure Act* suspending time from running for the purposes of a limitation defence. This second way the order deals with non-registering Group Members is contingent upon "an in-principle settlement [being] reached before the commencement of the trial on the common issues and that settlement is ultimately approved by the Court".

191 Payne JA considered that there were two problematic aspects of the impugned order: first, that it went beyond the terms of s 179(b) of the *Civil Procedure Act* (which provides that the Court's judgment binds all persons in the group who have not opted out) (see [50]-[51]) and, second (at [52]), that:

> 52. … Group Members who fail to register are not entitled to participate in a distribution of settlement proceeds and yet are "barred from making any claim against the Defendant". Of course it may be necessary to revisit traditional notions of court process when dealing with the provisions governing representative proceedings and to fashion novel solutions to new problems. Part 10 provides that a court's order in approving a settlement or after a judgment may bind Group Members who fall within the group definition but who are not otherwise parties to court proceedings, who have not been served (whether personally or through orders for substituted service), and many

> thousands of whom may be unaware of the litigation and may have received no notice of it.

192 His Honour noted that ah order having the last-mentioned effect (barring a group member from making a claim) is permitted in two circumstances: approval of settlement (pursuant to s 173) and judgment after a hearing (pursuant to s 177) (see at [53]). His Honour referred to the High Court's decision in *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1; [2002] HCA 27 at [40] per Gaudron, Gummow and Hayne JJ where their Honours were there considering the then-existing version of Part 4A of the *Supreme Court Act 1986* (Vic). In Mobil Oil, their Honours referred to the legislative intent of the Victorian legislation as to representative proceedings (see at [40]) being that group members "need take no positive step in the prosecution of the proceeding to judgment to gain whatever benefit its prosecution may bring". His Honour said (and Ms Wigmans places no little weight on this) (at [54]):

> 54. The same remains true of Part 10 of the *Civil Procedure Act*. Group Members need take "no positive step" in the prosecution of the proceeding to judgment to gain whatever benefit its prosecution may bring, whether that benefit arises by a settlement (s 173) or a judgment (s 177).

193 The ratio of *Haselhurst* is that an order purporting contingently to extinguish group member claims (not in the context of court approval of a settlement of the representative proceeding or in a judgment) is beyond power. Payne JA emphasised that the bar to the making of claims by group members arose conditionally on the non-fulfilment of the registration condition: "that is, in order to gain whatever benefit the prosecution of the action may bring, by possible settlement, Group Members are required to take a positive step" (at [55]).

194 In the context of a submission that the Court must approve any ultimate settlement under s 173 of the *Civil Procedure Act* (such that the impugned order should be understood as interlocutory and subject to revision), Payne JA said (at [59]):

> 59. … The clear purpose of the [impugned] order is to effect a contingent extinguishment of Group Members' rights of action against the respondents. The effect of the order is the same; a contingent extinguishment of Group Members' rights of action against the respondents. The relevant contingency is that the Court in any settlement approval hearing has the ability not to approve any settlement which extinguishes non-registered Group Members' rights. If it were intended that the Court would only consider the potential extinguishment of non-registering Group Members' rights at any ultimate settlement approval

> hearing, the notice to Group Members of the orders would be misleading. No such additional opportunity to consider non-registering Group Members' rights was identified in that notice.

195 It was held that the impugned order, at least contingently, extinguished unregistered group members' rights against the respondents and that this was beyond power.

196 In the context of a legislative framework that requires all group members to be given the right to "opt out" prior to the commencement of the initial hearing (consider s 162 and supported by requirements of notice set out in s 175(1)(a)) but where there is no requirement to "close" an open class before any hearing and where the possibility of settlement is dealt with expressly but only by imposing an additional requirement of court approval (per s 173(1)), Payne JA considered that this tended strongly against an implication that there must be power to make an order "extinguishing the rights of an unregistered Group Member in advance of any settlement being achieved (or even attempted) in order to facilitate settlement of the claims of Group Members who choose to register their claims" (see at [66]).

197 It was recognised (at [67]) that practical considerations may in many cases make it desirable to convert an "open" class to a "closed" or fully identified class of group members. In that context, Payne JA referred to a number of ways in which that might occur (see at [70]ff). His Honour identified, as examples: permitting an amendment to the originating process so as to narrow the group definition so that it applied only to persons who, in addition to having a claim against the defendant, had also registered themselves or had retained the same firm of solicitors or agreed to a funding agreement with an external funder; or, where the identities of all class members are known, amending so as to take the proceedings outside Pt 10 altogether; or, altering the class to embrace a smaller time period or to include other criteria. His Honour made reference to the other ways as summarised by Professor V Morabito in "Class Actions Instituted Only for the Benefit of the Clients of the Class Representative's Solicitors" (2007) 29 Sydney Law Review 5 at 13-20). Payne JA said (at [68]ff):

> 68. It is important to observe the consequences mandated by Part 10. Persons may become Group Members without doing anything at all and

> without knowing that status. That depends upon the unilateral act of the representative plaintiff and the lawyers retained. Persons who are Group Members may not learn of that status through active solicitation or through notices authorised by the court or through other means.
>
> 69. An important aspect of the statutory regime protects persons who in that way, without any independent act of their own, become Group Members. Section 182 suspends the limitation period applying to a Group Member's claim when the representative proceedings commence until such time as they conclude or the Group Member opts out.
>
> 70. Accordingly, where the class of Group Members is "closed" by altering the definition so as to exclude persons who had not registered or had not retained the firm of solicitors or agreed to the terms of a litigation funder, then at that time the representative proceeding will cease to apply to that person's claim and time would thereafter continue to run for limitation purposes. That result is the opposite of that achieved by order 16. Yet in many cases, a redefinition through amendment of the group definition was aptly described as "closing the class".

198 At [81], his Honour identified the nub of the problem with the impugned order (having earlier noted that the mechanisms where a class was altered left those outside the class with the ability to pursue their claims – see at [75]) as follows:

> 81. … It is one thing to make orders after a judgment answering common questions (and in the case of *McMullin* the creation of sub-groups to deal with all the remaining damages questions in the litigation). It is a quite different thing, in advance of any judgment about common questions or any settlement of proceedings, "in principle" or otherwise, to order that the rights of Group Members who fail to register are to be contingently extinguished.

199 Again, the distinction drawn (at [83]) was with the situation where orders resulted in a smaller and "closed" class, but did *not* involve "class closure", in that the persons who had ceased to be group members were not barred from bringing separate proceedings. At [87], his Honour said:

> 87. The respondents submitted that the applicants accept that class closure type orders can be made after judgment or settlement. It was submitted that it was difficult to see why such orders should be available immediately after settlement or judgment, but not beforehand. For two reasons I reject that submission. The first is that the question of power raised here directly concerns the scope of specific powers in Part 10 which are enlivened *after* a settlement (s 173) or a judgment (s 177). The "gap-filling" power relied upon to support order 16, s 183, does not provide a licence to rewrite the legislative prescription of the exercise of those powers. Secondly, I do not accept the functional equivalence suggested of order 16 and an order made to facilitate distribution of the proceeds of an actual settlement. It is a very different thing, as a practical matter, to make orders barring a Group Member from further proceedings if he or she fails to take a step to receive a share of a settlement, rather than to make such an order, even contingently, before any settlement has been achieved (or even apparently discussed). In the former case the Court's responsibility to approve the settlement is there engaged. In the latter case, the present airbags controversy provides a good example of why the

> scheme of Part 10 is structured as it is. *A Group Member bombarded with detailed information about the proceedings need take no positive step in the prosecution of the proceeding to judgment or settlement to gain whatever benefit its prosecution may bring*. Once there is an amount of money available, whether by judgment or settlement, the Group Member will then have to take a positive step to share in the proceeds. Contrary to the respondents' submissions in this Court, the *Dorajay* and *Oz Minerals* representative proceedings demonstrate that "class closure" is *not* necessary in order to achieve substantial settlements.
>
> [emphasis as per Ms Wigmans' submissions]

200 That the ratio of the decision lies in the barring effect of the impugned order is evident from [105] where Payne JA, having accepted (at [104]) the proposition that the impugned order 16 would (or would arguably) assist in the management of the proceeding in order to bring it to a resolution, said that:

> 105. The difficulty with the respondents' argument, however, is that the effect of order 16 is to address a matter, the barring of a claim held by a Group Member, which is addressed in s 173 in the case of a settlement and s 177 in the case of a judgment, in each case supplemented by the specific power in s 179 to make a judgment binding all Group Members. It is, so the plurality in *Brewster* explains, incongruous to read a power into s 183 when other provisions of Part 10 make specific provisions apt to accommodate that task but which operate at the conclusion of the proceeding. The power to bar a claim held by a Group Member is one that arises at the conclusion of a representative proceeding …

201 At [109], Payne JA referred to the reasons of Nettle J in *Brewster* as being o inconsistent with a construction of s 183 as providing a separate power to extinguish group members rights, even contingently, before the time that Pt 10 specifically envisages (pointing to his Honour's comments at [125]) and stating (at [110]):

> 110. Nettle J's reference to the legislative scheme making specific provision for the entities in respect of whom, and *the point in time at which*, orders distributing cost burdens and judgment or settlement proceeds may be made is inconsistent with a construction of s 183 as providing power to extinguish Group Members' rights, even contingently, before the time that Part 10 specifically envisages. That is the effect of order 16.
>
> [Emphasis in original.]

202 At [119], his Honour said:

> 119. There are two significant matters to consider. The first is that the scheme of Part 10 is inconsistent with an interpretation of s 183 as empowering the Court to make orders for pre-settlement class closure. The secondary materials provide that Part 10 was modelled on and intended to be interpreted consistently, save for some presently irrelevant express exceptions, with Part IVA of the *Federal Court of Australia Act*. The Australian Law Reform Commission in its report Number 134, 2018, *Integrity, Fairness*

> *and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, at [1.54] noted that the Federal Government implemented the open class regime after careful consideration and quoted the Attorney-General at the time of the passage of the *Federal Court of Australia Act* amendments introducing Part IV as follows:
>
> > "It [the regime] ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceeding. It also achieves the goals of obtaining a common, binding decision while leaving a person who wishes to do so free to leave the group and pursue his or her claim separately."

203 Counsel for Ms Wigmans emphasised the "insoluble" conflict of interest referred to by Payne JA, which it is said will also be the case in the present proceeding if the proposed orders are made. In this regard, his Honour said (at [120]):

> 120. … The structure of Part 10 is that the representative plaintiffs represent the interests of the Group Members. Order 16 has the effect that the appellants and their legal advisors will necessarily face an insoluble conflict of interest in any mediation or settlement discussion. It is in the interests of all Group Members who have registered to achieve a favourable settlement. It is in the interests of Group Members who have not registered for the proceedings not to settle regardless of the terms offered. This is because order 16 has the effect that they will recover nothing should the matter settle but should the matter proceed to hearing they may be entitled to damages …

204 His Honour considered (see [121]) that a submission that, as a practical matter, there was no difference in substance between an order requiring a group member to take steps before any settlement and one of the kind discussed in *Brewster* (see at [94]) requiring steps to be taken after settlement has been achieved, was inconsistent with the text of the statute and the considered dicta of the majority judges in *Brewster* about the breadth of the power in s 183. His Honour said (at [122]):

> 122. Order 16 strikes at the heart of the Part 10 regime, by setting up an alternative regime of extinguishment of Group Members' rights of action for the purpose of encouraging the parties towards a pre-trial settlement. Self-evidently, the fewer people the respondents need to compensate, the less they believe they will need to pay to settle the proceedings. Whilst order 16 makes settlement more likely, it does so in a manner contrary to the scheme established by the legislature.

205 The remaining members of the Court of Appeal agreed, with Bell P making certain additional observations. In that regard, I note the learned President's specific observations, consistent with those of Payne JA which I have

considered above, concerning alternative means by which to achieve effective "class closure". Relevantly, if by way of example, Bell P (at [17]) observed that:

> 17. Alternatively, if registration was sought as a condition of mediation (without the fatal consequences of non-registration which order 16 mandates), it could be sought with a view to amending the class definition so that any settlement only applied to those members who had registered. This would avoid the risk of the respondents "overpaying" in any settlement, if that risk represents their genuine concern. Settlement of the claims of those consumers who had manifested their concern by taking an active step of registration could at least be achieved, without those who had neither opted out nor registered losing their causes of action.

206 I see the present application, specifically the proposed orders and opt out notice, as raising a different issue to that which was determined in *Haselhurst*. I do not accept that the proposed orders (which provide for the opt out process now to take place with a view to a mediation that may take place before the hearing and/or determination of the High Court appeal) have the effect of contingently extinguishing or barring the rights of group members who do not take a step in the proceeding (contra the impugned order in *Haselhurst*). Nor do I consider that the proposed orders (having regard to the stated intention noted in the proposed orders) are inconsistent with the statutory regime under which a group member is able to take the benefit of judgment or settlement even without taking any positive step in the proceeding.

207 Rather, what is being sought is consistent with the structure of the representative proceeding regime in that group members need take no positive step to participate in the proceeding at all at this stage but, as the legislation provides must occur, they will be required at this stage to be given notice as to their entitlement to opt out of the class and there will be a regime *inter partes* that provides for them to do so. If a member of the group does so, then that member's right to commence proceedings against AMP will not be extinguished by any outcome achieved in the mediation of the dispute. Likewise, if members neither opt out nor register, then they will remain members of the class in whose interests the legal representatives will be conducting the proceedings going forward (including at a mediation). One would assume that those legal representatives (whose qualifications and experience in class action litigation were put forward in the multiplicity hearing before me and who it cannot seriously be suggested would not be well

conscious of their professional and ethical obligations to group members and as officers of the Court) would do so consistent with their obligations to act in the best interest of their client and group members.

208 I do not see the fact that there has been foreshadowed an intention (assuming agreement in principle is reached in mediation) to seek an order limiting or barring the participation in a mediated settlement of persons who have not registered in compliance with the registration process now contemplated as giving rise to an insoluble conflict of interest at the time of mediation of the dispute. Without being in any way prescriptive, it seems to me that there is ample scope for negotiation of potential outcomes that might depend on the ultimate size of the class and/or its composition without there being an inevitable or insoluble conflict of interest. Further, there would be ways, if necessary, in which separate interests could be independently pursued within the course of the same mediation (perhaps with separate representation within the same firm of solicitors or with separate Counsel at the mediation).

209 For example, as presently drafted, the language of the proposed opt out notice accommodates the very steps which the Bell P and Payne JA identified in *Haselhurst* as a permissible means by which to put in place the condition of registration prior to a mediation taking place.

210 Indeed, were there not to be raised with group members a present intention to seek such an order or put in place such a condition in due course, then it would no doubt be suggested that the opt out notice was misleading in that respect.

211 Either way, such an endeavour on the part of the parties would require Court approval and group members who had not participated in the opt out regime would have an opportunity then to be heard. Similarly, I consider that issues as to a potential conflict of interest are more likely to arise, or perhaps even will only arise, at a time when (assuming an in principle settlement has been achieved) there is an application to restrict participation in the distribution of settlement funds only to those who have registered as part of the opt out process. That, arguably, would also arise if there were an application to amend the class (which, again, the Court of Appeal noted was a permissible way to affect closure of the class at that stage). In this way, and for these reasons and

others, to my mind it is premature for the Court now to consider such issues and, even more so, effectively to stay the proceeding because of them. Put differently, commencement of the opt out process at this stage does not, to my mind, mandate the outcome of any application that might later be made (as presently intended to be made) nor does it mandate how any settlement that might be able to be achieved could be structured in the interests of all the group members. The proposed opt out notice does no more than alert group members to the intention (or present intention, and hence only the possibility) that the parties may move in the manner described in the notice.

212 Finally, while I accept that mediation of the proceeding is not an end in itself (see Bell P in *Haselhurst* at [13]) and wholeheartedly agree with the learned President that the function of the Court is to resolve disputes (according to law) and not to act as a mere dispute "clearing house or mediation referral agency" (see *Haselhurst* at [15]), I consider that it is not consistent with the overriding statutory mandate for the just, quick and cheap resolution of the real issues in dispute to countenance the further delay in the progress of the resolution of this proceeding (which, though all the representative plaintiffs including Ms Wigmans have contemplated will involve a meditation, must ultimately, if not resolved in mediation, be determined by the Court). That is, of course, provided that by so doing Ms Wigmans' appeal rights are not rendered nugatory or otherwise relevantly prejudiced.

Conclusion

213 Were I to have reached the view that the making of the orders sought in the Komlotex motion rendered Ms Wigmans' appeal nugatory or otherwise might give rise to relevant prejudice (including, posing a real risk of practical difficulty for the High Court in determining the relief to be granted in the event that the appeal succeeds), I would have had no hesitation in refusing to make the orders sought by Komlotex and Fernbrook. Instead, I would simply have vacated the orders made in March and April this year relating to the opt out and registration procedure and for the progress of the matter to mediation pending the determination of the High Court appeal.

214 However, I am not persuaded that there is any real risk that Ms Wigmans' exercise of her right to appeal following the grant of special leave will be rendered nugatory (or again, otherwise give rise to relevant prejudice) by the making of the orders sought by Komlotex and Fernbrook. Rather, I have no doubt that it will be possible (albeit at some cost which I consider does not outweigh those factors which militate against this course) to "unscramble the egg", so to speak, if that becomes necessary. Nor do I consider that the High Court is likely to be constrained, in any real or practical way in the determination of what relief is to be granted in the event that the appeal succeeds, by the taking of the steps contemplated by the proposed orders sought in the Komlotex motion.

215 As to the submission that the orders sought are beyond power (and inconsistent with the legislative regime), having regard to what was said in the decision of the Court of Appeal in *Haselhurst*, for the reasons which I have indicated above I do not accept that position. Nor do I consider that the proposed opt out regime is inconsistent with the legislative scheme relating to representative proceedings or will give rise to any insoluble conflict of interest.

216 As to the form of the proposed opt out notice, while I do not consider that it was misleading in the manner that Ms Wigmans has submitted, there have been revisions proposed which I consider adequately put at rest those of Ms Wigmans' complaints that I have indicated above might be addressed.

217 As to the timing provided for in the orders sought, Counsel for Ms Wigmans indicated (not, it was said, *in terrorem*) that it was highly likely that he would be given instructions to seek leave to appeal from any decision unfavourable to the course for which Ms Wigmans here contends and sought, in effect, sufficient time to enable such an application to be made without the need for the costs of seeking a stay. That request was repeated in communications received in relation to the proposed revised opt out notice. I will take that into account in the timing set out in the orders to be made in light of these reasons, which I will fix after the parties have had an opportunity to make submissions when these reasons are published.

Orders

218 For the above reasons, I make the following orders:

(1) Dismiss the Notice of Motion filed 21 April 2020 by Ms Wigmans.

(2) Reserve the question of costs.

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