Court of Appeal
Supreme Court

New South Wales

Case Name:	Wigmans v AMP Ltd
Medium Neutral Citation:	[2020] NSWCA 104
Hearing Date(s):	25 May 2020
Decision Date:	4 June 2020
Before:	Macfarlan JA; Leeming JA; White JA.
Decision:	1. Grant leave to Ms Wigmans to appeal. 2. Direct Ms Wigmans to file a notice of appeal, in the form of the draft notice at tab 2 of the White Folder, within 7 days of today, and otherwise dispense with the requirements of service. 3. Appeal allowed. 4. Set aside order 1 made on 8 May 2020 (dismissing Ms Wigmans' notice of motion) and the orders made on 8 May 2020 and varied on 11 May 2020 on the notice of motion dated 27 April 2020 filed by Komlotex and Fernbrook. 5. In lieu thereof, dismiss the notice of motion dated 27 April 2020 and set aside orders 5-8 and 11-17 made on 12 March 2020 and all orders made on 9 April 2020. 6. The respondents to pay Ms Wigmans' costs of the appeal and of the notices of motion dated 21 and 27 April 2020.
Category:	Principal judgment

Parties:	Marion Antoinette Wigmans (Applicant) AMP Ltd (First Respondent) Komlotex Pty Ltd (Second Respondent) Fernbrook (Aust) Investments Pty Ltd (Third Respondent)
Representation:	Counsel: J T Gleeson SC, A M Hochroth (Applicant) E A Collins SC, I J M Ahmed (First Respondent) C A Moore SC, G Donnellan, A d'Arville (Second and Third Respondents) Solicitors: Quinn Emanuel Urquhart & Sullivan (Applicant) Herbert Smith Freehills (First Respondent) Maurice Blackburn Lawyers (Second and Third Respondents)
File Number(s):	2020/139924
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Equity
Citation:	[2020] NSWSC 504
Date of Decision:	08 May 2020
Before:	Ward CJ in Eq
File Number(s):	2018/310118

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the decision]

Separate representative proceedings were brought against AMP Ltd on behalf of certain shareholders under Pt 10 of the *Civil Procedure Act 2005* (NSW). The applicant in this Court, Ms Wigmans, was the representative plaintiff in one proceeding, and Komlotex Pty Ltd and Fernbrook (Aust) Investments Pty Ltd (the second and third respondents in this Court) were representative plaintiffs in two others. The proceedings alleged that AMP's non-disclosure of conduct resulted in group members acquiring interests in AMP shares at an inflated price from 2012 to 2018, and that the share price declined after the relevant conduct was revealed during hearings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry in 2018, causing group members to suffer loss.

In May 2019, the Komlotex and Fernbrook proceedings were consolidated into a single proceeding, and the Wigmans proceeding was permanently stayed. The Court of Appeal dismissed an appeal from the permanent stay, but in April 2020, the High Court granted Ms Wigmans leave to appeal against that decision. In May 2020, the primary judge made orders over Ms Wigmans' opposition providing for distribution of notices to group members in the Komlotex proceeding and other steps to culminate in a mediation early next year. The notices stated that group members who did nothing would be bound by the outcome of the Komlotex proceeding and that their rights to pursue the same claims against AMP would be extinguished. A note attached to the primary judge's orders, and the notices themselves, referred to an intention on the part of both Komlotex and AMP to apply, in the event that a settlement were reached between them, for an order excluding any group member who had neither registered nor opted out by the relevant deadline from receiving any benefit pursuant to the settlement.

Ms Wigmans sought leave to appeal to this Court against those orders and the application was heard concurrently with argument on the appeal.

The principal issue in the application was whether the orders were beyond power.

The Court held, granting leave to appeal and allowing the appeal:

1. The orders made were beyond power: at [132]. The opt out nature of representative proceedings is an important aspect of the legislative regime established by Pt 10 of the *Civil Procedure Act*. What was proposed by Komlotex and AMP was contrary to the essence of the opt out regime, in that group members who took no positive step either to register or to opt out would gain no benefit from any settlement and would have their rights extinguished: at [76]-[79], [95], [132].

Mobil Oil Australia Pty Ltd v Victoria (2002) 211 CLR 1; [2002] HCA 27; *BMW Australia Ltd v Brewster* [2019] HCA 45; 94 ALJR 51; and *Haselhurst v Toyota Motor Corporation Australia Ltd* [2020] NSWCA 66 applied. *Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194 distinguished.

2. Neither the power to issue notices pursuant to ss 175 and 176 of the *Civil Procedure Act* nor the case management powers in Pt 6 can sustain orders contrary to the basic precepts of the scheme established by Pt 10: at [102]. Although the orders did not themselves in form extinguish any rights of group members, the question of power required analysis of whether the practical effect of the orders conformed with the statute: at [103]-[104]. The joint present and communicated intention to apply for orders, if settlement took place, extinguishing the claims of group members who did nothing, had a large practical effect on the content of the notice and the decision to be made by group members: at [86], [123]-[126].

3. It was reasonable to expect that the extinction of passive or unregistered group members' rights would be one of the drivers of any settlement between registered group members and AMP in the Komlotex proceeding, and this gave rise to a real conflict between those group members who were registered and those who were not: at [79], [118]-[121].

JUDGMENT

1 **THE COURT**: Two representative proceedings brought under Pt 10 of the *Civil Procedure Act 2005* (NSW) on behalf of AMP shareholders are pending in the Commercial List. The first, in which Ms Marion Antoinette Wigmans is the representative plaintiff, is presently stayed, in circumstances described below. In the second, in which Komlotex Pty Ltd is the first representative plaintiff,

orders were made a few weeks ago over Ms Wigmans' opposition providing for the imminent distribution of notices to group members and other steps to culminate in a mediation early next year.

2 Ms Wigmans seeks leave to renew her challenge to those orders in this appeal. She says there was no power to make them. Alternatively, if there was power, then she says that the Court's discretion miscarried, having regard to the potential impact of the orders upon her proceedings which are the subject of a High Court appeal. But the main point is whether the orders should be set aside on substantially the same basis as this Court set aside orders effecting what was described as a "soft closure" in *Haselhurst v Toyota Motor Corporation Australia Ltd* [2020] NSWCA 66, whereby group members who neither registered with the plaintiff's solicitors nor opted out would have their claims extinguished in the event that a settlement was reached. The orders challenged in this appeal are different from those in *Haselhurst*, but there are important similarities.

3 We have concluded that Ms Wigmans is correct on her main point. The orders are contrary to Pt 10 of the Act and therefore not within power, and must be set aside.

Overview

4 Ms Wigmans seeks leave to appeal from orders made on 8 May 2020, and varied on 11 May 2020, which are directed to the provision of evidence and the registration and opting-out of group members in the representative proceeding brought by Komlotex Pty Ltd. The Court was told that Ms Wigmans is not only a group member in the Komlotex proceedings, but has also registered with the solicitors acting for Komlotex. However, her objection to the orders is made in her capacity as the representative plaintiff in the separate proceedings, presently stayed, which have been brought by her.

5 Both Ms Wigmans and Komlotex say that they acquired interests in shares of AMP Ltd, a listed public company, at times at which its share price is said to have been inflated by reason of the non-disclosure of conduct which, so it is alleged, first came to light during hearings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry in

2018. Shortly thereafter, it is alleged that the share price declined substantially. The Commercial List Statement filed by Komlotex alleges that AMP's non-disclosures were contrary to the continuous disclosure obligations under ASX Listing Rules and amounted to misleading and deceptive conduct. Speaking generally, it alleges that group members suffered loss merely because they acquired shares at market prices which were inflated because of the non-disclosures. In the alternative, it alleges that Komlotex and some group members suffered loss because of their direct reliance on the failures to disclose or the misleading and deceptive conduct.

6 AMP's Commercial List Response does not admit there were any contraventions at all, having regard to what it says is the tiny minority of instances of misconduct. It positively asserts that at least some of the alleged non-disclosures were made available to the market, years prior to the Royal Commission hearings, including by ASIC Report 499, *Financial Advice: Fees for no service* dated October 2016. It also asserts that class members had an opportunity to mitigate any loss by selling on 16 April 2018 or shortly thereafter, after the disclosures in the Royal Commission and before the share price fell. The pleadings suggest that any relationship between the alleged non-disclosure of information and the effect on the market price of shares is apt to be contestable and potentially quite complex.

7 Both Ms Wigmans and Komlotex brought representative proceedings identifying as group members many thousands of persons who acquired interests in AMP shares over a six year period, based on substantially the same claims of non-disclosure. The precise limits of the classes of group members need not be explored for present purposes, although the limitation stated as all persons who "entered into a contract (whether themselves or by an agent or trustee) to acquire an interest in" shares may contain some problematic aspects. (If the trustee of a self-managed superannuation fund buys shares, who are the group members? What if the trustee of a discretionary trust does so? Do "interests" in shares include the rights under futures contracts and other derivatives?) Significantly for present purposes, group members will include numerous persons who have merely an equitable interest in shares (where, say, the legal interest is held by a nominee company

associated with a broker or the custodian of an investment fund), and thus mere knowledge of the share register will not identify those group members. Argument in this Court proceeded uncontroversially on the basis that the class definition included such group members.

8 Ms Wigmans' proceeding was permanently stayed on 23 May 2019: *Wigmans v AMP Ltd* [2019] NSWSC 603. At the same time, two other representative proceedings were consolidated, resulting in the single proceeding in which Komlotex is the first plaintiff and Fernbrook (Aust) Investments Pty Ltd, the third respondent to this appeal, is the second plaintiff.

9 An appeal from the permanent stay was dismissed by this Court: *Wigmans v AMP Ltd* [2019] NSWCA 243; 373 ALR 323.

Two developments in April 2020

10 The two notices of motion which were heard by the primary judge on 30 April 2020 were prompted by two appellate decisions in the previous fortnight.

11 First, on 17 April 2020, the High Court granted special leave to appeal from this Court's decision: *Wigmans v AMP Ltd* [2020] HCATrans 52. No date for the hearing of the appeal has been allocated by the High Court. The notice of appeal relevantly identifies two possible outcomes, which may be referred to (using the parties' language) as "complete success" and "remitter". Complete success for Ms Wigmans involves the High Court setting aside the permanent stay of Ms Wigmans' proceeding and permanently staying the other two proceedings. Remitter involves the High Court setting aside the permanent stay but remitting the issue of whether any of the proceedings should be stayed to the Supreme Court.

12 Ms Wigmans' latest application is premised on the possibility that her appeal is wholly or partially successful in the High Court. She seeks to set aside orders made in the Komlotex proceeding which, in her submission, will prejudice her rights as representative plaintiff in her own proceeding in the event that her appeal succeeds.

13 Secondly, on 22 April 2020, this Court determined *Haselhurst*. That decision held that there was no power to make an order, described in submissions as a "soft closure" order, which was in the following form:

> "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."

14 It will be seen that the order which was set aside in *Haselhurst* (a) was expressly based on s 183 of the Act and (b) of its own force contingently bound unregistered group members to any settlement agreement which was reached and contingently barred such members from making any claim against the defendant or participating in any such settlement.

15 A substantially similar order had been made, with the consent of the representative plaintiffs and AMP, but without the participation of Ms Wigmans, in the Komlotex proceedings on 12 March 2020. It was order 15(b). Other orders made on that day were varied on 9 April 2020, but order 15(b) was unaffected. However, no doubt in light of the decision in *Haselhurst*, Komlotex and AMP promptly applied to vary order 15(b).

The applications heard and determined by the primary judge

16 Thus it was that two notices of motion came before the primary judge on 30 April 2020. Ms Wigmans' notice of motion sought to set aside the orders made in the Komlotex proceeding. Her motion was filed on 21 April 2020, shortly after the High Court had granted special leave.

17 Komlotex's and Fernbrook's notice of motion was filed on 27 April 2020, shortly after *Haselhurst* was delivered. It sought to vacate many of the orders in place, including order 15(b), and in their place impose a different regime, the most important difference of which was that rather than the orders *themselves* contingently sterilising claims of unregistered group members in the event that a settlement was reached, they *noted* a *present intention* to seek orders in the future, if the mediation led to a settlement, which would prevent unregistered

group members from participating in the settlement and also sterilise their claims. The notices to group members were drafted accordingly.

18 Ms Wigmans' principal point, to which the majority of her oral submissions were directed, was that the orders sought by Komlotex and Fernbrook were beyond power for substantially the same reasons as held in *Haselhurst*. The respondents maintained that *Haselhurst* was distinguishable, that the orders for the provision of notices were authorised by s 175, and that it was premature to determine whether the order which might be sought in the event that the mediation was successful was within power.

19 The orders made on 8 May 2020 were varied on 11 May 2020 in light of the setting down of Ms Wigmans' application for leave to appeal to this Court, which was heard concurrently as an appeal, only a fortnight later. The most important change was to delay the distribution of notices by some four weeks so that they would occur shortly after the hearing of the appeal, rather than the week before it was heard. It should be said immediately that the Court was considerably assisted by the way in which all parties co-operated in the provision of appeal books and written submissions in such an accelerated timeframe, which resulted in the hearing of a complex interlocutory appeal in a single day (albeit with extended sitting hours) a fortnight after the orders were made.

The orders and notices which are the subject of this appeal

20 It was common ground, in accordance with what was said in *Haselhurst* at [44]-[45], that the starting point was an analysis of the legal and practical effect of the orders. A consolidation of the orders made (reflecting all previous orders as varied up to and including 11 May 2020), helpfully provided by the parties, is Annexure A to this judgment. References to order numbers below are to the orders on that consolidation.

The orders as varied

21 Orders 2-5 made provision for registration of group members, either on a website maintained by Komlotex's solicitors or by a form sent to that firm, as an aspect of which a group member would be required to submit information including as to the member's acquisition and disposal of interests in AMP

shares. Persons who registered were "New Registered Group Members". The deadline for doing so was 4 September 2020, as provided by order 8, after which a "de-identified version" of the information would be provided to AMP's solicitors.

22 Orders 6-7 made provision for the exchange, between October and December 2020, of material on which the parties intended to rely at a mediation. Orders 6 and 7 stated that the material was to be provided on a "without prejudice" basis.

23 Orders 10-18 addressed the notices to be sent to group members. The submissions in this Court proceeded on the basis that there would be in excess of 500,000 notices sent, as well as a newspaper advertisement. We return to the notices below.

24 Order 19 provided for a mediation to be conducted by 19 February 2021 or such later date as the Court ordered, by a mediator agreed by the parties or appointed by the Court.

25 Paragraph 21 of the orders contained an important note concerning the parties' present intention:

> "21. In the event that the proceedings settle at any time between the first day of the mediation (being the mediation referred to in Order 19 above) and the first to occur of the following:
>
> a. the date which is 6 months after the first day of that mediation; and
>
> b. the first day of the hearing on liability in these proceedings,
>
> then the parties intend to apply to the Court for an order that 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 will not receive any benefit pursuant to the settlement."

26 The intention recorded in that note was at the forefront of Ms Wigmans' submissions, and was stated in the notices to be distributed to group members.

The notices to group members

27 The orders refer to two notices to group members: Schedule A, the "Notice to Group Members", which is to be distributed to group members either by email or by ordinary mail where no email address is available, and Schedule B, a so-called "Abridged Notice" which is to be placed in a newspaper. Each notice

identified the opt out date of 4 September 2020. There are differences in the two notices, which were mentioned during the course of the hearing. The parties were given time to provide further submissions relating to them.

28 The Notice to Group Members is a complex document of 10 pages. It referred to the class action, and under the heading "Key points to be aware of" advised that a person could register, or opt out, or if the person did nothing, then "your rights (if any) may be determined without your participation" and gave a reference to "Option C" later in the notice.

29 Under the heading "What is a class action?", the notice advises:

> "If there is a judgment or a settlement of the AMP Shareholder Class Action, Group Members will not be able to pursue the same claims against AMP in other legal proceedings, and may not be able to pursue similar or related claims against AMP in other legal proceedings. ... in a *settlement* of a class action, where the settlement provides for compensation to Group Members it may extinguish *all* rights to compensation which a Group Member might have against AMP which arise in any way out of the events or transactions which are the subject-matter of the class action." (emphasis original)

30 Slightly more than a page of the notice addresses the proceeding brought by Ms Wigmans, including its history up to the grant of special leave. This section included the finding by the Supreme Court that "the best and most efficient result for group members and fairness to the defendant" was for the Komlotex proceeding to proceed and for Mr Wigmans' proceeding to be stayed. None of this was said to be inaccurate. However, obviously what was said as to the status of the proceeding would be rendered out of date by the outcome of the appeal in the High Court.

31 The notice presented three options: registration (Option A), opt out (Option B) or do nothing (Option C).

32 Option A was described as "Register to Participate as a Group Member". The notice stated:

> "The Plaintiffs and AMP intend to seek an order that any Group Member who does not register for the AMP Shareholder Class Action by 4pm (AEDT) on 4 September 2020 should be excluded from receiving a benefit from any settlement that may be agreed to … at the forthcoming mediation ..."

33 After describing how registration was to occur, the notice advised that:

"Registrations received after [4 September 2020] will not be accepted, and you will be treated as having not responded to this notice (see Option C below). This means that you will remain as a Group Member in the AMP Shareholder Class Action, but you may not be entitled to receive a distribution payment from any settlement that may be agreed to at the forthcoming mediation, or within six months after the commencement of that mediation, if the Plaintiffs and AMP are successful in obtaining an order that only those Group Members who have registered can obtain compensation received through the settlement."

34 The final section of the notice addressed the third option:

"***Option C – Do Nothing***

8. Group Members who do nothing (i.e. have not already retained Maurice Blackburn, do not register in accordance with Option A and do not opt out in accordance with Option B before the deadline of **4.00 pm (AEDT) on 4 September 2020**) will remain as Group Members in the AMP Shareholder Class Action for all purposes, but may not be entitled to receive a distribution payment from any settlement that may be agreed to at the mediation to be held by 19 February 2021 (or such later date as the Court orders), or within six months after the commencement of that mediation, if the Plaintiffs and AMP are successful in obtaining an order that only those Group Members who have registered can obtain compensation received through the settlement. However, Group Members who do nothing may still be entitled to receive a distribution payment from any settlement that may be agreed to after that time, or from any favourable judgment, in the AMP Shareholder Class Action.

9. Further, Group Members who do nothing will be bound by the ultimate outcome of the AMP Shareholder Class Action, and will therefore not be able to pursue the same claims, and may not be able to pursue related claims, against AMP in other legal proceedings in the future."

35 Turning to the Abridged Notice which is Schedule "B" to the orders, this more concisely described the proceeding, and the fact that Ms Wigmans' proceeding was the subject of a High Court appeal, which if successful might have an effect on the conduct of the proceeding brought by Komlotex and Fernbrook. It gave a simplified summary of the class definition. It advised:

"**Class action deadline**

The Court has made orders (amongst other things) that:

1. Any person who wishes to register for the AMP Shareholder Class Action for loss suffered as a result of the conduct described above, must by **4.00pm (AEDT) on 4 September 2020**:

a. Have already retained Maurice Blackburn to act for you in relation to the AMP Shareholder Class Action; or

b. complete and submit the AMP Shareholder Class Action Group Member Registration Form which is available:

(i) online
at https://www.mauriceblackburn.com.au/AMPshareholder/; or

(ii) by contacting Maurice Blackburn on 1800 931 524 or by email at AMPClassAction@mauriceblackburn.com.au.

2. Any person who wishes to have no part in the class action must opt out of the class action by **4pm (AEDT) on 4 September 2020**.

If you do not do either of these things then it may affect your rights."

Summary of orders and notices

36 It will be seen that the orders and Notice to Group Members make no secret of the intention to seek orders in the future which will deny the right of group members who failed to register to participate in any settlement.

37 There was some debate during the hearing as to whether those notices might be consistent with a different approach, namely an application to redefine the class so as to exclude group members who had not registered. The significant difference between those two formulations in the context of a settlement may be obvious but should be stated immediately.

38 Section 163(1) of the Act provides that:

> "The Court may at any stage of representative proceedings, on application by the representative party, give leave to amend the originating process commencing the representative proceedings so as to alter the description of the group."

39 Relevantly for present purposes, s 163 permits an amendment to the Commercial List Statement so as to narrow what is presently identified as a very large group of persons who acquired interests in AMP shares. If, say, the class of group members were narrowed to those who had acquired interests in AMP shares *and* had registered a claim in a specified fashion by a specified date, then there would be two important consequences:

(1) The representative plaintiff and its solicitors would thereupon act on behalf of a smaller class all of whose members' share activity and claims were known with some level of precision.

(2) Those persons who formerly had been group members but who had not registered a claim in the ways and by the time specified, would cease to be group members. They would still, potentially, have claims against AMP, and (subject to complexities which we put to one side as to the operation of limitation periods sourced in federal law) they would have the benefit of the suspension of the running of the limitation period applicable to the group members' claim effected by s 182.

40 On the other hand, if persons continue as group members, and there is a settlement between the representative plaintiff and AMP, then they will be

bound by any orders made. If, say, the Court approves a settlement pursuant to which registered group members receive an amount of money, but group members who have not registered receive nothing, and the proceedings are dismissed, then group members who have not registered will receive nothing. Moreover, they will have their claims against AMP extinguished. Section 179 provides:

> "A judgment given in representative proceedings—
>
> (a) must describe or otherwise identify the group members who will be affected by it, and
>
> (b) binds all such persons other than any person who has opted out of the proceedings under section 162."

41 That was what was sought to be achieved by order 16 in *Haselhurst*, and has more recently been achieved in orders made in two subsequent proceedings in the Federal Court upon which the respondents relied.

42 It may also be obvious, but worth saying explicitly, that from AMP's perspective, it is likely to be more valuable to settle the claims of *all* the group members in a widely drafted class other than those who opted out, rather than merely to settle the claims of those group members who have registered with Komlotex's solicitors. It follows also that, other things being equal, Komlotex and other group members who have registered may be able to achieve a more generous settlement from AMP if the settlement frees AMP from an exposure to the claims of all group members who had not opted out, as opposed to leaving in existence the possibility that group members who have not registered might subsequently bring a claim. It takes no great imagination to contemplate a subsequent representative proceeding similar to the existing Commercial List Statement with a group definition that is identical save that it excludes persons who participated in and were bound by the earlier settlement, and AMP would, acting responsibly, be concerned that any settlement not leave it exposed to such a claim. Indeed, it may be that AMP would not be inclined to settle at all with a smaller class.

43 There is nothing in the orders or the notices which suggests that group members who neither register nor opt out will be redefined out of the class, so as to preserve such rights as they have against AMP. Counsel for Komlotex

fairly accepted as much. On the other hand, it is fair to say that there is nothing in the orders or notices which explicitly precludes that possibility. But we do not think that that is the impression which a group member would receive, in particular, from the heavy emphasis upon a group member who does nothing remaining a member of the class with the potential of that member's rights being affected. Further, the unequivocal warning that "Group Members who do nothing will be bound by the ultimate outcome of the AMP Shareholder Class Action, and will therefore not be able to pursue the same claims ..." with which Section 2 of the notice commences, and which concludes the section describing "Option C – Do Nothing" is inconsistent with a present intention to redefine the class so that those who do not register cease to be group members.

The need for registration in order to identify group members' claims

44 As noted above, the share register is insufficient to identify group members, let alone the quantum of any claims they might have. The reasons include the following, which are not intended to be exhaustive.

(1) The register will not identify group members who acquired equitable interests in shares.

(2) The register will identify persons who suffered no loss, because they only acquired a bare legal interest in the shares and therefore suffered no loss.

(3) The register will not directly reveal the price for any purchase or sale of shares. Even if there is a rough attempt to correlate the timing of share transfers on the register with (say) average prices for market transfers three days before the register is altered, there may be no little complexity in correlating the particular shares sold with those which have been bought. Many group members will have bought and sold many parcels of shares over the six year period in the group definition. How is netting off to occur? After all, the group is not confined to retail investors. It includes the persons who buy and sell AMP shares in the day to day activities of index funds, listed investment companies and many other investment vehicles. It also includes short term traders and arbitrageurs.

(4) Whether there is a causal connection between any non-disclosure by AMP and the price paid or received by a shareholder may turn on matters not disclosed by the register (we are not intending to express any view on the way causation operates on an ASX-listed security where there has not been complete disclosure of price-sensitive information, or on the carefully drafted alternative formulations in the

> Commercial List Statement). In particular, the pleading proceeds on the basis that some group members would not have purchased AMP shares at all if the matters said to amount to non-disclosures had been disclosed.

45 For all those (and other) reasons, it will be necessary, assuming that AMP is found to have contravened any norms applicable to it, for group members to identify their claims at some stage. We readily accept that the registration process is apt to provide much more information concerning the claims of group members than is otherwise available.

46 The respondents say that there is a need for registration if there is to be an effective mediation. Without the information provided by a registration process, and in light of the difficulties some of which are identified above, neither Komlotex and its advisers nor AMP can gain a meaningful understanding of the true scope of the claims of group members. We will return to this submission below.

The reasons of the primary judge and Ms Wigmans' challenges to them

47 The primary judge heard submissions on both motions on 30 April 2020, and extremely promptly produced a very substantial judgment of 219 paragraphs over 79 pages little more than a week later on 8 May 2020: *Komlotex Pty Ltd v AMP Ltd* [2020] NSWSC 504. Her Honour addressed the question of power last. That reflected the structure of Ms Wigmans' submissions at first instance, which framed her attack on the proposed orders as "a further reason" why they should not be made, because "they are an attempt to achieve by another means the type of class closure found ... to be beyond power in *Haselhurst*". This may have reflected the fact that Ms Wigmans' motion was filed before *Haselhurst* was delivered. Further, power was the fifth of five proposed grounds of appeal, and was addressed last in her written submissions. However, as Mr Gleeson SC (who appeared in this Court but not at first instance) recognised, the question of power is logically anterior to the exercise of discretion. It is best addressed at the outset.

48 The reasons of the primary judge on power are at [189]-[212]. Much of that portion of her Honour's reasons (at [189]-[205]) summarises what this Court

held in *Haselhurst*, and no criticism was made of that. Three points which should be noted were made in the course of that summary.

(1) First, at [189], her Honour observed in respect of the focus upon s 183 in *Haselhurst* that "s 183 is not similarly at the heart of the present application, although the submissions at times suggested that it was".

(2) Secondly, her Honour stated that the ratio of *Haselhurst* was 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": at [193].

(3) Thirdly, her Honour at [203] referred to Ms Wigmans' submission concerning the "insoluble" conflict of interest to which Payne JA referred in *Haselhurst* at [120].

49 At [206], her Honour observed, with respect correctly, that the proposed orders did not themselves have the effect of contingently extinguishing or barring the rights of group members who failed to register. However, her Honour added:

> "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."

50 Her Honour elaborated why what was proposed was consistent with the structure of Pt 10, because members who took no steps would continue as group members and the legal representatives, conscious of their professional and ethical obligations to group members, would act consistently with their obligations to act in the best interests of their clients and group members. Ms Wigmans submitted that to that extent, the reasons disclosed error.

51 Concerning the expression of present intention in the orders and the Notice to Group Members, her Honour said at [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)."

52 Against this, Ms Wigmans said that the statement of present intention was designed to be relied upon by hundreds of thousands of group members, who were called upon to make a one-off decision – whether to register, opt out or do nothing – and incentivised to register because of the real threat that if they failed to do so they would not participate in any settlement. It was said that there was no basis in the evidence to conclude that separate interests could be pursued within the course of the mediation, because those members who chose not to, or who did not, register, would not be represented at all.

53 Her Honour also said at [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."

54 Ms Wigmans challenged the correctness of this paragraph as a "misreading of the notice". For the reasons we have already given, we do not accept that the notices fairly conveyed the possibility of an application to redefine the class so as to exclude group members who failed to register. The notices and the parties' joint intention was to apply for orders to extinguish, rather than preserve, the rights of unregistered group members in the event that a settlement were reached.

55 Her Honour observed that if the present intention had not been disclosed, then it would be suggested that the proposed opt out notice was misleading in that respect.

56 Her Honour accepted a submission that it was wrong in effect to stay the proceeding, and that consideration of any conflict of interest was premature, in the absence of any settlement. Her Honour continued:

> "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."

57 Her Honour concluded this section of her reasons at [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 mediation, 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."

Respondents' submissions

58 Komlotex and Fernbrook (for which Mr Moore SC appeared) and AMP (for which Ms Collins SC appeared) made common cause, as they had below, in defending the reasoning of the primary judge. Their submissions emphasised the following points.

59 First, *Haselhurst* was confined to the absence of power pursuant to s 183 to make orders which simultaneously purported to extinguish the claims of group members who failed to register and to bind them to the terms of a future settlement agreement. Thus, so it was submitted, *Haselhurst* was "not concerned with the limits of any other head of power" nor "was it purporting to deal with the scope of any order that could ultimately be made under different heads of power".

60 Secondly, Komlotex advanced the following characterisation of the orders:

> "All they do is to make some mechanical and procedural provision for a registration process (see orders 2 – 5 of the Orders dated 8 May 2020), and provide for the sending out of an opt-out notice (orders 10 – 13). There can be no objection to such orders on the basis that the primary judge lacked power to make them. They do not, for example, make provision for any consequence for a failure to register".

61 It was said that the notice to group members "does not say that the order <u>will</u> be made, or that group members who fail to register <u>will</u> not be able to participate".

62 Thirdly, it was said that it would be premature to consider on the present application whether an order such as that contemplated in the parties' joint intention should or could be made in due course, in the event that an in principle agreement was reached at a mediation.

63 Fourthly, reliance was placed upon two recent decisions of the Federal Court of Australia which considered *Haselhurst* and proceeded on the view that s 33V of the *Federal Court of Australia Act 1976* (Cth) did not prevent making an order excluding from participation in a settlement those who have not registered prior to that settlement: *Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Ltd (No 2)* [2020] FCA 579 at [57]-[63] and *Inabu Pty Ltd as trustee for the Alidas Superannuation Fund v CIMIC Group Ltd* [2020] FCA 510 at [8]. It was submitted that if there were power under s 173 to determine that those who had not registered could not participate in a claim, then it was difficult to see why that head of power would be limited by reference to the time of registration.

64 A further submission was that in *Haselhurst* the Court held that the primary judge's discretion had miscarried in circumstances where the order providing for class closure was made on the basis that it was necessary in order for mediation to be effective, without evidence to support that finding. The present case was different, and there was some evidence in support, which will be mentioned below. AMP in particular submitted that, unlike in *Haselhurst*, both the representative plaintiffs and AMP agreed that the registration information was conducive to the mediation and necessary in order to produce some understanding as to the likely size of the claim.

65 Finally, emphasis was given to [104] of *Haselhurst*, where Payne JA noted that a registration process was a permissible exercise of power, saying:

> "It was submitted that to read down the power in s 183 as relating only to those aspects of the Part 10 regime that concern the progress of the proceedings to trial, and not steps directed to settlement pursuant to s 173, is an unwarranted limitation. So much may be accepted. For that reason s 183 permits orders such as registration in the present case to be made."

66 Hence, reliance was placed on the power conferred by s 175 to approve a notice. It was said that Ms Wigmans' submission sought, wrongly, to read into s 175(5) a limitation that was found nowhere in the terms of the provision, with reliance being placed upon principles requiring powers conferred on superior courts to be construed broadly and not subject to an implied limitation.

Ms Wigmans' submissions in reply

67 Ms Wigmans responded by submitting that neither AMP nor Komlotex squarely grappled with the portions of the judgments in *Haselhurst* and *BMW Australia Ltd v Brewster* [2019] HCA 45; 94 ALJR 51 which made it clear that group members were "under no obligation to identify themselves" and cannot be required to take any positive step in the prosecution of the proceedings until after settlement is reached or a judgment on common questions is delivered. She also submitted that while the *form* of the orders did not require group members to register, their *practical effect* was to threaten the sanction of a contingent extinguishment of group members' rights against AMP and thereby to seek to compel group members to behave in a manner which was held in *Haselhurst* and *Brewster* to be contrary to the scheme of Pt 10.

68 Ms Wigmans emphasised that it was not merely the signalling of a "present intention" of the parties to seek orders in the future, and the concomitant possibility that no such application might ever be made. What was significant was that:

> "the regime provides for a court-approved notice to contain an *in terrorem* threat to group members with the plain intention and effect of compelling them to take the positive step of registration prior to settlement. A rational group member reading the notice, having decided not to opt out, would be impelled to register upon learning that a failure to do so will lead to Komlotex and AMP asking the Court to exclude the member from the benefits of a settlement".

69 Ms Wigmans also observed that it was not to the point that the primary judge had powers to make orders fixing an opt out date, inviting registration or approving a notice to group members. The question was "whether an exercise of those powers will be within the scope of the power conferred on the Court, where they are exercised in such a manner to compel a course not countenanced by the scheme of Part 10".

70 It was submitted that registration was not needed to find out in advance of the mediation who the group members were or the size of their claims, but rather, the registration process was:

> "designed to facilitate a splitting of the class into two groups: registrants and non-registrants; with Komlotex and AMP then to negotiate a settlement which sees the former group gain a distribution and the latter nothing (i.e. a position where Komlotex acts under a conflict of interest and positively favours itself and the former group over the latter); and the Court is then asked to approve

> such a settlement. Such orders run contrary to the scheme of Part 10; a matter outweighing the discretionary matters relied upon by AMP."

71 Ms Wigmans submitted that the recent decisions of the Federal Court were incorrect and should not be followed, while noting that in *Vocus* Moshinsky J allowed late registrants to participate in the settlement, and it was not clear whether that occurred in the *CIMIC* case.

Supplementary submissions on the abridged notice

72 The focus before the primary judge and in the parties' written submissions on appeal was upon the more detailed Notice to Group Members intended to be emailed or posted to group members, rather than the Abridged Notice intended to be placed in a newspaper. All parties supplied short submissions after the hearing, in accordance with this Court's leave.

73 Ms Wigmans emphasised that the abridged notice presented that there were only two options: register or opt out. It was said that it was telling that there was very little difference between the form of the notice the subject of the orders challenged on appeal, and the notice which was the subject of the orders made on 12 March 2020, prior to *Haselhurst*, which invalidly made provision for the barring of claims by group members who did not register, in the event that a settlement was reached. It was put that:

> "The Manichean presentation of the options in the Abridged Notice confirms that the real picture Komlotex and AMP wish to present to group members is: register, or face the threat of sanction. In other words, group members should take a step prior to settlement if they wish to participate in the fruits of any settlement. This Court in *Haselhurst* has confirmed, following *Brewster*, that such orders are beyond power."

74 Komlotex and AMP emphasised that the abridged notice was constrained by the limitations of what would be effective in a newspaper, and was not intended to be a complete summary of group members' position. It was put on behalf of Komlotex that "[t]he abridged notice, like the long form notice, identifies three options, not two". To this end it was put that in addition to the two numbered paragraphs, the statement that "If you do not do either of these things then it may affect your rights" accurately captured why potential group members needed to read more information, and that the absence of the concluding sentence would render the notice "actively misleading".

75 AMP made the point that the decision to approve the abridged notice was a discretionary decision, reviewable only on the basis of *House v The King* error, and that the notice had not been at all prominent in the submissions advanced to the primary judge.

Consideration

76 The broad structure of Pt 10 was described in *Haselhurst* at [34]-[42] and in many other decisions. It is modelled on Part IVA of the *Federal Court of Australia Act 1976* (Cth), although there are some differences. Group members need not consent to be members, and very often they may be entirely unaware of their status as members of a widely drawn class. A person falling within the class selected by the representative plaintiff is a group member until he, she or it opts out, and the legislation insists that group members be notified of that important right. Group members are, at least generally speaking, not exposed to a risk of an adverse costs order. All group members are bound by judgments and settlements (which require the Court's approval), and neither may occur in advance of group members being given an opportunity to opt out.

77 The opt out nature of the regime has long been recognised to be an important aspect of the legislative regime. In *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1; [2002] HCA 27 at [39]-[40], Gaudron, Gummow and Hayne JJ said of the materially equivalent federal regime:

> "There is, therefore, a real possibility that some group members would remain 'perfectly ignorant of the proceedings, and of what is really going on'. That is, some of those who would benefit from success in the proceeding (but thereby lose the opportunity to pursue their individual claim in some way, or to some effect, different from the group proceeding) may have their rights affected without their knowing or consenting to that being done.
>
> So much follows from the fact that Pt 4A provides for what is sometimes called an 'opt out', rather than an 'opt in', procedure. That is, persons who are group members may opt out of the proceeding and, if they do, they are taken never to have been a group member (unless the Court otherwise orders) .... **Group members, however, need take no positive step in the prosecution of the proceeding to judgment to gain whatever benefit its prosecution may bring**." (emphasis added)

78 In *BMW Australia Ltd v Brewster* at [73], Kiefel CJ, Bell and Keane JJ noted that passage with approval, and applied it to the similarly worded Pt 10 of the Act.

79 What is proposed by Komlotex and AMP is prima facie contrary to a fundamental precept of Pt 10, as confirmed by the joint judgments in *Mobil Oil* and *BMW Australia v Brewster*, and inherent in the legislative choice of an opt out regime. If what is contemplated by Komlotex and AMP comes to pass, group members who take no positive step will gain no benefit from any settlement and will have their rights extinguished. Indeed, it is reasonable to expect that the extinction of passive or unregistered group members' rights would be one of the drivers of any settlement between registered group members and AMP. This prima facie gives rise to a conflict between group members who are registered and those who are not.

80 Komlotex and AMP implicitly accepted that the orders they had consensually prevailed upon the Court to make in March 2020 were beyond power, for the reasons identified in *Haselhurst*. No submission was advanced that *Haselhurst* was incorrect. Rather, *Haselhurst* was sought to be distinguished. In order to determine whether the variation they consensually persuaded the primary judge to make, over Ms Wigmans' opposition, is within power, it is first necessary to turn to the details of the reasoning in *Haselhurst.*

The reasoning in Haselhurst

81 The leading judgment in *Haselhurst* was given by Payne JA, with which all members of this Court, constituted by five Judges of Appeal, agreed. Central to the reasoning in *Haselhurst* was the inconsistency between the order contemplating extinguishing the rights of unregistered group members and the statutory regime which permitted group members to proceed passively until settlement or judgment, which was endorsed in *Mobil Oil* and *Brewster*, with the representative plaintiff acting in their interests.

82 Payne JA described ways in which an open class could be "closed" so as to identify with precision the persons who fell within it. That could be achieved by a redefinition of the class (at [70]-[72]), by amending so as to take the proceedings outside of Pt 10 altogether (at [73]), or by other variants noted at [74]. Of these, his Honour said at [75]:

> "All of these approaches produce the same result: a class whose members may readily be identified. The Group Members in the reformulated class are a subset, often, a small subset, of the persons who were originally Group

> Members. However, those persons who had been Group Members but who had ceased to continue to be Group Members retained their rights to bring a claim against the defendant. They enjoyed the benefit of s 182, for the limitation period had been suspended for the period they had been Group Members."

83 This is important because of what was said by Komlotex and AMP as to the necessity of the course they have taken if the mediation is to be meaningful, to which we return below.

84 Secondly, there followed in *Haselhurst* an extensive review of decisions which were said to have supported the "soft closure" orders that had previously been made. This included a rejection of what had been said in *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2017) 252 FCR 1; [2017] FCAFC 98. The submissions made in this appeal warrant reproducing what a Full Court of the Federal Court had said concerning the desirability of achieving settlement:

> "[74] Having said this, if a class closure order operates to facilitate the desirable end of settlement, it may be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding and therefore appropriate under s 33ZF of the Act. The courts have accepted on numerous occasions that, in order to facilitate settlement, it is appropriate to make orders to require class members to come forward and register in order to indicate a willingness to participate in a future settlement, and to make orders that class members be bound into the settlement but barred from sharing in its proceeds unless they register. ... An important aspect of the utility of a class proceeding is that they may achieve finality not only for class members but also for the respondent.
>
> [75] The rationale behind such class closure orders is that a requirement for class members to register their claims will facilitate settlement, because it allows both sides to have a better understanding of the total quantum of class members' claims, permits the settlement amount to be capped by reference to the number of class members, and assists in achieving finality (to the extent the Part IVA regime permits): see Grave D, Adams K and Betts J, *Class Actions in Australia* (2nd ed, Lawbook Co, 2012) at [14.410]. A class closure order that precludes class members, who neither opt out nor register, from sharing in a subsequent settlement may facilitate settlement, and therefore be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding." (case references omitted)

85 Payne JA concluded that what was held by the High Court in *Brewster* was inconsistent with those passages. His Honour explained why in detail at [100]-[122]. The respondents placed considerable reliance on what was said at [104]:

> "The respondents' strongest argument that order 16 is consistent with the legislative scheme of Part 10 and within power is that it assists in the management of the proceeding in order to bring it to a resolution. The words 'justice in the proceedings' are apt to include resolution by way of settlement or

> agreement. The word 'proceedings' is defined, broadly, in s 155 to mean 'proceedings in the Court other than criminal proceedings'. The term is also employed throughout the *Civil Procedure Act* to signify the dispute brought before the Court for determination. Part 4 of the *Civil Procedure Act* and s 173 each deal with mediation and settlement of proceedings. The interrelation between achieving justice in the proceedings and resolving the dispute as efficiently as possible is recognised in ss 56, 57 and 58 of the *Civil Procedure Act*, which apply also to an exercise of discretion under Part 10. It was submitted that to read down the power in s 183 as relating only to those aspects of the Part 10 regime that concern the progress of the proceedings to trial, and not steps directed to settlement pursuant to s 173, is an unwarranted limitation. So much may be accepted. For that reason s 183 permits orders such as registration in the present case to be made."

86 The respondents emphasised the closing sentence. We agree that, if all that had occurred were orders and notices concerning an opt out date and exhorting registration, what occurred would have been within power. If there is a vice in the orders and notices, it lies in the joint present and communicated intention to apply for orders extinguishing the claims of group members who do not register if a settlement takes place. That is no small thing. The present intention has a large practical effect on the content of the notice and the decision to be made by group members, and it is apt to shape the negotiations at the mediation.

87 Contrary to the tenor of some of the respondents' submissions, it is necessary to read beyond [104] and to identify the crux of the reasoning in *Haselhurst*, in order to identify whether the orders impugned in this appeal are contrary to its reasoning. The critical reasoning is at [114]-[122], especially in the following paragraphs:

> "[114] Nevertheless, order 16 in the present case is beyond the power conferred by s 183. This is not because settlement of proceedings is not a desirable aim. Plainly it is. I do not, however, accept as the respondents submitted that the 'supplementary' power in s 183 was intended to provide a power of contingently extinguishing Group Members' claims so that 'realistic settlement discussions may take place' by 'seeking to crystallise the outer sum being claimed'.
>
> [115] This submission, as with many others, was directed to what was said to be the practical necessity, in order to secure the desirable result of settling claims, for an order extinguishing the rights of unregistered Group Members."

88 Payne JA referred to the absence of evidence for that submission (at [118]), the historical fact that there had been representative proceedings before any "soft closure" orders had ever been made, and (at [119]) the fact 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."

89 His Honour referred to the purposes for which Part IVA had originally been enacted, including the statement by the Attorney General that:

> "[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."

90 Payne JA concluded at [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."

91 Bell P, with whom Payne JA agreed, said at [12]-[13]:

> "[I]t is difficult to conceive of how an order which destroys a person's cause of action within the limitation period, without a hearing and with no guarantee that the person will necessarily know of the outcome or consequences of their failure to register, is an order that could be thought to be 'necessary to ensure that justice is done in the proceedings'. To ask whether such an order could be thought to be 'appropriate … to ensure that justice is done in the proceedings' is, for the reasons explained by Beach J in *Earglow*, to ask essentially the same question.
>
> Whilst a mediation of the proceedings may well be desirable and no doubt should be explored and encouraged, it is not an end in itself and is not, in my opinion, something which is required to ensure that justice is done in the proceedings. If a mediation can only occur in circumstances where group members who do not register to participate in it will lose their causes of action (an assertion which must underpin the respondents' position and which I consider dubious), I do not consider that that outcome is something that can be described as either 'appropriate or necessary' to 'ensure that justice is done in the proceedings'."

92 The President added at [15], emphasising that settlement was not the be-all and end-all of litigation:

> "If the group or class is so large that the respondents do not wish to settle, they cannot be forced or required to do so. If that means that the Court has to deal with, manage and hear a complex proceeding, so be it. Courts exist to resolve disputes, however complex those disputes may be, not to act as mere dispute clearing houses or mediation referral agencies."

93 His Honour also noted that there could be a mediation of only those class members who had registered, if the class definition were amended: at [17].

94 Returning to the orders impugned in this appeal, the essence of the proposal is that it is in AMP's interest to resolve the claims of all members of this very large class. It is also in Komlotex's interest that there be a resolution for all members of this class, especially if Komlotex can obtain the benefit of a larger settlement for its own benefit as the price AMP is willing to pay to be free of the claims of *all* group members.

95 A settlement whereby Komlotex and registered members receive payment, but group members who have not registered receive nothing and whose rights against AMP are extinguished, is contrary to the essence of the opt out regime. This *prima facie* falls squarely within what was held in *Haselhurst*.

96 The respondents pointed to a range of matters which, in their submission, caused the orders impugned in this appeal to fall outside the reasoning summarised above. We deal with them in turn below. We have already addressed and rejected the submission that the orders and notices may be justified as reflecting an intention to redefine the class so as to leave group members who do not register free to pursue their claims.

Different source of power

97 The orders impugned in the present appeal are sourced in s 175, rather than s 183. Section 175 relevantly provides:

> "**175 Notice to be given of certain matters** (cf s 33X FCA)
>
> (1) Notice must be given to group members of the following matters in relation to representative proceedings—
>
> (a) the commencement of the proceedings and the right of the group members to opt out of the proceedings before a specified date, being the date fixed under section 162 (1),
>
> (b) an application by the defendant in the proceedings for the dismissal of the proceedings on the ground of want of prosecution,
>
> (c) an application by a representative party seeking leave to withdraw under section 174 as representative party.
>
> ...
>
> (5) The Court may, at any stage, order that notice of any matter be given to a group member or group members.

> (6) Notice under this section must be given as soon as practicable after the happening of the event to which it relates."

98 Section 176 facilitates the power conferred by s 175, making provision for the form and content of the notice, who is to give it, how it is to be given, and who is to pay for it.

99 Section 183 stands in contrast with ss 175 and 176:

> "**183 General power of Court to make orders** (cf s 33ZF FCA)
>
> In any proceedings (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings."

100 It may be seen that the power to issue notices under s 175(5) is unqualified. In contrast, the power conferred by s 183 is qualified by the words "that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings".

101 In *BMW Australia Ltd v Brewster* the High Court allowed an appeal from the judgment of this Court and held that those words limited the power to make an order obliging all group members to pay a proportion of any moneys ultimately recovered in the proceedings to a litigation funder, described as a "common fund order". As explained at the outset of these reasons, in *Haselhurst*, this Court concluded that the reasoning in *Brewster* entailed that a "soft closure" order, whereby group members who neither opted-out nor registered had their claims extinguished in the event that a settlement was reached between registered group members and the defendant, was also beyond power.

102 Ms Wigmans recognised that s 183 was not relied on to sustain the orders the subject of the appeal. She nonetheless submitted that the power to issue notices must nonetheless conform with the basic precepts of the scheme established by Pt 10. That submission is sound. Sections 175 and 176 do not sustain orders which are contrary to basic precepts of Pt 10. Nor do the case management powers in Pt 6 (ss 56-61) extend to the making of orders in representative proceedings under Pt 10 that are inconsistent with those precepts.

The orders do not in form contingently extinguish any rights

103 The respondents also relied on the fact that the orders did not *themselves* extinguish any rights of group members. To the contrary, the orders noted, and the notices fairly disclosed, a *present intention* on the part of Komlotex and AMP to seek such an order in the future, in the event that a mediation succeeded. As it was put:

> "The orders as made do not extinguish any claim, do not bind any party to enter settlement and do not adversely affect the substantive rights of any person in stark contrast to what had occurred in the *Haselhurst* decision."

104 That is correct so far as its goes. However, that is not the end of the analysis. Once again, the question of power is not resolved by the form of the orders alone. There remains a question whether the practical effect of the orders conforms with the statute.

Evidence supporting the need for orders if settlement were to be achieved

105 A principal of the (corporate) law firm acting for Komlotex gave unchallenged evidence that it was necessary to know how many group members would be involved in a settlement and how many shares they had acquired. He said:

> "[I]t is not possible to consider the question of the value of the claim without some idea of how many group members would be participating in any claim. In the position of a plaintiff, it is not possible to calculate the total value of the claim, because one would need to know how many AMP shares were bought and sold in the relevant period. In addition, even if that information is known, the total amount of the claim cannot be known until the parties have some idea of which group members say that they were affected by the conduct.
>
> For those reasons, in order for the parties to engage in any meaningful settlement discussions, it is necessary to have some understanding of how many group members are likely to participate in the settlement. That is the purpose of the orders proposed by the parties relating to registration of group members for the purposes of a mediation."

106 All of that evidence accords with common sense and may be accepted.

107 However, we do not accept the slide, implicit in the respondents' submissions, that it followed that the orders were necessary because otherwise there could be no settlement at all. We have reproduced what Bell P said in *Haselhurst* above on this issue.

108 It is to be borne steadily in mind that Komlotex and those advising it have chosen to draft an enormous class, in respect of which they freely and very

properly accept they are unable presently to have any meaningful idea of the number of group members or the value of their claims.

109 First, there is no reason why, if those advising Komlotex wish not to progress the litigation to trial, but would prefer to compromise Komlotex's claims, they may not apply to alter the class definition, or alternatively to convert the proceeding to one that no longer falls within Pt 10, and effect a compromise on behalf of all those known members for which they act.

110 Secondly, and even if Komlotex desires to maintain the breadth of the class in the Commercial List Statement, that does not preclude useful steps being undertaken at a mediation. There is no reason that the so-called "event studies" which seek to convert particular non-disclosures into hypothetical share price premiums may not be developed and exchanged and, perhaps, agreed as between the parties, as counsel for Komlotex candidly acknowledged (T29.18-28). That information and analysis which is central to the case is independent of the group. There is obvious benefit to all group members and to AMP in seeking to reach agreement, if agreement can be reached, as to the premium, if any, at which AMP shares were trading at any particular time resulting from particular alleged non-disclosures. The exchange of information may lead all parties to focus on the particular alleged non-disclosures which matter, and thereby promote attention to the real issues in the litigation.

111 Nor is there any reason why, in principle, agreement could not be reached to settle the entire claim by providing a sum, in accordance with s 178, to be followed by a process of identifying group members who would then participate in that judgment through a claims process.

112 We do not accept that the submission based on what is necessary to facilitate settlement is an answer to orders which are contrary to the legislative scheme and give rise to a conflict of interest.

Subsequent Federal Court decisions distinguishing Haselhurst

113 Komlotex and AMP can take little comfort from two first instance decisions of the Federal Court after *Haselhurst*. This Court determined that what was held in *Treasury Wine Estates* was inapplicable in the Supreme Court. It is no

function of this Court to determine whether *Treasury Wine Estates* remains good law, following *Brewster*, in the Federal Court.

114 But in any event, neither decision assists as a matter of authority. Both were settlement approvals. While in both cases the judge was directed to *Haselhurst*, it is clear that no submission was made to the effect that it precluded the settlement. Relevantly, both decisions proceeded by consent. (All aspects of the decision in *Inabu* were consensual. In *Fisher*, while there was some dispute from 11 unregistered group members and 1 registered group member, it is clear that no one appeared in the interests of the remaining unregistered group members whose claims were being extinguished, and no submission was made that the notice (reproduced at [27]) was on all fours with what was contemplated in *Haselhurst*.)

115 After the hearing of this appeal, at least one further settlement approval was made by the Federal Court: *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647. That decision, where once again there was no contradictor, does not alter the position. It is unclear whether the Federal Court was told, when it was asked to approve that settlement, that argument was reserved on the correctness of *Inabu* and *Fisher.*

116 It is, with respect, a little surprising that reliance was placed on those decisions. In *Haselhurst*, this Court repeatedly emphasised that decisions made by consent provided no precedential authority: see for example at [79] ("The orders made in *Matthews* were relevantly by consent"); at [84] ("The orders to which J Forrest J referred are not contained in any judgment and were expressed to be by consent"); and at [86] ("the orders made by Ryan J on 17 December 2008 in *Vlachos v Centro Properties Ltd* were also stated to have been made by consent ..."). At [93], Payne JA said that *Matthews* was "not authority for the proposition that there is power for the Supreme Court of New South Wales to make order 16 purporting to extinguish the rights of unregistered Group Members in advance of a mediation", for four reasons, one of which was directed to a difference in the legislation, but at least two of the remaining three of which were based on the absence of any argument:

> "(2) *Matthews* was a decision relevantly by consent;

> (3) insofar as *Matthews* refers to earlier decisions where comparable orders have been made, they were (i) merely orders made by consent without reasons, or (ii) orders made *after* a settlement had been achieved; and
>
> (4) the exception to the above is *McMullin*, where the precise orders are not known, but in any event they were made after a trial of all issues by the representative applicant and further trials by some but not all Group Members."

117 We respectfully agree. It does not matter how frequently approval has been given in the absence of any contradictor to a settlement which extinguishes rights of unregistered group members. Such reasons as may be provided when approval is granted without opposition do not provide precedential authority for anything.

The insoluble conflict

118 We also respectfully disagree with what was said by the primary judge and propounded by Komlotex and AMP concerning the conflict confronted by Komlotex and those acting in its interest.

119 With the utmost respect to those who take a different view, we consider that what occurred on applications to approve a settlement in such cases well illustrates the conflicts to which Mr Gleeson pointed:

> "What has happened, and is proposed under these orders, and this is the conflict of interest that was referred to in *Haselhurst*, is that Komlotex goes into the proposed settlement negotiations, effectively bargaining away the claims of the non-registrants for the purpose of being able to give AMP the security that it will not have to worry about those people's claims, doing so for the benefit of the registrants. That's what's wrong practically and legally with this type of procedure."

120 The interests of the representative plaintiff (and all other registered group members) are served by promoting the settlement. So too are the interests of the defendant. But the representative plaintiff is – at the same time it asks for the settlement to be approved – meant to be representing unregistered group members, who, by reason of the very settlement which the representative plaintiff is propounding, will receive nothing and whose rights will be extinguished. The conflict is real, immediate and direct. The interests of the representative plaintiff are diametrically opposed to those of group members who have not registered.

121 The primary judge considered (at [208] quoted at [51] above) that the conflict might be capable of being managed by the separate interests of group members being separately represented at a mediation by different solicitors of the same firm or different counsel retained by the plaintiff's solicitors. That observation recognises the conflict but provides no solution. It would not be possible to obtain the informed consent of all group members to the solicitors so acting.

Prematurity

122 For similar reasons, we do not accept the submissions of Komlotex and AMP that the point is premature. This objection was captured by Mr Moore thus:

> "My friend seeks to accelerate to now a consideration of what form of order might ultimately be able to be made in circumstances where there is not before the Court a precise form of order that any court is contemplating being made. There is not before the Court the evidence that would be put on in support of such an order, including evidence addressing the types of matters that the Court referred to in *Haselhurst* which would ordinarily also include a confidential opinion from counsel acting in the matter as to what considerations were underpinning the making of any order that is sought on the settlement approval hearing and without having heard from any other interested party, including the usual procedure of allowing people who wish to object to any settlement the right to be heard in relation to any order that any party might seek to be made. To try and deal with today in this context with all of those considerations we say is just entirely premature."

123 It is true that the orders made on 8 May do not themselves extinguish any rights of unregistered group members. It is also true that the present intention is just that, and is contingent upon there being a settlement and orders being made in the future. But that does not fully capture the problem. For one thing, the "present intention" is to be deployed in the next few days in order to prevail upon group members to make binding decisions. Mr Gleeson submitted that while the notation to the orders, and the notices, referred merely to a "present intention":

> "[I]t is hard to think of a more considered and carefully formulated and committed statement of intention. It is made by both parties. They have made it to the Court and now they are making it to the group, or they seek to at least. They are asked to decide whether to approve the settlement on that basis."

124 We agree. The "present intention" is included in the orders as a note, and is prominent in the notices, for the sound reason that it is an important consideration for group members to bear in mind.

125 Moreover, if the orders proceed, one of the mechanisms which will be at the forefront of the minds of those acting for Komlotex and AMP will be a settlement which gives money to registered group members, and extinguishes the rights of unregistered group members. That is, after all, a direct consequence of the joint present intention shared by Komlotex and AMP, and it may readily be seen how that might be in the interests of those two companies. But it is adverse to the interests of the group members (who may easily number in the tens of thousands) who have not registered.

126 The essential difficulty confronting the submission that it is too soon to complain of an absence of power is that in a matter of days, hundreds of thousands of group members are to be asked to make a choice based on notices sent pursuant to orders which proceed on the basis that their rights to participate in any settlement may be extinguished if they do not register. This difficulty is not one that can be put off until the time (if ever) when an in principle settlement is reached. It is inherent in the orders which have been made, and it affects the decisions of group members in the immediate future. We respectfully disagree with the reasons of the primary judge insofar as her Honour accepted the submission that the point was premature.

Necessity in order to promote settlement

127 In the reasons approving the settlements in *Fisher* and *Inabu*, reliance was placed on what was said in *Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194 at [68] by Beach J:

> "The orders affecting the UGMs [unregistered group members] have underpinned the settlement. Absent such orders, the settlement would not have been agreed to by Billabong. That would not have been in the interests of group members as a whole. Moreover, now that the settlement is to be approved, there needs to be finality and certainty on who can participate and who is barred. Otherwise distributions under the scheme cannot be finalised. It cannot be correct to say that a UGM, who has been given adequate opportunity to participate, can come along months or years later and belatedly seek a distribution or even commence a new proceeding against Billabong. That is not conducive to efficiency, finality or justice for group members generally or indeed Billabong. Yet that would be the likely counterfactual if the bars were not in place. Those who posit that barring orders should not be made, do not posit a satisfactory alternative to address such questions."

128 We agree that the extinguishment of the rights of unregistered group members in that and other cases have underpinned the settlement, and it is

contemplated by the orders impugned in this appeal. We can also envisage cases where there has been an in principle settlement, *after which* group members are notified, and given the opportunity to participate (it might be expected that such notification would advise the quantum offered to group members and the mechanism by which their claims would be assessed), and if what Beach J has written about unregistered group members being given adequate opportunity to participate is understood in that sense, then to that extent there is no difficulty with the reasoning. However, that is not what is proposed by Komlotex and AMP. It is not proposed that all group members be given any opportunity at all to participate in any settlement, but rather only those which register. We respectfully disagree with the reasoning insofar as it is relied on to justify what Komlotex and AMP propose.

129 More generally, insofar as Komlotex and AMP invoke necessity in order to justify the direct conflict of interest in which the representative plaintiff is placed, following a settlement which divides the group into two subgroups, those who will be paid something and those who will be paid nothing, we disagree. There are alternatives, and we do not regard them as unsatisfactory. One reflects the practice of the Federal Court for many years, which was to effect a class closure including by class redefinition before any settlement was achieved. True it is that that may involve cost to those standing behind the representative plaintiff, in advertising and recruiting members, but the history of representative proceedings in the Federal Court demonstrates that that is no insuperable obstacle. Another is to run a trial of the test case, which was after all the model on which these provisions were based, and thereafter notify group members of what has been determined on the issues common to group members.

130 It is important to bear steadily in mind that these difficulties are a direct consequence of the broad class definition chosen by Komlotex and those acting for it. The difficulties would evaporate if the class were confined to AMP shareholders who had registered with Komlotex's solicitors, or some other narrower class.

131 We are conscious that the Act proceeds on the basis that there may be an open class, including a class with hundreds of thousands of members such as that defined in Komlotex's Commercial List Summons. But the facts that (a) the legislation permits that to occur, and (b) Komlotex has availed itself of acting for a very large number of group members, in no way justify making orders which will subvert two fundamental aspects of the regime, which is that Komlotex acts for *all* group members, and that group members may do nothing prior to a settlement and still reap its benefits.

Conclusion on ground 5

132 We conclude that the main ground of appeal is made out. The orders are based on the idea that group members should be prevailed upon to register lest they lose rights to participate in a settlement, and have any rights they might have against AMP extinguished. This is contrary to a basic premise of Pt 10, and engenders an immediate conflict of interest. The fact that it occurs in a two-step process, rather than in a single order, does not remove the inconsistency. The fact that it is contingent, in the sense that the threat is conditional upon an in principle settlement being achieved, does not make it hypothetical or premature, because group members who are entitled to take no active step are being threatened, in the next fortnight, with the sanction of possible extinguishment of their rights unless they take a positive step and register with Komlotex's lawyers or opt out.

Remaining grounds of appeal

133 In light of the foregoing, nothing turns on proposed grounds 1-4 of the appeal, to which Ms Wigmans gave less attention in oral submissions. We are conscious that, by reason of the orders made consensually by Komlotex, Fernbrook and AMP, over the opposition of Ms Wigmans, this Court has been asked to provide its decision within little more than a fortnight, in order to spare the expense to the parties and potential confusion to group members of notices being distributed. Dealing fully with the grounds and the parties' submissions would very considerably expand these reasons, and delay their delivery. In the circumstances, we think the preferable course is to give brief indicative reasons in respect of these non-dispositive grounds, which indicate, albeit at a high level, the difficulties they confront.

134 Proposed grounds 1 and 3 refer to the findings as to whether Ms Wigmans' appeal might be rendered nugatory. Proposed ground 1 complains that the primary judge did not attend to Ms Wigmans' point that, in the event that the High Court allows her appeal but remits the question of whether a competing representative proceeding should be stayed, she will be prejudiced if steps are taken to advance the Komlotex proceeding. The essence of her point in ground 3 is that the distribution of notices to hundreds of thousands of group members will cause confusion in the event that Ms Wigmans' proceeding is permitted to run. In particular, the notices refer to the finding of the Supreme Court that the Komlotex and Fernbrook class action would be "the best and most efficient result for group members and fairness to the [respondent]", a finding which may not survive the High Court appeal.

135 We are doubtful that *House v The King* error is made out on either of these grounds. Her Honour did have regard to these considerations, and there is force in the respondents' submission that Ms Wigmans' real complaint is that she failed to give them dispositive weight. Further, we accept the force of the respondents' complaint that it is difficult to see how Ms Wigmans is prejudiced, as a registered class member of the Komlotex proceeding. It is easy to see how those standing behind Ms Wigmans, who are funding and hoping to profit from this litigation, might be prejudiced, but reliance was not sought to be placed on their interests.

136 Proposed ground 2 challenged the finding by the primary judge that there was no actual or potential utility to the Wigmans proceeding in the steps being taken towards a mediation of the Komlotex proceeding. We doubt this ground was made out. In particular, the provision of materials in support of a mediation will be apt to assist all parties in identifying the real issues dividing them on the extent to which, if at all, AMP's share price was inflated by reason of non-disclosures said to have been committed over a six year period. As we understood it, much of the force in Ms Wigmans' submissions on this ground focussed on the "without prejudice" characterisation of orders 6 and 7, on the basis that she, although a registered group member, would never be permitted to obtain access to the material supplied on the basis that the order somehow created a joint privilege personal to the representative plaintiff and the

defendant. Perhaps this ground proceeded upon a misapprehension of the effect of orders 6 and 7. In any event, it was made clear by Mr Moore and Ms Collins that there was no prohibition on the material being shown to Ms Wigmans and her advisers (T30.17-23; 51.25-38), to which Mr Gleeson said that was the first his side had heard of that (T64.27-32). Whatever be the background to this aspect of the appeal, we doubt this ground is made out.

137 Proposed ground 4 challenged the finding that the orders sought by Ms Wigmans would effectively stay the proceedings for a year or more. Ms Wigmans said that there were two aspects to this. One was that the effective delay was only until the resolution of the High Court appeal. If the appeal were dismissed, that was an end to the matter. If the appeal were allowed and the Komlotex proceeding stayed, that also was an end to the matter. Both those possibilities could reasonably be expected to be determined within a year. However, if the appeal were allowed, and the question of which proceeding should be stayed were remitted to this Court, then some different interlocutory regime could be put in place, and if there were a delay, that should not count for the purposes of assessing the balance of convenience on this application. The second aspect was that steps could be taken to progress the litigation, including steps leading to evidence being served in preparation for trial, to which Ms Wigmans had no objection.

138 We think that Ms Wigmans' analysis of the impact of the orders sought by her is, broadly speaking, correct, but that she has overstated aspects of the reasoning of the primary judge in relation to delay. On any view, there was some delay and risk of wasted costs in the orders sought by Ms Wigmans, and her Honour was correct to have regard to that. The evidence was such that any regard could only be qualitative, and her Honour proceeded on that basis. Her Honour said at [163] that the effect of the orders sought by Ms Wigmans was effectively staying the Komlotex proceedings "for, perhaps, a year or more" and, at [170], "effectively staying the Komlotex proceeding for what seems likely to be at least six months and perhaps up to one or two years". Her Honour did not proceed on the basis that there would be more than a year's delay, but only that there was a possibility of that. On the evidence available to her Honour, there was no error in taking that course.

139 For completeness, we note that no undertaking as to damages appears to have been sought or proffered in this litigation. This judgment does not stand as authority for the proposition that an undertaking may not be necessary as part of the price for orders which in substance would prevent taking further steps in an extant proceeding pending the outcome of an appeal.

Orders

140 For those reasons, there should be a grant of leave to appeal and the appeal allowed. There was a muted submission, scarcely developed (T48.22), that not all of the orders impugned by Ms Wigmans need be set aside. We disagree. The gravamen of the regime was one directed to a process of notification to group members of an opt out date, with group members to exercise their rights on the basis that they were at risk of losing their claims against AMP if they did nothing. That is not consistent with what was held in *Haselhurst.*

141 Nothing in these reasons prevents further steps being taken in the Komlotex proceeding, pending the hearing of the High Court appeal. Nothing prevents the solicitation of registration of members by Komlotex and those acting for it. Nothing prevents the provision of discovery and evidence which may lead to a trial or a mediation. We wholeheartedly agree with the primary judge that the proceedings have not progressed as promptly as they ought to have.

142 Although the orders this Court will make will set aside the timetable for the provision of materials leading to a mediation, that is only because those orders are premised upon notices which appear to have underpinned the decision-making in this litigation, and it might be an altogether different question if those standing behind Komlotex remain subject to obligations to pay for the provision of evidence in circumstances where it is now clear that neither their original approach in March nor their altered approach in April to “soft closure” can be achieved. Any dispute as to what steps, if any, should be taken should be determined in the Equity Division. It is likely that the timing of Ms Wigmans’ appeal will be known in the near future, so as to give better guidance to the parties.

143 Broadly speaking, we have concluded that Komlotex’s and AMP’s attempt to avoid the consequences of *Haselhurst* has failed. Komlotex and AMP were

correct to proceed on the basis that the orders made in March should be varied, but their joint application to vary those orders in April should have been rejected. Ms Wigmans' motion should have succeeded, and Komlotex's motion should have been dismissed. It seems likely that costs of the notices of motion of 21 and 27 April 2020 should follow the event as determined by this Court, but there may be some matters of which this Court is not apprised in which case application may be made consistently with UCPR r 36.16.

144 Orders appear to have been made, relevantly, on 12 March 2020, varied on 9 April, made again on 8 May and further varied on 11 May. Some of the orders made on some of those dates (for example, concerning discovery) have presumably been performed. We have attempted in the orders formulated below to address this, although we acknowledge that in circumstances where the materials available to this Court included a very helpful "pro forma" consolidation of the results of orders made in March, varied in April and varied twice in May, there is ample scope for error. Notwithstanding the complexity of the position, we think the preferable course is to make the following orders which are based on the draft notice of appeal, to which the respondents made no complaint in written or oral submissions, and noting that it is open to the parties to apply to vary or supplement them within the next 14 days if there is some order which this Court should make on appeal which we have overlooked.

1. Grant leave to Ms Wigmans to appeal.

2. Direct Ms Wigmans to file a notice of appeal, in the form of the draft notice at tab 2 of the White Folder, within 7 days of today, and otherwise dispense with the requirements of service.

3. Appeal allowed.

4. Set aside order 1 made on 8 May 2020 (dismissing Ms Wigmans' notice of motion) and the orders made on 8 May 2020 and varied on 11 May 2020 on the notice of motion dated 27 April 2020 filed by Komlotex and Fernbrook.

5. In lieu thereof, dismiss the notice of motion dated 27 April 2020 and set aside orders 5-8 and 11-17 made on 12 March 2020 and all orders made on 9 April 2020.

6. The respondents to pay Ms Wigmans' costs of the appeal and of the notices of motion dated 21 and 27 April 2020.

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Annexure A

Amendments

15 October 2020 - [47] – "found to be beyond power" changed to "found … to be beyond power" in the quote.

[77] – "orders). Group members" changed to "orders) .... Group members" in the quote.

[121] – "quoted at [50] above" changed to "quoted at [51] above".

[126] – "if they to not register" changed to "if they do not register".

[133] – "grounds. which indicate" changed to "grounds, which indicate".

[135] – "behind Mr Wigmans" changed to "behind Ms Wigmans".