Court of Appeal
Supreme Court
New South Wales

Case Name:	**Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia; Whisson v Subaru (Aust) Pty Ltd; Kularathne v Honda Australia Pty Ltd; Brewster v BMW Australia Ltd; Bond v Nissan Motor Co (Australia) Pty Ltd; Coates v Mazda Australia Pty Ltd; Dwyer v Volkswagen Group Australia Pty Ltd t/as Volkswagen Australia**
Medium Neutral Citation:	[2020] NSWCA 66
Hearing Date(s):	19 February 2020
Date of Orders:	22 April 2020
Date of Decision:	22 April 2020
Before:	Bell P at [1]; Macfarlan JA at [19]; Leeming JA at [20]; Payne JA at [21]; Emmett AJA at [132].
Decision:	(1) Leave to appeal granted in matters 2017/00340824; 2017/00378526; 2017/00353017; 2018/00009555; 2018/00009565; 2018/00042244 and 2018/00322648; (2) Appeal allowed; (3) Set aside order 16 made in proceedings 2017/00340824; 2017/00378526; 2017/00353017; 2018/00009555; 2018/00009565; 2018/00042244 and 2018/00322648; (4) Remit the matters to the Equity Division; (5) Respondents to pay the costs of the appellants.
Catchwords:	CIVIL PROCEDURE – representative proceedings – Part 10 Civil Procedure Act – group members – s 183 – interlocutory order made to facilitate settlement at proposed mediation – registration of group members – group members who did not register barred from receiving any settlement amount – order that group members barred from bringing subsequent

proceedings against defendant – power to make order

CIVIL PROCEDURE – representative proceedings – Part 10 Civil Procedure Act – group members – s 183 – registration of group members – group members who did not register barred from receiving any settlement and from bringing subsequent proceedings against defendant – whether discretion to make order miscarried

Legislation Cited:

Civil Procedure Act 2005 (NSW), Part 4, ss 56, 57, 58, 61(1), Part 10
Federal Court of Australia Act 1976 (Cth), Part IVA
Matrimonial Causes Act 1959-1966 (Cth) ss 84, 86, 89(1)
Supreme Court Act 1986 (Vic), Part 4A

Cases Cited:

Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd (2019) 99 NSWLR 419; [2019] NSWCA 61
Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485; [1993] HCA 15
BMW Australia Ltd v Brewster [2019] HCA 45; (2019) 94 ALJR 51
Bradgate (Trustee) v Ashley Services Group Ltd [2017] FCA 1591
Bray v F Hoffmann-La Roche Ltd [2003] FCA 1505
Brewster v BMW Australia Ltd [2019] NSWCA 35; (2019) 366 ALR 171
Camping Warehouse Australia Pty Ltd v Downer EDI Ltd [2016] VSC 784
Capic v Ford Motor Company of Australia Ltd [2016] FCA 102
Cominos v Cominos (1972) 127 CLR 588; [1972] HCA 54
Dorajay Pty Ltd v Aristocrat Leisure Ltd [2008] FCA 1311; (2008) 67 ACSR 569
Dorajay Pty Ltd v Aristocrat Leisure Ltd (2005) 147 FCR 394; [2005] FCA 1483
Earglow Pty Ltd v Newcrest Mining Ltd [2016] FCA 1433
Earglow Pty Ltd v Newcrest Mining Ltd (2015) 230 FCR 469; [2015] FCA 328
Farey v National Australia Bank Ltd [2014] FCA 1242
Hobbs Anderson Investments Pty Limited v Oz Minerals Ltd [2011] FCA 801
House v The King (1936) 55 CLR 499; [1936] HCA 40
Inabu Pty Ltd v Leighton Holdings Ltd [2014] FCA 622
Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 2) [2003] VSC 212

Johnston v Endeavour Energy [2015] NSWSC 1117
Jones v Treasury Wine Estates Ltd (No 2) [2017] FCA 296
Kamasaee v Commonwealth of Australia (No 8) [2017] VSC 167
King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd) [2003] FCA 980
Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66; [2008] HCA 42
Mann v Paterson Constructions Pty Ltd [2019] HCA 32; (2019) 93 ALJR 1164
Matthews v SPI Electricity Pty Ltd (No 13) (2013) 39 VR 255; [2013] VSC 17
McGuirk v University of New South Wales [2010] NSWCA 104
McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd [2017] FCA 947
McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 2) [2019] FCA 215; (2019) 135 ACSR 278
McMullin v ICI Australia Operations Pty Ltd (No 6) (1998) 84 FCR 1; [1998] FCA 658
Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd (2017) 252 FCR 1; [2017] FCAFC 98
Mercieca v SPI Electricity Pty Ltd [2012] VSC 204
Mobil Oil Australia Pty Ltd v Victoria (2002) 211 CLR 1; [2002] HCA 27
Money Max Int Pty Ltd v QBE Insurance Group Ltd (2016) 245 FCR 191; [2016] FCAFC 148
Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd (2007) 164 FCR 275; [2007] FCAFC 200
Newstart 123 Pty Ltd v Billabong International Ltd [2016] FCA 1194; (2016) 343 ALR 662
Perry v Powercor Australia Ltd [2012] VSC 113
Rod Investments (Vic) Pty Ltd v Clark [2005] VSC 449
The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc (1994) 181 CLR 404; [1994] HCA 54
Timbercorp Finance Pty Ltd (In Liq) v Collins [2015] VSC 461
Thomas v Powercor Australia Ltd [2011] VSC 614
Watson v AWB Ltd [2007] FCA 1367
Webster (Trustee) v Murray Goulburn Co-Operative Co Ltd (No 3) [2018] FCA 990
Wigmans v AMP Ltd [2019] NSWCA 243; (2019) 373 ALR 323

Texts Cited:	Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, (No 134 2018), [1.54] V Morabito, "Class Actions Instituted Only for the Benefit of the Clients of the Class Representative's Solicitors" (2007) 29 *Sydney Law Review* 5
Category:	Principal judgment
Parties:	Louise Haselhurst (First Applicant) Kimley Lloyd Whisson (Second Applicant) Akuratiya Kularathne (Third Applicant) Owen Brewster (Fourth Applicant) Jaydan Bond (Fifth Applicant) Camilla Coates (Sixth Applicant) Philip Dwyer (Seventh Applicant) Toyota Motor Corporation Australia Ltd t/as Toyota Australia (First Respondent) Subaru (Aust) Pty Ltd (Second Respondent) Honda Australia Pty Ltd (Third Respondent) BMW Australia Ltd (Fourth Respondent) Nissan Motor Co Australia Pty Ltd (Fifth Respondent) Mazda Australia Pty Ltd (Sixth Respondent) Volkswagen Group Australia Pty Ltd t/as Volkswagen Australia (Seventh Respondent)
Representation:	Counsel: R McHugh SC with E Holmes and R Mansted (Applicants) G K Rich SC with T Kane (First Respondent) J C Sheller SC with T J Boyle (Second Respondent) D T W Wong (Third Respondent) J K Kirk SC with T O Prince (Fourth Respondent) RCA Higgins SC with J K S Entwisle (Fifth Respondent) C Bannon (Sixth Respondent) S J Free SC with I Ahmed (Seventh Respondent) Solicitors: Quinn Emanuel Urquhart & Sullivan (Applicants) Herbert Smith Freehills (First Respondent) Clayton Utz (Second and Seventh Respondents) K & L Gates (Third Respondent) Ashurst Australia (Fourth Respondent) Allens (Fifth Respondent) Mills Oakley (Sixth Respondent)
File Number(s):	2019/403346

Publication Restriction: Nil

Decision under appeal

Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Equity
Medium Neutral Citation:	[2019] NSWSC 1493
Date of Decision:	1 November 2019
Before:	Sackar J
File Number(s):	2017/340824; 2017/353017; 2017/378526; 2018/9555; 2018/9565; 2018/42244; 2018/322648

[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 judgment]

This appeal arose out of seven separate representative proceedings being case managed together in the Equity Division concerning allegedly defective Takata airbags, most or all of which are the subject of compulsory recalls mandated by the Australian Competition and Consumer Commission. The appeal concerned the scope of s 183 of the *Civil Procedure Act 2005* (NSW), particularly having regard to the decision of the High Court about an earlier order made in the same proceedings: *BMW Australia Ltd v Brewster* [2019] HCA 45; (2019) 94 ALJR 51.

On 1 November 2019, the primary judge delivered his reasons. The orders subsequently made provided that an opt out notice be sent to Group Members (order 12) and that Group Members who did not wish to opt out be invited to register their interest in the proceedings (order 15). The controversial order was order 16, which was self-described as one effecting "class closure". Order 16 only had effect in circumstances where an "in principle" settlement was achieved prior to the commencement of the trial on the common issues. In that event, and subject also to court approval of that settlement, the causes of action held by Group Members who had neither registered nor opted out would be extinguished by the order. Order 16 was said by the respondents to provide for "soft" class closure because in the event that an "in principle" settlement was not reached prior to the commencement of the trial on the common issues, the rights of Group Members who had not registered would not be extinguished.

The principal issue on the appeal was whether order 16 was within the power granted by s 183 of the *Civil Procedure Act*. If there was power to make such an order, the second issue was whether the discretion to make order 16 miscarried.

The Court held, allowing the appeal:

Issue 1

Per Bell P, Macfarlan, Leeming, Payne JJA and Emmett AJA agreeing:

1. An order which destroyed a person's cause of action within the limitation period, without a hearing and with no guarantee that the person would necessarily know of the outcome or consequence of their failure to register, was not an order that was "necessary to ensure that justice is done in the proceedings" or "appropriate ... to ensure that justice is done in the proceedings": at [12].

BMW Australia Ltd v Brewster [2019] HCA 45; (2019) 94 ALJR 51 at [46], [70]; *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469; [2015] FCA 328 at [33], discussed and applied. *McGuirk v University of New South Wales* [2010] NSWCA 104 at [139], [144], discussed. *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191; [2016] FCAFC 148 at [161], not followed.

Per Payne JA, Bell P, Macfarlan, Leeming JJA and Emmett AJA agreeing:

2. The purpose and effect of order 16 was to effect a contingent extinguishment of unregistered Group Members' rights of action against the respondents: at [59], [61].

3. Practical considerations may make it desirable to convert an "open" class to a "closed" or fully identified class of Group Members: at [67]. However, existing techniques that produce a class whose members may readily be identified allow those persons who had been Group Members but had ceased to continue to be Group Members to retain their rights to bring a claim against the defendant: at [75].

4. *Matthews v SPI Electricity Pty Ltd (No 13)* (2013) 39 VR 255; [2013] VSC 17 is not authority for the proposition that there is power for the Supreme Court of New South Wales to make an order purporting to extinguish the rights of unregistered Group Members in advance of a mediation: at [93].

Matthews v SPI Electricity Pty Ltd (No 13) (2013) 39 VR 255; [2013] VSC 17, not followed.

5. The construction of Part 10 of the *Civil Liability Act* preferred by the majority in *BMW Australia Ltd v Brewster* [2019] HCA 45; (2019) 94 ALJR 51 is inconsistent with acceptance of the dicta in *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2017) 252 FCR 1; [2017] FCAFC 98 at [74]-[75]: at [99].

Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd (2017) 252 FCR 1; [2017] FCAFC 98 at [74]-[75], not followed. *BMW Australia Ltd v Brewster* [2019] HCA 45; (2019) 94 ALJR 51, applied.

6. Section 183 of the *Civil Procedure Act* is not a source of power to do work beyond that done by the specific provisions which the text and structure of the legislation show the section was intended to supplement: at [106].

BMW Australia Ltd v Brewster [2019] HCA 45 at [70]; (2019) 94 ALJR 51, applied.

7. Section 183 of the *Civil Procedure Act* is not a source of power to extinguish Group Members rights before settlement of the proceedings (see s 173) or a judgment in the proceedings (see s 177): at [107].

Issue 2

8. The primary judge's conclusion that mediation would "only" be effective if order 16 was made was a *House v The King* error: at [127].

House v The King (1936) 55 CLR 499; [1936] HCA 40, applied.

9. Whether order 16 was in the interests of all Group Members was a relevant consideration not taken into account: [129].

JUDGMENT

1 **BELL P**: I agree with the orders proposed by Payne JA and the careful analysis which informs those orders.

2 His Honour's judgment sets out the terms of the orders that were made at first instance and surveys the case law in which so-called "class closure" orders have been made. That survey exposes the vice of short form labels, particularly when such labels are used to describe orders of different courts which operate under different (albeit similar) statutory regimes. In particular, his Honour highlights the fact that a number of decisions of the Supreme Court of Victoria in which "class closure" orders have been made were explicable by reference to s 33ZG of the *Supreme Court Act 1986* (Vic) which lacks any counterpart in the *Civil Procedure Act 2005* (NSW) or Pt IVA of the *Federal Court of Australia Act 1976* (Cth).

3 Under challenge in these proceedings is an order (order 16) the effect of which is that a person who has a cause of action against, in these cases, a motor vehicle manufacturer, in respect of an allegedly defective airbag system will lose that cause of action because that person neither opts out of the proceedings, nor registers (within a relatively small window of time) to participate in a mediation of proceedings in which the person did not choose actively to participate in the first place. In particular, the question is whether an order which has this effect could be thought to be "appropriate or necessary to *ensure* that justice is done in the proceedings" (emphasis added). That is the question because the extent of the Court's power to make orders under s 183 of the *Civil Procedure Act* is confined by that requirement.

4 As the High Court's decision in *BMW Australia Ltd v Brewster* [2019] HCA 45; (2019) 94 ALJR 51 (**BMW**) makes plain, s 183 of the *Civil Procedure Act* is not "at large" and is not a power conferred on the Supreme Court simply to make such orders "as the Court thinks fit" or which are "in the interests of justice" or which will promote or facilitate settlement. This can be contrasted to, for example, the much more open-ended powers conferred on the

Supreme Courts of the States under ss 84, 86 and 89(1) of the *Matrimonial Causes Act 1959-1966* (Cth) considered in *Cominos v Cominos* (1972) 127 CLR 588; [1972] HCA 54.

5 The words "appropriate or necessary to ensure that justice is done in the proceedings" are words of limitation which "should not be ignored": *BMW* at [46] and [70]. If it cannot be concluded that an order meets this description, s 183 of the *Civil Procedure Act* does not authorise it: cf. *McGuirk v University of New South Wales* [2010] NSWCA 104 at [144] per Sackville AJA (**McGuirk**). As that case demonstrates, even a power to give such directions as a court "thinks fit ... for the speedy determination of the real issues between the parties to the proceedings" is not "an open-ended power to make any directions the court considers appropriate": see *McGuirk* at [139], referring to s 61(1) of the *Civil Procedure Act*.

6 As Beach J observed in *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469; [2015] FCA 328 at [33] (**Earglow**) of the equivalent provision in the *Federal Court of Australia Act* to s 183 of the *Civil Procedure Act*:

> "... although in a general sense s 33ZF(1) has been described as a plenary power, nevertheless it is not unlimited. It is in one sense both trite and question begging to assert that the power must be exercised judicially. But let me pass to the language of s 33ZF(1) itself. It uses the language 'make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding'. Grammatically, 'thinks' is to be applied distributively, so that it reads 'thinks appropriate' or 'thinks necessary'; there is no 'is' before 'necessary'. But as applied distributively, 'thinks appropriate' has a lower threshold than 'thinks necessary'. But in the composite phrase, the concept is 'thinks appropriate ... to *ensure* that justice is done in the proceeding' (emphasis added). In other words, although the words 'thinks appropriate' have a lower threshold than 'thinks necessary', nevertheless the relevant element of necessity in another guise is enshrined in the coupling of the words 'to ensure that'. In summary, the question becomes whether I think it is appropriate, to ensure that justice is done in the proceeding, to make the orders sought by Newcrest. It is not whether I think it to be merely convenient or useful per se. Section 33ZF(1) is not a licence for me to impose my own expansive case management philosophy. Rather, I must be satisfied that any order that is made satisfies the statutory test."

7 This passage, or relevant excerpts of it, has been cited with approval in a large number of decisions: see, for example, *Johnston v Endeavour Energy*

[2015] NSWSC 1117 (Garling J) (**Johnston**); *Timbercorp Finance Pty Ltd (In Liq) v Collins* [2015] VSC 461 (Robson J) (**Timbercorp**); *Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194; (2016) 343 ALR 662 (Beach J); *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (Murphy J); *Camping Warehouse Australia Pty Ltd v Downer EDI Ltd* [2016] VSC 784 (Digby J); *Jones v Treasury Wine Estates Ltd (No 2)* [2017] FCA 296 (Foster J); *Kamasaee v Commonwealth of Australia (No 8)* [2017] VSC 167 (McDonald J); *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (Beach J); *Webster (Trustee) v Murray Goulburn Co-Operative Co Ltd (No 3)* [2018] FCA 990 (Beach J); *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 2)* [2019] FCA 215; (2019) 135 ACSR 278 (Beach J).

8 In *Timbercorp*, Robson J observed (at [416]):

> "Further, to enliven the power to make an order the court must think it appropriate or necessary to ensure justice *is* done in 'the proceeding'. Although a broad power, it does not appear to enable general case management. In *Earglow Pty Ltd v Newcrest Mining Ltd*, Beach J distinguished between orders that facilitate or improve the efficiency of the resolution of issues and those that are 'appropriate or necessary to ensure justice *is* done in the proceeding' which is the necessary prerequisite to enliven s 33ZF." (footnote omitted, emphasis in original)."

9 In *Johnston*, Garling J said (at [92]):

> "I am conscious that even though s 183 of the *Civil Procedure Act* is properly to be regarded as a broad power, it is not an unlimited one. It is not to be used as a vehicle to rewrite the legislative precision of Part 10 of the Civil Procedure Act: *Courtney* at [52]. Nor is the statutory formulation '*... to ensure that justice is done ...*:' to be ignored: *Earglow Pty Ltd v Newcrest Mining Ltd* [2015] FCA 328 at [33]."

10 Notwithstanding the statement of the Full Court of the Federal Court (Murphy, Gleeson and Beach JJ) in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191; [2016] FCAFC 148 at [161] (**Money Max**) that it "largely agree[d]" with the passage from *Earglow* which I have extracted at [6] above, there is, in my opinion, a real tension between this passage and the observations of the Full Court in *Money Max* at [165], which are as follows:

> "...[T]here is less of a difference between 'appropriate to ensure justice' and 'necessary to ensure justice' than might initially appear. In s 33ZF 'necessary' identifies a connection between the proposed order and an identified purpose as to which the Court must be satisfied before making an order. The expression 'necessary to ensure that justice is done' has shades of meaning and admits of degrees of comparisons and in context the expression should not be given a narrow construction. The requirement that a proposed order be 'necessary to ensure that justice is done in the proceeding' does not require that the Court be satisfied that unless the order is made the administration of justice will collapse or that justice in the proceeding will not be 'ensured' in the sense of being certain. Section 33ZF provides a wide power directed at enabling the Court to make orders to deal with the novel problems that might arise through a new statutory procedure for representative proceedings, *and the expression 'necessary to ensure that justice is done' requires that the proposed order be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding.*" (emphasis added).

Whilst I agree with their Honours observation in the first sentence of this passage, the balance of the analysis and conclusion results, in my opinion, in an illegitimate glossing of s 33ZF of the *Federal Court of Australia Act* (the counterpart to s 183 of the *Civil Procedure Act*) and a dilution of the meaning of the word "ensure", especially when coupled with the words "appropriate or necessary".

11 Although the decision of the Full Court of the Federal Court in *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2017) 252 FCR 1; [2017] FCAFC 98, upon which great reliance was placed by the respondents, did not refer to *Money Max*, it is noteworthy that, at [75], it echoes the language of the final sentence of [165] of *Money Max* in expressing the conclusion that:

> "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.*" (emphasis added).

12 Returning to the order under consideration in the present case, it 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.

13 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".

14 In *BMW*, Nettle J noted at [125] that "[t]he limits of what may properly be described as the demands of justice in a particular case, and so the court's power under s 33ZF [the equivalent of s 183 of the *Civil Procedure Act*], must be determined by the text of the Act read as a whole, taking into account the relevant context and purpose." As Payne JA has explained, unless parties that fall within a group opt out of the group, the scheme of Pt 10 of the *Civil Procedure Act* is that they are to have the benefit (or indeed the burden) of any settlement or judgment.

15 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.

16 This is not of course to say that mediation is not valuable and that settlement should not be encouraged. Moreover, there is no reason why, in my opinion, there could not be mediation in the current case without an order of the kind under challenge being required. The respondents will know how many vehicles containing defective airbags were sold in the period covered by the group definition; they should know at least approximately how many vehicle

owners have had their airbags replaced. To the extent that uncertainty as to the number and/or identity of group members remains (because of resales, for example), it is not difficult to conceive as to how a settlement might be structured on a pro rata basis to accommodate such uncertainty i.e. by being structured to result in a payment of a designated amount to any person meeting a particular description, as opposed to a global settlement sum. Every settlement occurs, moreover, in a context where there exist aspects of uncertainty.

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

18 I should make it plain that my criticism of order 16 should not be taken to be a criticism of the learned primary judge in this case. It is important to note that the primary judge's reasons were delivered prior to the High Court's decision in *BMW* which reversed decisions of this Court and the Full Court of the Federal Court as to the amplitude of s 183 of the Civil Procedure Act and s 33ZF of the *Federal Court of Australia Act* (see *Brewster v BMW Australia Ltd* [2019] NSWCA 35; (2019) 366 ALR 171; *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34; (2019) 265 FCR 21) and also took into account that similar "class closure" orders had been made by the Full Court of the Federal Court in *Treasury Wine* based on a pre-*BMW* understanding of s 33ZF, the equivalent provision in the *Federal Court of Australia Act* to s 183 of the *Civil Procedure Act*.

19 **MACFARLAN JA**: I agree with Payne JA and also with the additional observations of Bell P.

20 **LEEMING JA**: I agree with Payne JA. I also agree with what Bell P has written.

21 **PAYNE JA**: This appeal raises an important question about the operation of representative proceedings under Part 10 of the *Civil Procedure Act 2005* (NSW) having regard, in particular, to the recent decision of the High Court about another order made in these proceedings: *BMW Australia Ltd v Brewster* [2019] HCA 45; (2019) 94 ALJR 51. For this reason, although leave to appeal is required from the interlocutory order here in issue, leave should be granted. I will refer to the representative plaintiffs who are the applicants for leave as the appellants.

22 The proceedings involve seven separate representative proceedings which are being case managed together in the Equity Division. The proceedings are concerned with allegedly defective airbags, most or all of which have been the subject of compulsory recalls mandated by the Australian Competition and Consumer Commission. Whilst common questions to be addressed at any ultimate hearing of the representative plaintiffs' cases have been formulated, the appellants have filed and served lay affidavits but have not filed or served any expert reports. The respondents have not filed or served any affidavits or reports.

23 The proceedings were initially fixed for hearing in the Equity Division of the common questions and any remaining issues idiosyncratic to the representative plaintiffs for three weeks commencing on 20 August 2020. That date was postponed to October 2020. For reasons that are presently unimportant, we were informed at the hearing of the appeal that there is a significant prospect that the commencement of the proceedings would soon be further adjourned until early 2021.

Decision of the primary judge

24 On 1 November 2019, the primary judge delivered his reasons. On 3 February 2020, his Honour made a suite of orders which are Annexure A to these reasons. It was not controversial that an order providing that an opt out

notice be sent to Group Members should be made (order 12) and that an order should be made that Group Members who did not wish to opt out should be invited to register their interest in the proceeding (order 15).

25 For the purposes of this appeal, the critical order is order 16 which provides:

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

26 This order was self-described as one effecting "class closure". It only has effect in circumstances where an "in principle" settlement is achieved prior to the commencement of the trial on the common issues. In that event, and subject also to court approval of the settlement, the causes of action held by Group Members who had neither registered nor opted out would be extinguished by the order. The order is said by the respondents to provide for "soft" closure because in the event that an "in principle" settlement is not reached prior to the commencement of the trial on the common issues, the rights of Group Members who had not registered would not be extinguished.

27 The appellants submitted that the Court lacked power to make order 16 or, in the alternative, in the exercise of discretion the order should not have been made.

28 As to power to make the order, the primary judge relied upon the decision of the Full Federal Court in *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2017) 252 FCR 1; [2017] FCAFC 98 for the proposition that a "class closure order" which "operates to facilitate the desirable end of settlement" may be appropriate under s 33ZF of the *Federal Court of Australia Act 1976* (Cth) (which is materially indistinguishable from s 183 of the *Civil*

Procedure Act) noting that the question whether to "close the class" raises matters of "balance and judicial intuition": at [16], [18].

29 As to the discretion to make the order sought, his Honour reasoned at [43] and [50] that:

> "[43] ... the parties must come to terms with the reality of the situation, and that involves all sides having an understanding of who will be in the class and therefore what the likely damages will be.
>
> ...
>
> [50] ... A mediation will only be effective if the parties know the likely number of participants and can thus offer an amount reflective of those numbers."

30 The primary judge at [51] found that it was time for "commercial reality to bite" and that the class should be closed in such a way as to allow sufficient time for a settlement to be reached.

31 The primary judge found that the interests of Group Members who failed to register and were locked out of the fruits of any settlement by order 16 were trumped by the imperative that the parties explore whether the matter could be resolved at mediation:

> "[50] The defendants want to get a handle on who is or is not likely to participate and therefore formulate a settlement proposal. The plaintiff urges the Court not to move too quickly lest people fail to register. Given the length of the hearing and the resources that would be involved, it is imperative that parties explore whether the matter can resolve at mediation. A mediation will only be effective if the parties know the likely number of participants and can thus offer an amount reflective of those numbers."

32 On 4 December 2019, approximately one month after the primary judge delivered his reasons, *Brewster* was handed down by the High Court. The appellants sought to re-open to raise the effect of that decision. The primary judge took the view that he was functus officio and, in any event, the appellants' challenge to *Treasury Wine Estates* would be a matter which needed to be addressed, at least in the first instance, by this Court. It should be noted that whist the orders made by the primary judge on 3 February 2020

were expressed to be "by consent", it was common ground that the appellants disputed the existence of the power to make order 16.

Issues on the appeal

33 The principal issue on the appeal was whether order 16 in the present case was within the power granted by s 183 of the *Civil Procedure Act*. So-called "class closure orders" have been endorsed by the Full Court of the Federal Court as being empowered by s 33ZF of the *Federal Court of Australia Act*, which is equivalent to s 183 of the *Civil Procedure Act*. The appellants submitted that ss 183 and 33ZF did not support an interpretation empowering the making of order 16 for the purpose of encouraging or facilitating a settlement. Further, it was submitted that even if there was power to make such an order, the discretion to make order 16 here miscarried.

The statutory scheme of Part 10 of the *Civil Procedure Act*

34 The critical parts of Part 10 of the *Civil Procedure Act* are, for present purposes, the following. The prerequisites to commencing a representative proceeding are as follows:

> **157 Commencement of representative proceedings** (cf s33C FCA)
>
> (1) Subject to this Part, where—
>
> (a) 7 or more persons have claims against the same person, and
>
> (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances, and
>
> (c) the claims of all those persons give rise to a substantial common question of law or fact,
>
> proceedings may be commenced by one or more of those persons as representing some or all of them.
>
> (2) Representative proceedings may be commenced—
>
> (a) whether or not the relief sought—
>
> (i) is, or includes, equitable relief, or
>
> (ii) consists of, or includes, damages, or

(iii) includes claims for damages that would require individual assessment, or

(iv) is the same for each person represented, and

(b) whether or not the proceedings—

(i) are concerned with separate contracts or transactions between the defendant in the proceedings and individual group members, or

(ii) involve separate acts or omissions of the defendant done or omitted to be done in relation to individual group members.

35 Importantly for present purposes, consent is not required to be a Group Member:

159 Is consent required to be a group member? (cf s33E FCA)

(1) Subject to subsection (2), the consent of a person to be a group member is not required.

(2) None of the following is a group member in representative proceedings unless the person gives consent in writing to being so—

(a) the Commonwealth, a State or a Territory,

(b) a Minister of the Commonwealth, a State or a Territory,

(c) a body corporate established for a public purpose by a law of the Commonwealth, a State or a Territory, other than an incorporated company or association,

(d) an officer of the Commonwealth, a State or a Territory, in his or her capacity as an officer.

36 The running of the limitation period that applies to the claim of a Group Member to which the proceedings relate is suspended by operation of s 182 which provides:

182 Suspension of limitation periods (cf s33ZE FCA)

(1) On the commencement of any representative proceedings, the running of the limitation period that applies to the claim of a group member to which the proceedings relate is suspended.

(2) The limitation period does not begin to run again unless either the member opts out of the proceedings under section 162 or the proceedings, and any appeals arising from the proceedings, are determined without finally disposing of the group member's claim.

(3) However, nothing in this section affects the running of a limitation period in respect of a group member who, immediately before the commencement of the representative proceedings, was barred by the expiration of that period from commencing proceedings in the member's own right in respect of a claim in the representative proceedings.

(4) This section applies despite anything in the *Limitation Act 1969* or any other law.

37 Concomitant with the scheme not requiring the consent of a Group Member to participate is the right of a Group Member to "opt out" of the representative proceedings. Section 162 of the *Civil Procedure Act* provides:

162 Right of group member to opt out (cf s33J FCA)

(1) The Court must fix a date before which a group member may opt out of representative proceedings in the Court.

(2) A group member may opt out of the representative proceedings by written notice given under the local rules before the date so fixed.

(3) The Court may, on application by a group member, the representative party or the defendant in the proceedings, fix another date so as to extend the period during which a group member may opt out of the representative proceedings.

(4) Except with the leave of the Court, the hearing of representative proceedings must not commence earlier than the date before which a group member may opt out of the proceedings.

38 There is a specific power to alter the definition of Group Members:

163 Causes of action accruing after commencement of representative proceedings (cf s33K FCA)

(1) 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.

(2) The description of the group may be altered so as to include a person—

(a) whose cause of action accrued after the commencement of the representative proceedings but before such date as the Court fixes when giving leave, and

(b) who would have been included in the group, or, with the consent of the person would have been included in the group, if the cause of action had accrued before the commencement of the proceedings.

(3) The date fixed under subsection (2) (a) may be the date on which leave is given or another date before or after that date.

(4) If the Court gives leave under subsection (1), it may also make any other orders it thinks just, including an order relating to the giving of notice to persons who, as a result of the amendment, will be included in the group and the date before which such persons may opt out of the proceedings.

39 Any settlement or discontinuance of a representative proceeding must be approved by the Court. Section 173 provides:

173 Approval of Court required for settlement and discontinuance (cf s33V FCA)

(1) Representative proceedings may not be settled or discontinued without the approval of the Court.

(2) If the Court gives such approval, it may make such orders as are just with respect to the distribution of any money, including interest, paid under a settlement or paid into the Court.

40 The powers of the Court to determine relevant questions in a representative proceeding are extensive. Section 177 provides:

177 Judgment—powers of the Court (cf s33Z FCA)

(1) The Court may, in determining a matter in representative proceedings, do any one or more of the following:

(a) determine a question of law,

(b) determine a question of fact,

(c) make a declaration of liability,

(d) grant any equitable relief,

(e) make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies,

(f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members.

(2) In making an order for an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled.

(3) Subject to section 173, the Court is not to make an award of damages under subsection (1) (f) unless a reasonably accurate assessment can be

made of the total amount to which group members will be entitled under the judgment.

(4) If the Court has made an award of damages, the Court may give such directions (if any) as it thinks just in relation to:

(a) the manner in which a group member is to establish the member's entitlement to share in the damages, and

(b) the manner in which any dispute regarding the entitlement of a group member to share in the damages is to be determined.

41 A judgment given in representative proceedings must identify the Group Members who will be affected by it. A judgment given in representative proceedings binds all Group Members so identified. Section 179 provides:

179 Effect of judgment (cf s 33ZB FCA)

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.

42 The provision at the heart of this appeal is the general power for the Court to make orders that it thinks are "appropriate or necessary to ensure that justice is done in the proceedings". Section 183 of the *Civil Procedure Act* provides:

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.

43 Order 16 was made in reliance upon the power to make orders under s 183 that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings.

Construction of order 16

44 The starting point is the construction of the only order sought to be challenged, namely order 16. Until the legal and practical effect of that order

is understood, it is not possible to address the questions of power and miscarriage of discretion. Despite what was said in earlier litigation in this Court between the same parties in *Brewster v BMW Australia Ltd* [2019] NSWCA 35 at [19]-[28]; (2019) 366 ALR 171 at 176-7, and despite this being raised early in the hearing of the appeal, none of the respondents sought meaningfully to engage with the language of the order.

45 To the contrary, the respondents' written and oral submissions tended to refer to "closure", or sometimes "soft closure", as if that label itself sufficiently delineated the order. Nettle, Gordon and Edelman JJ recently reiterated John Chipman Gray's adage that a "loose vocabulary is a fruitful mother of evils": *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 at [150]; (2019) 93 ALJR 1164 at 1198. That remains as true today as it was when it was originally written more than a century ago. As will be seen below, "closing" a class is language which has been used to describe very different orders in representative proceedings over the last three decades.

46 Order 16 deals with Group Members who neither opt out nor register following a three month period of advertisement. The order applies in two distinct ways to such persons. First, it provides that they "shall remain a Group Member for the purposes of any judgment or settlement". That is entirely superfluous. The *Civil Procedure Act* provides that Group Members are all persons so defined by reference to the pleadings who have not opted out. It is clear from s 163(1) of the *Civil Procedure Act* that there is power to alter the description of the group as the litigation progresses. The class of persons who are Group Members may vary from time to time following (a) an amendment to the group description and/or (b) the exercise of the right to opt out.

47 The second way the order applies to Group Members who neither opt out nor register following a three month period of advertisement is to extinguish the rights of those Group Members – even though hitherto they have taken no active part in the proceedings, and their rights against the relevant defendant have benefited from s 182 of the *Civil Procedure Act* suspending time from running for the purposes of a limitation defence. This second way the order

deals with non-registering Group Members is contingent upon "an in-principle settlement [being] reached before the commencement of the trial on the common issues and that settlement is ultimately approved by the Court".

48 Two matters should be teased out. First, "in-principle settlement" might, in many contexts, refer to a compromise agreed informally but not presently giving rise to contractual rights. In the context of order 16, an "in-principle settlement" should be understood as a presently binding compromise, subject to the condition subsequent of Court approval being given. Secondly, the settlement so described is a partial one. It is not the settlement of the claims of all Group Members. It is the settlement of the claims of Group Members who have registered in the proceeding.

49 In the eventuality that settlement has been achieved and approved, then Group Members who have not registered are (a) "bound by the terms of the settlement agreement" and (b) "barred from making any claim against the Defendant" in a wide variety of ways. Both of these aspects of the order are problematic.

50 The former goes beyond the terms of s 179(b) of the *Civil Procedure Act* which provides that the Court's judgment binds all persons in the group who have not opted out. The statutory provision confirms that the ordinary effect of orders of the Court upon parties applies to all Group Members in a representative proceeding. Conceivably this first aspect of order 16 on its proper construction goes no further (after all, the earlier wording in the order about persons remaining a Group Member is mere verbiage).

51 The reason that order 16 goes beyond the terms of s 179(b) of the *Civil Procedure Act* is that on its face it appears to give force to the terms of an approved settlement agreement, binding all of the members of the class. Any settlement agreement is likely to contain provisions which go beyond any order made by the court. There are usually, for example, obligations of confidentiality or non-disparagement in an agreement which are not made in orders of the court. It is likely that if a settlement agreement is entered into

following the mediation contemplated by order 16, it would purport to forbid unregistered Group Members from making any further claims. That could not be done as a matter of contract, in respect of persons who do not participate in the settlement. It is sought to be done by court order.

52 The second problematic aspect of order 16 is that Group Members who fail to register are not entitled to participate in a distribution of settlement proceeds and yet are "barred from making any claim against the Defendant". Of course it may be necessary to revisit traditional notions of court process when dealing with the provisions governing representative proceedings and to fashion novel solutions to new problems. Part 10 provides that a court's order in approving a settlement or after a judgment may bind Group Members who fall within the group definition but who are not otherwise parties to court proceedings, who have not been served (whether personally or through orders for substituted service), and many thousands of whom may be unaware of the litigation and may have received no notice of it.

53 An order having such an effect is permitted in two circumstances: approval of settlement (s 173) and judgment after a hearing (s 177). As the High Court explained about the then-existing version of Part 4A of the *Supreme Court Act 1986* (Vic) in *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 32; [2002] HCA 27 at [40] (Gaudron, Gummow and Hayne JJ), the evident legislative intent of representative proceedings is that:

> "[40] ... Group members, however, need take no positive step in the prosecution of the proceeding to judgment to gain whatever benefit its prosecution may bring."

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

55 Order 16 is of a different kind. To the extent that it addresses those who have opted out, the order is orthodox and does not affect the rights of those people.

Order 16, however, purports to bar the making of claims against the respondents on the basis of the non-fulfilment of a registration condition. That bar arises conditionally on the non-fulfilment of the registration condition; that is, in order to gain whatever benefit the prosecution of the action may bring, by possible settlement, Group Members are required to take a positive step.

56 One way of construing the order is that it would amount to an injunction. If so, it would be a contempt if (assuming a Group Member has neither registered nor opted out) a Group Member seeks later to make a claim against a defendant after having notice of the order. An alternative is that the prohibition is merely a matter which might be pleaded in bar so as to summarily defeat any subsequent proceedings.

57 Mr McHugh SC, who appeared for the appellants, acknowledged that his case was sufficiently made out by taking the order on its face value of contingently extinguishing unregistered Group Members' rights against a respondent. The respondents, some of whom were presumably responsible for the drafting of the orders, made no submissions about their construction, save that as the Court must approve any ultimate settlement under s 173 of the *Civil Procedure Act* the order should be understood as interlocutory and subject to revision. For example, Mr Kirk SC, who had primary carriage of the argument for the respondents about power to make the order, submitted that if a settlement was achieved and a Group Member who had failed to register came forward, as a pragmatic matter the Court asked to approve the settlement would probably allow the individual to participate. So much may be accepted. That submission does not, however, address the critical issue.

58 Each of the respondents made submissions to the effect that the "closure" order does not bar any Group Member's claim until settlement is reached and is approved by the Court, exercising its protective function. A court may decline to approve the settlement at all, or permit Group Members to participate notwithstanding their failure to register. If either of these conditions is not satisfied, no claim is "extinguished" or "stripped". Mr Kirk SC submitted that an interlocutory order is always capable of variation and it is not

uncommon for unregistered Group Members to be allowed to participate in settlements if they can show good cause for missing the registration.

59 These submissions do not address the purpose and effect of order 16. The clear purpose of the order is to effect a contingent extinguishment of Group Members' rights of action against the respondents. The effect of the order is the same; a contingent extinguishment of Group Members' rights of action against the respondents. The relevant contingency is that the Court in any settlement approval hearing has the ability not to approve any settlement which extinguishes non-registered Group Members' rights. If it were intended that the Court would only consider the potential extinguishment of non-registering Group Members' rights at any ultimate settlement approval hearing, the notice to Group Members of the orders would be misleading. No such additional opportunity to consider non-registering Group Members' rights was identified in that notice.

60 The fact that the order was intended to provide a "consequence" for Group Members who failed to register was embraced by Mr Rich SC for the first respondent, whose submissions about the appropriate exercise of discretion were adopted by the other respondents, in these terms:

> "PAYNE JA: Mr Rich, on one view these are powerful reasons in favour of a registration procedure and asking people who might come forward all of these things. Why do you need o 16 in order to facilitate that?
>
> RICH: In particular because we submit absent consequence, and by that I mean absent a class closure or a consequence that says if you do not register then adverse consequences will follow, or may follow, common experience would tell us that people, why would they respond if they had no incentive to do so? If somebody receives a notice and requires them to fill out information and supply it to people involved in litigation, but they're not told that if you don't do that something might happen adversely to your interests, why would they do it? Why would a busy person for no particular reasons supply that information? That the class closure order supplies an incentive, an important incentive in our submission, to all group members to take the notice seriously and actually respond to it. Absent some consequence, we submit there must be a considerable risk that most people would ignore it. So in fact the consequence of class closure incentivises and makes it more likely that people will actually respond to the notice and will actually register and protect their interests.

> The second aspect, or the second perhaps answer to your Honour's question, is that the purpose of the registration orders is obviously enough to facilitate a settlement. So is the class closure, in the sense that it supplies what the President described earlier today as a critical integer. That is, how many people are we settling with. And that's not, it's not just a detail."

61 The appellants' submission that order 16, at least contingently, extinguishes unregistered Group Members' rights against the respondents, should be accepted.

The power to make order 16

62 Jargon abounds in cases arising under Part 10 of the *Civil Procedure Act.* Order 16 describes itself as a "class closure order". "Class closure" is not a statutory term. Part 10 authorises a wide range of representative proceedings which may, but need not, concern an "open class". That is to say, Part 10 permits representative proceedings to be brought on behalf of Group Members who may (but need not necessarily) be identifiable on a list.

63 As it happens, practical considerations often result in representative proceedings being commenced on behalf of an open class, although that need not be so. Insofar as it was repeatedly submitted that "closure", whether at all or particularly before any settlement, was *necessary*, that is not so as a matter of demonstrable historical fact.

64 Critically, one of the few mandatory requirements in Part 10 is for all Group Members to be given the right to "opt out" prior to the commencement of the initial hearing: s 162. That right is supported by requirements of notice: s 175(1)(a). But there is no requirement to "close" an open class before any hearing, including the hearing of common questions, even if that hearing about common questions also includes the hearing of claims for actual loss by the representative applicant and individual Group Members.

65 Part 10 deals expressly with the possibility of settlement but only by imposing an additional requirement of court approval: s 173(1). Part 10 says nothing about an obligation to "close" a class before a settlement is achieved or before mediation occurs.

66 That legislative framework tends strongly against an implication that there must be power to make an order extinguishing the rights of an unregistered Group Member in advance of any settlement being achieved (or even attempted) in order to facilitate settlement of the claims of Group Members who choose to register their claims.

67 Practical considerations may in many cases make it desirable to convert an "open" class to a "closed" or fully identified class of Group Members. This may occur in a number of ways. For very many years this occurred by courts permitting an amendment to the originating process so as to narrow the group definition so that it applied only to persons who in addition to having a claim against the defendant had also registered themselves or had retained the same firm of solicitors or agreed to a funding agreement with an external funder.

68 It is important to observe the consequences mandated by Part 10. Persons may become Group Members without doing anything at all and without knowing that status. That depends upon the unilateral act of the representative plaintiff and the lawyers retained. Persons who are Group Members may not learn of that status through active solicitation or through notices authorised by the court or through other means.

69 An important aspect of the statutory regime protects persons who in that way, without any independent act of their own, become Group Members. Section 182 suspends the limitation period applying to a Group Member's claim when the representative proceedings commence until such time as they conclude or the Group Member opts out.

70 Accordingly, where the class of Group Members is "closed" by altering the definition so as to exclude persons who had not registered or had not retained the firm of solicitors or agreed to the terms of a litigation funder, then at that time the representative proceeding will cease to apply to that person's claim and time would thereafter continue to run for limitation purposes. That result is the opposite of that achieved by order 16. Yet in many cases, a redefinition

through amendment of the group definition was aptly described as "closing the class".

71 The availability of the technique of altering a class so as to confine it to persons with a claim against the defendants and who had retained the firm of solicitors and/or had entered into a litigation funding agreement was confirmed by *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275; [2007] FCAFC 200.

72 Before then, there had been cases where such a redefinition had been regarded as inconsistent with the Act: *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394; [2005] FCA 1483 (Stone J); *Rod Investments (Vic) Pty Ltd v Clark* [2005] VSC 449 (Hansen J, where the 127 class members, all of whom had retained the same firm of solicitors, were named in the application). However, in accordance with *Multiplex*, such an amendment is one way by which a class may be "closed".

73 That is far from the only way to "close" the class. Another, where the identities of all class members are known, is to amend so as to take the proceedings outside Part 10 altogether. Another is to alter the class to embrace a smaller time period or to include other criteria. In the *Bray v F Hoffmann-La Roche Ltd* litigation, originally commenced on behalf of all persons who purchased a range of vitamins, the class was narrowed to manufacturers, distributors and suppliers of products or food which contained those vitamins, or producers of livestock who had purchased stock feed containing those vitamins, who had expended at least $2,000 in the period: [2003] FCA 1505 at [9]. Finkelstein J described the effect thus:

> "[9] ... If the proposed amendments are made there will be a discontinuance of all of the claims for relief by most group members leaving extant only the claims, which are in respect of animal nutrition and health vitamins, made on behalf of the group members who fall within the newly defined class of group members."

74 There are many other variants, which are summarised in V Morabito, "Class Actions Instituted Only for the Benefit of the Clients of the Class Representative's Solicitors" (2007) 29 *Sydney Law Review* 5 at 13-20.

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.

76 In relation to the asserted power to make the "soft class closure" order here engaged it is necessary to trace a number of decisions.

77 Great reliance was placed by the respondents on *Matthews v SPI Electricity Pty Ltd (No 13)* (2013) 39 VR 255; [2013] VSC 17. That was the case where a distinction between "class closure" and a "closed class" was introduced by J Forrest J at [23]:

> "[23] Class closure is a different concept from that of a closed class. This expression means, as I understand it, that a court may require group members to identify themselves by a certain point in time as having an interest in any judgment or proposed settlement. Failing a declaration of such interest (normally achieved by registering with the court or a firm of solicitors by a certain date), any subsisting entitlement to damages of the group members relating to the claim may be extinguished."

78 Of course, neither "class closure" nor "closed class" is a statutory term. Both terms describe the effect of amendments to originating process and pleadings or the operation of court orders upon the legal rights of Group Members in representative proceedings.

79 The orders made in *Matthews* were relevantly by consent. There were two categories of Group Members: those with personal injury or dependency claims, and those with claims for economic loss and property damage. The

orders made excluded unregistered Group Members with personal injury or dependency claims from the amended representative proceeding, but explicitly noted that limitation periods for those persons began to run again from 22 March 2013 (order 1). The orders also operated in a similar way as order 16 in relation to Group Members with claims for economic loss and property damage: unregistered Group Members (and their insurers) would remain Group Members but "shall not, without leave of the court, be permitted to claim compensation" (orders 3(d) and 4(d)). While the defendants opposed the preservation of the claims of unregistered Group Members with personal injury or dependency claims, all parties were agreed as to orders precluding claims of unregistered Group Members with claims for economic loss and property damage: at [3]. The decision contains an elaborate survey of the decisions dealing with "class closure": at [26]-[39].

80 The first decision to which reference was made was *McMullin v ICI Australia Operations Pty Ltd (No 6)* (1998) 84 FCR 1; [1998] FCA 658. Unfortunately the report does not include the orders, which were made not merely after notification, but also after there had been a trial on the common questions, and a series of damages hearings for individual Group Members. Although the effect of the orders was to permit the representative proceedings to be concluded, it is unclear whether that was done by an amendment to the definition of Group Members, or by some other means.

81 Assuming, in favour of the respondents, that the effect of the orders ultimately made in *McMullin* was to extinguish the rights of Group Members who had failed to register their claim after the decision on liability for common questions had been made, the decision addresses a quite different issue to the present. It is one thing to make orders after a judgment answering common questions (and in the case of *McMullin* the creation of sub-groups to deal with all the remaining damages questions in the litigation). It is a quite different thing, in advance of any judgment about common questions or any settlement of proceedings, "in principle" or otherwise, to order that the rights of Group Members who fail to register are to be contingently extinguished.

82 The second decision, mentioned at [27]-[28] of *Matthews*, was the GIO class action (*King v AG Australia Holdings Ltd*). It was said that Moore J "subsequently ordered class closure, although these orders did not have a terminating effect upon the entitlement to damages of those who failed to register" (footnotes omitted). The second element of that sentence is correct. Moore J granted leave to amend the group definition in the proceedings, with the result of reducing the number of Group Members from about 67,000 to about 25,000: see *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 980 at [4], [9]-[10]. Moore J noted at [10] that it was common ground between the parties that, following those orders:

> "[10] ... Any judgment ultimately given would not bind people who may have initially been members of the representative group but were not one of the 23,099 who had completed Form C and became, in aggregate, the representative group by the orders made on 19 June 2003. Those who did not become part of the redefined representative group had the benefit of a temporary suspension of limitation periods at least until 7 August 2003."

83 Thus, to use the terminological distinction adopted in *Matthews*, the GIO orders resulted in a smaller and "closed" class, but did *not* involve "class closure", in that the persons who had ceased to be Group Members were not barred from bringing separate proceedings.

84 At [29] of *Matthews*, it was noted that the approach in *McMullin* was followed by Mansfield J in orders made in *Guglielmin v Trescowthick* on 18 April 2000. The orders to which J Forrest J referred are not contained in any judgment and were expressed to be by consent. They stated that Group Members who failed to return the relevant registration form were bound to any resolution of the proceeding but not entitled "to claim any assessment or distribution of any award of damages or settlement sum". Allowance was made to add or delete persons from the schedule of "Participating Group Members" if it appeared that a person had been omitted or included by error.

85 Reference was made in *Matthews* at [30] to *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2008] FCA 1311; (2008) 67 ACSR 569. It was correctly noted

that the orders were made *after* settlement had been agreed. Further, there was no relevant opposition to the orders.

86 Reference was made in *Matthews* at [31] to three other occasions when orders had been made effecting "class closure":

(1) 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 and were unaccompanied by any reasons;

(2) the orders made by Gyles J in *Watson v AWB Ltd* [2007] FCA 1367 (cited at *Matthews* [31] fn 30) have nothing to do with class closure. However, orders were made in that litigation some eight months later, on 26 March 2009, by consent and unaccompanied by reasons, in comparable terms to order 16;

(3) the orders made by Emmett J on 22 October 2010 in *Scott v Oz Minerals Ltd* were not expressed to be by consent, but were accompanied by reasons which make it plain that there had already been a settlement of that claim (and another brought against the same defendant) in the amount of $60 million; his Honour noted that the proceedings had been brought to settlement at an early stage, before discovery: *Hobbs Anderson Investments Pty Limited v Oz Minerals Ltd* [2011] FCA 801 at [39].

87 The respondents submitted that the applicants accept that class closure type orders can be made after judgment or settlement. It was submitted that it was difficult to see why such orders should be available immediately after settlement or judgment, but not beforehand. For two reasons I reject that submission. The first is that the question of power raised here directly concerns the scope of specific powers in Part 10 which are enlivened *after* a settlement (s 173) or a judgment (s 177). The "gap-filling" power relied upon to support order 16, s 183, does not provide a licence to rewrite the legislative prescription of the exercise of those powers. Secondly, I do not accept the

functional equivalence suggested of order 16 and an order made to facilitate distribution of the proceeds of an actual settlement. It is a very different thing, as a practical matter, to make orders barring a Group Member from further proceedings if he or she fails to take a step to receive a share of a settlement, rather than to make such an order, even contingently, before any settlement has been achieved (or even apparently discussed). In the former case the Court's responsibility to approve the settlement is there engaged. In the latter case, the present airbags controversy provides a good example of why the scheme of Part 10 is structured as it is. A Group Member bombarded with detailed information about the proceedings need take no positive step in the prosecution of the proceeding to judgment or settlement to gain whatever benefit its prosecution may bring. Once there is an amount of money available, whether by judgment or settlement, the Group Member will then have to take a positive step to share in the proceeds. Contrary to the respondents' submissions in this Court, the *Dorajay* and *Oz Minerals* representative proceedings demonstrate that "class closure" is *not* necessary in order to achieve substantial settlements.

88 Paragraphs [32]-[36] of *Matthews* analysed Bromberg J's refusal to make a class closure order in *Winterford v Pfizer Australia Pty Ltd* [2012] FCA 1199. Bromberg J's reasons were relatively brief, and given *ex tempore*. Bromberg J said at [3] that his Honour was satisfied that there was power to make such an order, relying on *McMullin* and *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 2)* [2003] VSC 212 at [65]. No submission to the contrary had been advanced. Bromberg J said that *McMullin* was an example of a case where there was a "compelling reason" to make such an order: at [6]. His Honour dealt with the practical considerations which were at the forefront of the parties' submissions in the present case at [8]:

> "[8] I appreciate that settlement of class actions without the quantification of group members' claims presents difficulties. There are, however, a multitude of mechanisms available for structuring settlements. Many years of experience in both this country and in countries with other opt-out regimes, demonstrates that respondents are not only able to enter into negotiations without a quantification of group member claims, but can often successfully settle actions in those circumstances."

89 Bromberg J distinguished other cases in which such orders had been made (such as *Johnson Tiles*; *Perry v Powercor Australia Ltd* [2012] VSC 113 and *Thomas v Powercor Australia Ltd* [2011] VSC 614) on the basis that they had "reached a far more advanced position towards finality": at [11]-[12].

90 In *Matthews*, the proceedings were far advanced. Further, J Forrest J noted at [36] that "the power in Victoria to make such an order does not rest solely on s 33ZF". The Victorian statute, unlike the provisions of the *Federal Court of Australia Act* 1976 (Cth) and the *Civil Procedure Act*, contains s 33ZG:

> **33ZG Order may specify a date by which group members must take a step**
>
> Without limiting the operation of section 33ZF, an order made under that section may—
>
> (a) set out a step that group members or a specified class of group members must take to be entitled to—
>
> (i) any relief under section 33Z; or
>
> (ii) any payment out of a fund constituted under section 33ZA; or
>
> (iii) obtain any other benefit arising out of the proceeding—
>
> irrespective of whether the Court has made a decision on liability or there has been an admission by the defendant on liability;
>
> (b) specify a date after which, if the step referred to in paragraph (a) has not been taken by a group member to whom the order applies, the group member is not entitled to any relief or payment or to obtain any other benefit referred to in that paragraph.

91 Reference was made in *Matthews* at [37]-[39] to four decisions of the Victorian Supreme Court in which similar orders were made.

(1) in *Perry v Powercor* and *Thomas v Powercor* the orders were expressly made pursuant to s 33ZG;

(2) in *Mercieca v SPI Electricity Pty Ltd* [2012] VSC 204, Emerton J said at [41] that the class closure order was "specifically authorised by s 33ZG of the *Supreme Court Act*.";

(3) in *Johnson Tiles* while there was a statement by Gillard J at [65] that s 33ZF of the *Federal Court of Australia Act* permitting the Court to "make orders it considers appropriate or necessary to ensure that justice is done in the proceeding" enabled closure of a class of claims, his Honour continued:

> "[65] ... In the Victorian legislation there is express power. Under s 33ZG of the Act, the court does have power to make orders which would have the effect of closing the class of claimants and this can be done by a certain date".

(4) further, as J Forest J with respect correctly noted at [37], there was no opposition to the making of the order (as opposed to its form) in *Johnson Tiles*.

92 In *Matthews*, J Forrest J thereafter addressed the decisions permitting "closed classes" (as opposed to closure orders) in *Multiplex* (at [40]-[46]), and noted at [47] that there was no contradictor to the proposition that Group Members should be required to register either by an alteration of the definition of the class or by a "class closure" order. His Honour ultimately favoured a "class closure" order, on the basis that such a course was not precluded by the High Court's decision in *Mobil* nor the *Multiplex* decision, and because the Victorian legislature had accepted a recommendation from the Australian Law Reform Commission and enacted s 33ZG (at [55]-[56]). His Honour concluded at [56]-[57]:

> "[56] In particular, requiring a group member to take a step pursuant to s 33ZG may be undertaken 'irrespective of whether the court has made a decision on liability or there has been admission by the defendant on liability'. It was this power that was relied upon by Gillard J in closing the class in *Esso*; it specifically extends to enabling a court to preclude a group member from the benefit of a settlement or judgment if the member fails to take the prescribed step.
>
> [57] I am satisfied that it is within the power of the court to make orders requiring group members to take the step of registering either as part of converting an open class to a closed class or in effecting class closure. The existence of an opt-out process does not, in my view, militate against such a conclusion, particularly in the context of Pt 4A."
>
> (Footnotes omitted.)

93 *Matthews* is 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 these reasons:

(1) there is no equivalent to s 33ZG contained in Part 10 of the *Civil Procedure Act*. The respondents submitted that the fact that s 33ZG of the *Supreme Court Act* was not replicated in the *Civil Procedure Act* says nothing about the scope of s 183. I do not agree;

(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.

94 The other decision which was central to the respondents' submissions that power under Part 10 existed to make order 16 was *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2017) 252 FCR 1; [2017] FCAFC 98. In that case the Full Federal Court said:

> "[72] The Commonwealth Parliament, in implementing a core recommendation of the Australian Law Reform Commission in its report *Grouped Proceedings in the Federal Court, Report No 46* (Canberra, 1988) at [127], expressed a legislative intention to adopt an opt out rather than an opt in procedure: Second Reading Speech, *Federal Court of Australia Amendment Bill 1991* (Cth), House of Representatives Parliamentary Debates, Hansard, 14 November 1991 p 3,175. It must be accepted that the requirement for class members to take active steps to 'register' in order to share in a settlement of a class action undercuts to some extent the opt out rationale underpinning the Part IVA regime. In *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1; [2002] HCA 27 at [40] (Gaudron, Gummow and Hayne JJ) their Honours said:

'Group members, however, need take no positive step in the prosecution of the proceeding to judgment to gain whatever benefit its prosecution may bring.'

[73] Class proceedings are intended to require little or no active involvement by class members and class members participate principally for the limited purpose of taking the benefit or suffering the burden of the findings made on the common questions: *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 2)* [2010] FCA 176 at [16] (*P Dawson No 2*) (Finkelstein J). As J Forrest J said in *Thomas v Powercor Australia Ltd (Ruling No 1)* [2010] VSC 489 (*Thomas v Powercor No 1*) at [30], 'one of the consequences of the opt out model, as was clearly intended by the legislature, is the ability of group members to "sit back" and watch the proceeding unfold'. There must be a good reason to exercise the discretion to make a class closure order which may operate to deny the benefits of a settlement to class members who do not opt out and who do not take the active step of registering: *P Dawson No 2* at [17].

[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: see for example, *Matthews v SPI Electricity & SPI Electricity Pty Ltd v Utility Services Corporation Ltd (Ruling No 13)* (2013) 39 VR 255; [2013] VSC 17 at [22]-[80] (*Matthews v SPI No 13*) (J Forrest J) and the authorities there referred to; *Farey v National Australia Bank* [2014] FCA 1242 at [11]-[16] (Jacobson J); *Inabu Pty Ltd v Leighton Holdings Pty Ltd* [2014] FCA 622 at [17]-[22] (Jacobson J); *Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194 at [67]-[68] (Beach J). 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."

95 The first thing to notice about *Treasury Wine Estates* is that the appellant in oral submissions conceded that:

(1) the Court had power pursuant to s 33ZF of the Act to make the "class closure" order in the terms that it did; and

(2) it was appropriate for the primary judge to make the "class closure" order at that stage of the proceeding: at [47].

96 Secondly, the principal authority cited for the proposition in paragraph [74], *Matthews*, provides no authority for the proposition that there is power for the Supreme Court of New South Wales to make order 16.

97 Thirdly, the other cases referred to, *Farey v National Australia Bank Ltd* [2014] FCA 1242 at [11]-[16] (Jacobson J); *Inabu Pty Ltd v Leighton Holdings Ltd* [2014] FCA 622 at [17]-[22] (Jacobson J); and *Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194 at [67]-[68]; (2016) 343 ALR 662 at 675 (Beach J), each proceeded by consent. As Jacobson J acknowledged in *Farey*, orders of this kind were usually sought in conjunction with, or ancillary to, an application to the Court under s 33V of the Act to approve a settlement: at [11]. *Billabong International Ltd* was a settlement approval hearing under s 33V, although Murphy J had earlier made orders to the same effect as in the present case. Beach J regarded it as appropriate to reconsider that order: at [64]-[65]. After a careful consideration of all the issues, Beach J approved a settlement and made orders which extinguished the rights of Group Members who had not earlier registered.

98 Fourthly, the orders in *Treasury Wine Estates* were made before the decision of the High Court in *Brewster*, a decision concerning an earlier order made in the present cases.

99 It is this fourth matter which is the most significant. Even if, as is the case, I disagree with paragraphs [74]-[75] of *Treasury Wine Estates*, I would only decline to follow it if I was of the view that the Full Federal Court was clearly wrong: *Wigmans v AMP Ltd* [2019] NSWCA 243 at [82]; (2019) 373 ALR 323 at 341 citing *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492; [1993] HCA 15. That conclusion is, of course

subject to any contrary authority of the High Court. I have concluded that the construction of Part 10 of the *Civil Liability Act* preferred by the majority in *Brewster* is inconsistent with acceptance of the dicta in *Treasury Wine Estates* at [74]-[75].

100 The subject matter in *Brewster* was, relevantly, whether s 183 of the *Civil Procedure Act* empowered the Supreme Court of New South Wales to make what was known as a "common fund order" ("CFO"). Such an order was characteristically made at an early stage in representative proceedings and provided for the quantum of a litigation funder's remuneration to be fixed as a proportion of any moneys ultimately recovered in the proceedings, for all Group Members to bear a proportionate share of that liability, and for that liability to be discharged as a first priority from any moneys so recovered: at [1]. The rationale for the making of such an order was that without it litigation funders would be reluctant to advance funds and representative proceedings would not be commenced or continued.

101 In August 2018, Mr Brewster applied for a CFO. A litigation funder, Regency Funding, the solicitor firm for Mr Brewster, and Mr Brewster each offered to undertake to each other and to the Supreme Court to comply with their obligations under funding terms annexed to the proposed order. Regency Funding agreed to bind itself to maintain the litigation. Upon that undertaking the Supreme Court was asked to order that, subject to further orders of that Court pursuant to s 183 of the *Civil Procedure Act* or its inherent jurisdiction, Mr Brewster and the Group Members be bound to pay from any resolution sum:

(1) the legal costs, disbursements and administration expenses expended by Regency Funding;

(2) remuneration to Regency Funding in the amount of 25 per cent of so much of the resolution sum as remains after payment of the abovementioned expenses (or such other sum as the Supreme Court

considers reasonable at the time of the approval of a settlement or judgment); and

(3) any GST upon these amounts

prior to the distribution of the resolution sum to the Group Members: at [27].

102 It may be accepted, as the respondents submitted, that the subject matter of the making of a CFO was substantially different to the question of power to make order 16 for the avowed purpose of encouraging settlement of the proceedings. Nevertheless, in addressing the correct construction of the power conferred by s 183 of the *Civil Procedure Act*, the majority judgments each made clear that the power conferred by s 183 was to be construed in the context of structural considerations in Part 10 relating to settlement and judgment.

103 In rejecting the proposition that s 183 of the *Civil Procedure Act* provided power to make a CFO, Kiefel CJ, Bell and Keane JJ explained that:

> "[3] Properly construed, neither s 33ZF of the FCA nor s 183 of the CPA empowers a court to make a CFO. Section 33ZF of the FCA and s 183 of the CPA each provide relevantly that in a representative proceeding, the court may make any order the court thinks appropriate or necessary to ensure that justice is done in the proceeding. While the power conferred by these sections is wide, it does not extend to the making of a CFO. These sections empower the making of orders as to *how* an action should proceed in order to do justice. They are not concerned with the radically different question as to whether an action *can* proceed at all. It is not appropriate or necessary to ensure that justice is done in a representative proceeding for a court to promote the prosecution of the proceeding in order to enable it to be heard and determined by that court. The making of an order at the outset of a representative proceeding, in order to assure a potential funder of the litigation of a sufficient level of return upon its investment to secure its support for the proceeding, is beyond the purpose of the legislation.
>
> ...
>
> [47] While it has rightly been acknowledged that the power conferred by each of s 33ZF and s 183 is broad, it is one thing for a court to make an order to ensure that the proceeding is brought fairly and effectively to a just outcome; it is another thing for a court to make an order in favour of a third party with a view to encouraging it to support the pursuit of the proceeding, especially where the merits of the claims in the proceeding are to be decided by that

court. Whether an action *can* proceed at all is a radically different question from *how* it *should* proceed in order to achieve a just result."

(Emphasis in original.)

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.

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

"[51] The text of each of s 33ZF and s 183 assumes that an issue has arisen in a pending proceeding between the parties to it, and that the proceeding will

be advanced towards a just and effective resolution by the order sought from the court. The construction of ss 33ZF and 183 for which the respondents contend departs from this assumption. The making of a CFO does not assist in determining any issue in dispute between the parties to the proceeding; it does not assist in preserving the subject matter of the dispute, or in ensuring the efficacy of any judgment which might ultimately be made as between the parties; it does not assist in the management of the proceeding in order to bring it to a resolution. Nor does it assist in doing justice *between* group members in relation to the costs of litigation.

...

[59] The difficulty attending the making of a CFO at the outset of the proceeding goes beyond the practical difficulty identified in *Money Max*. Contrary to the view of the Full Court in that case, the problems that attend the fixing of the rate of the funder's remuneration at the beginning of the proceeding are not concerned solely with the factual and prudential aspects of the exercise of the discretion conferred by s 33ZF; they also involve the conceptual difficulty of an absence of criteria to guide the exercise of discretion by the court. In addition, there is the incongruity of reading such a power into s 33ZF or s 183 when other provisions of Pt IVA and Pt 10 make specific provision apt to accommodate that task but which operate at the conclusion of the proceeding."

(Emphasis in original, footnotes omitted.)

106 Critically, for present purposes, the plurality explained that s 183 was not a source of power to do work beyond that done by the specific provisions which the text and structure of the legislation show the section was intended to supplement:

"[70] It was submitted on behalf of the first respondent in the BMW appeal that the topics addressed in ss 168, 169, 170 and 177 of the CPA (which are to the same effect as ss 33Q, 33R, 33S and 33Z of the FCA respectively) also fall within the scope of s 183. According to this submission, Pt 10 of the CPA is 'redundant where it is convenient'. That submission is not helpful in seeking to come to grips with the meaning to be given to the words of limitation 'appropriate or necessary to ensure that justice is done in the proceeding'. Further, it exalts the role of s 183 (and s 33ZF) above that of a supplementary or gap-filling provision, to say that it may be relied upon as a source of power to do work beyond that done by the specific provisions which the text and structure of the legislation show it was intended to supplement. The work which the respondents require s 183 (and s 33ZF) to do is beyond the scope of the other provisions of the scheme. As will be seen, those other provisions are engaged upon a different occasion and address materially different circumstances from those that are involved in the making of a CFO. Section 183 (and s 33ZF) cannot be given a more expansive construction and a wider scope of operation than the other provisions of the scheme. To accept this submission would be to use s 183 (and s 33ZF) as a vehicle for rewriting the scheme of the legislation."

(Footnotes omitted.)

107 Further, the plurality explained the structure of Part 10 as envisaging the identification of Group Members so as to facilitate the distribution of any proceeds of the proceedings, whether derived from a settlement or a favourable judgment. The time for the making of orders in relation to distribution of the proceeds of the action is at its successful completion:

> "[72] The provisions of Pt IVA of the FCA and Pt 10 of the CPA envisage the identification of all group members so far as that is possible. That identification facilitates the distribution of any proceeds of the proceedings, whether derived from a settlement or a favourable judgment. ...
>
> [73] Under s 33J of the FCA, the court must fix a date before which a group member may opt out of a representative proceeding. Because that date will usually fall before the outcome of the action is known, the problem of "free riding" by group members who would seek to opt in to the proceeding only after a favourable outcome is achieved is addressed. As this Court has noted, the opt out model adopted by Pt IVA of the FCA and Pt 10 of the CPA is designed so that a representative proceeding may continue even if group members are unaware of it; and group members 'are under no obligation to identify themselves'. That said, both legislative schemes do allow identification of all group members (as far as is possible) in order to distribute any proceeds. That this is so is apparent from ss 33V, 33X(3)-(4), 33Z and 33ZA of the FCA. Reference to the terms of these provisions confirms that the legislative scheme contemplates that the occasion for the making of orders in relation to distribution of the proceeds of the action is its successful completion."
>
> (Footnotes omitted.)

108 As I have said, order 16 contingently extinguishes unregistered Group Members' rights against the respondents. This gives rise to an incongruity of the kind identified by the plurality in construing s 183 as providing power to extinguish Group Members' rights, even contingently, before the time that Part 10 specifically envisages, being approval of settlement (s 173) or following a judgment (s 177).

109 The reasons of Nettle J are also inconsistent with a construction of s 183 as providing a separate power to extinguish Group Members rights, even contingently, before the time that Part 10 specifically envisages:

> "[125] ... The power conferred by s 33ZF is to make orders the purpose of which is to ensure justice is done in a representative proceeding. The limits of

> what may properly be described as the demands of justice in a particular case, and so the court's power under s 33ZF, must be determined by the text of the Act read as a whole, taking into account the relevant context and purpose. With respect to those who may take a different view, that has precious little to do with the entitlement to restitution of salvors under admiralty law or of barristers and solicitors, who have long been subject to the 'general jurisdiction of the Court ... to regulate the charges made for work done'. As the plurality observe, the provisions of Pt IVA, in which s 33ZF sits, make specific provision for the entities in respect of whom, and the point in time at which, orders distributing cost burdens and judgment or settlement proceeds may be made. None of those provisions expressly or impliedly contemplates the kind of CFOs sought in these matters nor the issues to which they were addressed. The context of s 33ZF strongly implies exclusion of a construction of that provision that permits of the making of a CFO."
>
> (Footnotes omitted.)

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

111 The reasons of the remaining judge in the majority, Gordon J, are also inconsistent with the construction of s 183 advanced by the respondents. Her Honour held:

> "[147] Considered in the context of Pt IVA as a whole and ss 33C, 33J, 33M, 33N, 33V, 33Z, 33ZA and 33ZB in particular, s 33ZF(1) as a supplementary or gap-filling power is a power to do what is appropriate or necessary to advance the objective of Pt IVA – to provide a procedure for representative proceedings. As has been seen, none of the provisions mentioned envisages a Court being engaged in making a common fund order."

112 Her Honour's reference to the specific powers approving settlement (ss 173/33V), orders following judgment (ss 177/33Z) and ultimate orders binding all Group Members (ss 179/33ZB) and the contrasting "gap-filling" power provided by ss 183/33ZF tends against the construction advanced by the respondents that s 183 provides power, even contingently, to extinguish Group Members' rights.

113 It is correct, as the respondents submitted, that the plurality's reasons in *Brewster* should not be over-read. It is also correct that the majority of the Court in *Brewster* confirmed that the power conferred by s 183 is "wide", "broad" and intended to deal with new and unforeseen circumstances. Section 183 should not be construed by reference to limitations not found in its text: *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* (1994) 181 CLR 404; [1994] HCA 54.

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.

116 Thus, by way of example, the first respondent submitted that unless there was the consequence of non-participation in the fruits of any settlement, most Group Members would ignore the notice. Indeed, it was said that order 16 was in fact in the interests of the representative applicants.

117 Mr McHugh SC pointed out that while on the one hand the respondents emphasised that order 16 was interlocutory and could be varied at a settlement approval hearing so as to permit additional Group Members to participate, this was difficult to reconcile with the submission that an order in the nature of the "soft closure" was *necessary* in order to promote settlement.

118 That submission together with others directed to the need for an order to promote settlement turns upon empirical propositions of fact. No evidence was pointed to in their support. No academic literature was relied upon. As

the President pointed out in argument, the submissions are falsified by decades of history of representative proceedings in this country:

> "BELL P: ... settlements occurred in class actions for years, decades even, without this mechanism. The forensic benefits of this mechanism are obvious, for defendants, but you're putting up that unless this is permissible, settlements which are a desirable thing, will not be able to be achieved."

119 There are two significant matters to consider. The first is that the scheme of Part 10 is inconsistent with an interpretation of s 183 as empowering the Court to make orders for pre-settlement class closure. The secondary materials provide that Part 10 was modelled on and intended to be interpreted consistently, save for some presently irrelevant express exceptions, with Part IVA of the *Federal Court of Australia Act*. The Australian Law Reform Commission in its report Number 134, 2018, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, at [1.54] noted that the Federal Government implemented the open class regime after careful consideration and quoted the Attorney-General at the time of the passage of the *Federal Court of Australia Act* amendments introducing Part IV as follows:

> "It [the regime] ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceeding. It also achieves the goals of obtaining a common, binding decision while leaving a person who wishes to do so free to leave the group and pursue his or her claim separately."

120 The fifth respondent submitted that the fact that the orders may adversely affect a subset of Group Members does not mean that order 16 was not "appropriate" or "necessary" to ensure justice is done in the proceedings. It was submitted that any order directed to facilitating settlement could be "appropriate" once the interests of the representative group as a whole are appreciated. I do not agree. The structure of Part 10 is that the representative plaintiffs represent the interests of the Group Members. Order 16 has the effect that the appellants and their legal advisors will necessarily face an insoluble conflict of interest in any mediation or settlement discussion. It is in the interests of all Group Members who have registered to achieve a

favourable settlement. It is in the interests of Group Members who have not registered for the proceedings not to settle regardless of the terms offered. This is because order 16 has the effect that they will recover nothing should the matter settle but should the matter proceed to hearing they may be entitled to damages. This issue was confronted by Mr Kirk SC in the following way:

> "LEEMING JA: But isn't the conflict more brutal than that? At the negotiation, Mr McHugh, if he's still with them, with the people who have registered will be trying to get as much money as he can on the table, but if your o 16 stands all of those people who have done nothing, the unregistered non opting out people, their best interests must be served by the settlement failing because if it succeeds and gets through they get nothing. If the settlement fails then at least they're still alive. This isn't a potential thing. This is going to happen at the very time the settlement negotiation starts.
>
> KIRK: Can I make a couple of points in response to that? First, as I put earlier, as the High Court plurality recognised in para 94, people have to stick their hand up at some stage and, as I've said, all you're doing is bringing it forward. This doesn't answer the logic of your Honour's point but it answers the practicality of to a substantial extent. If they didn't stick up their hand first time round, it is possible, though not likely, if you've done decent notice, as you should have done otherwise you're not complying with the scheme, they're going to stick up their hand a second time. So that's a very significant practical answer.
>
> You have to stick up your hand. There's got to be notice. It may not be in Mr McHugh's preferred paper but it's going to be done in some way and some people will miss out. That's it. I have accepted that sometimes there's a little rump of people who hear about it the second time, perhaps because it's on p 3 of the Herald where they didn't hear about it the first time."

121 I understand Mr Kirk SC to have accepted that as a matter of logic the appellants would face a conflict of interest in any mediation but to submit that as a practical matter there was no difference in substance between an order requiring a Group Member to take steps before any settlement and one of the kind discussed in *Brewster* at [94] requiring steps to be taken after settlement has been achieved. The pragmatic answer that there is an "effective determination" of the merits of those Group Members' claims at a time earlier than that envisaged by ss 173 and 177 seems to me to be inconsistent with the text of the Act and the considered dicta of the majority judges in *Brewster* about the breadth of the power in s 183.

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.

123 Since writing this I have also read the judgment of Bell P and I agree with his Honour's additional reasons.

Discretion to make order 16

124 If, contrary to the view of s 183 that I prefer, the Court had power to make order 16, the primary judge's exercise of discretion to make the order miscarried. My reasons may be briefly stated.

125 It is correct, as the respondents submitted, that a number of contentions made by the appellants about the exercise of discretion by the primary judge focused on an alleged failure to give "adequate" consideration or to afford "sufficient" weight, to certain considerations. In the absence of a statutory mandate as to the weight to be given to various relevant factors in the exercise of a discretion, the weight to be given to them is a matter for the primary judge alone: *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at 112; [2008] HCA 42 at [137]–[138] (per Gummow ACJ, Kirby, Hayne and Heydon JJ); *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* (2019) 99 NSWLR 419 at 47; [2019] NSWCA 61 at [20] (Bathurst CJ and Leeming JA). Nevertheless, I have concluded that *House v The King* (1936) 55 CLR 499; [1936] HCA 40 error has been established.

126 In *Winterford* Bromberg J declined to make an order similar to order 16 in circumstances where pleadings were not closed, common questions had not been settled, opt out notices had not been sent out, settlement discussions

had not been undertaken, and no settlement discussions were proposed unless the Court made the order. Bromberg J held at [9] that to make such an order at that stage would "turn on its head the very nature of the opt-out model chosen by the legislature". I would draw the same conclusion here. The proceedings in the present case are in much the same position as in *Winterford*, save that pleadings have closed and common questions have been identified. In the present case, opt out notices have not been sent out, no expert evidence addressing the issue of damages (relating to the representative plaintiffs or Group Members) has been filed and settlement discussions have not been undertaken.

127 The primary judge proceeded on the basis that if the making of order 16 would facilitate settlement, that end was itself sufficient to justify the order, exploring settlement being "imperative": at [50]. In the same paragraph the primary judge found that it was necessary to make order 16 because mediation would "only" be effective if order 16 was made.

128 There was no evidence that a settlement at mediation could "only" be effective if order 16 was made. To the contrary, it is difficult to see how order 16 could be seen to be conducive to settlement at all as it was vigorously opposed by the appellants. No doubt for this reason Wigney J in *Bradgate (Trustee) v Ashley Services Group Ltd* [2017] FCA 1591 at [38] held that "... [t]he Court should generally exercise some caution before making a class closure order over the objection of the applicant". It may readily be accepted, as the respondents submitted, that only 117 Group Members, of an approximate total class size of 300,000, had at the time of the making of order 16 signed a funding agreement. The conclusion that mediation would "only" be effective if order 16 was made was nevertheless an error. The finding was made without evidence. The conclusion that mediation would "only" be effective was inconsistent with a long history of representative proceedings. There are numerous methods for settling cases where there is a doubt about the number of Group Members or the amounts of their claims. Those methods include capping any settlement amount or applying distribution rules to ensure

all Group Members are compensated fairly. *House v The King* error has been established.

129 Secondly, order 16 would have the principal effect of limiting the number of Group Members entitled to participate in any settlement amount. Before making such an order it was a relevant consideration to take into account the interests of all Group Members. The primary judge referred to the comments of Perram J in *Capic v Ford Motor Company of Australia Ltd* [2016] FCA 1020, in which his Honour emphasised that the Court has a role in ensuring that "the interests of the non-party group members are not sacrificed to the interests of the parties before the Court": at [19]. Order 16, by contingently extinguishing some Group Members' rights upon a settlement, prioritises the interests of defendants over a section of Group Members. It is of course in the interests of the defendants to effect a settlement which will bar the claims of the greatest possible number of Group Members. The primary judge did not take into account whether order 16 was in the interests of all Group Members. This was a relevant consideration which was not taken into account.

130 For these reasons if, contrary to the conclusion I have reached there was power to make order 16, the discretion to make the order miscarried and it should be set aside.

Conclusion and proposed orders

131 I propose the following orders:

(1) Leave to appeal granted in matters 2017/00340824; 2017/00378526; 2017/00353017; 2018/00009555; 2018/00009565; 2018/00042244 and 2018/00322648;

(2) Appeal allowed;

(3) Set aside order 16 made in proceedings 2017/00340824; 2017/00378526; 2017/00353017; 2018/00009555; 2018/00009565; 2018/00042244 and 2018/00322648;

(4) Remit the matters to the Equity Division;

(5) Respondents to pay the costs of the appellants.

132 **EMMETT AJA**: This appeal is concerned with the extent of the powers of the Court to make orders under s 183 of the *Civil Procedure Act 2005* (NSW) (**the Act**). Section 183 relevantly provides that, in any proceedings conducted under Pt 10 of the Act, the Court may make an order that the Court thinks appropriate or necessary to ensure that justice is done in the proceedings. Part 10 is concerned with representative proceedings in the Supreme Court of NSW. Section 157(1) of the Act provides that, where seven or more persons have claims against the same person, the claims of all of those persons are in respect of or arise out of the same, similar or related circumstances and the claims of all of those persons give rise to a substantial common question of law or fact, **representative proceedings** may be commenced by one or more of those persons as representing some or all of them.

133 Seven separate representative proceedings have been commenced in the Equity Division of the Court and are being case managed together. Each of the defendants is a motor vehicle manufacturer and each of the proceedings is concerned with allegedly defective airbags installed in motor vehicles. While the seven proceedings have been fixed for hearing in August 2020, it appears likely that the proceedings will not commence until early 2021.

134 On 1 November 2019, a judge of the Equity Division (**the primary judge**) gave reasons foreshadowing orders made on 3 February 2020 and entered on 4 February 2020 relating to the management of all of the proceedings. Save for order 16, the orders are not controversial. Order 16 was described as a "Class Closure" order and was made pursuant to s 183 of the Act. It provided that any group member who neither opts out in accordance with

another order made by the primary judge, nor registers in accordance with a further order on or before a fixed date, is to remain a group member for the purposes of any judgment or settlement. However, order 16 provided that, 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, any group member who neither opts out nor registers is to be bound by the terms of the settlement agreement and barred from making any claim against the defendants in respect of or relating to the subject matter of the proceedings. Thus, according to its terms, the order has effect only in circumstances where an in-principle settlement is achieved prior to the commencement of the trial. In that case, the causes of action of the group members who neither opt out nor register would be extinguished. If an in-principle settlement is not reached and approved, the causes of action of such group members would not be extinguished.

135 In the course of his reasons for making order 16, the primary judge said that the parties must "come to terms with the reality of the situation" and that that involved the parties having an understanding of who would be in the class and therefore what the quantum of likely damages would be.[1] His Honour considered that the class should be closed as proposed in order to allow sufficient time for a settlement to be reached. His Honour considered that it was imperative that the parties explore whether the matter can resolve at mediation and that the mediation would only be effective if the defendants knew the likely number of participants in the class and could make offers reflective of those numbers. His Honour considered that a mediation would only be effective if the parties knew the likely number of participants, such that an offer could be made reflective of those matters.

136 I have had the considerable advantage of reading in draft form the proposed reasons of Payne JA for concluding that leave to appeal should be granted in all of the proceedings, the appeals should be allowed and the relevant "Class Closure" orders be set aside. I agree with his Honour's reasons for proposing those orders and with the making of those orders. I have also read in draft

[1] *Takata Air Bag – Class closure and registration* [2019] NSWSC 1493 at [43] (Sackar J).

form the additional comments of the President and agree with those comments.

137 In particular, I agree with his Honour that, on its proper construction, the purpose of the impugned order 16 is to effect a contingent extinguishment of the causes of action of some group members. The contingency is that the Court may approve a settlement that would have the effect of extinguishing the causes of action of group members who have not registered.

138 I also agree with Payne JA that the impugned order 16 is beyond the power conferred by s 183 of the Act. Section 183 does not confer a power of contingently extinguishing causes of action of some members of the group simply to ensure that realistic settlement discussions may take place by crystallising the maximum amount being claimed. While settlement of such proceedings is desirable and the impugned order 16 may well make settlement more likely, I agree with Payne JA that it does so in a manner contrary to the scheme established by Pt 10 of the Act.

139 Finally, I would also be disposed to agree with Payne JA that, if the impugned order 16 is authorised by s 183, the exercise of discretion by the primary judge miscarried. It is by no means certain that mediation would result in settlement, in circumstances where the impugned order 16 was vigorously opposed by the plaintiffs. Caution should be exercised before making a "Class Closure" order over the objection of the plaintiff. The conclusion of the primary judge that mediation would only be effective if the impugned order was made was reached without evidence and was inconsistent with what is now a substantial history of representative proceedings in this country. It is not essential for settlement to occur that there be no doubt about the number of members of the group or the total amounts of their claims.

****

ANNEXURE A

"Takata Airbag Class Action Proceedings

SHORT MINUTES OF ORDER – REGISTRATION

1 Pursuant to ss 162 and 183 of the Civil Procedure Act 2005 (NSW) (the Act), 4.30 pm AEDT on the date 12 weeks from the Start Date specified in Order 19 of these orders (the Class Deadline) be fixed as the date on or before which:

(a) a Group Member may opt out of the proceeding; and

(b) a Group Member who wishes to participate in the proceeds of any settlement of this proceeding reached before the commencement of the trial on the common issues must register their interest in doing so in the manner set out in these orders.

2 The form and content of the:

(a) Group Member notice, which is Annexure A to these Orders (the Notice);

(b) abridged notice, which is Annexure B to these Orders (the Newspaper Notice);

(c) registration website, the content of which is set out in Annexure C to these orders (the Registration Website),

are approved for the purposes of sections 175 and 176 of the Act.

Notice to Group Members

3 For the purposes of facilitating distribution of the Notice:

(a) Within three days of the Start Date, the solicitors for the Plaintiff and Defendant will jointly engage Epiq Systems Australia Pty Ltd (Epiq) in conjunction and cooperation with the parties to proceedings (2017/00340824); (2017/00378526), (2017/00353017); (2018/00009555); (2018/00009565); (2018/00042244) and (2018/00322648) (the Concurrent Proceedings); and (b) the Plaintiff and the Defendant (and parties to the Concurrent Proceedings) will enter into a deed with Epiq that requires Epiq to keep confidential the information provided to it in the course of its engagement (the Epiq Engagement).

4 Within one week of the Start Date, the Plaintiff will provide to Epiq an email address for each person who has, at the date of these orders, provided their contact information to the Plaintiffs' solicitors (Quinn Emanuel), or to Regency Funding Pty Ltd (Regency), or any related party engaged by Quinn Emanuel, in respect of the proceeding.

5 Within one week of the Start Date, the Defendant will provide to Epiq any email address that the Defendant holds as at the date of these orders, including from any data supplied to it by the State and Territory registration authorities, for each person who has been identified by the Defendant as now

or previously having a Nissan vehicle that is or has been affected by the Takata airbag recall, and Quinn Emanuel must not (and must procure that Epiq does not) use the email addresses provided under this order for any purpose other than for Court ordered communications with Group members.

6 The Plaintiff and Defendant will jointly instruct Epiq, in conjunction and cooperation with the parties to the Concurrent Proceedings, to:

(a) Within one week of the Start Date, arrange for the Registration Website containing only the content in Annexure C to be made available to the public. In these orders, the next business day following the date on which the Registration Website is made available to the public is referred to as the Notice Commencement Date;

(b) By 4:00pm on the Notice Commencement Date:

(i) create an Instagram account by the name of "Australian_Takata_Class_Actions" and cause that account to post an advertisement on Instagram with a reach of approximately 2.5 million; and

(ii) create a Facebook account by the name of "Australian Takata Class Actions" and cause that account to post an advertisement on Facebook with a reach of approximately 4 million,

with each advertisement to contain only a link to the Registration Website and the following text:

Takata airbags class actions

Class Actions have been commenced in the Supreme Court of New South Wales against BMW, Honda, Mazda, Nissan, Subaru, Toyota and Volkswagen, in relation to recalled Takata airbag/s. If you own or lease a BMW, Honda, Lexus, Mazda, Nissan, Subaru, Toyota or Volkswagen vehicle affected by the recall, you may be eligible for compensation. Important information about the class actions, including the option to register or your right to opt out is available here [Epiq insert URL to Registration Website].

(c) Take all reasonable steps to prevent public comments from being displayed on the advertisements referred to in (b) above to the extent practical.

7 Continuously throughout the period from the Notice Commencement Date up to the Class Deadline (the Notice Period), a copy of the Notice will be displayed on the class action page on the website of the Supreme Court of New South Wales. Quinn Emanuel is to notify the Associate to Sackar J of the Notice Commencement Date.

8 The Plaintiff and the Defendant will jointly instruct Epiq, within one week of the Notice Commencement Date, to send an email containing a link to the Registration Website comprising only of the following text:

IMPORTANT LEGAL NOTICE: Takata Airbag Class Action against Nissan (Supreme Court of New South Wales)

You have received this email because you have been identified as someone who may own or lease (or formerly owned or leased) a Nissan Vehicle, which has (or will be) subject to a safety recall arising from it being fitted with certain Takata airbag/s.

This notice is relevant to you if you owned or leased such a vehicle as at 27 February 2018. If you did not own or lease such a vehicle as at 27 February 2018, this notice does not apply to you and you can ignore it.

A class action has been commenced in the Supreme Court of New South Wales against Nissan Motor Co.(Australia) Pty Ltd seeking compensation for owners/lessees of Nissan vehicles (as at 27 February 2018) that are or were fitted with recalled Takata airbags (the Nissan Class Action).

Important information about the Nissan Class Action, including the option to register your claim or your right to opt out of the proceeding is available here [Epiq to insert URL to Registration Website when live],

to each Group Member for whom an email address has been provided pursuant to Orders 4 and 5 above. If further email addresses are provided after that time, the parties are to instruct Epiq to send the above text (including the link to the Registration Website) by email to those further email addresses as soon as possible.

9 The Plaintiff will, for the duration of the Notice Period, cause a link to the Registration Website, together with a copy of the Further Amended Statement of Claim and the Defence to be displayed on the website hosted by Regency regarding the proceeding (www.airbagrecall.com.au) and to remain continuously displayed until further order of the Court or conclusion of the proceedings.

10 The Defendant will, on the Notice Commencement Date, cause a link to the Registration Website to be placed prominently on:

(a) its website (https://www.nissan.com.au/); and

(b) the social media platform belonging to the account https://www.facebook.com/nissanaustralia/:

with liberty to apply appropriate settings so that the post is only visible to audiences accessing Facebook from within Australia (subject to those settings being provided to the Plaintiff 7 business days prior to the Notice Commencement Date) and to take steps to prevent public comments from being displayed on the post to the extent practical, with the following text:

Takata Airbag Class Action – Important Legal Notice

A class action has been commenced in the Supreme Court of New South Wales against Nissan Motor Co. (Australia) Pty Ltd in relation to the recall of Nissan vehicles fitted with certain Takata airbag/s. If, as at 27 February 2018, you owned or leased a Nissan vehicle affected by the recall, you may be eligible for compensation. Important information about the Class Action, including the option to register your claim and your right to opt out is available here: [insert URL to Registration Website once live],

to remain continuously displayed for the duration of the Notice Period.

11 During the Notice Period, the Plaintiff will, acting in conjunction and cooperation with the Plaintiffs in the Concurrent Proceedings, cause a copy of the Newspaper Notice to be published, as a half page, in the following newspapers:

(a) The Australian;

(b) The Australian Financial Review;

(c) Herald Sun, Victoria;

(d) The Daily Telegraph, New South Wales;

(e) The Advertiser, South Australia;

(f) The Courier Mail, Queensland;

(g) The Mercury, Tasmania;

(h) Canberra Times, Australian Capital Territory;

(i) The West Australian, Western Australia; and

(j) NT News, Northern Territory,

with the first publication to appear within two weeks of the Notice Commencement Date, the second publication to appear on or around 8 weeks after the Notice Commencement Date and the third publication to appear on or around 12 weeks after the Notice Commencement Date.

Opt out

12 Pursuant to s 162 of the Act, any Group Member who wishes to opt out of these proceedings must, on or before the Class Deadline, deliver to the Sydney Registry of the Supreme Court of New South Wales (the Registry), an Opt Out Notice in the form of Schedule A to the Notice.

13 If, on or before the Class Deadline, the solicitors for any party receive a notice purporting to be an Opt Out Notice referable to this proceeding, the solicitors must file that notice with the Court, within three (3) days of receipt of the notice by the solicitors and the notice shall be treated as an Opt Out Notice received by the Court at the time it was received by the solicitors.

14 The solicitors for the parties have leave to inspect the Court file and to copy any Opt Out Notices filed.

Registration

15 Pursuant to s 183 of the Act, any Group Member who wishes to participate in the proceeds of any settlement of this proceeding which is reached at any time prior to the commencement of the trial on the common issues must register by either:

(a) completing and submitting the online Group Member registration form available on the Registration Website, which will contain the questions set out in the form of the Registration Website at Annexure C of these orders (Group Member Registration Form); or

(b) by downloading the PDF version of the Group Member Registration Form, completing it and forwarding it to Epiq at the address specified in the Notice,

before the Class Deadline.

Class closure orders

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

17 For the duration of the Notice Period, the solicitors for the Plaintiff and Defendant are to request Epiq to provide to them a spreadsheet within 5 business days of the end of each calendar month (and 5 business days of the Class Deadline) containing:

(a) a unique identification number for each of each Group Member who has submitted or returned a Group Member Registration Form (Registered Group Members), with new entries since the last spreadsheet was provided clearly identified; and

(b) the information provided in the Registration Form, save for the name and contact details of the Registered Group Member,

and the Defendant and Plaintiff (and their legal advisers) must not (and must procure that any third party does not) use the information provided under this order for any purpose other than for engaging in settlement discussions. For the avoidance of any doubt, the information must not be used for book-building purposes.

Other

18 The parties have liberty to apply on three (3) days' notice generally.

19 The proceedings are listed for a Case Management Hearing on 26 February 2020 (Start Date), on which occasion the Court will consider:

(a) whether, and if so how, Annexures A, B and C ought to be altered by reason of any amendment to the Plaintiff's pleadings that is made on or before the Start Date; and

(b) whether, and if so how, any alteration should be made to these orders by reason of any submissions made by the Roads Corporation (trading as

"VicRoads") or similar authority in relation to the use of driver registration information."

I certify that the preceding 139 paragraphs are a true copy of the reasons for judgment herein of the Honourable Justice Payne and of the Court.

Date: 22/4/2020

Associate: