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THE SHOW MUST GO ON: *WIGMANS V AMP LTD* (2021) 388 ALR 272

I Introduction

Australian legislation governing representative proceedings — more commonly known as class actions — does not provide guidance on how courts are to deal with multiple representative proceedings brought in respect of the same controversy.[1]

This lack of guidance has led Australian courts to adopt a number of divergent approaches to the issue of a multiplicity of proceedings. One such approach is to adopt a process similar to that utilised by courts in the United States.[2] That is, to conduct a form of 'beauty parade', whereby one proceeding is selected to continue, and the others stayed, after conducting a 'multi-factorial analysis'.[3] The High Court's endorsement of this approach in *Wigmans v AMP Ltd* ('*Wigmans*')[4] means that 'beauty parades' look set to remain part of the Australian class action landscape in the future and provides much needed clarity with respect to the issue of multiplicity.

This case note explores the High Court's decision in *Wigmans* and the decisions of the courts below. Ultimately, it will accept that the majority's approach is the correct one, having regard to the purpose of representative proceedings and the consequences of the 'first in, best dressed' approach for which the appellant contended.

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1 Vince Morabito, 'Clashing Classes Down Under: Evaluating Australia's Competing Class Actions through Empirical and Comparative Perspectives' (2012) 27(2) *Connecticut Journal of International Law* 245, 248, 252, 317.

2 *Federal Rules of Civil Procedure of 2020*, 28 USC r 23 ('*Federal Rules of Civil Procedure*'). Similarly, in Canada, courts entertain 'carriage motions' to determine which proceeding should continue: ibid 282–4; Australian Law Reform Commission, *Integrity, Fairness and Efficiency: An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) 103–5 [4.54]–[4.57].

3 See, eg, *Perera v GetSwift Ltd* (2018) 263 FCR 92 ('*GetSwift*'). It should be noted that Australian courts have been loath to expressly employ the phrase 'beauty parade' for the process by which a multiplicity of proceedings is resolved: see, eg, *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2017) 252 FCR 1, 17 [62] (Jagot, Yates and Murphy JJ).

4 (2021) 388 ALR 272 ('*Wigmans*').

II Background

Evidence given by executives of AMP Ltd ('AMP') at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry on 16–17 April 2018 revealed that AMP deliberately charged its customers fees for ongoing financial services that it had not provided.[5] Predictably, AMP's share price fell sharply.[6] Within seven weeks of the evidence being given, five open class[7] representative proceedings on behalf of AMP shareholders had been commenced against AMP.[8]

Ms Marion Wigmans, represented by Quinn Emanuel, was 'first off the mark' with proceedings on her behalf commencing in the Supreme Court of New South Wales on 9 May 2018. Some seven hours later, Wileypark Pty Ltd, represented by Phi Finney McDonald, commenced proceedings in the Federal Court of Australia. On 25 May 2018, Mr Andrew Georgiou, represented by Shine Lawyers, commenced proceedings in the Federal Court, as did Fernbrook (Aust) Investments Pty Ltd ('Fernbrook'), represented by Slater & Gordon. The fifth and final proceeding was commenced in the Federal Court on 7 June 2018 by Komlotex Pty Ltd ('Komlotex'), represented by Maurice Blackburn.[9]

The claims made in each of the proceedings overlapped considerably,[10] with each party seeking compensation for loss caused by AMP's alleged breach of its continuous disclosure obligations.[11] Claims of misleading and deceptive conduct and statutory unconscionability were also advanced.[12]

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5 See: ibid 273 [1] (Kiefel CJ and Keane J), 286–7 [54] (Gageler, Gordon and Edelman JJ); *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 140; Transcript of Proceedings, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Round 2, Commissioner Hayne, 16 April 2018) 1053–99; Transcript of Proceedings, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Round 2, Commissioner Hayne, 17 April 2018) 1103–201.

6 *Wigmans* (n 4) 273 [1] (Kiefel CJ and Keane J).

7 *Wigmans v AMP Ltd* (2019) 103 NSWLR 543, 545–6 [4] (Bell P) ('*Wigmans* (CA)'):

> [T]he class actions … [were open] in the sense that, apart from the act of investment in [AMP] … none of the class or group members had to take any further step[s] to become a member of the class such as enter into a retainer agreement with a firm of solicitors and/or a funding agreement with a [litigation] funder.

8 *Wigmans* (n 4) 273 [2] (Kiefel CJ and Keane J), 287 [55] (Gageler, Gordon and Edelman JJ).

9 Ibid 273–4 [3] (Kiefel CJ and Keane J).

10 For a consideration of the differences in the respective proceedings, see ibid 287 [56] (Gageler, Gordon and Edelman JJ).

11 *Corporations Act 2001* (Cth) s 674(2); ASX, *Listing Rules* (at 1 May 2013) r 3.1.

12 *Wigmans* (n 4) 273 [2] (Kiefel CJ and Keane J).

The proceedings commenced in the Federal Court were transferred to the Supreme Court of New South Wales,[13] and the Fernbrook proceedings were consolidated with the Komlotex proceedings.[14]

Between 29 August 2018 and 9 November 2019 — faced with the threat of competing with multiple proceedings — the representative plaintiff in each of the four remaining proceedings sought orders that each of the other proceedings be stayed.[15] AMP took no position in relation to the applications, other than to submit, unsurprisingly, that it should only be made to face one of the four sets of proceedings.[16]

The task of the courts was to determine which of the proceedings should be allowed to continue.

III Decisions Below

A *Supreme Court of New South Wales*

At first instance, Ms Wigmans, the first party in time to file, advanced two primary submissions in support of her stay application. First, that the continuation of the subsequent proceedings was an abuse of process.[17] Second, given that the proceedings were further advanced in terms of preparation for mediation or an ultimate hearing, the application of case management principles contained within the *Civil Procedure Act 2005* (NSW) ('*CPA*')[18] supported the Wigmans proceeding being the only one permitted to continue.[19]

Chief Judge in Equity Ward rejected the abuse of process argument, noting that the legislation governing representative proceedings contemplates that there may be more than one proceeding in relation to the same controversy.[20] Instead, the issue of a multiplicity of proceedings was, in her Honour's view, to be dealt with by reference to case management principles.[21] However, the progress of the proceedings was but one factor to which Ward CJ in Eq had regard. Her Honour undertook a '"multi-factorial analysis" of the kind endorsed by the Full Court of the Federal Court'[22]

13 *Wileypark Pty Ltd v AMP Ltd* (2018) 265 FCR 1 ('*Wileypark*').

14 *Wigmans v AMP Ltd* [2019] NSWSC 603, [112] (Ward CJ in Eq) ('*Wigmans* (SC)').

15 *Wigmans* (n 4) 273–4 [3] (Kiefel CJ and Keane J), 288 [58] (Gageler, Gordon and Edelman JJ).

16 Ibid.

17 *Wigmans* (SC) (n 14) [27] (Ward CJ in Eq).

18 To 'facilitate the just, quick and cheap resolution of the real issues in the proceedings': *Civil Procedure Act 2005* (NSW) s 56(1) ('*CPA*').

19 *Wigmans* (SC) (n 14) [30] (Ward CJ in Eq).

20 Ibid [98].

21 Ibid [104].

22 *Wigmans* (n 4) 274–5 [6] (Kiefel CJ and Keane J).

in *Perera v GetSwift Ltd* (‘*GetSwift*’).[23] Relevant to this analysis were eight factors drawn from the judgment of the Full Court in *GetSwift*,[24] as well as Lee J at first instance.[25] They were the

1. competing funding proposals, costs estimates and net hypothetical return to group members;[26]

2. proposals for security for AMP’s costs;

3. nature and scope of the causes of action advanced;

4. size of the respective classes;

5. extent of any bookbuild;[27]

6. experience of the legal practitioners (and funders) and availability of resources;

7. state of progress of the proceedings; and

8. conduct of the representative plaintiffs to date.[28]

Having regard to the proposals with respect to security for AMP’s costs, the choice of which proceedings to stay and which to continue was narrowed to two options. For Ward CJ in Eq, the proposals made by the Wigmans and consolidated Komlotex

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23 *GetSwift* (n 3) 136 [195] (Middleton, Murphy and Beach JJ).

24 Ibid 135–7 [188]–[197].

25 *Perera v GetSwift Ltd* (2018) 263 FCR 1, 48–9 [169] (Lee J) (‘*Perera v Getswift*’), citing *McKay Super Solutions Pty Ltd v Bellamy’s Australia Ltd* [2017] FCA 947, [71] (Beach J) (‘*McKay Super Solutions*’).

26 A group member is a ‘member of a group of persons on whose behalf a representative proceeding has been commenced’: *Federal Court of Australia Act 1976* (Cth) s 33A (definition of ‘group member’). See also: *Civil Procedure Act 2005* (NSW) s 155 (definition of ‘group member’); *Supreme Court Act 1986* (Vic) s 33A (definition of ‘group member’). Group members are ultimately those who stand to benefit in any judgment sum or settlement obtained on their behalf.

27 A term used to describe the process by which a law firm seeking to act for plaintiffs in representative proceedings identifies potential group members, contacts them, creates awareness of the proceedings generally, and encourages those potential group members to register their interest or enter into retainer and funding agreements: John Walker, Susanna Khouri and Wayne Attrill, ‘Funding Criteria for Class Actions’ (2009) 32(3) *University of New South Wales Law Journal* 1036, 1044; Vicki Waye and Vince Morabito, ‘Financial Arrangements with Litigation Funders and Law Firms in Australian Class Actions’ in Willem H van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Routledge, 2017) 155, 178.

28 *Wigmans* (SC) (n 14) [126] (Ward CJ in Eq), cited in *Wigmans* (n 4) 274–5 [6] (Kiefel CJ and Keane J), 288 [60] (Gageler, Gordon and Edelman JJ).

proceedings to pay security directly into court, as distinct from relying on 'after the event' ('ATE') insurance policies, meant that they were to be preferred.[29]

However, the decisive factor between the Wigmans and combined Komlotex proceedings was the 'no win, no fee' model proposed by the Komlotex proceedings with Maurice Blackburn charging a 25% uplift fee on its professional fees, should the action be successful.[30] This was compared with the funding model proposed by the Wigmans proceedings, under which a commercial litigation funder stood to receive up to 20% of any recovery in addition to the professional fees of Quinn Emanuel.[31] The 'no win, no fee' model was considered likely to deliver a greater net return to group members than the model proposed in the Wigmans proceeding.[32]

Ms Wigmans appealed to the New South Wales Court of Appeal.

B *New South Wales Court of Appeal*

President Bell, with whom Macfarlan, Meagher, Payne and White JJA agreed, found no error in the approach of Ward CJ in Eq below and dismissed the appeal.[33] The Court of Appeal upheld the multifactorial approach taken by Ward CJ in Eq in determining which of the proceedings ought to continue.[34] Analogies drawn by Ms Wigmans to the principles of *lis alibi pendens*, the 'clearly inappropriate forum' test, and abuse of process principles were, in the Court of Appeal's view, inapposite in this context.[35]

The only 'real point of difference' between the reasoning of Bell P and Ward CJ in Eq was one of terminology.[36] In Bell P's view, the task of dealing with a multiplicity of proceedings within the context of a stay application was not an exercise in mere 'case management' and instead 'involve[d] an assessment as to whether the ends of justice require such a remedy'.[37] Ms Wigmans appealed to the High Court of Australia.

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29 On the basis that reliance on ATE insurance would result in additional costs being borne by group members and that there was uncertainty surrounding the precise terms of the policies; those policies not being in evidence: *Wigmans* (SC) (n 14) [222], [226]–[228], [233] (Ward CJ in Eq).

30 Ibid [57].

31 Ibid [55]–[56].

32 Ibid [354].

33 *Wigmans* (CA) (n 7) 565 [100] (Bell P, Macfarlan JA agreeing at 565 [101], Meagher and Payne JJA agreeing at 565 [102], White JA agreeing at 567 [111]).

34 Ibid 564 [91]–[92] (Bell P).

35 Ibid 554–5 [43]–[44], 561 [73]–[77], 562 [80], 563–4 [88]–[90] (Bell P).

36 Ibid 565 [95] (Bell P).

37 Ibid.

IV High Court Decision

By a slim majority, comprising Gageler, Gordon and Edelman JJ, the High Court dismissed the appeal and held that the approach taken by Ward CJ in Eq to the multiplicity of proceedings was the correct one. Chief Justice Kiefel and Keane J dissented.

A *The Majority*

Ms Wigmans' 'central complaint'[38] before the High Court was that the Court of Appeal erred in not applying a rule or presumption that 'it is prima facie vexatious [and oppressive] to commence an action if an action is already pending in respect of the same controversy'.[39] In this regard, Ms Wigmans' relied on several lines of authority. Namely

- general law principles concerning multiplicity of suits, and *McHenry v Lewis*[40] in particular;
- the court's inherent power to grant a stay;
- abuse of process principles from *Henry v Henry*[41] and *Moore v Inglis*;[42] and
- equitable principles concerning test actions.[43]

In dismissing Ms Wigmans' 'central complaint', the majority turned to the statutory language of s 67 of the *CPA*, the source of the Supreme Court's power to grant a stay, and pt 10, governing representative proceedings more generally. In the majority's view, there was

> nothing in s 67 … that supports Ms Wigmans' contention that the considerations to which a court might have regard in exercising the power in s 67 are to be confined, or that the statutorily identified considerations … are to be displaced, by reference to a first-in-time rule or presumption.[44]

The conclusion that there is no first-in-time rule or presumption was, in the majority's view, reinforced by the scheme of pt 10.[45]

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38 *Wigmans* (n 4) 289 [68] (Gageler, Gordon and Edelman JJ).

39 Ibid 284 [43] (Kiefel CJ and Keane J).

40 (1882) 22 Ch D 397.

41 (1996) 185 CLR 571.

42 (1976) 9 ALR 509.

43 *Wigmans* (n 4) 289–90 [69] (Gageler, Gordon and Edelman JJ).

44 Ibid 291 [75] (Gageler, Gordon and Edelman JJ).

45 Ibid [76], citing *BMW Australia Ltd v Brewster* (2019) 374 ALR 627, 641–6 [60]–[81] (Kiefel CJ, Bell and Keane JJ), 660–3 [136]–[145] (Gordon J).

Employing the words of Lord Templeman in *The Abidin Daver*,[46] the majority observed that a first-in-time approach would be unworkable and would result in an 'ugly rush' to the court door, with causes of action and claims for relief being framed as broadly as possible to gain so-called 'juridical advantages'.[47]

Consistent with the decisions of the lower courts, the majority disagreed that the authorities relied upon by Ms Wigmans supported any first-in-time rule or presumption. Her arguments in this regard were, according to the majority, 'impermissibly selective and at various points merge[d] different ideas from areas with different jurisprudential foundations'.[48]

Instead, adopting the language of Bell P below, the majority held that there can be no 'one size fits all' approach to a multiplicity of representative proceedings.[49] The majority noted that staying one or more of the proceedings was but one option for dealing with the issue of multiplicity.[50]

When selecting which of the proceedings should go forward, the majority held that the court is to determine which proceeding going ahead would be in the best interests of group members.[51] This question is to be determined by reference to 'all relevant considerations', including those identified by the primary judge.[52] Contrary to Ms Wigmans' submissions, this included a consideration of the competing funding proposals, costs estimates and net hypothetical return to group members.[53]

In this regard, the majority noted that '[t]here is nothing foreign to the judicial process for a court to take into account likely success in proceedings or quantum of recovery'.[54] The majority noted this is a relevant factor when a court is considering

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46 [1984] AC 398.

47 *Wigmans* (n 4) 294 [86] (Gageler, Gordon and Edelman JJ), quoting ibid 426.

48 Ibid 294 [88].

49 Ibid 286 [52], 299 [106] (Gageler, Gordon and Edelman JJ).

50 Ibid 299 [106] (Gageler, Gordon and Edelman JJ). Other options included those initially identified by Beach J in *McKay Super Solutions* (n 25) [9], which involved competing representative proceedings in which Maurice Blackburn and Slater & Gordon acted for the applicants. The options were as follows: consolidate the proceedings; 'de-clas[s]' one or more of the proceedings under s 33N(1) of the *Federal Court of Australia Act 1976* (Cth); hold a joint trial of all proceedings with each left constituted as open class proceedings (described as the 'wait and see' approach in *Southernwood v Brambles Ltd* (2019) 137 ACSR 540, 545 [20] (Murphy J)); and close the classes in one or more of the proceedings but leave one of the proceedings as an open class proceeding, with a joint trial of all. For a recent example of consolidation being used as a means of dealing with the issue of multiplicity see *Fuller v Allianz Australia Insurance Ltd* [2021] VSC 581.

51 *Wigmans* (n 4) 286 [52], 300 [109] (Gageler, Gordon and Edelman JJ).

52 Ibid 300 [109], 301 [112] (Gageler, Gordon and Edelman JJ).

53 Ibid 300 [110] (Gageler, Gordon and Edelman JJ).

54 Ibid 301 [112] (Gageler, Gordon and Edelman JJ).

'whether bringing or defending litigation by trustees is proper or can be justified having regard to the best interests of those to whom fiduciary duties are owed'.[55]

B *The Minority*

In the minority, Kiefel CJ and Keane J held that the lower courts erred by not allowing Ms Wigmans her right to pursue her case as, in their Honours' view, the first-in-time case should prevail unless there is a juridical basis to prefer a later in time filed action.[56]

Unlike the majority, the minority was uncomfortable with the prospect of the Supreme Court making a speculative choice as to which sponsor, be it law firm or litigation funder, would be capable of delivering the best outcome for group members, particularly in circumstances where the same court will be tasked with ultimately determining the outcome of the proceedings.[57] The minority warned:

> The Supreme Court's fundamental function as the independent arbiter of the merits of the group members' claims as between them and the defendant sits awkwardly with the assumption, without legislative direction, of a role whereby the Court makes a reputational investment in the choice of sponsor.[58]

In emphasising that the provisions of the *CPA* did not provide for a process by which the Court would make a reputational investment in a particular sponsor, the minority contrasted the provisions of the *CPA* to 'carriage' and 'certification' motions under United States law.[59] The minority observed that in the United States, the *Federal Rules of Civil Procedure of 2020* ('*Federal Rules of Civil Procedure*') provide that the court must 'appoint class counsel' to control the prospective proceeding on the plaintiff's side of the record.[60] In circumstances where more than one adequate applicant has sought appointment, 'the court must appoint the applicant best able to represent the interests of the class'.[61]

The minority observed that the provisions of the *Federal Rules of Civil Procedure* 'stand in stark contrast to Pt 10 of the *CPA*'[62] and that

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55 Ibid. The majority there noted that 'similar principles apply to liquidators seeking advice or seeking approval to settle a proceeding or enter a funding agreement' and 'are centrally important when a court approves a compromise of a claim made by a person under disability': at 301 [112].

56 Ibid 277 [16] (Kiefel CJ and Keane J).

57 Ibid 277 [15] (Kiefel CJ and Keane J).

58 Ibid.

59 Ibid 281–2 [33] (Kiefel CJ and Keane J).

60 Ibid.

61 *Federal Rules of Civil Procedure* (n 2) r 23(g)(2).

62 *Wigmans* (n 4) 282 [35] (Kiefel CJ and Keane J).

> [i]t is telling that, when the *CPA* was enacted, the Parliament of New South Wales had before it the example of the legislative regime that operates in the United States to facilitate the determination by the courts of the competition between would-be sponsors of class actions, but did not adopt that example or any relevant aspect of it.[63]

The minority concluded that '[t]he stay and cross-stay applications ought to have been determined, not by the "multi-factorial analysis"'[64] for which they found no support in the *CPA*, 'but by reference to the principle that it is prima facie vexatious to commence an action if an action is already pending in respect of the same controversy'.[65]

As to whether this conclusion would result in a 'race to the courthouse' and inadequate preparation, the minority was of the view that this was an 'irrelevant distraction' and ironic given that s 56 of the *CPA* recognises speed in litigation as a positive virtue.[66]

V Comment

The majority's approach — and the approach of the courts below — to determine the question of multiplicity by reference to which of the proceedings would be in the best interests of group members, should be an uncontroversial one.[67] An approach that does not have the best interests of group members as its primary consideration would be inimical to the whole purpose of representative proceedings: 'to enable claimants … whose claims would be singularly too insignificant to justify … commencing [the] proceedings alone', to seek compensation.[68]

A 'first-in-best-dressed' approach that gave an arbitrary primacy to the time of filing would favour the commercial interests of law firms and litigation funders to be the first to the filing gate and ignore the interests of those whom the courts are ultimately there to protect.[69] There can be little doubt that such an approach would lead to an 'ugly rush' to the courthouse and would result in 'hasty preparation and lack of mature reflection'[70] with 'poorly thought through originating applications and pleadings'.[71] All of which would serve to vex respondents and undermine the policy

63 Ibid.

64 Ibid 284 [43] (Kiefel CJ and Keane J).

65 Ibid.

66 Ibid 285 [47] (Kiefel CJ and Keane J).

67 Indeed, it was the approach preferred by the Australian Law Reform Commission in its 2018 report into class action proceedings and third-party litigation funders: Australian Law Reform Commission (n 2) 119 [4.108].

68 *Kelly v Scenic Tours Pty Ltd* [2019] NSWSC 1266, [110] (Harrison AsJ).

69 *Wileypark* (n 13) 8 [18] (Allsop CJ).

70 Ibid.

71 *Perera v GetSwift* (n 25) 49 [170] (Lee J).

objectives of modern dispute resolution,[72] which are directed toward the 'just, quick and cheap resolution of the real issues in the proceedings'.[73] This is perhaps why, as Acting Justice of Appeal Arthur Emmett has observed, '[t]he common law has never favoured the first to file rule as a means of resolving which of competing actions should proceed'.[74]

In practice, unless one proceeding is well-advanced as compared to the others, most of the factors considered in a 'multi-factorial analysis' will be neutral, leaving, as it did in *Wigmans*, the net hypothetical return to group members as the determinative factor.[75] This will invariably lead to an increase in competition between law firms and litigation funders prepared to reduce their costs or proposed commissions to vie for the carriage of the proceeding. Ultimately, this competition will result in higher returns for group members.[76] Such a result is surely to be desired, not feared. Again, this approach will serve to benefit group members and not the commercial interests of law firms and litigation funders.

VI Conclusion

Wigmans provides welcome clarity to those involved in representative proceedings. It confirms that the issue of a multiplicity of proceedings should be dealt with by having primary regard to the best interests of group members and by reference to all relevant considerations.

In practice, as has already been demonstrated by the decision in *CJMcG Pty Ltd v Boral Ltd*,[77] the acceptance of a 'beauty parade' approach is likely to result in the net hypothetical return to group members being the determinative factor, resulting in law firms and litigation funders reducing their proposed commissions to vie for the privilege of conducting a representative proceeding on behalf of group members. It also avoids those actors competing in an 'ugly rush' to the courthouse with hastily prepared claims, liable to vex respondents and act to the detriment of group members.

Beauty parades in class action litigation are here to stay. That is a good thing.

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72 Ibid.

73 *CPA* (n 18) s 56. See also *Aon Risk Services Australia v Australian National University* (2009) 239 CLR 175, 210–11 [90]–[93] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

74 Acting Justice of Appeal Arthur Emmett, 'Class Action Squabbling' (2019) (15–16) *Butterworths Corporation Law Bulletin* [25]: 4–10, [23].

75 See also *CJMcG Pty Ltd v Boral Ltd [No 2]* (2021) 389 ALR 699 ('*CJMcG*'), in which Lee J found substantially all of the considerations to be neutral, such that the 'most compelling factor' was the net return to group members: at 704 [14], 724–5 [96].

76 Robert Johnston et al, 'Beauty Parades Are Here to Stay', *Johnson Winter & Slattery* (Article, March 2021) <https://jws.com.au/en/insights/articles/2021-articles/beauty-parades-are-here-to-stay>; Komlotrex Pty Ltd and Fernbrook (Aust) Investments Pty Ltd, 'Second and Third Respondents' Submissions', Submission in *Wigmans v AMP Ltd*, S67/2020, 7 July 2020, [53].

77 *CJMcG* (n 75).