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TRANSCRIPT OF PROCEEDINGS

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S ECI 2022 04175

SUPREME COURT OF VICTORIA

CIVIL JURISDICTION

MELBOURNE

FRIDAY 21 OCTOBER 2022

BEFORE THE HONOURABLE JUSTICE RIORDAN

PETER LAWRENCE v MELBOURNE FOOTBALL CLUB LIMITED (ACN 005 686 902)

APPLICATION

MR J. PETERS KC appeared on behalf of the Plaintiff.

MS P. NESKOVCIN KC appeared on behalf of the Defendant.

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7

8 MR PETERS: Your Honour, the matter's proceeding.

9 HIS HONOUR: Thank you, Mr Peters.

10 MR PETERS: Now, some paperwork's come in since we last spoke,  
11 Your Honour.

12 HIS HONOUR: Yes, I'll take you through what I've got to make  
13 sure I've got everything if that's - - -

14 MR PETERS: Certainly, Your Honour.

15 HIS HONOUR: - - - the most convenient method. If you could  
16 just bear with me for a moment while I close a few  
17 windows. Critically, I have the affidavit of Mr Lawrence  
18 of 18 October.

19 MR PETERS: Yes.

20 HIS HONOUR: I have your submissions of 19 October. I have an  
21 affidavit of Mr Goldberg of 20 October. I have  
22 submissions from the defendant on 20 October, an  
23 affidavit of Mr Gu of 20 October, I have a joint bundle  
24 of submissions, I have plaintiff's supplementary  
25 submissions of today's date. Do I have everything from  
26 your point of view?

27 MR PETERS: You do, Your Honour, and I suspect that what's I've  
28 noted also from the defendant's point of view.

29 HIS HONOUR: All right, thank you. Ms Neskovicin, do I have  
30 everything from your point of view?

31 MS NESKOVICIN: Yes, thank you, Your Honour.

32 HIS HONOUR: All right. Ms Neskovicin, I might, if I could,  
33 address you first just so I understand the issues as you  
34 put them. Your position is that, what I'll just call the

1 Archtics database, which on one view, is a database that  
2 contains records relating to all of the AFL clubs,  
3 members, et cetera. I gather that, in terms of the  
4 Melbourne Football Club, only the Melbourne Football Club  
5 and the AFL can have access to all that database.

6 MS NESKOVCIN: Correct, Your Honour.

7 HIS HONOUR: Interesting that the AFL can as well, I gather.

8 MS NESKOVCIN: Yes, Your Honour, because they manage the  
9 platform.

10 HIS HONOUR: And the evidence displays that there's all sorts  
11 of material on that database about members but other  
12 things as well - - -

13 MS NESKOVCIN: Yes.

14 HIS HONOUR: - - - and Mr Peters contends it appears that the  
15 entirety of that database is the register.

16 MS NESKOVCIN: Yes.

17 HIS HONOUR: You, rather, say that that's not - the entirety is  
18 not the register. You say that your client complies with  
19 its obligations by reason of the fact that, in that great  
20 bag of material - database of material, all of those  
21 things that need to be on the register are in there  
22 somewhere - - -

23 MS NESKOVCIN: Yes.

24 HIS HONOUR: - - - and they can be organised and displayed by  
25 reason of an appropriate search of the database.

26 MS NESKOVCIN: Yes.

27 HIS HONOUR: But searches to those features out.

28 MS NESKOVCIN: Yes.

29 HIS HONOUR: And on that basis, you say that your client  
30 complies with its requirements and it may be there's  
31 another alternative that in fact this method of doing it

1 so that there's no thing called a register but rather the  
2 register is complied with by your client's capacity to  
3 search the database and provide the information in hard  
4 copy from time to time, is an interesting question.

5 MS NESKOVCIN: Can I interrupt, Your Honour.

6 HIS HONOUR: Yes.

7 MS NESKOVCIN: Our position is actually made entirely clear by  
8 s1306 of the Corporations Act and we fail to mention that  
9 in our submissions. It's a matter that my learned junior  
10 brought to our attention - - -

11 HIS HONOUR: 1306?

12 MS NESKOVCIN: 1306. Because it confirms what we said in our  
13 submissions in very clear terms and that is, that the  
14 register, if the matter is stored elsewhere, does not  
15 have to be a thing until it is produced. The 1306 says,  
16 'A book [which for present purposes includes a register]  
17 that is required by this Act to be kept, may be kept by  
18 [looking at] (b), recording or storing the matters  
19 concerned by means of, relevantly, an electronic device.'

20 But then that's subject to sub-paragraph 2 which says,  
21 'Sub-s1 does not authorise a book to be kept by an  
22 electronic device unless [in] (a), the matters stored  
23 will be capable of being reproduced in a written form.'

24 HIS HONOUR: Yes, all right. So you say that supports your  
25 position - - -

26 MS NESKOVCIN: Yes.

27 HIS HONOUR: - - - that, in modern age, it doesn't have to be  
28 kept.

29 MS NESKOVCIN: That's right.

30 HIS HONOUR: It can be prepared from time to time.

31 MS NESKOVCIN: Correct.

1 HIS HONOUR: Yes, I understand that, and it seems to support  
2 that proposition. If, in fact, you're wrong about that,  
3 then your client hasn't kept a register in accordance  
4 with the Act and the effect of that - I'll hear from  
5 Mr Peters in a minute though - means that this  
6 application would have to fail. Your client might have  
7 other difficulties but you don't have a register to  
8 inspect.

9 MS NESKOVCIN: That's one alternative. Alternately,  
10 Your Honour, the plaintiff's rises no higher than his  
11 right under 173 and as our learned friends now can see,  
12 the right under 173 is the right of access to what is  
13 required to be kept on the register and all that is  
14 required to be kept on the register are the names and  
15 postal addresses. Your Honour raised the question as to  
16 whether or not address means an email address. The  
17 parties now agree that it does not include email  
18 addresses.

19 HIS HONOUR: Well, let me challenge that question because  
20 that's not what His Honour Justice Yates held, is it?

21 MS NESKOVCIN: We say it is what His Honour held.

22 HIS HONOUR: No, he specifically says that's the minimum  
23 required. Sorry, it indicates a minimum requirement  
24 because there's this facility to serve.

25 MS NESKOVCIN: Yes. Yes, but, Your Honour, what His Honour  
26 said was, for the purposes of 169(1)(a), the reference to  
27 'address' is a reference to a postal address.

28 HIS HONOUR: No, he doesn't say that. He doesn't.

29 MS NESKOVCIN: But that does not mean that it cannot  
30 include - - -

31 HIS HONOUR: He doesn't even say that.

1 MS NESKOVCIN: - - - something additional.

2 HIS HONOUR: He says it indicates.

3 MS NESKOVCIN: Well, can I take Your Honour to 249J and this is  
4 how it came about. Now, this section's since been  
5 amended but this itself supports the construction that we  
6 say arises. 249J talks about how to give notice of the  
7 meeting and in sub-s(3) which His Honour considered but  
8 in a different form, there he says that, 'A company may  
9 give the notice of meeting to a member by sending it by  
10 post to the address for the member in the register of  
11 members or the alternative address.'

12 Now, let's say there's no alternative address or let's  
13 just put that to one side. The reference to the address  
14 for member in the register is a reference to the postal  
15 address.

16 HIS HONOUR: Certainly.

17 MS NESKOVCIN: But then what - - -

18 HIS HONOUR: And there's no doubt, you can serve, providing  
19 they've given you a physical address and it's  
20 recorded - - -

21 MS NESKOVCIN: Yes.

22 HIS HONOUR: - - - this is a facilitative provision which  
23 enables - - -

24 MS NESKOVCIN: Correct.

25 HIS HONOUR: - - - a service to be affected by post at that  
26 address.

27 MS NESKOVCIN: Yes, but this is the only indicator in the Act  
28 that, in our submission, suggest that the reference in  
29 169(1) (a) to address is a reference to a postal address.  
30 That does not mean other persons cannot nominate an  
31 alternative address, but otherwise, address is not

1 defined in the Act and certainly email address is not  
2 included within address.

3 But there's a second important point, Your Honour.  
4 You look at sub-s(c) in the volume that Your Honour's  
5 looking at, it's since been amended, it says, 'An  
6 alternative way of giving notice is by electronic means  
7 in accordance with s253RA.' And as Your Honour might be  
8 aware, s253RA and other provisions were enacted around  
9 the time of the COVID pandemic in order to allow  
10 companies to hold virtual meetings, sign documents  
11 electronically and give notice by electronic means.

12 Now, those temporary measures have now been entrenched  
13 in amendments which came into effect in February this  
14 year and what s249J(3)(c) now says is that, 'A company  
15 may give notice by electronic means in accordance with  
16 s11D.' And if we could perhaps look at that online and  
17 I'm sorry we didn't include this. It's my oversight.

18 But if 110D - - -

19 HIS HONOUR: Sorry, are we looking at 249J?

20 MS NESKOVCIN: Yes, which refers in sub-s(3)(c) to - it should  
21 refer if you're looking at the updated version.

22 HIS HONOUR: Yes, to paragraph 11D.

23 MS NESKOVCIN: Yes. I think it says 1C.

24 HIS HONOUR: 110D, yes.

25 MS NESKOVCIN: So if Your Honour can now go to 110D.

26 HIS HONOUR: Yes.

27 MS NESKOVCIN: What that section says is that, as its heading  
28 suggests, 'Technology neutral sending of documents,' and  
29 paragraph (1)(a) and (b) talk about the physical form and  
30 in (b) it says, 'By sending the recipient sufficient  
31 information in physical form to allow the recipient to

1 access the document electronically,' and then in (c) it  
2 says, 'By sending the document in electronic form by  
3 means of an electronic communication,' et cetera.

4 And you'll see that in (e) it can be sent by an  
5 electronic form on a website and the onus is then put on  
6 the company. If you look at sub-s(2) it says, 'This  
7 sub-section is satisfied if, at the time the document is  
8 sent, it is reasonable to expect that the document would  
9 be readily accessible so as to be useable for subsequent  
10 reference.'

11 Now, what's important here is, Your Honour, at the  
12 time the legislature amended the provisions regarding  
13 means of giving notice it did not amend the provisions to  
14 deal with the register. So the register now includes or  
15 only refers to names and postal addresses in distinction  
16 to electronic methods of communication being  
17 allowed - - -

18 HIS HONOUR: Sorry, when you say the register only refers to  
19 that, what do you mean?

20 MS NESKOVCIN: So I'll go back a step. These provisions were  
21 introduced around the time of the COVID pandemic and  
22 they're a serious of - - -

23 HIS HONOUR: Are you saying 249J now just says, 'By sending it  
24 by post to the address for the member in the  
25 register' - - -

26 MS NESKOVCIN: Yes.

27 HIS HONOUR: - - - or, 'In the manner.'

28 MS NESKOVCIN: Yes.

29 HIS HONOUR: Yes.

30 MS NESKOVCIN: But what wasn't amended at the same time was  
31 those provisions about keeping the register and there's



1 now a distinction between the register still only  
2 requiring the names and addresses, meaning the postal  
3 addresses, on the one hand and electronic communication  
4 being allowed by means outside the register.

5 HIS HONOUR: Why do you say that? That's the point but why do  
6 you say it?

7 MS NESKOVCIN: Because in response to Your Honour's question,  
8 that the register doesn't necessarily include email  
9 addresses, Your Honour said Justice Yates is against me  
10 on that - - -

11 HIS HONOUR: Yes.

12 MS NESKOVCIN: - - - and I submit that he's not and I submit  
13 that the legislation confirms the interpretation of  
14 His Honour's reasons that we contend - would Your Honour  
15 like to go back to Yates now?

16 HIS HONOUR: Yes, I think we need to go to Yates because - take  
17 me now to the relevant paragraph.

18 MS NESKOVCIN: Twenty-five, Your Honour. Perhaps I'll let  
19 Your Honour read it and then - - -

20 HIS HONOUR: Yes, I'm familiar with the paragraphs. Because he  
21 says, 'This indicates that the requirement - - -

22 MS NESKOVCIN: 'That the requirement - - -

23 HIS HONOUR: - - - in 169(1) (a) - - -

24 MS NESKOVCIN: - - - is for an address - - -

25 HIS HONOUR: - - - for a physical location to which mail can be  
26 sent by post.'

27 MS NESKOVCIN: Yes. 'That's the minimum requirement,' he says,  
28 'however, there appears to be nothing which will prohibit  
29 the inclusion of additional information.' So what  
30 His Honour was dealing with there is the fact that the  
31 register included additional information.

1 HIS HONOUR: Certainly, but the question that he leaves open  
2 is - and he doesn't decide that the register must - - -

3 MS NESKOVCIN: Yes.

4 HIS HONOUR: - - - include an email address if it's nominated.  
5 He doesn't deal with that proposition.

6 MS NESKOVCIN: No, he doesn't, Your Honour.

7 HIS HONOUR: He deals with the proposition - - -

8 MS NESKOVCIN: Yes.

9 HIS HONOUR: - - - that he would say it's an indication that  
10 there's a minimum requirement for a physical address and  
11 that might be accepted. But of course, the question I  
12 have to decide is whether the requirement for an address  
13 includes a requirement for the address including an  
14 electronic address if, in fact, that is provided.

15 MS NESKOVCIN: Well, in ours submission, there's nothing in the  
16 legislation to indicate that that is requirement and  
17 everything suggests - - -

18 HIS HONOUR: Let me help you. Let me put some questions to you  
19 about that. The word 'address' is ambiguous, is it not,  
20 because it can - I think the Macquarie says it can mean a  
21 residential address where someone resides or where  
22 somebody can be reached. And the Act itself, for  
23 example, it doesn't have a definition of address, does  
24 it, and yet at 205D they deal with the word 'address' by  
25 identifying that under certain sub-sections which are  
26 sub-sections which give rise to a strict liability of  
27 offence, it says that the person's address must be their  
28 usual residential address.

29 So there they limit the meaning of 'address' to  
30 residential address. The reason for that's plain enough  
31 if you read the rest of it because, subject to somebody

1 giving an alternative address, you can - in fact, they're  
2 entitled not to be on the electoral role.

3 MS NESKOVCIN: Yes.

4 HIS HONOUR: Then it enables the enforcement of judgment  
5 debts - - -

6 MS NESKOVCIN: Yes.

7 HIS HONOUR: - - - at the residential address.

8 MS NESKOVCIN: Yes and, Your Honour - - -

9 HIS HONOUR: So there, that recognises that 'address' as it's  
10 used throughout the Act, is not limited to residential  
11 address.

12 MS NESKOVCIN: Yes, Your Honour, and I was just going to say,  
13 the history of these provisions will no doubt show  
14 reference to residential address was for the purposes of  
15 being able to, not only serve a person, but also identify  
16 the person. A person having a common name, for example,  
17 could be identified as a particular person by reference  
18 to their occupation, which was often the case when it  
19 came to murals and attesting documents and, for the  
20 purposes of the Corporations Act, their residential  
21 address.

22 HIS HONOUR: Well, it doesn't - the Act bothers to talk about  
23 addresses, residential address, in relation to certain  
24 sections which aren't 169.

25 MS NESKOVCIN: Yes, but, Your Honour, I go back to the point we  
26 made before. Having recently looked at these provisions,  
27 the legislature chose not to expand the reference to  
28 'address' to an email address and, rather, to leave  
29 'electronic means of communication' as a matter that's  
30 open to the company if it can satisfy the requirements of  
31 112D.

1 HIS HONOUR: You made that point though.

2 MS NESKOVCIN: If Your Honour could just please go back  
3 to - - -

4 HIS HONOUR: But these are facilitative provision that simply  
5 deal with how you serve people.

6 MS NESKOVCIN: Yes and that's exactly what's confirmed in  
7 249J(3) again. That section distinguishes between, on  
8 the one hand, the address for the member in the register,  
9 which is the postal address, or an alternative address  
10 which could anything nominated by - - -

11 HIS HONOUR: No, well, presumably the alternative addresses are  
12 reference to 205D but we can put - - -

13 MS NESKOVCIN: Or it could be reference to an electronic  
14 address.

15 HIS HONOUR: I don't think so because they actually refer in  
16 the section, don't they, to an electronic address. So  
17 the Act identifies - - -

18 MS NESKOVCIN: In which section, sorry?

19 HIS HONOUR: There's a thing called 'address' which is a  
20 general term.

21 MS NESKOVCIN: Yes.

22 HIS HONOUR: There's a thing called a 'residential address'  
23 which applies to some sections - - -

24 MS NESKOVCIN: Yes.

25 HIS HONOUR: - - - and it refers to an electronic address.

26 MS NESKOVCIN: Well, I'm sorry, Your Honour, I didn't  
27 appreciate that there was a reference to an electronic  
28 address.

29 HIS HONOUR: If you have a look at 249 as it was. It's  
30 249(3)(c).

31 MS NESKOVCIN: But that's exactly the - that's an electronic

1 means.

2 HIS HONOUR: Sorry?

3 MS NESKOVCIN: That's electronic means.

4 HIS HONOUR: No, that's electronic address.

5 MS NESKOVCIN: Perhaps I'm looking at a different - - -

6 HIS HONOUR: I'm sorry, you're talking about as it's now  
7 amended? It's now amended in that form, as you say,  
8 recently. Prior to that, it talked specifically about by  
9 sending it an electronic address.

10 MS NESKOVCIN: Yes.

11 HIS HONOUR: So the Act recognises from time to time that it  
12 can be an electronic address, it can a residential  
13 address or there can be an address.

14 MS NESKOVCIN: Yes and I'm just repeating myself, but the  
15 distinction in (3) (b) and (c) suggests that, where  
16 'address' is referred to in the register, it's referring  
17 to postal address. But I accept, Your Honour, that - - -

18 HIS HONOUR: I accept that. So if there's only one address  
19 required, then that would point, and Justice Yates would  
20 point, to the proposition that, if there's only one  
21 address that must be there, that it might be the physical  
22 address. But as Justice Yates indicates, that's the  
23 minimum requirement and the question is whether more is  
24 required if, in fact, a member provides to the  
25 cooperation a nominated email address for the purpose of  
26 communication which is what practically happens now,  
27 doesn't it?

28 MS NESKOVCIN: Yes and, again, that's a facilitative matter  
29 which the Act deals with and if it was intended that  
30 'address' could be a range of matters as opposed to - as  
31 it's more commonly understood, an actual address, that

1 would've been specified in the way that it has previously  
2 been specified in other parts of the legislation. We say  
3 that the Act is deliberately distinguishing between the  
4 address on the register and means of communicating with  
5 the members more broadly.

6 HIS HONOUR: That would be surprising, wouldn't it, because, as  
7 I say, they could've said residential address.

8 MS NESKOVCIN: Yes.

9 HIS HONOUR: They could've said postal address.

10 MS NESKOVCIN: Yes.

11 HIS HONOUR: They didn't say either but they said 'address'.

12 But interestingly, if somebody puts forward an address  
13 for the purposes of communications, there's something  
14 incongruous to the fact that the Act provides the ability  
15 or inspection of the register. It then acknowledges that  
16 the purpose of the inspection will be to communicate with  
17 members and it prescribes communicating with members,  
18 except for, I'll call it, the prue pursers.

19 MS NESKOVCIN: Yes.

20 HIS HONOUR: It would be unusual, wouldn't it, if in fact,  
21 having set up that regime, the address which you would be  
22 inspecting is not the address that the members have  
23 identified or nominated for communications.

24 MS NESKOVCIN: Well, that's one view, Your Honour. In our  
25 submissions, had that been intended, it would've been  
26 specifically provided for.

27 HIS HONOUR: Well, you say that but, on the other hand, it  
28 could've been specifically provided that it's a physical  
29 address or, as they did in other parts of the Act, the  
30 residential address. Very easy to do so.

31 MS NESKOVCIN: Yes.

1 HIS HONOUR: 'Address' means more than residential address  
2 because when the Act deals with a residential address, it  
3 says so.

4 MS NESKOVCIN: Yes.

5 HIS HONOUR: I'm concerned about the purpose. There's  
6 something silly about the proposition that members who  
7 seek to have an address for communication, whatever that  
8 might be, electronic, a PO Box or a physical address, are  
9 in fact not going to - that won't be available on the  
10 register for purposes who want to access it. And what it  
11 leads to is this situation; where a corporation keeps the  
12 address for communication, you say, separately off the  
13 register.

14 Because we know, if it's on the register, then it's  
15 open for inspection. You say they can quarantine it off  
16 the register, thereby, depriving the person who wants to  
17 access the register for the purpose of communicating with  
18 members, the opportunity to communicate with them in the  
19 way they've nominated they want to be communicated with.

20 MS NESKOVCIN: I understand, Your Honour. In our submission,  
21 that is a - it can be well understood that addresses such  
22 as email addresses would be specifically protected, given  
23 the possibility for misuse subsequently and the  
24 difficulty of ongoing dissemination of email addresses,  
25 interceptions - - -

26 HIS HONOUR: That really troubles me, Ms Neskovicin, because I  
27 would've thought that people are much more concerned  
28 about their residential address being disclosed than they  
29 would their email address. I can't be assaulted at my  
30 email address. Would that not be a greater privacy  
31 concern; that people know one's residential address?

1 MS NESKOVCIN: There are concerns both ways, Your Honour, and  
2 that's, as Your Honour's identified, why there is a  
3 prescribed purpose in relation to disclosure and access  
4 to these details.

5 HIS HONOUR: And also, plainly enough, the Act seeks to  
6 facilitate communication by persons who wish to for the  
7 approved purposes. If I would adopt your interpretation,  
8 that it's affectively the residential address, then it's  
9 going to affectively deprive people of the opportunity of  
10 communicating with members through the facility of  
11 accessing it because the cost is phenomenal.

12 MS NESKOVCIN: Yes.

13 HIS HONOUR: This case demonstrates it; \$56,000. So wouldn't  
14 the purpose of the Act, which is to facilitate the  
15 distribution of information to members of corporations,  
16 specifically for that purpose, isn't that furthered by  
17 the Board interpretation of 'address' to include the  
18 preferred address for communications as nominated by the  
19 member.

20 MS NESKOVCIN: Your Honour, that's one view. Just going back  
21 to what I said - previously submitted. The Act  
22 specifically contemplates that the members' of access are  
23 limited and the information on register is limited.  
24 Whether or not it becomes difficult or onerous or  
25 otherwise to then facilitate communications is, I  
26 suppose, the consequence of having a restricted register  
27 and a restricted right of access on the one hand so far  
28 as persons inspecting the register is concerned, but on  
29 the other hand, the Act enabling facilitating electronic  
30 communication and other means of communications by the  
31 company. So there seems to be this deliberate



1 distinction.

2 HIS HONOUR: Well, you better take me - why would I say there  
3 was a - why would I find that it furthers the purpose of  
4 the Act to have some distinction between the preferred  
5 method of communication, the address that they prefer for  
6 communication in 169 when you'd accept that one of the  
7 principle purposes for the address in 169 is to enable  
8 the communication under 173.

9 MS NESKOVCIN: I'm approaching it by looking at the right of  
10 access at 173. That is the limited right of access.

11 HIS HONOUR: Of course. They can only communicate for the  
12 limited purposes. But your interpretation makes it, with  
13 a large company, prohibitively expensive and means that  
14 people receive their communications in a manner which  
15 they have not preferred.

16 MS NESKOVCIN: That might be the consequence of it,  
17 Your Honour, but as the reaction to Mr Lawrence's mailout  
18 has shown, members don't necessarily invite  
19 communications, other than from the company.

20 HIS HONOUR: But the legislature's dealt with that. I wonder  
21 how they feel about their home addresses being handed  
22 out.

23 MS NESKOVCIN: Well, not very well, as it turns out.

24 HIS HONOUR: No, but the axe dealt with that and it's weighed  
25 that up and I can't interfere with the fact that the  
26 legislature had considered it appropriate that their  
27 address be made available and be made available for the  
28 purposes of communication. I can't get around that, can  
29 I?

30 MS NESKOVCIN: No.

31 HIS HONOUR: One might say that this should be kept

1 confidential but the Act deals with by allowing it for  
2 limited purposes and providing penalties if unauthorised  
3 communications are had.

4 MS NESKOVCIN: Yes, Your Honour.

5 HIS HONOUR: I'm just trying to indicate, it just doesn't seem  
6 to benefit anybody by requiring the residential addresses  
7 to be handed out and not email addresses. That's the  
8 strict interpretation you would have me put on the word  
9 'address'; you would say it should be, what is it,  
10 residential or physical, what address would you say it  
11 should be?

12 MS NESKOVCIN: Postal. Postal. Well, it could be - what the  
13 legislation suggests is that it's a postal address. In a  
14 lot of cases, that might be a person's residential  
15 address but not necessarily.

16 HIS HONOUR: No, but they don't say 'post'. It doesn't say  
17 'postal address'.

18 MS NESKOVCIN: Well, we say, if you look at the  
19 combination - - -

20 HIS HONOUR: No, I understand that point. There's a  
21 facilitative provision which says you can post it to that  
22 address.

23 MS NESKOVCIN: Yes.

24 HIS HONOUR: Well, that might be because it's a residential  
25 address. But look, I understand where you go with that  
26 point - - -

27 MS NESKOVCIN: Yes.

28 HIS HONOUR: - - - but the fact is, under the actual  
29 interpretation Act, 'address' may well mean addresses.  
30 So if somebody gives more than one address, what do you  
31 say the obligation, when they're registered, is to do?

1 Can they - let's take - and do we record both addresses  
2 or you pick one?

3 MS NESKOVCIN: No. The obligation is to record the address  
4 which is the postal address, whether it's a residential  
5 or postal address. If another address is nominated, that  
6 permits the company to use that address for the purposes  
7 of services. And can I just go back to - - -

8 HIS HONOUR: So you say to me that, really, it's just a postal  
9 address but if I give you two postal addresses, do you  
10 record both of them?

11 MS NESKOVCIN: Well, Your Honour, a person wouldn't have  
12 two - a person might have a residential address and a  
13 postal address. That would be a question - I don't know  
14 the answer to that question, Your Honour, but the  
15 purposes of these registers is - - -

16 HIS HONOUR: Well, I can suggest to you the answer is that,  
17 yes, they should record both and, of course - - -

18 MS NESKOVCIN: Your Honour, the purpose of these registers is,  
19 as I said earlier, partly for identification purpose.  
20 Take, for example, the Australian Taxation Office. A  
21 register for the purposes of the taxation office is  
22 meaningless if it's a person's email address. The  
23 purpose is to identify the person.

24 HIS HONOUR: I can accept that as one of the purposes.

25 MS NESKOVCIN: And if all that was required to be provided was  
26 email addresses, you would, no doubt, get many fictitious  
27 persons trying to - take, for example, a company in a  
28 takeover context trying to accumulate shares without  
29 being noticed, registering their name with a member with  
30 different variations, Peter, Pete, P, for example,  
31 multiple email addresses.

1           If that person's required to identify their  
2 residential address, that minimises and mitigates the  
3 risk of confusion if the person can't be identified and  
4 abuse of the register.

5 HIS HONOUR: If that was right, why did the Act not include in  
6 s205D that the purposes - a person's address for the  
7 purposes of notice of application under the sub-section  
8 to these and why didn't it include 169(1) so that then it  
9 would give the facility to - it would require the  
10 residential address and, if the residential address  
11 wasn't viewed, an alternative address for some people who  
12 wish to keep their - are entitled to keep their address  
13 private, they could put an alternative address. Why not  
14 insert it in there?

15 MS NESKOVCIN: Your Honour, no doubt, the legislature should  
16 but, in our submission, the purpose of the register is  
17 for the purposes of identification. Secondly, the  
18 purposes of communication, when it comes to the company's  
19 rights of communication, that is dealt with elsewhere in  
20 the Act and there are means to facilitate that. But the  
21 primary purpose of the register is identification and  
22 identification is best achieved by the construction that  
23 'address' means a person's residential or postal address.

24 HIS HONOUR: Well, it might well be that Justice Yates is  
25 right. I'm not too sure but the address should include  
26 it. I'm not convinced about it. It seems to me, the  
27 principle purpose is for communications and that, really,  
28 what's happening - and not in this case - but by getting  
29 the communication address and leaving it off the register  
30 enables the company to have a facilitative method of  
31 communicating with members but nobody else.

1 MS NESKOVCIN: But we say, that's deliberate, Your Honour, and  
2 so is the legislation, looking at the expansion of s249J  
3 with the ability to enable communication, even by website  
4 if the company's satisfied that that was - there's a  
5 reasonable expectation that that will achieve actual  
6 communication with members. So there is this deliberate  
7 distinction.

8 HIS HONOUR: Again, but these are facilitative provisions which  
9 are sensible with the development of electronic  
10 technology and Dropbox. They're saying, well, any way  
11 that you can communicate with these people is an  
12 effective way of giving notice. But that plainly, for  
13 the purpose of allowing persons who have access to the  
14 register, which includes the corporation, the most  
15 sensible thing to put - address to have there, is to  
16 include the preferred communication address.

17 MS NESKOVCIN: Yes and that requires - - -

18 HIS HONOUR: Which in most cases is electronic.

19 MS NESKOVCIN: That requires Your Honour to do a significant  
20 amount of reading into the Act, in our submission.

21 HIS HONOUR: See, that's what troubles me because I don't think  
22 so, does it? It means that, if I go your way, I've got  
23 to say, look, it meant residential address and they just  
24 made a mistake when they left that requirement out of  
25 205D, they should've applied the 169(1) because that's  
26 what they intended and they intended to do that despite  
27 the fact that the member has got a preferred method of  
28 communication which is an email address and despite the  
29 fact that that may well make the ability to communicate  
30 with the membership of large companies financially only  
31 available to the very wealthy. That's what you'd ask me

1 to do?

2 MS NESKOVCIN: Yes, Your Honour.

3 HIS HONOUR: All right. I understand all of those submissions,  
4 thank you. Mr Peters, dealing with the point about the  
5 register, do you say that the entire Archtics database is  
6 the register?

7 MR PETERS: It's on this basis, Your Honour. We don't say  
8 Your Honour has to go that far but if one keeps one's  
9 register with a whole range of information on the  
10 register, then that's what the register is. Let's  
11 imagine if it's a physical piece of paper. So if I keep  
12 the name, the address, the email addresses, perhaps the  
13 name of the family members, perhaps some additional  
14 matters such as credit card details, that becomes part of  
15 the register.

16 HIS HONOUR: And so if in fact a corporation was to maintain  
17 one big database, on that database it's got all its  
18 financials and its 11 secret herbs and spices and  
19 everything else that you could imagine, but it also,  
20 somewhere in the database, is the information necessary  
21 for the register. And so that on the push of a  
22 button - because it's well programmed, you push a  
23 register button and it prints out, obviously, selecting  
24 from all of the relevant parts, a spreadsheet with the  
25 information required by 169(1). Do you say they haven't  
26 complied?

27 MR PETERS: With 168 and 169 what I - can I phrase this in a  
28 way that enables Your Honour to decide the case without  
29 asking an extraneous question?

30 HIS HONOUR: Yes, all right.

31 MR PETERS: Even if I'm right about the database being the

1 register, which is our broadest case, the right to  
2 inspect is what Your Honour's looking at and that is  
3 controlled by the discretion to allow inspection under  
4 1303. So Your Honour can say, look, I can see there's a  
5 great deal of information on this website - this  
6 register. Let's say it's a physical box of papers. I'm  
7 going to allow you to inspect what you need to inspect  
8 for that purpose.

9 HIS HONOUR: That rule will require the corporation to come to  
10 court because, prima facie, you've got a right to inspect  
11 everything, don't you, unless the court is to restrict  
12 you.

13 MR PETERS: Well, yes, and part of that restriction depends on  
14 the purpose. You're inspecting the register, to  
15 communicate with members, not to sell them something or  
16 do a credit check on them. It's a purpose that - - -

17 HIS HONOUR: But if somebody was to go and say, no, I want to  
18 inspect the lot. Then they go to court and the court  
19 says, well, that's pretty silly, I'll just give you the  
20 email addresses.

21 MR PETERS: I'll link it to your purpose. Your right to  
22 inspect is not wholly unfettered.

23 HIS HONOUR: No.

24 MR PETERS: You don't have an unfettered right to inspect  
25 everything. You've got to satisfy the purpose, then  
26 you've got to satisfy the court's discretion as  
27 Justice Byrne said in O'Brien's case, 'Why are you doing  
28 it? I can limit your right to inspect.' That's what we  
29 accommodate here. With our request limited to - - -

30 HIS HONOUR: But I need to decide the broader question and that  
31 is, is the entire database the register? I have to

1           decide that question if I'm going to decide your  
2           question. I can't pass that.

3 MR PETERS: Well, we say you don't.

4 HIS HONOUR: And you contend the entire Archtics space is the  
5           register and prima facie, subject to the court's  
6           intervention, any person's got the right to inspect the  
7           entirety of it.

8 MR PETERS: That's the broadest view of our case. That's the  
9           broad - - -

10 HIS HONOUR: And it doesn't really end well, does it, with the  
11           section that Ms Neskovicin helpfully took me to which says  
12           you don't have to keep it, you can prepare it.

13 MR PETERS: Yes, but can I just go back a step, Your Honour,  
14           because Your Honour's saying - - -

15 HIS HONOUR: By all means. What section was that again, to  
16           remind me? I'm sorry, I - - -

17 MS NESKOVCIN: 1306.

18 HIS HONOUR: 1306. Sorry, Mr Peters, please continue.

19 MR PETERS: All right, can I come back to 1306 in a minute?

20 HIS HONOUR: Yes, of course.

21 MR PETERS: Your Honour, the broadest case is, that's the  
22           register. You choose to co-mingle your register and  
23           include a whole range of other material for purely  
24           marketing purposes, that is the register in the form  
25           you've kept it. Your Honour doesn't need to decide that  
26           and I want to tell Your Honour why, if I can, because, we  
27           say, the register at least includes the email address for  
28           the purposes of facilitating communication.

29 HIS HONOUR: Why?

30 MR PETERS: Because that is why they've collected the  
31           information. That's what Mr Goldberg says in his



1 affidavit.

2 HIS HONOUR: So why are they collected? Have they - why are  
3 they collected? Why does that matter, whether or  
4 not - if they're not required to collect that as part of  
5 the register - - -

6 MR PETERS: You create a register, you have the minimum  
7 requirements. And Justice Aurora said, in MDA said, 'If  
8 you add extra things on the register and it's part of the  
9 register, you have to disclose that as well.'

10 HIS HONOUR: That assumes that it's all the register, doesn't  
11 it?

12 MR PETERS: Yes, yes.

13 HIS HONOUR: I have to decide that.

14 MR PETERS: Well, we say you don't because you - - -

15 HIS HONOUR: I don't understand that then, Mr Peters, because  
16 if they're right and all they have to do is prepare the  
17 register from the database in accordance with 1306 which  
18 appears to right, I have to say, then all they've got to  
19 give you is the prepared register.

20 MR PETERS: If that be right, Your Honour, then they have  
21 prepared such a document and that's the list which they  
22 use to communicate to members. And if they take  
23 advantage of this section to say, once we prepare a  
24 register based on limited material extracted from the  
25 broader range of material, they can't hide from the fact  
26 that they prepared such a register to call a special  
27 general meeting.

28 HIS HONOUR: That wasn't the register. They say that's not the  
29 register. They say the register is that which we are  
30 required to keep by 169.

31 MR PETERS: Yes. I tried to deal with that by saying (1),

1 those are the minimum requirements (2), if you add things  
2 to the minimum requirements and keep it on the  
3 register - - -

4 HIS HONOUR: I understand that. So that's the entirety. You  
5 say the whole thing's the register.

6 MR PETERS: That's our case at its broadest. At its narrowest,  
7 it is the material they've given us plus the email  
8 addresses.

9 HIS HONOUR: Well, it's only the email addresses if, in fact,  
10 the address is to be found in the broader manner.

11 MR PETERS: I'm sorry, I'm not following Your Honour.

12 HIS HONOUR: Sorry. If address and the 169 includes the  
13 nominated address for communications, then they've got to  
14 give it to you - - -

15 MR PETERS: Yes.

16 HIS HONOUR: - - - and I think Ms Neskovcin accepts that.

17 MR PETERS: Yes, we accept that, Your Honour, and we accept  
18 that but we also say, if 'address' is given a more  
19 limited manner, that they include on their register the  
20 method of communicating, that's directly within the  
21 Aurora decision; that is the email addresses. They don't  
22 say the register does not include the email addresses.  
23 What they say - - -

24 HIS HONOUR: Well, they do.

25 MR PETERS: Well, they say - - -

26 HIS HONOUR: Ms Neskovcin says that, under 136, what they can  
27 do is prepare the register in accordance with that  
28 section which is all of those things that they're  
29 required to have under 169.

30 MR PETERS: Well, Your Honour, that would allow them to choose  
31 what is the register at a given point of time - - -

1 HIS HONOUR: No.

2 MR PETERS: - - - and it would not facilitate the purposes of  
3 the Act.

4 HIS HONOUR: No, they must always, on their case, prepare all  
5 of the items that they're required to keep under 169.

6 MR PETERS: Yes. Where I think Your Honour and I are differing  
7 is, is the register simply the minimum requirements under  
8 s169 or is the register, as Justice Yates found, whatever  
9 they keep; whether it's the minimum requirements or  
10 something extra.

11 HIS HONOUR: Well and then it's the entire database, you say.

12 MR PETERS: Well, that could be the case and, if that's the  
13 case, Your Honour, Your Honour has a discretion to  
14 control access to it. We don't keep the register. We  
15 are - - -

16 HIS HONOUR: Well, under 136 [sic] what are they obliged - when  
17 they prepare, which they're able to do, from the computer  
18 database, what are they obliged to identify under 1306?

19 MR PETERS: What they keep on the register for what they regard  
20 as their registry of members and if you look at the  
21 manner in which they create the register, it starts with  
22 someone applying to become a member. The first thing you  
23 do is you give your email address.

24 HIS HONOUR: Yes.

25 MR PETERS: It's a mandatory field according to Mr Goldberg.

26 HIS HONOUR: Yes and they've got to give their credit card  
27 details and a whole - a lot of things.

28 MR PETERS: That might be. That might be. It's a  
29 limited - - -

30 HIS HONOUR: It doesn't mean it's on the register, does it?

31 MR PETERS: Well, our case is that it would be.

1 HIS HONOUR: I have trouble seeing that, but what do you say  
2 then about the proposition that 'address' should be given  
3 a broader meaning than residential address?

4 MR PETERS: We embrace it, Your Honour, and Your Honour's  
5 analysis is quite clear. It's just the word 'address'.  
6 They seek to confine it to a residential address and read  
7 words into the Act that aren't there. And could I say,  
8 Your Honour's deposed construction accords precisely with  
9 what Justice Gordon said in Direct Share. Does  
10 Your Honour have a copy of that case?

11 HIS HONOUR: I'm not sure I do. Is that in the authorities  
12 I've been given?

13 MR PETERS: It is, Your Honour. Direct Share - - -

14 HIS HONOUR: In that case, I've got a copy. Just give me - - -

15 MR PETERS: - - - Purchasing and - - -

16 HIS HONOUR: No, it's not.

17 MR PETERS: We've referred to it, I thought.

18 HIS HONOUR: I've got Aurora - that's all right. So if I - - -

19 MR PETERS: I can do it through a different decision, Your  
20 Honour.

21 HIS HONOUR: That's all right. Just give the citation and I  
22 can bring it up.

23 MR PETERS: It's Justice Gordon in Director Share Purchasing,  
24 it's 2011 - - -

25 HIS HONOUR: Yes.

26 MR PETERS: - - - FCA 165.

27 HIS HONOUR: Yes and any particular paragraph?

28 MR PETERS: Paragraph 27. It starts really at paragraph 26.

29 HIS HONOUR: Would it be sensible - and it refers to O'Brien v  
30 Sporting Shooters, which you have given me.

31 MR PETERS: It does. It does.

1 HIS HONOUR: Should I read those paragraphs?

2 MR PETERS: Yes, Your Honour, and really, the point is, it's  
3 the work that s177 and 173 do and the purpose that's to  
4 be facilitated under the sections; that is, the using  
5 information on the register to contact unit holders, have  
6 then exercise their rights. Here it's a unit holding  
7 issue, our case is a membership issue.

8 HIS HONOUR: Sorry, I just looked it up on Jade, Ms Neskovicin.  
9 Do you need a minute to look at it? So really, your  
10 point is that Her Honour said that the interpretation  
11 affectively - in substance, Her Honour was saying that  
12 the interpretation that read down the facilitative nature  
13 of access rights would not be preferred. That's your  
14 point?

15 MR PETERS: Yes, Your Honour. And, Your Honour, can I pick it  
16 up by what learned friend's just said when discussing  
17 with Your Honour what the purpose of the section was and  
18 they put one of the purposes include communication. Now,  
19 they would have it, I presume, communication by the  
20 company to its members but that's not the only  
21 communications that are relevant in the Corporate  
22 Governance text.

23 Communications between members and members about  
24 corporate affairs and nothing is more of fundamental  
25 communication than talking to members before a special  
26 general meeting about what should be done in their  
27 contract between themselves and the contract with the  
28 board of directors. So once they accept the purposive  
29 nature of including this information is for communication  
30 by the company's - the members, it leads to the concept,  
31 the likelihood, that it is collective for part of the

1 registered members to communicate between them.

2 HIS HONOUR: I was also troubled by the possibility that those  
3 who live outside metropolitan areas know that sometimes  
4 the residential address, there are no mail deliveries.

5 MR PETERS: No. Next Wednesday, Your Honour. Maybe  
6 fortnightly.

7 HIS HONOUR: Or not at all.

8 MR PETERS: Yes.

9 HIS HONOUR: And we seem to - it would greatly effect - and not  
10 to mention interstate and overseas and other matters,  
11 that if you limited the communication to a residential  
12 address, then for many - sorry, I don't know what cities  
13 members - but a certain number of members, they can never  
14 be accessed through this facility because the post  
15 wouldn't get to them.

16 MR PETERS: Yes.

17 HIS HONOUR: Not to mention, I have to say, I'm concerned about  
18 just the cost to ordinary people who have participated in  
19 the affairs of a corporation. It's phenomenally  
20 increased, we know.

21 MR PETERS: Well, Mr Lawrence could afford it but very few  
22 other people could.

23 HIS HONOUR: Very few.

24 MR PETERS: I mean, he's a massive donor to the club, he's  
25 taken part in its affairs, there's no issue taken with  
26 his purpose. He was fortunate enough that he could send  
27 the letters out but whether they got there or not is  
28 another issue.

29 HIS HONOUR: I'm not sure about the name 'Democracy',  
30 Mr Peters, but anyway, I don't think - - -

31 MR PETERS: Well, in the interests of full disclosure,

1           Your Honour, I've been a rabid Melbourne fan since I was  
2           three in 1964 and it took until last year to get over  
3           that disability.

4   HIS HONOUR:   I understand.

5   MR PETERS:    But I want say anything about 'Democracy'.

6   HIS HONOUR:   I'm sorry, so is there any other matters that you  
7           wanted to raise at this stage?

8   MR PETERS:    Only to clarify Your Honour's concern about the  
9           breadth of what is the register. Your Honour, we say,  
10          only has to decide, are the emails part of the register  
11          or not and our case is, we accept Your Honour's purposive  
12          interpretation of 'address', but if it's not an  
13          obligation to record the emails, our case is, once they  
14          are recorded, for the purposes mentioned - - -

15   HIS HONOUR:   Anywhere on the database?

16   MR PETERS:    Well, the database must - it compels the conclusion  
17          they were recorded to be part of the register of members  
18          to facilitate - - -

19   HIS HONOUR:   I just don't know if they're - that's what I have  
20          struggled with. I don't know why you would say that.

21   MR PETERS:    Because it facilitates communication. It  
22          facilitates the purpose of s168, even if the words don't  
23          capture it.

24   HIS HONOUR:   Well, I understand that submission. But you would  
25          say, if in fact they collected all that data and put it  
26          on different computer, then they'd have you stymie.

27   MR PETERS:    Well, they put it on a different computer that it  
28          be separate.

29   HIS HONOUR:   The email addresses, yes.

30   MR PETERS:    Yes, they put it on a different computer, yes.

31   HIS HONOUR:   Yes, it seems an unfortunate result but,

1           nonetheless, I understand the submission.

2 MR PETERS: And, Your Honour, we have to be practical about  
3 this case. We have a corporate entity with 40,000  
4 members and they say, we have a register of members, we  
5 keep it diligently but we don't include their emails on  
6 it to send out messages. The purpose of getting the  
7 emails was to send out messages, according to the general  
8 meetings.

9 HIS HONOUR: Your junior's got the winning point here, I think.

10 MR PETERS: Yes, she does. She usually does, Your Honour.

11           Yes, it's Mr Goldberg at paragraph 42, 'The purpose of  
12 the request was to enable [that's the request to give  
13 your email address] the Melbourne Football Club to  
14 communicate about the upcoming general meeting.'

15 HIS HONOUR: I don't think there's any - I don't think  
16 Ms Neskovicin would dispute the proposition that they  
17 collect the email addresses to facilitate their  
18 communication with the members, but I think her point, as  
19 I understand it, is the fact that they do that doesn't  
20 mean it becomes part of the register in the manner in  
21 which they prepare the register these days.

22 MR PETERS: That reminds me of what Lord Atkins said in  
23 Liversidge with John Anderson when Athamian was arrested  
24 in 1942 by the Minister for Home Affairs. A bit of  
25 habeas corpus was issued and the Minister said, 'I only  
26 have to form a belief. I don't have to tell you what it  
27 is, I don't have to tell you why, I just have to form  
28 it.' And Lord Atkins said, 'It has to be objectively  
29 based. You look at the facts and circumstances  
30 surrounding it to see if it's a real belief.'

31           Now, our learned friend's case is, because we say the



1 register is the register, the court's stuck with it. We  
2 say, look at what they did, look at the information they  
3 collected, look at what they did with it; they used it  
4 for corporate purposes of communicating with members.  
5 Now, for such an argument, Lord Atkins said, 'When I use  
6 a word, "Humpty Dumpty said in a rather scornful tone,"  
7 it means just what I choose it to mean, neither more nor  
8 less.' Now, we would say that's their case. And that  
9 1948, two appeal cases at 245.

10 HIS HONOUR: All right, thank you very much.

11 MR PETERS: Thank you, Your Honour.

12 HIS HONOUR: I'll note that as the Humpty Dumpty submission.

13 Ms Neskovcin.

14 MS NESKOVCIN: I note that as Mr Peters' grab bag of things to  
15 bring to the court because I think that was in his bag  
16 all the time.

17 HIS HONOUR: He always brings that to court, Ms Neskovcin.

18 It's amazing how often it applies.

19 MS NESKOVCIN: Your Honour, I just want to make two  
20 submissions. Your Honour has asked me and Mr Peters  
21 about the purposive nature of the register and we submit  
22 the primary purpose of the register is always to  
23 facilitate the establishment of the company, along with  
24 the constitution, the articles and the like. The  
25 secondary purpose is the communication, as Your Honour's  
26 observed. We say that the important point there is the  
27 communication by the company.

28 But can I also make this observation, Your Honour. If  
29 the Melbourne Football Club had established a register  
30 and labelled it a register and it included the names and  
31 postal addresses, there could be no question that it

1           hadn't complied by not including addresses nominated for  
2           service of notices.

3   HIS HONOUR:   Just say that again so I make sure I understood  
4           what you just said.

5   MS NESKOVCIN:   Let's assume there was a separate register.

6   HIS HONOUR:   Yes, a book.

7   MS NESKOVCIN:   A book and it was labelled a register and  
8           included the names and postal addresses of all of the  
9           members. There could not be a question under the Act  
10          that the company had not complied with its obligations  
11          because it had not included address nominated for  
12          service.

13   HIS HONOUR:   If you're right about that then you're right about  
14          the next point. The first point is, do companies that  
15          keep a register, in whatever form, in a hard copy form  
16          included, have to record the address at which their  
17          members have sought to be communicated.

18   MS NESKOVCIN:   There's nothing to suggest that is an  
19          obligation.

20   HIS HONOUR:   It probably goes back to our previous  
21          exchange - - -

22   MS NESKOVCIN:   Yes.

23   HIS HONOUR:   - - - and I do understand the basis upon which you  
24          say that.

25   MS NESKOVCIN:   Yes.

26   HIS HONOUR:   Before you sit down though, I just needed to make  
27          sure that, with respect to 249, isn't it; 249J, do you  
28          know the date on which that was amended?

29   MS NESKOVCIN:   Yes, Your Honour. So this is in our  
30          submissions. It came into effect in February this year  
31          and the previous transitional - there was a transition

1 period in 2021 for the previous version. So if  
2 Your Honour has our submissions - - -  
3 HIS HONOUR: Yes, I do, of course. I'll just highlight it.  
4 MS NESKOVCIN: Footnote 5 on p5.  
5 HIS HONOUR: Given (indistinct) yes, thank you.  
6 MS NESKOVCIN: Yes and if Your Honour has the hard copy at  
7 249J - - -  
8 HIS HONOUR: Yes.  
9 MS NESKOVCIN: - - - in its previous version, Your Honour may  
10 see where it - your version may say in (c), 'By  
11 electronic means in accordance with s253RA.' Does  
12 Your Honour's version have that?  
13 HIS HONOUR: I'm sorry, am I looking at 249J(3)?  
14 MS NESKOVCIN: Yes.  
15 HIS HONOUR: And which part of (3)?  
16 MS NESKOVCIN: (c).  
17 HIS HONOUR: No, mine just says, 'By sending it to the fax  
18 number or electronic address, if any nominated by the  
19 member.'  
20 MS NESKOVCIN: Yes. So Your Honour's got - I've got the  
21 version in-between Your Honour's version and the one  
22 that's been amended.  
23 HIS HONOUR: The up to date one.  
24 MS NESKOVCIN: Yes.  
25 HIS HONOUR: So that's been amended along the way, has it?  
26 MS NESKOVCIN: Yes, in light of COVID, and those amendments  
27 were brought in in 2021 with effect.  
28 HIS HONOUR: I'm sorry, they were the COVID amendments.  
29 MS NESKOVCIN: So that, yes, there were some transitional  
30 provisions.  
31 HIS HONOUR: Is there anything that I should - well, I'll check

1           that but is there anything that I should check about the  
2           COVID - - -

3 MS NESKOVCIN: No, Your Honour. Your Honour can note that  
4           they've now been enacted permanently in s110D.

5 HIS HONOUR: But you say that (c) said, in accordance with -  
6           could you read it to me again please?

7 MS NESKOVCIN: It said, 'By electronic means in accordance with  
8           s253RA,' and 243RA - - -

9 HIS HONOUR: 243, is it?

10 MS NESKOVCIN: Yes. No, 253.

11 HIS HONOUR: 253, yes.

12 MS NESKOVCIN: And 253R and RA has since been repealed but it  
13           had provisions along the lines of what's now in s110 and  
14           110D.

15 HIS HONOUR: Can you give me that number; 253?

16 MS NESKOVCIN: 253R and RA.

17 HIS HONOUR: Yes, all right, 253R and RA.

18 MS NESKOVCIN: Yes.

19 HIS HONOUR: Thank you.

20 MS NESKOVCIN: It's a bit confusing but there's been a lot of  
21           amendments.

22 HIS HONOUR: And what do they provide?

23 MS NESKOVCIN: They provided, as s110D now does, a means of  
24           giving notice by electronic communication.

25 HIS HONOUR: Yes. Well, it seems to me, what we can take out  
26           of this exchange, just so I understand you correctly, you  
27           rightly point to the fact, as Justice Yates did, that  
28           this facilitative provision contemplates that service can  
29           be affected by posting it to the address in the  
30           register - - -

31 MS NESKOVCIN: Yes.

1 HIS HONOUR: - - - and the fact that it talks about posting  
2 address to the register indicates that it's contemplating  
3 a residential address or something such as - - -

4 MS NESKOVCIN: On the register.

5 HIS HONOUR: - - - in the register.

6 MS NESKOVCIN: Yes.

7 HIS HONOUR: And therefore, if there was only - if one was to  
8 assume there was only one address required in the  
9 register - - -

10 MS NESKOVCIN: Yes.

11 HIS HONOUR: - - - that is a point that you point to.

12 MS NESKOVCIN: Yes and the fact that the section talks about an  
13 alternative address nominated without referring to it  
14 being a nominated address on register.

15 HIS HONOUR: Yes, but as I say, that could easily be a  
16 reference to 205 which talks about alternative addresses.  
17 It's difficult to know. That's the only other place I  
18 could find a reference pertaining to addresses. That may  
19 or may not be right. But the other things was, of  
20 course, up until February, I suggest this goes against  
21 your limited interpretation of 'address' being only a  
22 physical address is, (c) talks about electronic address.  
23 So the Act does have the capacity to identify different  
24 sorts of addresses when it wants to.

25 MS NESKOVCIN: Yes. Yes, Your Honour, but that actually, we  
26 say, favours our interpretation because when it's talking  
27 about an address on the register, it's only talking about  
28 the postal address, recognising - - -

29 HIS HONOUR: Yes, you make the point they don't say electronic  
30 address on register.

31 MS NESKOVCIN: On register, yes.

1 HIS HONOUR: I understand. No, I understand that, thank you.

2 Nothing further?

3 MS NESKOVCIN: No, thank you, Your Honour.

4 HIS HONOUR: All right, good. Thank you, you've been helpful.

5 You haven't given me too much time to decide this case.

6 What I'll do I think is, I'll deliver my decision at 4 pm  
7 today after I can give some thought to those submissions  
8 and I'll probably do that online, just for the  
9 convenience of everybody, rather than bringing you back  
10 to court to listen to me read out, because there'll be  
11 nothing in writing, I'm afraid.

12 MR PETERS: Yes, I understand that, Your Honour. Could I say,  
13 Your Honour, there's one issue that might require some  
14 discussion in front of Your Honour.

15 HIS HONOUR: Yes.

16 MR PETERS: We wrote last night and said - this is in Mr Gu's  
17 affidavit at paragraph 8 - if in the event the  
18 application's successful, could you please give us the  
19 email addresses forthwith? Could you be ready for it,  
20 could you have them prepared and we see they already have  
21 prepared them to send out to the EGM. There's been stony  
22 silence, Your Honour, on that. Now, we're certain - - -

23 HIS HONOUR: They're confident of victory, Mr Peters.

24 MR PETERS: I'm not confident of victory, Your Honour, I'm  
25 just putting - - -

26 HIS HONOUR: But they are.

27 MR PETERS: Well, they seem to be but, Your Honour, if they're  
28 wrong, we would be very disappointed if the club was not  
29 able to deal with it forthwith.

30 HIS HONOUR: As I say, I'll deliver my reasons at 4 pm. If in  
31 fact I find that they are obliged to provide the email

1 addresses, I'm sure Ms Neskovicin will have instructions  
2 as to when that will occur. She will provide - is that  
3 right, Ms Neskovicin?

4 MS NESKOVCIN: Your Honour, can you just bear with me. My  
5 instructor's just getting instructions on a matter that I  
6 might wish to raise with Your Honour on this point.

7 HIS HONOUR: By all means.

8 MS NESKOVCIN: One moment. Your Honour, in the event that you  
9 are inclined to grant Mr Lawrence's application, the  
10 defendant would be prepared to facilitate the electronic  
11 communication on his behalf without - given that they've  
12 got the means and resources to do that, without actually  
13 providing Mr Lawrence with the email addresses. We would  
14 be prepared to do that. Whether that's a matter for  
15 Your Honour to note or if it requires an undertaking  
16 through counsel.

17 HIS HONOUR: I would've thought, Ms Neskovicin, that's a matter  
18 for you to speak to Mr Peters about.

19 MS NESKOVCIN: Yes.

20 HIS HONOUR: I would've thought I can only determine the  
21 question before me.

22 MS NESKOVCIN: Yes, Your Honour.

23 HIS HONOUR: And if you were to make it attractive as possible  
24 to Mr Peters, it might be - if you were able to tell him  
25 how quickly all of that would be done and the form it  
26 would be done, but I think that's entirely a matter  
27 between - - -

28 MS NESKOVCIN: Yes, Your Honour.

29 HIS HONOUR: That solves it, Mr Peters, at this stage?

30 MR PETERS: Well, Your Honour, my instructions are, given the  
31 history of the matter and the difficulty, we would prefer

1 to have the email addresses and send them out forthwith  
2 under our own steam, as Justice Byrne found in the  
3 O'Brien decision. If the court pleases.

4 HIS HONOUR: As I say, I don't think it's within my  
5 jurisdiction to determine that question.

6 MR PETERS: If Your Honour pleases.

7 HIS HONOUR: All right. Thank you for your assistance. I'll  
8 stand the matter down till 4 pm online. You'll be sent a  
9 copy of the link.

10 MR PETERS: If Your Honour pleases.

11 HIS HONOUR: Adjourn the court.

12 (Short adjournment.)

13 (RULING FOLLOWS)



1 HIS HONOUR: Mr Peters, do you require any order other than an  
2 order that the defendant give the plaintiff a copy of the  
3 members' names and email addresses?

4 MR PETERS: Only that the word 'forthwith' be added,  
5 Your Honour. What the concern is, is next Wednesday is  
6 the meeting.

7 HIS HONOUR: Let me ask Ms Neskovicin when practically it can be  
8 provided. Ms Neskovicin.

9 MS NESKOVCIN: Your Honour, I'm instructed that two to three  
10 hours is required and given that there's that window, I  
11 think, the - in my submission, the safest thing to do is  
12 to give the outside time so that there's not an  
13 accidently breach of the order.

14 HIS HONOUR: I'm inclined to give you until 8 o'clock tonight.  
15 Is that satisfactory?

16 MS NESKOVCIN: Yes, thank you, Your Honour. Two other - - -

17 HIS HONOUR: Mr Peters, is that satisfactory then? Your client  
18 will be able to receive it at that time?

19 MR PETERS: Yes, Your Honour. If it can be forwarded to  
20 Colin Redlich, that'll probably smooth things.

21 HIS HONOUR: Thank you. Ms Neskovicin, yes, other matters?

22 MS NESKOVCIN: Two things. Membership changes constantly. The  
23 register that is available or the names and email  
24 addresses that are available are the names and email  
25 address that were provided to Mr Lawrence, the plaintiff,  
26 on previous occasions. That's the information that is  
27 available. If it's to be updated as at today's date,  
28 that may take more time.

29 HIS HONOUR: Mr Peters, you're comfortable with what  
30 Ms Neskovicin's suggesting?

31 MR PETERS: Yes, Your Honour. If there's any problem, we can

1 work it out.

2 HIS HONOUR: Ms Neskovicin, I think on the transcript Mr Peters  
3 will accept the email addresses and, obviously, if they  
4 want to make some further request and to give some time,  
5 but I'm expecting that that shouldn't be necessary in the  
6 circumstances.

7 MS NESKOVCIN: The other matter, Your Honour, is that,  
8 obviously, there's the implied limited purpose of which  
9 the emails are provided.

10 HIS HONOUR: Of course.

11 MS NESKOVCIN: Given the concerns that we've addressed or  
12 raised in Mr Goldberg's affidavit, I'm instructed to also  
13 seek an order that the list that's provided be destroyed  
14 after the emails have been dispatched.

15 HIS HONOUR: Mr Peters, I think you've previously been prepared  
16 to give that undertaking.

17 MR PETERS: Yes, Your Honour, we can do that.

18 HIS HONOUR: Yes.

19 MR PETERS: I can't give an undertaking because I don't have  
20 instructions but I can say that if Your Honour orders  
21 that it be destroyed after the meeting on Wednesday,  
22 that'd be reasonable.

23 HIS HONOUR: All right. Anything further, Ms Neskovicin?

24 MS NESKOVCIN: Can I suggest to Your Honour that Mr Peters'  
25 instructors formulating order, we can review it and then  
26 submit that to Your Honour's chambers.

27 HIS HONOUR: I think that would be excellent, thank you very  
28 much. Mr Peters, can that be done?

29 MR PETERS: Yes, it can. Your Honour, the issue of costs, I'd  
30 like to speak to Ms Neskovicin over the next few days.  
31 Perhaps we could - if there's any disagreement on costs

1 or we can't come to an arrangement, we can submit very  
2 short submissions of two pages only about costs, if  
3 there's any dispute, next Thursday.

4 HIS HONOUR: Is that satisfactory, Ms Neskovcin?

5 MS NESKOVCIN: Yes, thank you, Your Honour. Thank you,  
6 Mr Peters.

7 HIS HONOUR: All right. I'll simply then reserve the question  
8 of costs at this time.

9 MR PETERS: Thank you, Your Honour, and liberty to apply,  
10 Your Honour.

11 HIS HONOUR: And definitely liberty to apply, yes.

12 MR PETERS: Thank you, Your Honour.

13 HIS HONOUR: Nothing further?

14 MR PETERS: No, Your Honour.

15 MS NESKOVCIN: If the court pleases.

16 HIS HONOUR: Thank you very much. Adjourn the court.

17 MR PETERS: Thank you, Your Honour.

18 ADJOURNED TO A DATE TO BE FIXED