

# Class Actions Landscape Australia

April 2026 Edition



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# Introduction



By any measure, 2025 was a landmark year for Maurice Blackburn's class actions practice. With more than \$1 billion secured for group members, a run of major trial and settlement outcomes, and multiple recoveries ranking among the largest in Australian history, the year demonstrated not only the scale of the practice but its enduring commitment to public interest litigation and meaningful compensation for those we represent.

In a landmark decision handed down early April, the Brambles case has become Australia's first shareholder class action to succeed at judgment, with the Federal Court finding in favour of the plaintiff. The outcome is a welcome correction to a run of decisions and settings that have, in recent years, made it harder for shareholders to enforce their rights in relation to market disclosure. This case demonstrated that shareholder class actions remain a vital means of holding listed companies to account where disclosure failures cause investor harm.

In other developments expected to shape shareholder cases in the near future, the High Court granted special leave to appeal in the CBA shareholder case in February this year, taking the opportunity to provide what is expected to be an important clarification of the law on causation and loss in securities class actions. The ultimate decision of the Court is likely to have wide-reaching ramifications for how shareholder class actions are conducted. Following the Full Court's earlier declaration that CBA breached its continuous disclosure obligations, we now welcome the opportunity to make the case that group members are entitled to recover the losses which the applicants say follow from that breach.

The settlement approvals of the first wave of GCO matters signalled the regime's maturation, and cemented Victoria's position as a very popular jurisdiction for class action filings. In the vast majority of cases, the courts affirmed the original GCO rates, which underscored both the stability of the framework and its value for transparency and, ultimately, better returns for group members. As more GCO matters progressed through approval hearings over the course of the year, the regime's strong adoption reflected years of sustained advocacy and a genuine shift in access to justice for hundreds of thousands of Australians.

As we move through the first quarter of 2026, these developments set an important foundation for the next stage of the class actions landscape—one defined by a growing recognition of the essential role collective redress plays in Australia's justice system.

**Rebecca Gilsean**  
National Head of Class Actions  
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## Brambles: A Landmark Win in Australian Shareholder Class Actions

On 10 April 2026, the Honourable Justice Murphy of the Federal Court of Australia handed down a landmark judgment in *Southernwood v Brambles Ltd (No 3)* [2026] FCA 418 – the first shareholder class action in Australia that has succeeded at judgment following trial. Maurice Blackburn conducted this matter, jointly with Slater & Gordon.

The applicants were successful in their primary claims against Brambles for a considerable part of the relevant claim period. The Court found that Brambles had contravened the law and engaged in misleading or deceptive conduct and breached its continuous disclosure obligations between 16 November 2016 and 23 January 2017. The contravening period the Court upheld captures the critical window in which Brambles' internal results had deteriorated to the point where guidance should not have been maintained.

### The case in brief

Brambles is a multinational company listed on the ASX with a focus on pallets and logistics services. In a series of three market announcements, Brambles gave, and reiterated, earnings guidance in respect of the 2016/17 financial year. Then, without warning, on 23 January 2017 Brambles withdrew its sales and underlying profit guidance – and only a month later, withdrew its medium-term financial targets as well. The market reacted sharply: Brambles' share price fell approximately 15.8% on 23 January 2017 and a further 11.8% on 20 February 2017.

The Court accepted that aggressive internal budgets are unremarkable in commercial life. The difficulty was that Brambles' senior management and Board chose to set external guidance so close to those budgets that there was almost no room for underperformance – a miss of less than 1% to its underlying profit budget would be enough to breach the FY17 guidance. The Court inferred that Brambles set the bar that high to optimise its share price, and while it was entitled to do so, the consequence was that investors were likely to rely on that guidance in deciding whether to buy or sell.

The applicants were successful in their core claims from 16 November 2016 against Brambles and, significantly, the Court assessed the losses of group members at \$1.85 per share for shares purchased before 23 January 2017 and held after that date; and \$1.57 per share for those purchased between 16 November to 21 December 2016.

### Advancements on causation and loss principles

Some of the most important aspects of the judgment relate to the Court's advancement of causation and loss principles in shareholder

class actions – the areas that have proved most challenging for plaintiffs to date. The reasons also set out a framework for how plaintiffs can succeed on these issues at trial. Three developments stand out.

First, this decision has made clear that when assessing questions of causation and loss, plaintiffs are not required to establish "exact" economic equivalence – properly recognised as being an insurmountable standard of perfection. Instead, the Court has reframed the approach to ask whether as a matter of "economic substance" the alleged undisclosed information was equivalent to the corrective information. The decision cautions against an "overly technical approach focussing upon a supposed need to prove exact economic equivalence ...[which] risks missing the point". The compensatory principle should not be rendered subservient to the supposed need to conduct a perfect analysis, otherwise, doing so "risks giving credit to Brambles for its own misconduct".

Second, the decision endorses a commercial "common sense" evaluation of causation and loss, and demonstrates the importance of assessing evidence such as actual market analyst reactions to the release of bad news.

Third, market-based causation has been reaffirmed as being available as a matter of law. In doing so, the Court rejected Brambles' argument that market-based causation impermissibly "anthropomorphises" the share market by attributing a single purpose or causal influence to a diverse group of buyers and sellers, each trading for their own reasons and on the basis of their own information. The Court was not persuaded that the existence of heterogeneous trading motivations undermined the availability of market-based causation as a matter of law.

This judgment has progressed the landscape in shareholder class actions and sets out a worked example of how these claims can succeed at trial. It also provides a practical and commercially sensible framework for assessing questions of causation and loss.

Maurice Blackburn is proud to have led this ground-breaking outcome which continues to strengthen corporate governance and affirms the rights of investors in Australian capital markets

At the date of writing, the judgment has not yet been publicly published.



### Southernwood v Brambles Ltd (No 3) [2026] FCA 418

Federal Court of Australia | Murphy J | 10 April 2026

## Court approves \$110M settlement in BHP shareholder case

In this judgment Moshinsky J approved a \$110 million settlement in a shareholder class action against BHP Group Ltd arising from the collapse of the Fundão tailings dam in Brazil on 5 November 2015, which was entered into shortly before the trial of the proceeding was due to commence on 9 September 2025. The dam formed part of the Germano iron ore mine complex in Minas Gerais, Brazil, operated by Samarco Mineração SA—a 50:50 joint venture between BHP and Brazilian mining corporation Vale SA. The dam collapse killed 19 people and caused significant economic, social and environmental damage, leading to substantial falls in the price of both BHP Ltd and BHP plc shares (and leading to numerous civil and criminal proceedings in multiple jurisdictions).

In summary, the applicants (Mr Impiombato and Klemweb Nominees Pty Ltd) alleged in the proceeding that BHP failed to disclose material information regarding the safety and risks of the Fundão dam during the period August 2012 to November 2015, in contravention of section 674 of the *Corporations Act 2001* (Cth). The applicants also alleged misleading or deceptive conduct contrary to section 1041H(1) of the *Corporations Act* and section 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth), by making representations to the market concerning BHP's commitment to safety and the safety of its operations, including at Samarco.

The proceeding was commenced in May 2018 and had a complex procedural history spanning over seven years. Key procedural events included:

- three competing proceedings commenced by Mr Impiombato, Klemweb Nominees Pty Ltd and the Los Angeles County Employees Retirement Association (**LACERA**), which led to a carriage motion at first instance (heard in October 2018), and appeals to the Full Federal Court (which resulted in consolidation of the Impiombato and Klemweb proceedings and a permanent stay of the LACERA proceeding);
- BHP's application for a temporary stay of the proceeding based on extant criminal proceedings in the Brazilian courts, which was dismissed;
- BHP's strike-out application which raised novel jurisdictional issues concerning the application of Part IVA of the *Federal Court of Australia Act 1976* (Cth) to non-residents and BHP plc shareholders, which was ultimately dismissed by the High Court in October 2022; and
- competing applications concerning the scope of the group definition, and specifically whether it included persons who had acquired an interest in BHP Ltd or BHP plc shares in the relevant period through means other than trading on the ASX, LSE or JSE (and if not, whether the applicants should be permitted to amend the group definition retrospectively) – those applications also resulted in an appeal to the Full Federal Court, and an application for special leave to appeal to the High Court.

In addition, more than 250,000 documents were discovered in the proceeding (many of them in Portuguese which required translation).

Approximately 68,000 group members had registered to participate in the settlement, and there were no objections to the proposed settlement. Justice Moshinsky concluded (at [63]) that he was “comfortably satisfied that the settlement sum of \$110 million is fair and reasonable and in the interests of group members”.

His Honour also approved deductions of \$55 million from the settlement sum on account of legal costs, disbursements, and funding expenses. In light of the lengthy and complex procedural history summarised above, the actual amount payable in respect of legal costs, disbursements, and funding expenses was substantially more than \$55 million, but the lawyers and funder agreed to reduce those amounts so as to ensure that at least 50% of the settlement sum would remain available for distribution to group members.



### Impiombato v BHP Group Ltd (No 6) [2025] FCA 1594

Federal Court of Australia | Moshinsky J | 5 December 2025

**Applicants' Solicitors:** Maurice Blackburn & Phi Finney McDonald

**Respondent's Solicitors:** Herbert Smith Freehills

**Applicants' Funder:** G&E KTMC Funding LLC

**Austlii Link:** [Available here](#)

## JB Hi Fi extended warranties class action reaches millions of customers

Justice Delany has dismissed the application made by JB Hi-Fi Group Pty Ltd (**JBHF**) for 'soft class closure' orders in the class pursuant to ss 33ZF and 33ZG of the *Supreme Court 1986 (Vic)*.

The application was made in the context of a class action against JBHF, seeking compensation on behalf of the plaintiff and group members who purchased allegedly worthless (or near worthless) 'extended warranties' from JBHF over an (almost) 13-year claim period.

The class action alleges that JBHF engaged in misleading or deceptive conduct or unconscionable conduct in relation to the sale of those warranties.

Given the length of the claim period, the plaintiff's solicitors, Maurice Blackburn (**MB**), had estimated that there were likely to be approximately 8 million potential group members.

Justice Delany refused JBHF's application, and did not order 'soft class closure', for several reasons, including:

- *First*, JBHF did not articulate a satisfactory proposal about how 'soft class closure' would be communicated to group members for whom no contact information is held by JBHF. Unlike in recent comparable class actions, where defendants held contact information for 99.9%-100% of potential group members, JBHF held contact information for less than 40% of potential group members in this class action. JBHF also did not include any evidence in support of its application regarding proposed alternative methods for contacting potential group members (such via press, radio or television). Accordingly, his Honour found that, in the absence of a "clear and detailed regime" for notifying potential group members of the need to register to participate in the class action, the interests of justice would not be served by making 'soft class closure' orders.
- *Secondly*, there was "the real prospect of duplicated costs" if 'soft class closure' orders were made, because the significant costs incurred in relation to 'soft class closure' would be followed by further similar costs if any settlement were reached.
- *Thirdly*, there was "the prospect of a conflict of interest emerging between group members" if 'soft class closure' orders were made and there was subsequently an opportunity for group members to register following any settlement (particularly if there were to be a considerable number of subsequent registrations, which Delany had "very real concerns" there would be). As such, any "post-settlement wave of registrations" could potentially "undermine any settlement reached by reference to a single monetary sum."

- *Fourthly*, his Honour was not persuaded that 'soft class closure' orders would enable the defendant to know their actual maximum exposure to damages. This was because such orders would only provide that information in relation to those group members who registered but *not* in relation to those who may register after any settlement is publicised.
- *Fifthly*, the making of 'soft class closure' orders in the absence of a satisfactory notice regime would "create a significant hurdle for group members who do not receive notice to overcome" if they ultimately sought to participate in a subsequent settlement (particularly given the "value of their individual claims is low"). Delany J found that it would not be in the interests of justice to make orders that would lead to that consequence for more than 60% of potential group members (for whom no contact information is held).

Although not determinative, Delany J also noted:

- (a) that the attitude of the parties to the application was a relevant consideration (and the plaintiff opposed JBHF's application); and
- (b) the "significance of the expected costs" associated with 'soft class closure' (which MB had estimated would cost \$500,000 per 100,000 group members).



### Clarke v JB Hi-Fi Group Pty Ltd [2025] VSC 664

Supreme Court of Victoria | Delany J | 23 October 2025

**Plaintiff's Solicitors** Maurice Blackburn

**Defendant's Solicitors:** Herbert Smith Freehills Kramer

**Supreme Court Website:** [Available here](#)

# Maurice Blackburn secures \$72.5 m settlement in Crown Resorts class action

This was a judgment approving the settlement of a shareholder class action against Crown Resorts Ltd (**Crown**), which was brought on behalf of all persons who:

- (a) acquired shares in Crown between 11 December 2014 and 18 October 2020 (inclusive); and/or
- (b) held an interest in shares in Crown throughout that period.

Put broadly, the class action alleged that, in relation to the appropriateness of its systems for ensuring compliance with certain regulatory requirements (particularly those relating to anti-money laundering and counter-terrorism financing), Crown:

- (a) engaged in misleading or deceptive conduct;
- (b) breached its continuous disclosure obligations; and
- (c) conducted its affairs contrary to the interests of its members as a whole.

The class action settled in May 2025 for **\$72.5 million**, which will be paid in three instalments. The first instalment of \$20 million was paid in June 2025, with the second instalment of \$25 million to be paid in May 2026 and the third instalment of \$27.5 million in May 2027. Although the proceeding was commenced in December 2020, it settled “at a relatively early stage” (that is, prior to the filing of lay and expert evidence).

In the judgment, Nichols J approved:

- (a) the proposed settlement, as fair and reasonable and in the interests of group members;
- (b) the proposed Settlement Distribution Scheme (**SDS**) (albeit with some minor variations to, inter alia, ensure the settlement sum is distributed to group members as soon as is practicable); and
- (c) legal costs, pursuant to a group costs order (**GCO**) that had been made at an early stage of the proceeding.

## The proposed settlement and SDS

Nichols J, having considered the confidential opinion of counsel and the evidence of a solicitor of Maurice Blackburn (**MB**), had “no doubt” that the proposed settlement of \$72.5 million was fair and reasonable and in the interest of group members.

In respect of the payment of the settlement sum by instalments, her Honour was satisfied that, having regard to Crown’s current financial position, “the plaintiff’s advisers negotiated for, and sought to obtain, payment terms that were as short as possible to ensure that substantial amounts were paid in the earliest payment tranches.”

Regarding the SDS, Nichols J appointed MB as the scheme administrator, given its experience “in administering settlements of this kind,” and found that it was appropriate for the steps to be taken by the administrator to be final and not subject to appeal (because the administrator’s assessments would “involve the application of a mathematical formula and not an evaluation or qualitative assessment”).

## Unregistered group members

Earlier in the proceeding, Nichols J had fixed 24 August 2024 as the date by which group members were to register their claims for the purpose of participating in any settlement that occurred before trial (which had been listed to commence on 13 April 2026). Following the announcement of the settlement, 12 unregistered group members sought to participate in the settlement. Ultimately, her Honour allowed each of those 12 group members to participate on the basis that:

- (a) the total quantum of their claims was immaterial (that is, the total quantum did not exceed 0.5% of the settlement sum); and
- (b) each group member’s application to participate in the settlement was supported by evidence (in the form of a statutory declaration).

## GCO

In December 2022, Stynes J had made a GCO in the proceeding with a ‘tiered’ or ‘ratcheted’ GCO rate. The relevant GCO rate, in respect of the settlement sum that was obtained, was 27.5%. At settlement, Nichols J found that, “taking into account the result that has transpired” in the proceeding, there was no justification for varying the GCO rate. In her Honour’s view, the GCO rate of 27.5%:

- resulted in a payment to MB that was neither unreasonable nor disproportionate;
- appropriately reflected the risks undertaken by MB in conducting the case;
- could not, on any reasonable view, be characterised as a ‘windfall’ for MB; and
- the reasons that supporting the making of the initial GCO rate remained cogent in respect of the outcome that was achieved.

## Lieberman v Crown Resorts Ltd [2025] VSC 596

Supreme Court of Victoria | Nichols J | 19 September 2025

**Plaintiff’s Solicitors:** Maurice Blackburn

**Defendants’ Solicitors:** Herbert Smith Freehills Kramer

**Supreme Court Website:** [Available here](#)



# Court reins in Blue Sky case, vacates trial date

This judgment addressed case management issues in a securities class action against Blue Sky Alternative Investments Ltd (in liq) and other respondents, including former officers of Blue Sky and its auditors Ernst & Young. The applicants, R&B Investments Pty Ltd and David Furniss, allege contraventions of continuous disclosure obligations under section 674 of the *Corporations Act 2001* (Cth) and prohibitions against misleading conduct under sections 1041E (false or misleading statements) and 1041H (misleading or deceptive conduct). Related claims are also made under section 18 of the *Australian Consumer Law and section 12DB of the Australian Securities and Investments Commission Act 2001* (Cth). In essence, the broad allegation is that there was conduct, either through positive representations or through other conduct, that was false or misleading, leading to an inflated market for the price of securities.

The principal issues addressed in the judgment concern the separation of issues for trial and the vacation of the hearing date originally scheduled for August 2026. Justice Lee proposed separating the issue of contravention from causation of loss, noting that proceedings under Part IVA of the *Federal Court of Australia Act 1976* (Cth) necessarily involve bifurcation of issues. As his Honour observed in a previous case, what is evident about the class action procedure is that it “already has built into it the bifurcation of issues”, and the real question is how all the issues should be bifurcated. Thus, practitioners should not “unthinkingly adopt procedures by way of reflex” without considering whether improvement or greater efficiency is possible. His Honour said (at [10]):

*As is often the case when the Court proposes an unanticipated course to facilitate the efficient resolution of the dispute, the applicant forcefully opposed such a course and referred to several authorities concerning the need for caution in splitting issues for determination. Those principles, as is well known, urge the Court to tread warily in determining separate issues; but as I observed during oral argument, although these cautions are well understood, they have much less force in the context of Part IVA proceedings which, if experience is any guide, almost always involve a staged hearing between common issues (or issues of commonality) and individual issues. As I noted in *McNickle* (at [9]), what is evident about the class action procedure is that it “... already has built into it the bifurcation of issues”.*

His Honour distinguished between the ex-ante analysis required to determine contravention (a forward-looking assessment of whether information would be likely to have a material effect on share price, assessed by reference to commercial common sense) and the ex-post analysis relevant to causation of loss. His Honour observed that in his experience, expert evidence on the question of materiality has often been of “very limited significance”, amounting to “voluminous and expensive material which over-intellectualises something which is supposed to be a matter of judgment assessed by reference to the realities of the business world”. His Honour noted that time and again he had seen huge sums spent on opinions which were no more insightful than applied common sense, and that the vice was compounded in that so-called materiality expert evidence often pays insufficient attention to the reality that when a company needs to make the materiality assessment, it is in the hurly-burly of real-time business decision-making. His Honour also said:

*[50] The potential difficulty in parties commissioning event studies prior to the Court deciding on the precise nature of the contravening conduct is the need for the event study expert to envisage every possible permutation and combination of alleged contraventions for the regression analysis to be calibrated to every eventual possibility. This necessarily adds to the length and complexity of such event studies. Further, as has been seen in some recent cases, even where contravening conduct has been proven, the applicant has nonetheless failed to discharge its evidentiary and persuasive burden of proving the market effect of the contravening conduct because of a failure to anticipate the precise nature of the contravening conduct found...*

*[54] It seems to me that it may be a real benefit in some cases in separating out the issue of contravention. Not only does this allow for both the parties and the Court to be focused on the correct ex-ante analysis, but it also serves to prevent unnecessary or unnecessarily long and complex event studies, or other materiality evidence, dealing with conduct which may never be proven.*

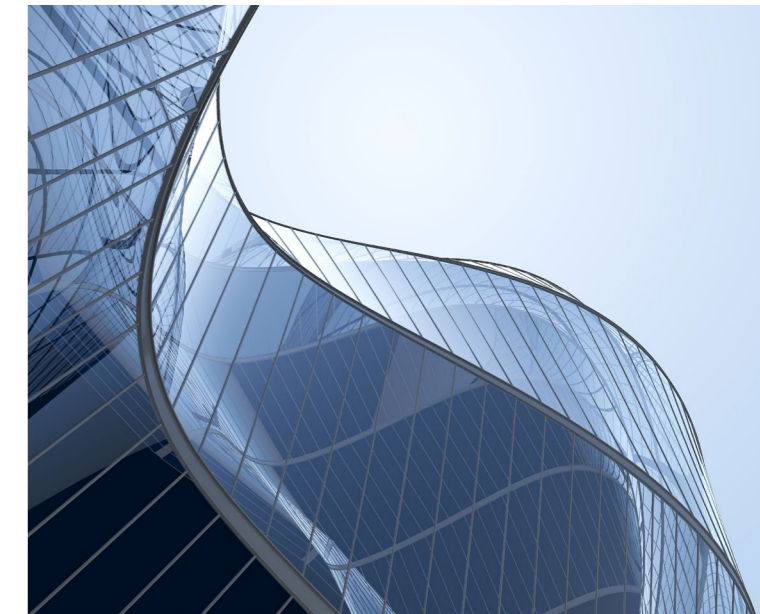
The applicants, however, had proposed a different approach to issue separation which would have the Court determine whether there was a “distortion of information” that “looks potentially like a contravention”, without actually finding whether contravening conduct occurred. His Honour rejected this approach, finding it “the

worst of all possible worlds” as it risked the Court engaging in impermissible hypothetical speculation about conduct without attending to the judicial task of determining whether such conduct exists. If there is to be a split between contravention and causation of loss, it must be “a clean split”. His Honour therefore declined to make the somewhat vague and potentially ambiguous orders proposed by the applicants.

The judgment also addressed the proceeding’s extensive discovery history. Investigations commenced as early as 2018, with Mr Furniss obtaining access to approximately 329 documents (over 9,000 pages) through a section 247A application in the Supreme Court of Queensland. The documents obtained included board packs, papers, minutes and agendas; audit committee materials; reports from KPMG on fund valuations; audit plans and closing reports from Ernst & Young; and relevant insurance policies. In February 2024, the applicants received over 8,000 documents produced to ASIC. Subsequently, non-party discovery from the receiver of Blue Sky was ordered, with a Discovery Referee appointed to determine the methodology. The applicants had initially sought orders requiring the receiver to give discovery of the entirety of Blue Sky’s file server and ‘Office 365 environment’. This resulted in identification of over 269,000 additional documents following refined search terms, though his Honour expressed concerns about whether this extensive additional discovery was truly necessary given the material already provided. His Honour noted he had real concerns that the applicants’ desire to chase down every potentially discoverable document may mean they were in danger of spending a good deal of unnecessary time and money.

Ultimately, his Honour vacated the trial date, noting that the applicants’ proposed timetable (which would not identify their final case until 17 April 2026) was wholly unrealistic in allowing the respondents sufficient time to respond. He emphasised that a person is entitled to their day in court, but not to another person’s day in court—the applicants could not proceed at

the pace they had travelled and just expect the Court to continue to allow them to ‘reserve’ a lengthy hearing date, as the efficient use of court time transcends the interests of the parties. He observed that the matter had been set down for hearing with the applicants’ active encouragement at a case management hearing in November 2024, when the Court was assured that “12 months from go to woe on evidence before a trial is plenty of time”. His Honour noted that nothing the respondents had done in relation to the provision of documents had caused the applicants not to be in a position of putting cogent material before the Court. He therefore ordered the applicants to pay the costs thrown away by reason of the vacation. Orders were also made for the parties to prepare expert questions and proposed amended pleadings by December 2025, with conferral between counsel in person to agree on expert questions. His Honour also required that if a substantive amendment application was made in December, it should be accompanied by an affidavit explaining why the newly discovered documents had caused a need to amend the pleading. A further case management hearing was listed for 15 December 2025, with a view to relisting the trial in late 2026.



## R&B Investments Pty Ltd v Blue Sky Alternative Investments Ltd (in liq) (Separation of Issues) [2025] FCA 1097

Federal Court of Australia | Lee J | 2 September 2025

**Applicants’ Solicitors:** Banton Group & Shine Lawyers

**Respondents’ Solicitors:** Gilbert + Tobin; Mullins Lawyers; Arnold Bloch Leibler; Clifford Chance

**Applicants’ Funder:** N/A

**Federal Court of Australia:** [Available here](#)

## Court ruling set to reshape CBA shareholder case

This judgment of the Full Court (Murphy, Moshinsky and Button JJ) addressed consequential orders following the Court's earlier judgment in May 2025 concerning alleged contraventions by the respondent (CBA) of continuous disclosure obligations (*Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Ltd* (2025) 174 ACSR 337; [2025] FCAFC 63). The proceedings arose from CBA's failure to lodge threshold transaction reports (TTRs) for cash transactions of \$10,000 or more processed through Intelligent Deposit Machines (IDMs) following their introduction, and CBA's failure to conduct account-level monitoring—failures which occurred due to a systems error from around November 2012. The proceedings at first instance were heard by the primary judge, who made orders dismissing the originating application in each proceeding on 28 May 2024. In its first judgment, the Full Court found that the applicants had succeeded in establishing that CBA had committed certain contraventions of its continuous disclosure obligations (albeit more limited than those contended for by the applicants), but that the applicants had not established that any inflation in the CBA share price resulted from the contraventions.

The remaining issues between the parties included:

- whether declarations of contravention should be made;
- whether there should be a remittal of any part of the proceeding; and the appropriate orders as to costs.

The Court held that it was appropriate to make declarations that CBA contravened ASX Listing Rule 3.1 and section 674 of the *Corporations Act 2001* (Cth) in the terms found by the Court, namely, by failing to disclose on or about 24 April 2017 that: (a) from around November 2012 to 8 September 2015, CBA had failed to give threshold transaction reports on time for approximately 53,506 cash transactions totalling approximately \$624.7 million (representing between approximately 80% and 95% of threshold transactions through IDMs during that period), and these late TTRs had not been lodged, at least in part, because of a systems error which occurred in or around November 2012; and (b) from around 8 September 2015, CBA was aware that from at least 20 October 2012 to 8 September 2015 it had failed to conduct account level monitoring with respect to 778,370 accounts.

CBA had submitted that declarations were unnecessary and inappropriate in circumstances where the appellants had failed to establish that they suffered any loss by reason of the contraventions. However, the Court rejected this submission, stating that it is “no small thing that Australia's largest bank contravened the continuous disclosure provisions of the *Corporations Act*”. The Court considered that making declarations was appropriate: it would vindicate the applicants' case on an important point, serve the purpose of promoting compliance with the continuous disclosure regime, and provide foundation for any ‘no transaction’ claims that group members might pursue. The Court emphasised that the class action regime not only facilitates access to justice to those who suffer loss by reason of conduct that contravenes statutory norms, but also assists in the enforcement of the substantive law, including by deterring contravening conduct.

The balance of the proceedings was remitted to a single judge for case management, hearing and determination (subject to any orders that may be made under sections 33N, 33Q, 33R or 33S of the *Federal Court of Australia Act 1976* (Cth)), to address whether any ‘no transaction’ claims would be pursued. CBA had contended that if any group members wished to bring a ‘no transaction’ claim, they could do so in separate proceedings, noting that the limitation period had been suspended during the course of the class action proceedings pursuant to section 33ZE. The appellants opposed this course and pointed to the fragmentation that would occur if separate proceedings were commenced in different courts about the same subject matter. The Court considered the preferable course was remittal, as the issue of whether further claims should be brought within the current proceedings or in new proceedings should be determined by a single judge after hearing from the parties.

Regarding costs, the Court determined that each party achieved a significant measure of success on the appeals and ordered that each party bear its own costs of the appeals and cross-appeals. For the proceedings at first instance, the appellants were ordered to pay 80% of CBA's costs. This reflected that whilst CBA was largely successful overall, some allowance was made for the appellants' success in establishing some contraventions.

[*Postscript*: Following this judgment, the applicants applied for special leave to appeal to the High Court in relation to the Full Court's dismissal of their claims on the basis that they had not established that any inflation in the CBA share price resulted from the established contraventions. On 13 February 2026 the High Court granted special leave to appeal, with the result that the key issue of proof of causation and loss in shareholder class actions will now be considered and determined by the High Court. The full High Court judgment is available here: [Available here](#)]



### Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Ltd (No 2) [2025] FCAFC 123

Federal Court of Australia | Murphy, Moshinsky and Button JJ | 4 September 2025

**Applicants' Solicitors:** Maurice Blackburn & Phi Finney McDonald

**Respondents' Solicitors:** Herbert Smith Freehills

**Applicants' Funder:** N/A

**Federal Court of Australia:** [Available here](#)

# Epic decision in landmark misuse of market power case against tech giants Apple and Google

Together, these decisions marked the first occasion on which the amended s 46 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) has been the subject of judicial determination on the merits. As Beach J observed, at [3691] of the *Epic v Apple* decision:

*The 2017 amendments relevantly recast s 46 to remove the requirement that a firm “take advantage” of a substantial degree of power in a market as an element of the contravention. Indeed, there is no express causal link required between the possession of “a substantial degree of power in a market” and the proscribed conduct with the requisite purpose, effect or likely effect.*

## The proceedings

These judgments arose after Epic Games, the developer of the globally popular game Fortnite, brought proceedings against both Apple and Google, alleging contraventions of ss 46 and 47 (alternatively s 45) of the CCA. The core complaint against Apple was that its contractual and technical restrictions forced app developers to distribute native iOS apps exclusively through the App Store and to use Apple’s in-app purchase system (**IAP**) as the sole payment solution for digital content, with Apple charging commissions of 30%. On 13 August 2020, Apple removed Fortnite from the App store after Epic introduced its own direct payment mechanism.

The parallel claim against Google alleged that Google hindered the ability of app developers (including Epic) to distribute apps to Android devices in a realistic and practical way, other than through Google’s Play Store. After Epic introduced its own direct payment mechanism, it was also removed from the Play Store on 13 August 2020

The third and fourth proceedings, *Anthony v Apple* and *McDonald v Google*, were representative proceedings, brought on behalf of developers and consumers. The class applicants’ case was “on all fours with Epic’s case in its separate proceeding against Apple and its separate proceeding against Google,” save that the class applicants alleged contraventions limited to the period from 6 November 2017 to 20 June 2022 (*Anthony v Apple*, [12]). The additional issue for determination was whether Apple and Google had caused app developers to pay materially higher commissions

on paid app downloads and in-app purchases of digital content than they would have paid absent the contravening conduct (*Anthony v Apple*, [10]).

## Key Findings

With regards to the s 46 claim, Apple was found to possess a substantial degree of market power in both the iOS app distribution market and the iOS in-app payment solutions market.

His honour held that “Apple’s restrictions on direct downloading or sideloading of native iOS apps had the purpose and effect or likely effect of substantially lessening competition in the iOS app distribution services market” (*Epic v Apple*, [55]). “Apple’s conduct in imposing IAP on app developers in the circumstances indicated had the effect or likely effect of substantially lessening competition in the payment solutions market” (*Epic v Apple*, [56]). However, Apple banning rival app stores within the App Store itself did not contravene the CCA, as this would have diminished the quality of the App Store (*Epic v Apple*; [67]).

In *Epic v Google*, his Honour found that there were three relevant markets: the mobile OS licensing market, the Android mobile app distribution market, and the Android in-app payment solutions market. Google was found to have a substantial degree of power in each market (*Epic v Google*, [69]).

Google engaged in conduct in the latter two of the three posited markets that has had or is likely to have the effect of substantially lessening competition in such markets, being conduct that prevents or prohibits developers and users from using alternative payment methods to Google Play Billing for purchasing digital in app content. With regards to the first market his Honour found that Epic did not put a case concerning conduct with an anti-competitive purpose or effect in the mobile OS licensing market (*Epic v Google*, [3370])

Further his Honour rejected the s 47 exclusive dealing claims against both Apple and Google. His Honour held that the requirement to use IAP or Google Play Billing did not constitute a “condition” within the meaning of s 47: “It is not sufficient that a ‘likely consequence’ of a provision is that a person will not acquire services from a competitor. There must be some form

of prohibition” (*Epic v Apple*, [6149]). Developers retained the ability to monetise their apps by other means, and users could choose their transaction platform. The s 45 claims were also rejected on the basis that Epic had not isolated the particular provisions said to have the anti-competitive purpose or effect (*Epic v Apple*, [6152]).

In the representative proceeding, Beach J concluded that “the commissions payable by developers would likely have been materially less absent the contravening conduct of Apple and Google” (*Anthony v Apple*, [858]). However, his Honour could not quantify the precise difference. He noted that there may not be a single counterfactual commission figure – “[a]ny relevant counterfactual commission may vary depending upon the time period one is considering or possibly the type of app or possibly developer revenue type considerations” (*Anthony v Apple*, [36]).

## Key Legal Principles

**Causation** - In finding that Apple and Google contravened s 46, his Honour interpreted that the new s 46 “is to be read such that some form of causation is to be taken as necessarily implicit in the statutory text and assumed by the legislature to apply and be conclusively assumed if all conditions for the statutory proscription in each case have been satisfied and without more” (*Epic v Apple*, [3714]).

**Market power** – His Honour recognised that in multi-sided digital markets, “no single market share metric can adequately capture the realities in such a market. Market share is therefore a poor tool for assessing the market power of platforms” (*Epic v Apple*, [3862]). His honour found that “the ultimate determinant of market power is the degree of competitive constraint to which a firm is subject in the relevant market” (*Epic v Apple*, [3868]). The possession and control of large data sets and first-mover advantages were identified as sources of market power in technology markets: “[a] new entrant may not be able to readily replicate the scope of data possessed by the operators of existing platforms within a reasonable time-frame or at a level which may enable it to effectively compete” (*Epic v Apple*, [3737]).

**Purpose** - The proscribed purpose must be a “substantial” purpose of the conduct, meaning it must loom large among the objectives sought to be achieved, but it need not be the sole purpose (*Epic v Apple*, [3827]–[3828]). Although purpose is subjective, it can be identified from objective circumstances and inferred from circumstantial evidence, including the predictable outcomes of a corporation’s conduct (*Epic v Apple*, [3831]). In the Apple proceeding, Beach J rejected Apple’s evidence that its sole purpose in maintaining centralised distribution was security and privacy, finding instead that “even if and to the extent that the model of centralised distribution served a

security purpose, it also served a substantial anti-competitive purpose" (*Epic v Apple*, [5051]). The two purposes were found to sit side by side.

**Counterfactual** – Beach J held that "[i]t is not necessary to prove each predicted fact on the balance of probabilities. The counterfactual is no more than an element of the calculus aimed at detecting the existence and extent of a change in the competitive process" (at *Epic v Apple*, [3791]). Further his Honour held that "it is not incumbent on an applicant to prove each predicted fact that may arise in the counterfactual on the balance of probabilities. The comparison of the "with" and "without" scenarios involves a consideration of all commercially realistic counterfactuals culminating in a "single evaluative judgment". That inquiry is not an atomised one." (*Epic v Apple*, [5224]).

In the Google proceeding, the counterfactual analysis was more nuanced. Beach J rejected Epic's effects case concerning several categories of conduct – including the MADA pre-installation provisions and technical restrictions – on the basis that Epic had failed to prove that there was a "real commercial likelihood" that OEMs or users would act differently absent those specific restrictions (*Epic v Apple*, [3575]). His Honour emphasised that "[i]t is not sufficient in a competition case to assess competitive effects by reference to mere speculative possibilities without any evidentiary foundation" (*Epic v Apple*, [3574]). However, the counterfactual analysis succeeded in respect of Project Hug and the GVP agreements, where Beach J found that absent those arrangements, participating developers "would be free to distribute differentiated or exclusive content through rival Android app stores, which those stores would promote so as to entice users away from the Play Store" (*Epic v Apple*, [4268]).

Beach J agreed with the class applicants that in a counterfactual without the contravening conduct, "acting as commercially rational firms without market power, Apple and Google would have taken legitimate steps to respond to competition", and that "the rational legitimate step absent the elements of the contravening conduct would have been to lower prices" (*Anthony v Apple*, [28]).

**Pro-Competitive Justifications** – His Honour found that "To be legally relevant, any claimed pro-competitive justifications must "negate the propositions that the impugned conduct had a substantial purpose of substantially lessening competition in the relevant markets and/or that it had, or was likely to have, the effect of substantially lessening competition in the relevant markets" (*Epic v Apple*, [4645]).

**Counterfactual Commissions**

His Honour indicated that the counterfactual commission and overcharge questions and their resolution need to be more focused and to take into account the actual contraventions found, and that he would need to hear further from counsel before resolving them. Accordingly, in all four proceedings, the further hearing has been stood over to a date to be fixed.

**Epic Games, Inc v Apple Inc [2025] FCA 900, Epic Games, Inc v Google LLC [2025] FCA 901, and Anthony v Apple Inc; McDonald v Google LLC [2025] FCA 902**

Federal Court of Australia | Beach J | 12 August 2025

**Applicants' Solicitors:** For Epic: Allens  
For Class Actions: Phi Finney McDonald and Maurice Blackburn

**Respondents' Solicitors:** Apple: Clayton Utz  
Google: Corrs Chambers Westgarth

**FCA Link:** [Available here](#)

## GCO granted in Sportsbet in-play betting class action

Justice Matthews has granted a Group Costs Order (GCO) at the rate of 33% (inclusive of GST) in a class action brought by Maurice Blackburn (MB) against Sportsbet Pty Ltd (Sportsbet) arising from its 'Fast Code' in-play betting service.

**Background**

The class action:

- (a) alleges that Sportsbet's 'Fast Code' service, which allowed customers to place 'in-play' bets, was prohibited under the Interactive Gambling Act 2001 (Cth); and
- (b) seeks refunds of betting losses incurred when using the 'Fast Code' service.

**GCO**

Because of the confidentiality orders made by Matthews J, her Honour was constrained in what she could set out in her reasons. Nevertheless, her Honour:

- noted that, in the event a GCO was not made, MB could, in its sole discretion, choose to either seek third party litigation funding, continue to act on a 'no win, no fee' basis or cease to act for the plaintiff;
- accepted the evidence of solicitors of MB, which was largely confidential, about what would likely occur if the GCO was not made (either at all or in the percentage sought), and, by considering that evidence, found that it would be in the interests of group members for the GCO to be made;
- was satisfied that the proposed GCO rate of 33% was proportionate and reasonable, given the "substantial legal and financial risks" MB was assuming in running the class action;

- was satisfied that, despite being comparatively high, the GCO rate of 33% was justified because "[a]part from anything else, [the class action] is a relatively novel case, such that the litigation risk associated with it is higher than, say, a standard shareholders class action"; and
- considered that s 33ZDA(3) of the Supreme Court Act 1986 (Vic), which allows the Court to amend a GCO (and its percentage) at a later stage of the proceeding, provided an important protection, and that this protection was the "preferable way to ensure that the GCO remains appropriate in this case" (rather than, for instance, imposing a 'tiered' or 'ratcheted' GCO rate at the present stage of the proceeding).

Accordingly, Matthews J made orders awarding a GCO at a rate of 33% (inclusive of GST).



**Bergman v Sportsbet Pty Ltd (GCO Ruling) [2025] VSC 521**

Supreme Court of Victoria | Matthews J | 28 August 2025

**Plaintiff's Solicitors:** Maurice Blackburn

**Defendant's Solicitors:** Allens

**Supreme Court Link:** [Available here](#)



# Maurice Blackburn secures \$59M settlement in forex rate-rigging case

Maurice Blackburn secured a \$59 million settlement on behalf of businesses that traded in foreign currency instruments between 2008 and 2013, bringing to a successful conclusion a complex, high-stakes cartel class action against five of the world’s major banks. In approving the settlement, Beach J made significant observations on the contested question of whether ‘pass through’ constitutes a defence to cartel damages claims under Australian competition law and offered pointed remarks on the future of hard class closure mechanisms in light of recent High Court dicta.

## Background

The proceeding was brought against five major banks – UBS AG, Barclays Bank Plc, Citibank N.A., JPMorgan Chase Bank N.A. and NatWest Markets Plc (the **Banks**) – alleging cartel conduct in the global foreign exchange market. The applicant alleged that the Banks co-operated with each other, co-ordinated trading and shared non-public information (concerning current or potential future trading) in contravention of the *Trade Practices Act 1974* (Cth) and *Competition and Consumer Act 2010* (Cth) (CCA).

The applicant argued that this conduct artificially increased the price of FX instruments, increased volatility, decreased competition, and caused loss to the applicant and to group members. Group members were parties to FX instruments in relation to one or more affected currency pairs in Australia during the relevant period (to a minimum transaction value of AUD 500,000).

The Banks denied that there was a global FX market or Australian FX market or that they engaged in any cartel conduct which caused loss or damage to the applicant. They also argued that any loss or damage that was passed on or ‘passed through’ cannot be recovered.

Following the imposition of a soft class closure mechanism and two mediations, the parties reached an in-principle settlement in February 2025. The deed of settlement was executed on 1 May 2025.

## Settlement Approval

His Honour applied the well-established principles for settlement approval under s 33V(1) of the *Federal Court of Australia Act 1976* (Cth), and confirmed he was satisfied that \$59 million represented a fair and reasonable compromise, having regard in particular to the confidential opinion of senior counsel and the significant litigation risks the proceeding faced, including on the question of whether any passing on or ‘pass through defence’ would be available to the Banks under Australian competition law.

## Some useful observations on the ‘pass through’ defence in Australia

A central issue in the proceeding was whether any loss suffered by group members could be reduced or extinguished on the basis that they passed the FX overcharge on to their own downstream customers.

Beach J said the availability of this defence in Australia is uncertain, citing Tracey J’s comments in *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd* [2008] FCA 1458 (at [41] to [43]);

It has yet to be determined authoritatively whether a respondent who is facing a loss and damages claim under s 82 has a defence if it is shown that the applicant has passed on to customers or clients all additional costs occasioned by the implementation of an agreement made in contravention of a provision of the Act.

His Honour noted that the US approach, which doesn’t permit consideration of any ‘pass through’, and bars claims by indirect purchasers, is not transposable to ss 82 and 87 of the CCA. Unlike the US regime, which is more focused on imposing punitive relief, the Australian provisions are compensatory in nature, requiring a claimant to prove actual loss. Where a claimant has fully passed on an overcharge to downstream customers, it may have suffered no compensable loss at all. His Honour noted [at 47]:

The relevant comparison is between the actual financial position and the financial position the person would have been in but for the contravening conduct. If the claimant is able to pass through the overcharge to persons downstream, such that the claimant is in no worse a financial position than would have been the case but for the contravening conduct, he has suffered no loss or damage.

The US position does not allow for indirect (or downstream) purchaser claims. It is a corollary of that restriction, that no ‘pass through’ claim is entertained. But s 82 and 87 of the CCA look at where the true loss resides and recovery by indirect purchasers cannot be disallowed. Accordingly, it is necessary to take into account ‘pass through’, to prevent the risk of double recovery.

Importantly, his Honour confirmed that ‘pass through’ is not a formal defence carrying any legal or evidentiary burden on the respondent – rather, it is one aspect of the claimant’s obligation

to prove loss. These observations, while obiter in the settlement approval context, represent the most detailed judicial treatment of this question to date and will be an important reference point for future competition class actions.

## A sidenote on hard class closure

While this case did not involve hard class closure, Beach J took the opportunity to acknowledge the recent views expressed by the High Court *Lendlease Corporation Ltd v Pallas* (2025) 423 ALR 23, that pre-settlement orders which contingently extinguish the rights of unregistered group members, may impermissibly usurp the Court’s function.

While the question of hard class closure mechanisms was not before the court in *Lendlease*, Beach J noted that those comments have ‘chilled the possibility of such a mechanism being further pursued at the moment’ and it may be that ultimately legislative reform will be needed, to resolve the issue.

### J Wisbey & Associates Pty Ltd v UBS AG (No 3) [2025] FCA 1018

Federal Court of Australia | Beach J | 15 August 2025

**Applicants’ Solicitors:** Maurice Blackburn

**Respondents’ Solicitors:** Herbert Smith Freehills Kramer; Clayton Utz; Allens; Allen Overy Shearman Sterling; King & Wood Mallesons

**Austlii Link:** [Available here](#)

## Federal Court grants carriage in Google adtech class action

This judgment addressed two competing representative proceedings brought against Google entities by online publishers alleging anti-competitive conduct related to ad-tech services. The *Q News* proceeding was commenced on 16 December 2024 by *Q News Pty Ltd* and *Sydney Times Media Pty Ltd*, represented by Piper Alderman and funded by Woodsford Group Ltd. The *Riverine* proceeding was commenced on 14 February 2025 by *Riverine Grazier Pty Ltd* and *Mornington Peninsula News Group Pty Ltd*, represented jointly by Maurice Blackburn (MB) and Phi Finney McDonald (PFM) pursuant to an Agency Retainer Agreement that annexed a document titled "Google AdTech Class Action Cooperative Litigation Protocol". Each proceeding is an 'open class' representative proceeding, and each proceeding raises similar allegations against Google. The applicants in each proceeding sought a permanent stay of the other.

Both proceedings allege that Google engaged in anti-competitive conduct in connection with programmatic sales of ad impressions for open display advertising, including allegations of misuse of market power contrary to section 46 of the *Competition and Consumer Act 2010* (Cth). The *Riverine* proceeding concerns a broader range of conduct and additionally alleges contraventions of section 47 (exclusive dealing) and section 21 of the *Australian Consumer Law* (unconscionable conduct). The claims broadly concern five types of ad-tech services supplied by Google: publisher ad servers, supply side platforms, demand side platforms, advertiser ad servers, and ad networks. The pleadings trace the development of ad-tech services from 2009 and allege various categories of conduct including Google's 'Decision Rule Conduct', User De-identification Conduct', Google's refusal to participate in 'Header Bidding', Tying Conduct' (requiring use of bundled services), and preferential treatment of Google's supply-side platform (AdX) over competitors. The *Riverine* proceeding also raises additional allegations concerning 'Project Bernanke Conduct' (relating to alleged third-price auctions where Google retained the difference between the second-highest and third-highest bids) and 'Google (YouTube) Exclusivity Conduct' that are not present in the *Q News* proceeding.

Justice O'Bryan held that the pleadings in both proceedings suffered from some deficiencies, but found that a key difference between the proceedings concerns group membership: the *Q News* proceeding was brought on behalf of publishers domiciled in Australia, whilst the *Riverine* proceeding was brought on behalf of publishers who sold (to advertisers) impressions for the display of advertisements to consumers of online publications who were physically located or ordinarily resident in Australia, regardless of where the publisher is located. This broader definition in the *Riverine* proceeding means it includes all group members from the *Q News* proceeding, plus overseas publishers who sold impressions displayed to Australian consumers. Another significant difference concerned the scope of claims: the *Q News* proceeding seeks only damages, whilst the *Riverine* proceeding also seeks declaratory and injunctive relief (the latter being particularly significant given allegations that the unlawful conduct is ongoing). His Honour noted that in circumstances where the alleged unlawful conduct is continuing, injunctive relief offers a means of changing Google's rules and practices and avoiding future loss to group members.

His Honour also addressed the territorial reach of Australian competition and consumer laws. The *Q News* applicants fastened upon the

location of the publisher claimants in Australia as the relevant connecting factor, raising claims in respect of the sale of impressions for the display of advertising anywhere in the world. Conversely, the *Riverine* applicants fastened upon the location of the display of advertisements to users in Australia as the relevant connecting factor, raising claims on behalf of publishers wherever they are located. At this early stage of the proceedings, his Honour found it was not possible to say that one approach was correct and the other incorrect, as both appeared to have merit. The *Riverine* proceeding defines the relevant markets by reference to the acquisition of ad-tech services in connection with the sale of impressions for the display of advertisements to consumers located in Australia, a definition his Honour accepted as arguable at this stage.

His Honour ultimately determined it was in the interests of justice to permanently stay the *Q News* proceeding and permit the claims to be litigated through the *Riverine* proceeding. This conclusion was based on three main factors: *first*, the broader group membership represented in the *Riverine* proceeding; *second*, the more comprehensive scope of claims and the relief sought (including the injunctive relief sought in the *Riverine* proceeding but not in the *Q News* proceeding); and *third*, the more realistic litigation budget in the *Riverine* proceeding

(being more than double the litigation budget in the *Q News* proceeding) and more beneficial funding arrangements in the *Riverine* proceeding (notwithstanding the higher proposed success fees and legal charges). The *Q News* proceeding was funded by Woodsford, which agreed to seek a success fee of 22.5% of the first \$150 million of gross proceeds and 20% of any gross proceeds over \$150 million. The *Riverine* proceeding was funded by Fortress Investment Group and Balance Legal Capital, which agreed to seek a success fee of 25% if there was a settlement or judgment within two years, or 30% thereafter.

Relevantly, his Honour said:

[134] As set out in some detail earlier in these reasons, the *Riverine* pleading has unsatisfactory elements, and in parts of the pleading it is difficult to identify with certainty the conduct that is alleged to be unlawful. Despite those difficulties, it is tolerably clear that the types or categories of conduct alleged to be unlawful in the *Riverine* proceeding include all of the types or categories of conduct alleged to be unlawful in the *Q News* proceeding, and includes other conduct. In that sense, the claims made in the *Riverine* proceeding are broader than those made in the *Q News* proceeding. It is not possible to assess the merits of the claims made at this stage of the proceeding. In particular, it cannot be said that the additional claims made in the *Riverine* proceeding are unmeritorious. As a result, the broader scope of the *Riverine* pleading (in terms of the categories of alleged unlawful conduct) weighs in the *Riverine*

proceeding's favour, because it would be contrary to the interests of group members to stay a proceeding in which those claims are made...

[171] ... I consider that the *Q News* budget is unrealistic.

[180] ... [Because of the unrealistic budget] there is some risk that financial pressures will cause the conduct of the *Q News* proceeding to be compromised. In my view, that risk outweighs the higher funding success fee being sought in the *Riverine* proceeding.

However, his Honour expressed concern about additional costs arising from the agency arrangement between MB and PFM, noting that no evidence was adduced as to the circumstances in which the firms decided to consolidate their investigations and jointly commence a representative proceeding. His Honour made orders requiring compliance with a Cooperative Litigation Protocol, stipulating that certain categories of duplicative costs (including Litigation Committee costs) would not be recoverable from the respondents or settlement proceeds, and appointing a costs referee to conduct six-monthly inquiries into potentially duplicative costs. His Honour ordered that the fees of the Costs Referee would also not be recoverable against the respondents or from the proceeds of any award or settlement.

[*Postscript*: On 27 August 2025 the applicants in the *Q News* proceeding filed an application for leave to appeal from O'Bryan J's decision, but subsequently discontinued the application.]

## Court approves \$34M settlement in 'add-on' insurance case

This judgment concerned an application under s 33V of the *Supreme Court Act 1986* (Vic) for approval of a proposed settlement of a class action brought against AAI Limited, TAL Life Limited and MTA Insurance Pty Ltd (collectively, the **Insurers**), arising out of the sale of 'add-on' insurance products to consumers between 1 May 2006 and 30 June 2018.

Maurice Blackburn brought the proceeding on behalf of consumers who purchased 'add-on' insurance products (including loan protection insurance, guaranteed asset protection insurance, cash benefit insurance, extended vehicle warranty insurance, and tyre and rim insurance) from car and motorcycle dealerships when they purchased or leased vehicles between 1 May 2006 and 30 June 2018. These products were usually added on to the loans that the dealership arranged for consumers to finance their vehicle purchase.

Consumers claimed the Insurers engaged in misleading or deceptive conduct and breached the *Corporation Act 2001* (Cth) by representing to them, that the add-on insurance products:

- were mandatory for finance approval;
- had real value; and / or
- were suitable for the consumer's personal circumstances.

The Insurers denied those claims and pointed to product disclosure statements which contained statements that the purchase of the insurance products was not a condition of obtaining finance (and to the use of scripted disclosures by dealers at the point of sale, confirming that the add-on insurance products were not a requirement for finance approval).

In response to the allegation that the add-on insurance products lacked any real value, the Insurers pointed out that claims had already been paid under the policies taken out by consumers, thereby delivering a real benefit from the coverage.

Two days before the trial was due to start, the proceeding settled for \$34 million (inclusive of legal and other costs). Justice Matthews approved the settlement as fair and reasonable having regard to the complexity of the proceeding, the risks attending the claims (including the limitation period issue) and the interests of approximately 40,800 registered group members from a class drawn from approximately 300,000 policies.

The proceeding was conducted pursuant to a group costs order (**GCO**) at the rate of 25%. Matthews J did not vary the GCO. There were no objections by group members about the percentage of the GCO. Her honour was satisfied that the rate was proportionate having regard to Maurice Blackburn's work and investment and the risks it had assumed. Maurice Blackburn was appointed as settlement scheme administrator



### Riverine Grazier Pty Ltd v Google LLC [2025] FCA 895

Federal Court of Australia | O'Bryan J | 6 August 2025

**Applicants' Solicitors:** Piper Alderman; Maurice Blackburn & Phi Finney McDonald

**Respondents' Solicitors:** Herbert Smith Freehills

**Applicants' Funder:** Woodsford Group Ltd; Fortress Investment Group & Balance Legal Capital

**Austlii Link:** [Available here](#)

### Anderson-Vaughan v AAI Ltd (Settlement Approval [2025]) VSC 469

Supreme Court of Victoria | Matthews J | 30 June, 4 August 2025

**Plaintiff's Solicitors:** Maurice Blackburn

**Defendant's Solicitors:** King & Wood Mallesons

**Funder:** Omni Bridgeway & Therium

**Supreme Court Link:** [Available here](#)

# Court approves settlements in trio of flex commissions class actions

These three judgments concerned approval of settlements in three separate, but related, proceedings arising out of the charging of undisclosed 'flex commissions' paid to car dealers in connection with loans arranged by car dealers and entered into between January 2011 and March 2016 (in the *O'Brien* proceeding) or March 2013 and October 2018 (in the *Nathan* and *Fox* proceedings). All three cases were case managed together.

The claims arose from arrangements whereby the defendant lenders notified car dealers of a 'base rate' of interest, but permitted dealers a discretion to set higher contract rates, with the lenders paying dealers a commission on the difference. A consequence of this arrangement was that the higher the rate of interest set by the dealer, the greater the flex commission and the greater the return to the lender. The plaintiffs alleged that this conduct was unfair for the purposes of section 180A of the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**), constituted misleading or deceptive conduct contrary to section 12DA of the *Australian Securities and Investments Commission*

*Act 2001* (Cth), and gave rise to claims in mistake at law (which entitled the plaintiffs and group members to rescission of the loan contracts or rendered them void or voidable). The claims under the NCCPA and for misleading or deceptive conduct were subject to a six-year limitation period.

The *O'Brien* proceeding settled shortly before trial for an amount of \$85 million. The *Nathan* and *Fox* proceedings settled after trial, but before judgment, for \$56.5 million and \$130 million respectively. At the time of settlement, there were than 300,000 registered group members in each of the *O'Brien* and *Fox* proceedings, and more than 150,000 registered group members in the *Nathan* proceeding. The evidence was that the proposed settlement and distribution scheme in each case was the subject of extensive modelling by the plaintiffs' legal team of the estimated value of the plaintiffs' and group members' claims.

The methodology for assessing loss was based on a forensic expert report, which calculated loss as

the difference between the actual interest paid under the contract rate and the interest that would have been paid at the 'base rate' (plus statutory Court interest). The settlement distribution scheme provided for different calculations between two classes: (i) those with loans that were entered into within six years prior to commencement of the proceeding (who therefore had statutory claims under the NCCPA and for misleading or deceptive conduct); and (ii) those with earlier loans (whose statutory claims were barred by limitation periods, and therefore only had 'mistake' claims). For the purposes of settlement distribution, the claims of the mistake-only claimants were discounted by ~90%, which was based on an assessment of the risks associated with those claims, having regard to the more limited basis of the claims and the defences pleaded.

Justice Harris separately approved each settlement, finding it fair and reasonable having regard to the litigation risks, particularly for the mistake-based claims which faced more significant barriers to success. For example, in the *O'Brien* proceeding Harris J concluded (at [76]) that "the figure is comfortably within the range of what is a reasonable and fair settlement amount for group members", and in the *Fox* proceeding (at [63]):

I accepted, based on the evidence and submissions, that the settlement sum was fair and reasonable. It was within the range of reasonable outcomes to resolve the plaintiffs' and group members' claims, and was arrived at rationally, having been informed by the extensive modelling described above of all the group members' losses.

Her Honour also approved the group costs order providing for the plaintiffs' solicitors to receive 24.5% of each settlement sum on account of legal costs. This percentage had been established by a group costs order made in each proceeding by Nichols J in March 2023. Justice Harris found no reason to vary the percentage rate, and specifically found that it remained within the mid-range of percentage rates in comparable group costs orders. Her Honour emphasised that the benefits of certainty and transparency had been served throughout the interlocutory phase of the proceedings and for the purposes of informing a mediated compromise. Pursuant to Maurice Blackburn's cost sharing arrangement with the funder Vannin, as agreed prior to the group costs order application, Vannin was obliged to pay 50% of the proceeding costs including professional fees and disbursements, and 50% of any adverse costs or security for costs; and Maurice Blackburn was obligated to pay Vannin 50% of any group costs order payment it received in the proceeding. Her Honour also separately approved settlement administration costs in each proceeding, and payments to each of the lead plaintiffs in amounts between \$20,000 and \$40,000 each.

Lastly, there were a small number of objections to some of the settlements, mostly by group members who had mistake-only claims (who contended that their claims should be valued at a higher amount for settlement distribution purposes). Those objections were considered in detail, but for the reasons set out above, were dismissed and did not prevent approval of the settlements.



## O'Brien v Australia and New Zealand Banking Group Ltd & Anor [2025] VSC 389

**Austlii Link:** [Available here](#)

## Nathan v Macquarie Leasing Pty Ltd [2025] VSC 594

**Austlii Link:** [Available here](#)

## Fox v Westpac Banking Corporation [2025] VSC 643

Supreme Court of Victoria | Harris J | 3 July 2025, 19 September 2025 & 15 October 2025

**Plaintiff's Solicitors:** Maurice Blackburn

**Defendants' Solicitors:** Herbert Smith Freehills; Gilbert + Tobin; King & Wood Mallesons

**Plaintiffs' Funder:** Vannin Capital Investments (Australia) Pty Ltd

**Austlii Link:** [Available here](#)



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