IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2020 04566

GREG LIEBERMAN — Plaintiff

v

CROWN RESORTS LIMITED
(ACN 125 709 953) — Defendant

JUDGE:	Nichols J
WHERE HELD:	Melbourne
DATE OF HEARING:	5 September 2025
DATE OF JUDGMENT:	19 September 2025, revised 23 September 2025
CASE MAY BE CITED AS:	Lieberman v Crown Resorts Ltd
MEDIUM NEUTRAL CITATION:	[2025] VSC 596

REPRESENTATIVE PROCEEDINGS — Part 4A Group proceeding — Application for approval of settlement — Whether settlement is fair and reasonable as between the parties and as between group members — Shareholder class action — Alleged breach of continuous disclosure obligations — Financial circumstances of the company — Payment of settlement sum in instalments – Settlement approved — *Supreme Court Act 1986* (Vic) Part 4A, ss 33V, 33ZF — *Botsman v Bolitho (No 1)* [2018] 57 VR 68, *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322, *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439 applied.

PRACTICE AND PROCEDURE — Part 4A Group proceeding — Application for approval of settlement —Soft class closure order — Proceeding settled at mediation —Applications for late registration to permit participation in the settlement — All applications approved — *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)* [2024] VSC 733, applied.

PRACTICE AND PROCEDURE — Part 4A Group proceeding — Approval for payment of legal costs from settlement sum — No reason to vary group costs order — *Supreme Court Act 1986* (Vic) Part 4A, s 33ZDA — *Fox v Westpac Banking Corporation* (2021) 69 VR 487, *Allen & Anor v G8 Education Ltd (No 4)* [2024] VSC 487, applied — *Fuller & Anor v Allianz Australia Insurance Ltd & Anor (Settlement Approval)* [2025] VSC 160, *McCoy v Hino Motors Ltd (No 2)* [2025] VSC 553 discussed.

PRACTICE AND PROCEDURE — Part 4A Group proceeding — Appointment of Scheme Administrator — Approval for payment of costs of administering settlement distribution scheme.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Ms R Howe Mr T Rawlinson	Maurice Blackburn
For the Defendant	Mr K Loxley Mr H Whitwell	HSF Kramer
For Maurice Blackburn as Intervenor	Mr A Hochroth	Maurice Blackburn

TABLE OF CONTENTS

HER HONOUR:

A. Introduction

1 This proceeding is a securities class action issued under Part 4A of the *Supreme Court Act 1986* (Vic) (**Act**) on behalf of all persons who acquired an interest in fully paid ordinary shares in Crown Resorts Ltd (**Crown**) between 11 December 2014 and 18 October 2020 inclusive or held an interest in Crown Shares during that time (the **Relevant Period**). The plaintiff, Greg Lieberman, and defendant, Crown, have reached an in-principle settlement subject to the Court's approval which may be given under s 33V of the Act. The plaintiff now seeks approval of the settlement, a proposed scheme for the distribution of the Settlement Sum between group members (**SDS**) and for the deduction from the Settlement Sum of legal and other costs.

2 Under the proposed settlement, the defendant is to pay the sum of $72.5 million in settlement of the claims of the plaintiff and group members (**Settlement Sum**). The Settlement Sum will be paid in three instalments. The first instalment of $20 million has already been paid, the second instalment of $25 million will be paid by 11 May 2026 and the third instalment of $27.5 million will be paid by 10 May 2027.

3 For the reasons that follow:

(a) I consider that the proposed settlement is fair and reasonable and in the interests of group members as a whole. I will make orders approving the settlement on the terms of the deed of settlement between the plaintiff and defendant dated 9 May 2025;

(b) I consider that the proposed scheme for the distribution of funds between group members is fair as between group members and that it adopts fair and reasonable processes. Subject to some confined amendments which are mentioned later in these Reasons, I will make orders approving the proposed SDS;

(c) There are no grounds upon which to revise the Group Costs Orders made by this Court under s 33DA of the Act in December 2022. The order will take effect so

that the legal costs payable to the plaintiff's solicitors (Maurice Blackburn) will be calculated at 27.5% of the Settlement Sum and liability for payment of those costs will be shared among the plaintiff and group members;

(d) I will approve settlement administration costs of up to $696,736.70 (inclusive of GST) subject to the Settlement Administrator submitting a report to the Court certifying the amount of costs actually incurred in the settlement administration;

(e) I will approve the sum of $4,208 in respect of the report of the plaintiff's costs expert;

(f) I will approve the sum of $20,000 as the plaintiff's reimbursement payment.

4 The plaintiff relied upon the evidence of Ms Rebecca Gilsenan, a principal of Maurice Blackburn who had ultimate responsibility for this matter on behalf of the plaintiff. Ms Gilsenan has practised predominantly in group proceedings since 1999. She has extensive experience as a litigation solicitor in conducting and settling matters of this kind. She is a member of Maurice Blackburn's investment committee which considers the firm's proposed investments in litigation, and is closely involved in decision-making processes in relation to Maurice Blackburn's class actions portfolio.

5 In applications of this kind it is customary for the Court to receive the written opinions and evidence of the plaintiff's legal advisers which disclose the basis of the settlement and how they evaluated the compromise by reference to the value of the claims and the risks of proceeding to trial. Such material, when carefully prepared and reasoned and candidly expressed, is of real assistance to the Court in discharging its duty to assess the reasonableness of the proposed settlement. Of necessity, such material is provided to the Court confidentially, and it is in the interests of justice that its confidentiality be maintained. Neither the defendant nor any other person beyond the plaintiff and his legal advisers would in other circumstances have access to that evidence. Similarly, evidence going to the appropriateness of the plaintiff's claim for legal costs includes material that is properly considered confidential. Orders have

been made on this application protecting the confidentiality of some but not all of the material upon which the plaintiff relied. Further, it is necessary that I refer in these Reasons to some matters that were the subject of claims to confidentiality, in order to cogently and publicly record the Court's Reasons.

6 In this case I was much assisted by the confidential opinion of the plaintiff's counsel, Mr Edwards KC, Ms Howe and Mr Rawlinson. The opinion set out in detail counsel's candid and considered views about the plaintiff's claims.

B. Background to the proceeding

7 Broadly speaking this case concerns Crown's alleged misleading or deceptive conduct and material non-disclosures regarding its corporate governance and regulatory compliance. Crown was the parent entity of the Crown Group which included the entities that operated the Crown Melbourne and Crown Perth casinos under license. Those entities were 'reporting entities' for the purposes of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (*Cth) and the *Anti-Money Laundering and Counter-Terrorism Financing Rules 2007* (Cth) (**AML Laws**). The true state of affairs, that the plaintiff alleged Crown did not disclose, concerned, among other things, deficiencies in Crown's anti-money laundering and counter-terrorism programs, compliance with its taxation obligations, certain dealings with regulators and other conduct alleged to be likely to facilitate money laundering.

8 Several public inquiries into the conduct of Crown and its subsidiaries occurred between 2019 and 2022, and regulatory enforcement action has been taken by AUSTRAC against certain of Crown's subsidiaries in relation to their compliance with the AML Laws. While the inquiry conducted by the New South Wales Independent Liquor & Gaming Authority was on foot, Crown published an announcement to the ASX on 19 October 2020 describing potential non-compliance by Crown Melbourne with the AML Laws in respect of which AUSTRAC had initiated a formal enforcement investigation. In the period immediately following this announcement, the price of ordinary shares in Crown fell from a closing price of $8.99 the previous trading day

(16 October 2020) to an intra-day low of $8.06 on 19 October 2020, ultimately closing at $8.25 on that day. Following publication of the NSW Independent Liquor & Gaming Authority's report, Royal Commissions in Victoria and Western Australia were also conducted. Various regulators have also taken regulatory actions against certain members of the Crown Group, largely as a result of matters that were revealed at these inquiries, including a civil penalty proceeding in the Federal Court of Australia commenced by AUSTRAC.

9 This proceeding was commenced on 11 December 2020. In February 2022 Crown announced that it had entered into a scheme implementation deed with a company on behalf of funds managed by Blackstone Inc.[1]

C. Steps taken in the proceeding

10 The proceeding was commenced as an 'open class' proceeding for the group members described above.

11 By orders made on 7 June 2024, I fixed 24 August 2024 as the date by which group members could opt out of the proceeding or alternatively register their claims for the purposes of any settlement that occurred before trial (**class closure orders**). As at the class deadline 193 group members had opted out and approximately 4,600 group members had registered their claims (**registered group members**).

12 I am satisfied that adequate notice was given to group members of the right to opt out of the proceeding and of the requirement to register their claims in order to participate in any settlement reached before trial. As discussed later in these Reasons, a small number of group members have applied to participate in the settlement, notwithstanding that they did not register by the class deadline.

13 The trial of the proceeding was fixed to commence on 13 April 2026 on an estimate of six weeks. The trial timetabling orders provided for a mediation to occur before the

[1] Blackstone was to acquire all of the shares in Crown by way of a scheme of arrangement at a price of $13.10 per share. The Blackstone acquisition was approved by the Federal Court on 15 June 2022. Crown shareholders were paid $13.10 cash per Crown share in respect of shares held on 17 June 2022.

filing of lay and expert evidence and before substantive trial preparation steps. The parties attended a mediation on 3 December 2024. Without prejudice discussions continued after that date and an in-principle settlement was agreed in March 2025, whilst the proceeding was still the subject of the class closure orders. The parties entered into a deed of settlement dated 9 May 2025.

14 The settlement was agreed just prior to the time at which the parties were to file their lay witness outlines. Although the proceeding had been on foot for some time it resolved at a relatively early stage in the sense that the parties were yet to file their evidence. Both the underlying factual substratum on which the claims were based and the claims themselves were attended by a relatively high degree of complexity. Although the facts upon which the claims in the present form of the pleading were advanced were derived in large part from the findings of the public enquiries into Crown's operations, it is very likely that had the matter not resolved then the pleadings would have been substantially amended, including to take account of the discovery produced by Crown.

D. Approval of Settlement – Governing Principles

15 Section 33V of the Act provides as follows:

> **Settlement and discontinuance**
>
> (1) A group proceeding may not be settled or discontinued without the approval of the Court.
>
> (2) If the Court gives such approval, it may make such orders as it thinks fit with respect to the distribution of any money, including interest, paid under a settlement or paid into court.

16 Section 33V confers two distinct but related powers upon the Court. The first, in s 33V(1), confers power to approve a settlement; the second, in s 33V(2) confers power to approve the distribution of payments.[2]

17 The principles that guide the Court's discretion on an application for approval under s 33V are well established. The task requires consideration of whether the settlement

[2] *Botsman v Bolitho (No 1)* [2018] 57 VR 68, 111 [200] (***Botsman***).

is in the interests of all group members and whether it is fair and reasonable having regard to the claims of all group members who will be bound by it if it is approved.[3] That involves consideration of whether the overall Settlement Sum as well as the distribution of that sum between group members is fair and reasonable. What is 'reasonable' falls to be considered within a range; the question being whether the settlement is within that range and whether there are any features that are obviously unfair or unreasonable.[4]

18 As the Court of Appeal said in *Botsman v Bolitho*,

> The Court is being asked to approve a compromise of litigation. Inevitably, that will require an assessment of whether the plaintiff is likely to succeed in the action, the measure of damages that a successful judgment would yield, the prospects of recovery, and the expenditure in costs, time and effort that would be required to bring the proceedings to a conclusion.
>
> That assessment does not involve a simple calculus but calls for matters of judgment based on imperfect knowledge and is influenced by the appetite for risk. It will be informed by the complexity and duration of the litigation and the stage at which the settlement occurs. It is important to acknowledge that it is the state of imperfect knowledge and the existence of risks that will have likely induced the settlement. It follows that those matters should be accorded a degree of prominence in any assessment of the reasonableness of the settlement.
>
> Those considerations mean that there will rarely, or ever, be a single correct settlement. Strategic decisions must be factored into account but it is not the role of the Court to second guess those decisions.[5]

19 It follows that in evaluating the proposed settlement, what is reasonable is to be judged by reference to 'the circumstances which could reasonably be expected to be knowable to the applicant and the applicant's lawyers.'[6] The Court should not apply hindsight bias in its evaluation.

---

3 *Lynden Iddles & Anor v Fonterra Aust Pty Ltd & Ors* [2023] VSC 566, [17], citing *Williams v FAI Home Security Pty Ltd [No 4]* (2000) 180 ALR 459, 465–6 [19]; *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322, 332–6 [30]–[40] (***Darwalla***); *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs apptd) (in liq) (No 3)* (2017) 343 ALR 476, 499–500 [81]–[85]; *Lenehan v Powercor Australia Ltd (No 2)* [2020] VSC 159, [20].

4 *Murillo v SKM Services Pty Ltd* [2019] VSC 663 [31] (***Murillo***), quoting *Darwalla* [40], [50]. See also *Murillo* [32], quoting *Darwalla* [39].

5 *Botsman* 112, [205]–[207] (citations omitted).

6 *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439, [77] (***Kelly***); *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs apptd) (in liq) (No 3)* (2017) 343 ALR 476, [83].

20 The reasonableness of a settlement must necessarily involve consideration of the amount to be allowed for legal and related costs because such deductions will directly affect the return to group members from the Settlement Sum and are the price that group member pay for obtaining the Settlement Sum.

21 The factors commonly taken into account when evaluating a proposed settlement are listed in the Court's *Practice Note SC GEN 10 Conduct of Group Proceedings (Class Actions) (second revision)*.

22 It is also important for the Court to consider whether group members received timely notice of the proposed settlement's critical elements, so they could take steps to protect their positions if desired. A lack of objections or other responses from group members following notice can be a relevant consideration for the Court in favour of approval,[7] but group members' silence does not equal assent.[8]

E. Is the settlement fair and reasonable as between the parties?

23 It is relevant to evaluate the reasonableness of the Settlement Sum by reference to the estimated aggregate value of the undiscounted claims of the group members. Against the estimated undiscounted value of the claims, the risks to the plaintiff of establishing liability, causation of loss and damage, and the ability of the defendant to withstand a greater judgment than the amount of the agreed Settlement Sum, are to be taken into account. Such estimates must necessarily be based on what is known to the plaintiff's advisers at the time of settlement. The question is whether in light of those considerations the settlement falls within the range for a reasonable compromise of the claim made in the proceeding.

24 As I have said, I have been assisted by the considered and detailed opinion of counsel and of the plaintiff's solicitor (given by the evidence of Ms Gilsenan). That material calculated the undiscounted value of the claims in aggregate, disclosing the basis for the calculations and the assumptions made. Counsel's written opinion in particular

---

7 *Rod Investments (Vic) Pty Ltd v Abeyratne* [2010] VSC 457, [22]; *Thomas v Powercor Australia Ltd* [2011] VSC 614, [15]; *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468 [5-(f)].

8 *Kelly* [56].

considered the critical substantive elements of the causes of action advanced, explaining counsel's assessments of prospects in respect of individual elements, save where there was insufficient information available at this stage of the proceedings to do so. Counsel addressed recent developments in the law, including the recent decision in *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Ltd*.[9] The opinion and evidence described the approach taken to settlement negotiations and how and why the plaintiff's advisers determined what they considered to be an appropriate settlement range going into negotiations. Subject to identified caveats, Counsel's opinion compared gross recovery by group members with the maximum face value of the claims assuming all risks to establishing liability and causation were surmounted. Counsel's opinion was that the settlement was fair and reasonable and in the interests of group members. The opinion was carefully reasoned and soundly based. The assumptions it made were rational and appropriately conservative. Having considered the material I have no doubt that the Settlement Sum agreed is a fair and reasonable compromise and is in the interests of group members. It is unnecessary to set out my reasons for so concluding to any greater extent.

25 I note that in view of the deferred payment structure adopted in the settlement the net present value of the Settlement Sum is approximately $69.8 million.[10] The conclusions reached in respect of appropriateness of the Settlement Sum apply also to its net present value, including because of the reasons for the settlement structure, which I now mention.

26 The agreed payment structure sees the full settlement amount paid in three tranches over 24 months (the first tranche having already been paid). The deferred payment terms in the deed of settlement create a risk of default by Crown in relation to the payment of future instalments. Payment of a single lump sum immediately upon settlement would not carry such a risk.

---

9 *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Ltd* [2025] FCAFC 63.

10 Calculated by applying the Reserve Bank of Australia's current cash rate target.

27 Ms Gilsenan set out in detail her assessment of the ability of Crown to pay a large sum within a shorter time. Much of the information upon which that assessment was based is in the public domain. It includes the fact that the financial reports of Crown and its parent entity disclose substantial ongoing trading losses, negative operating cashflows and declining net assets, and the fact that since about mid-2022 several very substantial regulatory fines have been imposed on Crown's operating subsidiaries Crown Melbourne and Crown Perth. I am satisfied on the basis of the confidential material that 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. The settlement terms do not provision for any form of security to be given by Crown or a related entity to secure payment of the remaining instalments. The deed does provide some safeguards to mitigate the risk of default by Crown:

(a) Under clause 2(g) of the settlement deed, if Crown defaults in paying any one of the instalments of the Settlement Sum, the remaining instalments become immediately due and payable (and begin to accrue interest at the rate specified from time to time under the *Penalty Interest Rates Act 1983* (Vic)).

(b) Under clauses 2(g), 3(c), 3(d) and 3(h) of the settlement deed, the plaintiff may give notice to Crown of his intention to terminate the settlement deed if Crown fails to pay, or procure the payment of, any instalment of the Settlement Sum. If, within seven business days of receipt of this notice, Crown does not remedy its default (by paying all of the remaining instalments), the plaintiff may terminate the settlement deed. In that event, any instalments of the settlement sum which have been paid up to that point are not required to be repaid to Crown, but will instead be dealt with in accordance with the settlement deed, the approved Settlement Distribution Scheme and any orders of the Court (and any distributions made to group members from those funds will constitute a *pro tanto* reduction in the amount of their respective claims).

(c) Under clauses 2(k), 4 and 5 of the settlement deed, the releases in the settlement deed to be given by the plaintiff (on his own behalf and on behalf of each Group Member) do not come into effect unless and until Crown has paid the final instalment of the settlement sum – thus, if Crown defaults in paying any one of the instalments and the plaintiff terminates the settlement deed, those releases will never become operative, and the plaintiff's and Group Member's claims against Crown will be preserved.

(d) Similarly, under clauses 8(i) and 13(b) of the settlement deed, the plaintiff is not required to seek the 'Dismissal Orders' unless and until Crown has paid the final instalment of the Settlement Sum (with the consequence that the proceeding will remain on foot, and the plaintiff's and group members' claims will not be released or compromised or otherwise terminated, until Crown's obligations under the settlement deed have been performed in full).

(e) Under clause 6(b) of the settlement deed, Crown is required to provide to Maurice Blackburn a copy of its audited financial statements for the financial years 2025 and 2026 within 10 business days of those financial statements being issued, so as to enable Maurice Blackburn to continue to monitor Crown's ongoing financial position.

28 One relevant consideration in evaluating this aspect of the settlement is that had the matter proceeded to trial, assuming the plaintiff were to succeed, the recovery of moneys under a judgment would not crystalise for a considerable period of time. Whilst it is not possible to know what the financial position of Crown would have been had that course been pursued, it is reasonable to conclude that a risk of not recovering would persist. On the evidence I am satisfied that the plaintiff's advisers have obtained a fair and reasonable compromise in the interests of group members in the circumstances, judged by them on reasonable grounds to be the best outcome they could obtain, notwithstanding the risks inherent in a deferred payment structure.

29 It is also necessary to mention the scope of the releases given under the settlement

deed.

30 Under clause 4 of the settlement deed, the plaintiff and group members give releases and covenants not to sue in favour of Crown and its Related Persons. In summary, the releases extend to:

(a) all Claims made (directly or indirectly) by the plaintiff in the proceeding;

(b) all Claims made (directly or indirectly) by the plaintiff arising out of the same or related circumstances to those raised in the proceeding;

(c) all Claims that the plaintiff has or may have which were or could have been raised against Crown or any of its Related Persons relating to or arising out of the matters the subject of the Proceeding or which are in respect of, or arise out of, the same or related circumstances to those raised in the Proceeding, or anything related to the proceeding; and

(d) releases given by the plaintiff, on his own behalf and on behalf of group members, all common Claims between the plaintiff and group members that are or could have been brought in the Proceeding, whether arising at common law, in equity or under statute or otherwise.

'Claim' is defined in clause 1.1 of the deed as follows:

> Claim means any and all claims, actions, demands, debts, causes of action, liabilities, allegations, losses, suits or proceedings, for damages, equitable relief, compensation, interest and legal and administrative costs, expenses and disbursements (present and future) of any description, debt, restitution, equitable compensation, account, interest, injunction, specific performance, judgment, decision or orders, or any other remedy, whether arising at common law, in equity or under statute or otherwise.

'Group Members' is defined in clause 1.1 to exclude persons who opted out.

31 I consider that the releases are fair and reasonable and within the authority of the plaintiff in his capacity as the representative of group members in that they do not purport to settle claims other than those that arise from the same or related circumstances as those that were raised or could have been raised in the proceedings.[11] The releases bind unregistered group members subject to any order of the Court allowing any individual unregistered group members to participate in the settlement. The settlement in this proceeding was reached on the basis that the class of group members was closed in accordance with the class closure orders. It is appropriate to give effect to those orders to approve a settlement incorporating releases of that kind.

F. Is the settlement reasonable as between the group members?

32 The settlement distribution scheme has the following features:

(a) The Settlement Sum is to be allocated among registered group members by reference to the proportion which the unscaled assessed loss of each registered group member bears to the aggregate of the unscaled assessed losses for all registered group members.

(b) The scheme applied a loss assessment formula, a calculation in the form of a mathematical formula which will be applied to determine distribution entitlements as between group members. The formula draws a distinction between the claims of 'acquiring group members' on the one hand and the claims of 'holding group members' on the other. That distinction is based on the different nature of the claims advanced for the two cohorts of group members, the loss theory advanced in the case and the assessment of the respective prospects of group members in those cohorts. It allows for the possibility that a single group member may fall into more than one cohort. The manner in which the formula will be applied has been explained in the confidential material, as have the assumptions embedded in the formula, including the inflation per share

[11] The controversy regarding whether releases given in settlements of Part 4A proceedings can extend to claims of group members that are unrelated to the subject matter of the proceeding does not arise in this case: see *Bendigo and Adelaide Bank Ltd v Pekell Delaire Holdings Pty Ltd* (2017) 118 ACSR 592. Cf *Dyczynski v Gibson* (2020) 280 FCR 583.

value.

(c) The scheme contemplates the appointment of Maurice Blackburn as scheme administrator. Maurice Blackburn has a dedicated administration team which is very experienced in administering settlements of this kind. I accept that Maurice Blackburn is an appropriate appointment to the role of scheme administrator.

(d) It makes appropriate arrangements for the receipt and holding of moneys and the accumulation of interest, together with the payment of taxes, duties and other imposts.

(e) The scheme provides that interest accruing on the settlement administration fund may be applied in the first instance to the payment of administration costs. Any interest which is not otherwise required for the payment of those costs will form part of the Settlement Sum and be available for distribution to registered group members if determined by the scheme administrator.

(f) It requires that the scheme administrator use reasonable endeavours at all times to ensure the accuracy of the claims database, including by distributing a 'trade check notice' to all registered group members as soon as practical after the approval orders have been made. Registered group members will be permitted to confirm their trade data or notify any error or omission within 28 days of the notices having been sent to group members. It provides that the scheme administrator may, by written notice, require a registered group member to provide and verify by statutory declaration or other means the group member's claim data where in the administrator's opinion it contains insufficient information or does not substantiate the group member's claim. Once a request has been made by the scheme administrator, or if the scheme administrator has made reasonable attempts to contact a registered group member and the claim data continues to contain insufficient information or does not otherwise substantiate the group member's claim such as to render the scheme administrator unable to provide an interim assessment notice or a final

assessment notice, then the group member will forfeit any right to receive a distribution from the settlement administration fund. I am satisfied that these provisions make fair and reasonable provision for the collection of data from group members to enable their participation in the settlement.

(g) The scheme makes appropriate provision for the identification of bank accounts or alternative means of deposit for the receipt of distribution payments.

(h) The scheme provides for a minimum distribution amount of $20. Amounts below that sum will not be distributed and will be included in the residual Settlement Sum for distribution. The Scheme Administrator may consider alternative solutions as to how the residual sum should be allocated and paid or apply to the Court for approval about that allocation. The rationale for the minimum distribution amount is that the costs of distributing amounts below that amount are likely to exceed the value of the distribution.

(i) Each registered group member is required to cooperate with the scheme administrator and take all steps that they are required to take pursuant to the scheme, that are reasonably requested or directed by the scheme administrator. Each group member is required to act honestly and take all reasonable steps to ensure that their agents and representatives likewise act honestly.

(j) The Scheme Administrator is required to report to the Court about the progress of the administration at defined intervals. **In addition** to the provisions made at clause 16.2 of the scheme, I will require that the scheme administrator report to the Court within seven days of the due date for the second and third tranches of the Settlement Sum as required by clause 2 of the deed of settlement, advising on each occasion whether the Settlement Sum has been duly received in accordance with the Deed. **The SDS will be varied accordingly**.

(k) The scheme administrator's consideration of any trade data, notice or amendment calculation of unscaled assessed losses, any interim distribution amounts and final distribution amounts is binding and not subject to review.

33 I consider that the mechanics embodied in the scheme have a rational basis and are appropriate to distribute sums of money to a large cohort of people. It is appropriate that registered group members be required to take active steps to assist the scheme administrator in discharging its functions. The provisions for the binding nature of the calculations and assessments made under the scheme are appropriate and balance the interest of group members in participating in the settlement and the interest of the broader cohort in ensuring that the Settlement Sum is not diminished unduly by administrative costs and the interests of the distribution of entitlements as quickly as practicable. The fact that the steps taken under the scheme are final and not subject to appeal is also appropriate given the nature of the assessments that will be made in order to make distributions which involve the application of a mathematical formula and not an evaluation or qualitative assessment.

34 The scheme provides for the making of an interim distribution in the Scheme Administrator's discretion. **Clause 6.2 of the SDS will be varied** to omit the words, '*in its absolute discretion and*'. The amendment reflects the Court's expectation that provided the Administrator determines that it is reasonable to do so within the terms of the scheme (in particular clauses 3.2(b), 6.2 and 6.3), an interim distribution should be made. Relatedly, **the SDS will be varied to add a new clause 6.3A** as follows:

> In the event that the Scheme Administrator determines that it is not reasonable to undertake the actions in sub-clause 6.2, the Scheme Administrator will report to the Court within 7 days of making that determination, advising that it has done so and explaining the reasons for its determination.

35 My objective in requiring those amendments to the SDS is to ensure that settlement moneys are distributed to group members as soon as practicable. It will be recalled that the first tranche of the Settlement Sum has been paid, the second is due in May 2026 and the third in May 2027. The plaintiff's solicitors gave evidence about the

process required to collect and verify group members' trading data, calculate unscaled loss assessments, obtain bank account details, calculate interim distribution amounts, prepare and send interim assessment notices and pay an interim distribution. That process allows for the elapse of the appeal period following the making of the settlement approval orders and the Scheme Administrator's stated intention not to distribute notice to group members over the Christmas and New Year period. Each of those allowances extend the period for the settlement distribution but each is reasonable in my view. As to the latter, notices will require action on behalf of group members within a given time frame, and failure to act may adversely affect their rights. Application of the process means that the Scheme Administrator will be in a position to commence making an interim distribution by May 2026, at about or shortly after the date on which the second tranche of the Settlement Sum is due to be paid.

G. Objections

36 There were no objections to the proposed settlement by group members. One group member filed a document described as an objection. In response to a request by Maurice Blackburn for clarification it became apparent that the group member was in fact seeking to register an intention to participate in the proceeding.

H. Should unregistered group members be permitted to participate?

37 As noted earlier, by orders made on 7 June 2024, I fixed 24 August 2024 as the date by which group members must register their claims for the purposes of participating in any settlement that occurred before trial. The 'class closure' orders have effect unless the Court exercises its discretion pursuant to s 33ZF of the Act to order otherwise. In exercising the s 33ZF power the Court has a protective role regarding group members as a whole, and must give primary consideration to their interests.[12]

38 It must be accepted that by operation of the class closure order unregistered group members will suffer prejudice if they are bound by the settlement but cannot obtain a share of the Settlement Sum. That prejudice alone is not a sufficient basis upon which

[12] *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)* [2024] VSC 733.

to make an order undoing the operation of the class closure order. The risk of such prejudice was taken into account when I determined to make the order. Instead, unregistered group members seeking to be permitted to participate in the proposed settlement must sufficiently demonstrate *unfair* prejudice to them in the operation of the class closure order.[13] The class closure order was expressly made subject to further order, and the approval of a proposed settlement is the occasion on which to consider whether the order ought be varied in respect of particular group members, taking into account their particular circumstances. The reasons why those group members now applying to participate in the settlement did not register within time and the sufficiency of the evidence upon which they rely will be significant in the consideration of whether they should not be permitted to participate. Evaluation of those applications should be undertaken with regard to the characteristics of the class and the nature of the Court's protective jurisdiction.[14]

39 The admission of late registrants necessarily dilutes the amount of the Settlement Sum otherwise returned to existing registered group members. One important consideration is whether the admission of late registrants will in a real sense undermine the settlement that has been negotiated and agreed on the assumption that it will be distributed between the cohort of registered group members and on the assessment of the plaintiff's advisers that it will provide compensation to those group members that reflects a reasonable compromise of their claims. The purpose of making class closure orders is to facilitate the making of settlements by allowing the parties' advisers to know the size of cohort among whom an agreed Settlement Sum will be distributed. That consideration must be approached while being cognisant of the reasons why particular group members who now wish to participate did not register within time and the cogency of the evidence supporting their applications.

40 In this case 12 group members who did not register their claims prior to 23 August

---

13 *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)* [2024] VSC 733 [63]; *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2018) 358 ALR 382, 392 [44]; *Andrianakis v Uber Technologies & Ors; Salem v Uber Technologies & Ors* [2023] VSC 415, [30].

14 *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)* [2024] VSC 733, [71].

2024 applied to participate in the settlement. The effect of admitting those group members on the quantum of the Settlement Sum to be distributed is immaterial, the value of their claims not exceeding 0.5% of the Settlement Sum.

41 Neither party opposed the admission of the late registrants (they 'took no position'). However, to assist the Court the plaintiff made submissions addressing the applications. The submissions were of assistance to the Court. The plaintiff made the point that it would be open to admit each of the 12 unregistered group members on the basis that doing so would not materially affect the result to the group member cohort as a whole. The plaintiff also addressed the circumstances of each group member's application.

42 I have considered each application. Each was supported by evidence in the form of a statutory declaration. The evidence of each addressed the reason or reasons why they had not registered within time. I have considered whether each had applied to participate in the settlement in accordance with the class closure order (but had done so out of time, before the settlement was announced), whether they had received the personal notice of the requirement to register, and the reasons given for not registering within time. In the case of one group member, supplementary evidence was filed in response to a direction from the Court, in order to clarify an ambiguity in the evidence submitted. I have admitted each of the 12 group members, having considered their evidence. I should add that Maurice Blackburn has assessed that four of the 12 group members will not have an entitlement under the scheme. That is a matter for the scheme administrator to determine once the administration commences.

I. Legal Costs

43 On 22 December 2022 Stynes J made a Group Costs Order (**GCO**) under s 33ZDA of the Act in relation to the plaintiff's costs of this proceeding in the following terms:

(a) The legal costs payable to Maurice Blackburn Pty Ltd in relation to the proceeding be calculated as a percentage of the amount of any award or settlement that is recovered in the proceeding, in accordance with the following table:

For each dollar of any award or settlement that is recovered in the proceeding:	The applicable percentage (including GST) is:
Between $0 - $100,000,000	27.5%
Between $100,000,001 - $150,000,000	22.0%
Over $150,000,000	16.5%

(b) liability for payment of the legal costs referred to in (a) above is to be shared among the plaintiff and all group members (other than those group members who opt out of the proceeding in accordance with s 33J of the Act).

44 Unless varied, the 27.5% percentage rate applies in this case because the settlement sum is less than $100 million. 27.5% of the settlement sum is $19,937,500. The costs will be paid to Maurice Blackburn by deducting its costs from each instalment of the settlement sum and then calculating group members' entitlements on the remaining balance.

45 On approving the deduction of legal costs from the Settlement Sum a question arises as to whether there is occasion to vary the order made in December 2022. Section 33 ZDA(3) of the Act provides:

> The Court, by order during the course of the proceeding, may amend a group costs order, including but not limited to, amendment of any percentage ordered under subsection 1(a).

46 The plaintiff did not seek an order amending the terms of the GCO. His submission was that he was not aware of any circumstances that have arisen since the making of the order that mean that an amendment is appropriate or necessary to ensure that justice is done in the proceeding within the meaning of s 33ZDA(3). The plaintiff made detailed submissions which I need only summarise briefly here. In substance he submitted that:

(a) The calculation of the aggregate value of registered group members' claims that the plaintiff's advisers made for the purposes of mediation and settlement

negotiations produced results that differed from the assumptions-driven modelling that was performed for the purposes of the application for the GCO, the more refined calculations at the time of mediation reflecting the information then available, in particular from claims registration data. That notwithstanding, the outcome that has eventuated with this settlement was plainly within the range of projected outcomes that were modelled and were before the Court on the application for the GCO.

(b) Group members were surveyed about alternative costs arrangements before the plaintiff applied for a GCO. The outcome of the survey (as described in the judgment of Stynes J granting the GCO) was that group members were firmly in favour of the GCO. The information provided to group members for that purpose including modelled outcome scenarios. The modelled outcomes included a result very close to that achieved in this settlement. The modelled costs structures demonstrated that standard hourly billing could produce a return to group members that was better than the return under the proposed GCO, depending upon the quantum of costs actually incurred, influenced by the stage at which the proceedings were finalised. Group members preferred the GCO notwithstanding that fact.

(c) The sliding scale in this case was included at the request of the plaintiff in order to protect against a disproportionate or 'windfall' return to the plaintiff's solicitors in the event of a very successful outcome. The inflection points for the sliding scale were accepted by Stynes J to have a rational basis. The reasoning underpinning the adoption of the values reflected in the sliding scale has not been undermined by what is now known.

(d) By all relevant measures the return to the plaintiff's lawyers is not disproportionate. It appropriately reflects the risks undertaken by the firm and cannot on any reasonable view be characterised as a windfall. The reasons that supported the making of the GCO remain cogent in respect of the outcome that

has been achieved.

47 In *Fuller v Allianz* Matthews J said that on an application for approval of a settlement and legal costs, counsel for the plaintiff have, at a minimum, a duty to inform the Court if circumstances have arisen that render a GCO rate excessive.[15] I agree. The plaintiff's counsel stated in their confidential opinion that they were not aware of any such circumstances, giving comprehensive reasons in support of their position.

48 Maurice Blackburn was granted leave to appear by counsel and make submissions in support of the maintenance of the GCO. The solicitors adopted the plaintiff's submissions and emphasised that on every relevant metric the return to the firm is reasonable and proportionate. They submitted that the GCO rate itself is close to the median of the GCO rates approved in proceedings in this Court thus far at the point of commencement of proceedings (the median being 25%). Six other proceedings in which GCOs have been made have settled, with a GCO in place. The median GCO rate on approval is 25%. In *McCoy v Hino Motors Ltd (No 2)*[16] the Court reduced the GCO rate on the approval of the settlement of that proceeding from 24.66%[17] to 17.392%. There, the return to the solicitors had the commencement GCO been left undisturbed would have been well outside the range contemplated by the plaintiff, the firm and the Court, as reflected in the modelling evidence before the Court on the application for the GCO. This case is to the contrary. Further, in this case (unlike in *Hino*) that proportion of the return to the solicitors that represents reward for risk in this case, compares favourably with risk premiums obtained by litigation funders in proceedings of this kind.

49 In my view, for the reasons that follow, there is no warrant for varying the GCO made by Stynes J in this proceeding, taking into account the result that has transpired.

50 The Court must satisfy itself when approving a settlement under s 33V that the

---

15 *Fuller & Anor v Allianz Australia Insurance Ltd & Anor (Settlement Approval)* [2025] VSC 160, [165].

16 *McCoy v Hino Motors Ltd (No 2)* [2025] VSC 553 (***Hino No 2***).

17 A blended rate resulting from the application of a sliding scale.

plaintiff's legal costs to be deducted from the settlement are reasonable in the circumstances, exercising a supervisory role.[18] In making that assessment it is to be recalled that legal practitioners acting for a party are required by s 24 of the *Civil Procedure Act 2010* (Vic) to ensure that costs are reasonable and proportionate to the complexity or importance of the issues in dispute and the amount in dispute. The fixing of a percentage of the settlement sum by reference to which legal costs are calculated under a GCO entails a consideration of whether the GCO percentage will likely deliver a proportionate return. One aspect of that consideration (but not the only aspect) is the fact s 33ZDA permits the linking of reward and risk. Those considerations will arise on an application for approval of costs fixed under a GCO, at the point at which the plaintiff seeks the Court's approval of a settlement and deduction of costs from the settlement sum. These issues have been discussed in numerous authorities in this Court including in *Fox v Westpac Banking Corporation,* in these terms:

> Proportionality is a measure of the relationship between things. Section 24 of the *Civil Procedure Act 2010* (Vic) directs attention to the relationship between costs and the issues and amount in dispute. Section 33ZDA, as noted earlier, engages with risk and reward, in that legal costs calculated as permitted under the section may reward the legal practice not only for the effort they contribute in legal work, but for the risk they accept in funding the proceedings and assuming obligations in respect of adverse costs. It therefore invites the question whether the reward proposed is (among other things) proportional to the risk to be undertaken.
>
> The question whether the return to the law practice under a group costs order is or is likely to be reasonable and whether it bears a proportionate relationship to the assumption of risk or to any other relevant measure, may be considered prospectively, but with real limitations on the Court's ability to make an informed assessment. That is where sub-s 33ZDA(3) assumes significance. A review under that sub-section, of a percentage fixed at an earlier time, once information informing questions of proportionality is available, will facilitate the Court ensuring that the percentage to which the law practice is ultimately entitled, remains appropriate. Such a review might be informed by the Court having regard to the practitioners' obligations under s 24 of the Civil Procedure Act.[19]

51 In *Allen v G8 (No 4)* Watson J set out the principles that guide the proper approach

---

18 *Botsman* 115 [222].

19 *Fox v Westpac Banking Corporation* (2021) 69 VR 487, [147]-[148].

when the Court is considering whether to exercise the power under s 33ZDA(3), as follows:

(i) The power to amend a group costs order only arises in circumstances where the court was satisfied that it was 'appropriate or necessary to ensure that justice is done in the proceeding' to make the original order.

(ii) The consideration of whether to exercise the power under s 33ZDA is not an occasion for a hearing *de novo* regarding the appropriateness of the group costs order.

(iii) Rather, the power to amend should only be exercised if the court is satisfied that circumstances now mean that an amendment is appropriate or necessary to ensure that justice is done in the proceeding. Whilst the language of s 33ZDA(3) contains no express limitation, such a limitation arises by necessary implication from the structure of s 33ZDA and the conditions on the original exercise of power under s 33ZDA(1).

(iv) Close attention should be paid to the reasons for the original group costs order.

(v) The court should ensure that costs payable to the lawyer under the group costs order remain proportionate in that they continue to represent an appropriate reward in the context of the effort and investment of the legal practice, the duration of the proceedings and the risks which were undertaken under the group costs order.[20]

52 Watson J added that Group Costs Orders tend to be made at an early stage of proceedings on a forward looking basis, meaning that they are made on the basis of imperfect information and where there is considerable uncertainty about the course

[20] *Allen v G8 (No 4)* [63].

the proceedings will take. At the finalisation of the proceeding uncertainties about costs and duration have resolved and the range of possible outcomes has narrowed to one. That provides the Court with an opportunity to consider whether the remuneration under the GCO is proportionate in light of known facts. However, the Court should not approach the crystallisation of a favourable outcome for the law practice as an occasion to amend a Group Costs Order. The Court should avoid hindsight bias in this regard. Where the outcome of a proceeding falls within the range of estimates relied upon by the legal practice in support of its application for the original GCO (or is not substantially outside those estimates) this will weigh against amending a GCO percentage on account of a lack of proportionality.[21] I respectfully agree with and adopt that reasoning.

53 In *McCoy v Hino (No 2)* Delany J reduced the GCO percentage originally fixed in that case in circumstances in which the case had settled very early and his Honour concluded that if left undisturbed, the return to the law firm would be well outside the projected range of outcomes to which the evidence was directed on the original application for the GCO, and accordingly well outside the contemplation of the Court and the law practice when the GCO was made.[22] Unless varied, the GCO rate would deliver a return to the firm that, when measured by reference to the firm's internal rate of return (**IRR**) would be well outside what was contemplated when the GCO was made and significantly higher than the 75th percentile of the historical five year range of IRR for the law practice in group proceedings.[23]

54 In this case, Stynes J made the Group Costs Order on the basis that:

(a) It provides a level of certainty as to the legal costs to be incurred which cannot be achieved through the hourly billing arrangement that is currently in place and that would continue if no GCO is made.

(b) It engenders simplicity and transparency to the costs payable and returns recoverable by the plaintiff and group members.

(c) It will likely serve to protect the group members, where the sum recovered is

21 *Allen v G8 (No 4)* [67]-[68].
22 *McCoy v Hino (No 2)* [114].
23 *McCoy v Hino (No 2)* [83].

low, from disproportionately high legal costs.

(d) There is a real and not fanciful possibility that the lower rates of the GCO will be engaged and that group members will obtain a better financial outcome under the GCO.

(e) The proposed rate is appropriate having regard to the risks confronting the claims made, the risks to be assumed by Maurice Blackburn under the GCO and the reward it might reasonably expect in return for the assumption of those risks.[24]

55 On the question of the appropriateness of the percentage rate, Stynes J took into account Maurice Blackburn's evidence concerning their anticipated IRR and evidence concerning the commissions paid to litigation funders in class action proceedings in Australia, observing that the order may be subject to review under s 33ZDA(3).

56 This proceeding settled at a relatively early stage. At the time at which it settled the plaintiff's evidence had not been filed. Maurice Blackburn had prepared a budget for the expenditure of legal costs (fees and disbursements), with fees calculated on an hourly-rate basis. The budget was included in its retainer with the plaintiff and was before the Court on the application for the GCO. The budget necessarily allowed for the costs of the preparation of evidence and a trial. The evidence on this application (for approval of the settlement and costs) set out the costs actually expended (calculated on the same basis). Because of the early stage at which the proceeding settled, costs associated with the preparation of evidence, preparation for hearing and trial were not incurred. As it happens, the actual costs for some steps that did occur (pleadings and discovery) were materially greater than those allowed in the budget.

57 The amount of the plaintiff's costs as calculated under the Group Costs Order (at 27.5% of the settlement sum) is materially greater than the costs would have been had they been calculated on an hourly rate basis. However, that fact is not by itself a reason to vary the GCO.

58 It must be recalled that by making an order under s 33ZDA the Court authorises an arrangement that by its very structure confers certain benefits on the plaintiff and

[24] *Lieberman v Crown Resorts Ltd* [2022] VSC 787, [83].

group members. Provided the percentage rate is reasonable, a Group Costs Order guarantees to group members that the return to them under any resolution sum will not be disproportionately eroded by legal costs. If the proceeding wholly fails or if the result is poor the solicitors alone bear the risk of no recovery or a poor recovery for the work they have undertaken. They are also required to assume the burden of meeting any order for security for costs and become liable to meet any adverse costs order in favour of the defendant. On the other side of the ledger, the statutory model implicitly contemplates that the remuneration for the legal practice acting for the plaintiff may include compensation for the assumption of risk. It permits solicitors to benefit from the upside when it occurs – where a particularly good result is achieved or where a case settles early and the firm has expended costs at a lower rate than would otherwise have been required. The Court's supervisory role on an application of this kind does not require it to have regard only to one side of the ledger (that side representing the interests of group members). Doing so would not reflect the attainment of justice in the proceeding as understood by refence to the statutory scheme for the calculation of legal costs established by s 33ZDA. As Watson J said in *Allen v G8 No 4*, the Court should not approach the crystallisation of a favourable outcome for the law practice as an occasion to amend a Group Costs Order. That is not the end of the story, however. The statutory scheme expressly contemplates that a Court may review the rate initially fixed under a GCO. The principles that govern the Court's consideration of whether an adjustment is required are those set out earlier. They are concerned with the reasonableness and proportionality of the award of costs.

59 There are several reasons why maintaining the GCO made in December 2022 results in a payment of costs to the plaintiff's solicitors that is neither unreasonable nor disproportionate. They may be stated shortly:

(a) First, the outcome (the Settlement Sum) falls within the contemplated range of outcomes considered by the Court, the plaintiff and the legal practice at the time at which the GCO was applied for and made. That necessarily means the amount

of legal costs payable to the solicitors on that settlement outcome was also within the express contemplation of the Court, the plaintiff and the solicitors at that time.

(b) The modelled costs structures prepared for the application for the Group Costs Order demonstrated that standard hourly billing could produce a return to group members that was better than the return under the proposed GCO, depending upon the quantum of costs actually incurred, influenced by the stage at which the proceedings were finalised. The plaintiff accepted as much in seeking a GCO at the rate of 27.5%, judging that the protections and benefits afforded by the GCO were worth the price. Stynes J agreed. The surveyed group members also agreed.

(c) The point at which this proceeding has resolved has meant that the solicitors have benefited from 'upside' by comparison with the position had their costs been calculated on an hourly rate basis. Had the proceeding continued to trial or settled close to trial, the return to the solicitors judged by that particular comparative measure would have diminished appreciably, enhancing the correlative protection to group members. Judged objectively and without the benefit of hindsight there is nothing to suggest that at the time at which the arrangements for legal costs were put in place (by the application for and making of the Group Costs Order) the settlement of this proceeding at a particular resolution sum or at a particular time (including a settlement before trial) was a foregone conclusion, very likely or even likely to occur. That is so notwithstanding that the conduct the subject of the proceeding was the subject of several public inquiries that made findings unfavourable to Crown. The solicitors bore the risk that the proceeding would not resolve early or not resolve at all. They also bore the risk of exposure to the defendant's legal costs and the requirement to pay security for costs.

(d) I am satisfied that the solicitors have undertaken a considerable amount of legal

work, commensurate with the complexity of the proceeding and the stage it had reached before settlement. The extent of that work was described in the confidential material including by reference to the firm's costs incurred and disbursements expended. This was by no means a case of a firm inadequately resourcing a case in the hope of obtaining a better profit margin on settlement.

(e) Ms Gilsenan gave specific evidence about Maurice Blackburn's internal rate of return (IRR) on the sum to be paid under the GCO. The IRR is '…in effect, the annual rate of return expressed as a percentage that an investment generates. More strictly it is the discount rate which makes the next present value of the project cashflows (outgoing cashflows in the form of expenses and incoming cashflows in the form of revenue) zero'.[25] The IRR is a useful measure of whether the amount of costs to be paid to the law firm for making the investment of its time and resources is reasonable, noting its limitations.[26] Ms Gilsenan calculated the actual IRR in this proceeding based on the costs 'actually incurred' meaning the cost of disbursements paid and the firm's costs of labour, overheads and the like (excluding any profit component), the time over which those costs were incurred and the time at which the firm expects to be paid under the deed of settlement. The IRR for this proceeding will be slightly less than the firm's IRR across its portfolio of class action cases. It will be marginally lower than the expected IRR described in the evidence relied upon in the application before Stynes J for the GCO. In the evidence on this application it was explained that the calculation of the IRR before Stynes J ought to have taken into account GST. Had it done so, the projected IRR would have been the same as the actual IRR. The reasonableness of the IRR judged in that way necessarily references the particular firm's own expectations for returns on the investments that it makes. Consideration of the particular firm's expectations is relevant because by acting in the proceeding, the firm is investing its own resources.

---

25 *Allen v G8 No 4* [78], quoted in *McCoy v Hino No 2* [81].

26 See *Allen v G8 No 4* [77]-[85].

(f) It is also informative to consider the question of reasonableness by refence to an objective measure that is not tied to the commercial expectations of the firm undertaking the work. By deducting the firm's costs actually incurred (its costs as opposed to its profit) from the gross costs sum allowed under the GCO one arrives at that proportion of the GCO costs sum that represents payment for the firm's assumption of risk. Expressed as a percentage of the settlement, that sum may be compared with funding commission rates charged by third party litigation funders in group proceedings. The plaintiff relied on reports by Professor Morabito and by Max Douglass of the McKell Institute, each of which analysed data concerning funding commissions. By reference to that evidence, the payment to Maurice Blackburn for the assumption of risk under the GCO made in this case, compares favourably to the commission rates charged by litigation funders in Australian group proceedings, including when commission rates agreed subsequent to the introduction the GCO regime in Victoria are taken into account.

(g) The GCO rate of 27.5% is comfortably within the range of the rates approved in commencement and settlement GCO's in this Court in the decided cases to date.[27]

(h) For those reasons the GCO rate appropriately reflects the risks undertaken by the firm and cannot on any reasonable view be characterised as a windfall. The reasons that supported the making of the GCO remain cogent in respect of the outcome that has been achieved.

J. Administration Costs

60 The plaintiff seeks prospective approval of the expected costs of the settlement administration in the sum of $696,736.70 (inclusive of GST) plus the sum of $8,415 (inclusive of GST) for the provision of the report of the costs consultant retained by the plaintiff to provide an opinion as to the reasonableness of the projected

[27] See the list of decided outcomes set out in Annexure A to the judgment *in McCoy v Hino (No 2)*.

administration costs.

61 I consider that it is appropriate to allow for the settlement administration costs by providing that the costs of the settlement administration up to, but not exceeding, the amount of $696,736.70 (inclusive of GST) be approved, subject to the Settlement Administrator submitting a report to the Court certifying the amount of costs actually incurred in the settlement administration. I intend that costs for the settlement administration may only be deducted from the Settlement Sum once work to that value has been incurred, so that if the value of the work undertaken falls short of that sum, any saving will remain in the fund for the benefit of group members. I also intend that the costs of the settlement administration be capped at that amount.

62 As to the quantum of the costs, Maurice Blackburn relied upon a report prepared by Ms Kerrie-Ann Rosati of DGT Costs Lawyers. I accept that Ms Rosati is an experienced costs consultant. She opined that the costs estimate as calculated by Maurice Blackburn was reasonable. To support that opinion, in summary Ms Rosati:

(a) identified the criteria for a review of assessment of lawyers' costs in Victoria;

(b) considered the hourly rates charged by Maurice Blackburn. It was concluded that they were 'within but toward the upper end of the range of rates' that in Ms Rosati's experience are charged by lawyers in the conduct of complex commercial and representative proceedings in the administration and settlement of such proceedings, and within or slightly above the rates in the scale of costs set out in the *Supreme Court (Chapter I Costs Amendment) Rules 2024*, introduced in Victoria on 1 January 2025 (2025 Victorian Scale);

(c) considered the costs estimate for the settlement administration provided by Maurice Blackburn. The description of the work expected to occur in the settlement administration, as provided by Maurice Blackburn, was set out in Ms Rosati's report, as was a breakdown of the work by category of fee earner; and

(d) Ms Rosati's assessment of the reasonableness of the costs was predicated on this

reasoning:

(i) the percentage of time allocated to each level of fee earner was calculated;

(ii) her opinion that the breakdown of work between fee earners appeared to be fair and reasonable 'for a relatively complex settlement administration'. The complexity was said to arise because of the more complex loss assessment formula to be applied in this case; the fact that the Settlement Sum will be paid in tranches over a 24 month period, allowing for an interim distribution, and because a relatively large number of group members has registered to participate (4,200 retail investors and 400 institutional investors);

(iii) her opinion that the costs estimate was not dissimilar to the estimates of costs that she has seen for administration costs in other comparable representative proceedings.

63 I found Ms Rosati's report not entirely adequate for the purposes of determining whether the costs claimed were in fact fair and reasonable. The costs estimate was prepared by Maurice Blackburn and what appeared in the report was largely descriptive of the instructions provided. I was assisted by the opinion about how Maurice Blackburn's hourly rates compared with the market. However, the opinion about the complexity of the settlement was given with little elaboration. It was not possible to tell, for example, why the application of a relatively complex loss assessment formula would in fact require more work than a simpler formula. The opinion about the breakdown of work between fee earners was supported by scant detail. Reliance on the fact that the costs estimate was not dissimilar to the estimates of costs that Ms Rosati has seen in other comparable cases had an element of circularity. Several of the matters in which Ms Rosati has provided a like opinion are conducted by the same firm. Why those matters were comparable and whether the costs charged in those cases were fair and reasonable was not sought to be established.

Certain elements of the criteria applied to assess the reasonableness of the work evidently had no real application to work of this kind (settlement administration as opposed to litigation). There was no consideration of whether what is reasonable and appropriate in the context of a settlement administration ought to be different in any way from what is reasonable in the conduct of the litigation itself.

64 I directed that Maurice Blackburn file further evidence providing an explanation of how the costs estimates were arrived at, the basis for and an explanation of the estimated hours allocated to Associate-level lawyers and an explanation for the relationship between the complexity of the loss assessment formula and the work required to be undertaken. Ms Kim Adey who is Maurice Blackburn's Manager – Settlement Claims Administration Team provided detailed evidence about those matters. I need not describe the evidence here. I am satisfied on the basis of that evidence that the estimate represents a considered and detailed consideration, based on sufficient experience, of the costs likely to be incurred. I am also satisfied that work by an Associate-level lawyer is required for the reasons and in the respects Ms Adey described. It is of note that the additional work that Ms Adey calculated would be required by reason of the relatively more complex loss assessment formula was minimal (equating to costs of $7,500).

65 At my direction Ms Adey re-calculated the costs estimate on the 2025 Victorian Scale. I directed that that occur because of Ms Rosati's opinion that Maurice Blackburn's hourly rates were at the high end of the market. The re-calculation, which was performed satisfactorily and set out in Ms Adey's evidence, produced a result that was very close to the estimate given by Maurice Blackburn on the basis of its hourly rates. The principal reason for that outcome is that while in most cases Maurice Blackburn's hourly rates for its lawyers are higher than the maximum rates provided by the scale, the scale provides hourly rates for data analysts at a higher hourly rate than the firm charges.

66 The evidence was that the interest accruing on the Settlement Administration Fund while it is invested, before distributions are paid to group members, will cover a substantial portion of the estimated administration costs for the scheme. That fact, and the fact that the expected costs will be less than 1% of the Settlement Sum, does not relieve the plaintiff or the settlement administrator of the obligation to establish the reasonableness of its costs by cogent evidence.

67 In all of the circumstance and having particular regard to the evidence of Ms Adey I am satisfied that it would be reasonable for the settlement administrator to incur costs up to the amount claimed.

68 I will allow the plaintiff to recover half of the costs of the Rosati report, noting that I have been assisted by it to a degree, but with the limitations on its utility that I have identified.

69 I am satisfied for the reasons given in the plaintiff's submissions that the costs of the administration are properly to be distinguished from the costs of the proceedings.[28] Group members were notified in this case that on the settlement approval application, the costs of the administration would be sought as a deduction from the settlement sum.

K. Plaintiff reimbursement payment

70 The plaintiff seeks the sum of $20,000 as a reimbursement payment in recognition of his assuming responsibility for instructing his solicitors in the conduct of the proceedings. The authorities accept that it is appropriate to acknowledge by the payment of a modest sum, the fact that the burden assumed by a representative plaintiff can involve the discharge of a not insignificant responsibility in achieving a benefit for the group member cohort. The evidence of Ms Gilsenan established that Mr Lieberman has performed his role diligently and conscientiously. I will make the payment sought, which is in keeping with the sums awarded in other comparable

[28] See ***Allen v G8 No 4*** [47].

cases.

CERTIFICATE

I certify that this and the 33 preceding pages are a true copy of the reasons for ruling of Nichols J of the Supreme Court of Victoria delivered on 19 September 2025 and revised on 23 September 2025.

DATED this twenty-third day of September 2025.

.....
Associate