IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS (CLASS ACTIONS)

Not Restricted

S ECI 2020 02853

BETWEEN:

TRACY-ANN FULLER AND ANOTHER (according to the attached Schedule)	Plaintiffs
v	
ALLIANZ AUSTRALIA INSURANCE LTD (ACN 000 122 850) AND ANOTHER (according to the attached Schedule)	Defendants

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JUDGE:	Matthews J
WHERE HELD:	Melbourne
DATE OF HEARING:	11 March 2025
DATE OF JUDGMENT:	2 April 2025
CASE MAY BE CITED AS:	Fuller & Anor v Allianz Australia Insurance Ltd & Anor (Settlement Approval)
MEDIUM NEUTRAL CITATION:	[2025] VSC 160

PRACTICE AND PROCEDURE — Application for approval of settlement of group proceeding — Whether terms of settlement fair and reasonable — Whether settlement distribution scheme fair and reasonable — Settlement approved — *Supreme Court Act 1986* (Vic) Part 4A, ss 33V, 33ZF.

PRACTICE AND PROCEDURE — Approval for payment of costs of administering settlement distribution scheme — Costs approved in form of a pre-approved cap — Pre-approval of a further contingency for costs of administering not granted.

PRACTICE AND PROCEDURE — Approval for payment of legal costs from settlement sum — Whether group costs order should be amended —*Supreme Court Act 1986* (Vic) Part 4A, s 33ZDA — *Allen v G8 Education Ltd (No 4)* [2024] VSC 487, applied.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr L Armstrong KC with Mr R Clark and Ms A Staker	Johnson Winter & Slattery; Maurice Blackburn
For the Defendants	Mr C Caleo KC with Mr P Holmes	King & Wood Mallesons
For Johnson Winter & Slattery and Maurice Blackburn	Mr A Hochroth, with leave	

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HER HONOUR:

A Introduction and overview

1 The Court is asked to approve a proposed settlement of a group proceeding under s 33V and s 33ZF of the *Supreme Court Act 1986* (Vic) (the **Act**) brought against Allianz Australia Insurance Ltd and Allianz Australia Life Insurance Ltd (together, **Allianz**). In brief, the parties propose to settle the proceeding on terms that Allianz pay $170 million (**Settlement Sum**) without admission of liability. The Court must also consider, as part of this judgment, the approval of the proposed Settlement Distribution Scheme (**SDS**) and appointment of an administrator for the SDS, in addition to whether the Group Costs Order (**GCO**) which has been ordered in the proceeding should be amended to adjust the percentage to be paid to the plaintiffs' solicitors.[1]

2 This proceeding concerns claims arising out of the sale of 'add-on' insurance products by Allianz to consumers at the point at which they purchased cars or motorcycles from motor vehicle dealers. In brief, the plaintiffs claim compensation for themselves and on behalf of the group for misleading or deceptive conduct, unconscionable conduct or unjust enrichment in relation to the sale of those products. To form part of the group, persons must have purchased 'add-on' insurance products issued or offered by Allianz at the point at which they purchased cars or motorcycles from motor vehicle dealers, in the period between 1 June 2006 and 27 September 2021. The 'add-on' insurance products are loan protection ('consumer credit') insurance, purchase price ('GAP' or 'shortfall') insurance,[2] extended motor warranties, and tyre and rim insurance.[3]

3 For the reasons set out in this judgment:

(a) the proposed settlement will be approved;

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[1] Order of Nichols J in *Fuller & Anor v Allianz Australia Insurance Ltd & Anor* (Supreme Court of Victoria, S ECI 2020 02853, 13 December 2022). Pursuant to the GCO made by Nichols J, the plaintiffs' solicitors are to be paid 25% of the Settlement Sum, subject to any further order of the Court.

[2] Also known as Motor Equity, Purchase Price, or Value Protect insurance.

[3] A more detailed explanation of the claims is set out in Section C below.

(b) the proposed orders regarding the SDS and appointing the scheme administrator are appropriate;

(c) with the exception of the Contingency Amount (defined in paragraph 132 below) relating to the costs of administering the settlement, the proposed deductions from the Settlement Sum for the costs of administering the settlement and for payments to the plaintiffs will be approved; and

(d) the GCO will not be amended.

B Procedural history

B.1 Commencement and consolidation of the proceedings

4 On 6 July 2020, Tracy-Ann Fuller commenced proceeding S ECI 2020 02853.[4] Jordan Wilkinson commenced proceeding S ECI 2020 04230 on 11 November 2020.[5] Nichols J made orders consolidating the two proceedings on 15 September 2021 and appointing Ms Fuller and Mr Wilkinson as joint plaintiffs and their respective solicitors, JWS and MB, as jointly-named solicitors on the record. The joint solicitors conducted the proceeding in accordance with a co-operation agreement and protocol reached between them.[6]

5 Also on 15 September 2021, the Court appointed Elizabeth Harris as a special costs referee, for the purpose of conducting inquiries every six months into the costs incurred by the plaintiffs. Specifically, Ms Harris was appointed to inquire into the whether there was any duplicated work being performed by reason of there being two firms jointly representing the plaintiffs rather than one firm, and providing confidential written reports to the Court, MB and JWS identifying and describing duplicated work to enable costs of that work to be quantified at a later time if needed.

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[4] Ms Fuller was represented by Johnson Winter & Slattery (**JWS**). Ms Fuller's proceeding was supported by litigation funding, as detailed later in these reasons.

[5] Mr Wilkinson was represented by Maurice Blackburn (**MB**). MB conducted Mr Wilkinson's proceeding on a 'no win, no fee' basis, prior to consolidation.

[6] The co-operation protocol was annexed to the orders of Nichols J made on 15 September 2021.

B.2 Making of the GCO

6 On 13 December 2022, Nichols J granted the plaintiffs' application for a GCO, pursuant to s 33ZDA of the Act, in the following terms:[7]

> 1. The legal costs payable to the solicitors for the plaintiffs and group members, Maurice Blackburn and Johson Winter & Slattery, be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding (up to the conclusion of the trial of common issues), with such payment to be shared equally between the two firms of solicitors.
>
> 2. Subject to further order, the percentage referred to in order 1 above be 25% inclusive of GST.
>
> 3. Liability for payment of the legal costs pursuant to orders 1 and 2 be shared among the plaintiffs and all group members.

7 The Court also ordered that JWS and MB be jointly and severally liable to pay any costs payable to the defendants in the proceeding and to give security for Allianz's costs (with security to be given by each firm in equal proportions).

B.3 Notices to group members: opt-out

8 Allianz disclosed to the plaintiffs' solicitors a list of purchasers of the 'add-on' insurance products the subject of this proceeding (**Purchasers List**), and that list formed the basis of the notices and communications given to the group.

9 On 20 December 2021, Nichols J made orders approving an opt-out process, which I shall describe in more detail later. The opt-out deadline ordered by the Court was 15 April 20222 (**Opt-out Deadline**).

10 Between February and April 2022, MB distributed around 225,000 opt-out notices to group members by email and advertisements were published in nine major newspaper publications.

11 On 21 December 2022, Nichols J made orders for a supplementary opt-out process for an additional cohort of group members (being purchasers of a particular extended warranty product) who had not been included as part of the prior opt-out distribution

[7] Written reasons for the award of the GCO appear on the Court file: *Fuller v Allianz; Wilkinson v Allianz*, (Supreme Court of Victoria, Nichols J, 13 December 2022, written reasons provided to the parties 1 November 2024, first revision dated 28 February 2025) (**GCO Reasons**).

in 2022 (described in paragraph 9 above). The deadline for this cohort of group members to opt out was 17 March 2023 (**EWP Opt-out Deadline**).

12 In February and March 2023, a further 40,000 opt-out notices were distributed to that additional cohort.

B.4 Notices to group members: registration

13 In April and May 2024, the Court made orders pursuant ss 33ZF and 33ZG of the Act, requiring any group member wishing to participate in any pre-trial settlement of the proceeding to register their claim by 4pm on 15 July 2024 (**Registration Orders**).[8] Pursuant to the Registration Orders, between May and July 2024, the plaintiffs' solicitors caused KPMG to issue approximately 850,000 notices[9] to group members via email, text message and post. There were two rounds of reminder notices issued during this period, as well as social media advertising.

14 On 4 July 2024, Nichols J issued a ruling in respect of the notification regime under the Registration Orders. The Court ruled that further notification should be undertaken at the plaintiffs' expense.[10] The plaintiffs sought orders further notification to be undertaken in light of potential confusion among group members as to another group proceeding with an overlapping registration period, brought against AAI Limited and others (the **AAI proceeding**).[11] Those orders were opposed by Allianz.

15 Approximately 204,000 persons registered by the Registration Deadline (**Registered Group Members** or **RGMs**). Using these registrations, the plaintiffs' solicitors created a list of RGMs (**Registration Distribution List**).

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8 I will describe this date and time as the **Registration Deadline**.

9 There were 849,918 unique persons on the list used for distribution under the Registration Deadline, which was prepared by the plaintiffs' solicitors from the Purchasers List by removing invalid email addresses and mobile phone numbers and de-duplication.

10 The Court observed that this should not be read as a statement 'saying generally that a plaintiff's request for additional rounds or a particular form of notification ought be granted provided the plaintiff bears the costs of notification, or that a defendant should not share the costs of notification unless the defendant consents to the notification regime'. Those matters will turn on the circumstances of the particular case: *Fuller v Allianz; Wilkinson v Allianz*, (Supreme Court of Victoria, Nichols J, 3 July 2024), [17]–[20].

11 *Zoey Anderson-Vaughan v AAI Limited & Ors* (Supreme Court of Victoria, S ECI 2021 00930, commenced 30 March 2021).

B.5 Settlement negotiations and orders regarding the approval application

16 After the Registration Deadline had passed, the parties engaged in settlement negotiations over the next few months, on the basis that the class of persons eligible to participate in any settlement was closed and limited to those persons who had registered by the Registration Deadline.

17 An in-principle settlement of the proceeding was reached on 21 October 2024, just prior to trial, which was due to commence before McDonald J on 23 October 2024. The parties recorded the terms of the proposed settlement in a deed dated 25 October 2024 (**Settlement Deed**).[12]

18 In respect of the proposed settlement, the plaintiffs issued a bifurcated summons on 22 November 2024, seeking:

(a) at the first return of the summons, orders approving proposed notices of settlement and the distribution of the same, in addition to orders deeming certain persons who mistakenly registered in the AAI proceeding prior to the Registration Deadline and who had since been identified as a likely group member in this proceeding to be Registered Group Members;

(b) at the second return, the appointment of a costs referee and orders for a costs report to be given to the Court; and

(c) at the third return, orders for approval of the proposed settlement and its administration, confidentiality orders and other ancillary orders.

19 On 11 December 2024, Delany J made orders, which in effect combined the first two of these matters. Amongst other things, orders were made:[13]

(a) deeming those persons who had mistakenly registered in the AAI proceeding to be Registered Group Members, such that they have leave to seek a benefit pursuant to the settlement;

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[12] The Settlement Deed is exhibited to the affidavit of Rebecca Gilsenan affirmed on 22 November 2024.

[13] Order of Delany J in *Fuller & Anor v Allianz Australia Insurance Ltd & Anor* (Supreme Court of Victoria, S ECI 2020 02853, 11 December 2024).

(b) approving the notices of proposed settlement pursuant to ss 33X(4) and 33Y(1) of the Act;[14]

(c) for the distribution of the notices to Registered Group Members and those persons who registered their claim in the proceeding prior to the Registration Deadline but whose details were not matched to the plaintiffs' registration distribution list[15] (**Unmatched Registrants**), by way of email, SMS or ordinary post (depending on the information available for each RGM or Unmatched Registrant);

(d) for the specific version of the notice, pleadings and a copy of the order itself to be published on the websites of JWS and MB, along with a redacted copy of the SDS (and an explanation of how group members can access an unredacted copy of the SDS);

(e) for the general notice to be posted on the website of JWS and MB, be advertised in nine major newspapers, and be posted on the Supreme Court website;

(f) for correspondence to be sent to **Late Registrants** (being persons who registered their claim in this proceeding after the Registration Deadline) by email or SMS, informing them that they would be identified to the Court and that it is a matter for the Court whether it decides to make an order to allow any late registrants to be treated as registered group members;

(g) pursuant to s 33ZF of the Act, providing that any group member who wishes to oppose the proposed settlement must:

(i) complete and submit an online objection notice, or send a completed notice of objection form by email or by post to the Court, by 4pm on 10 February 2025;[16]and

(ii) unless the Court otherwise orders, attend, or send a legal representative to attend, the Supreme Court of Victoria on 11 March 2025 at 10am when

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14 His Honour also made orders providing for amendment of the notices, if required.

15 This list was based on the list of purchasers, as described earlier in these reasons.

16 The order of Delany J also required objectors to sign their notice of objection or affix an electronic signature to their notice of objection.

the Settlement Approval Application is to be heard, and may address the Court with reasons why the proposed settlement should not be approved;

(h) providing that costs of giving notice be costs in the proceeding; and

(i) pursuant to s 33ZF of the Act and/or r 50.01 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic), appointing Kerrie Rosati of DGT Costs Lawyers as special referee (**Referee**) for the purpose of conducting an inquiry, and making a report to the Court, in respect of her estimate as to the reasonable costs that are likely to be incurred during the settlement administration process.[17]

20 Thus, by these means, all group members were given notice of the proposed settlement and of their right to lodge an objection to it with the Court.

21 By email dated 28 February 2025, the plaintiffs' solicitors informed the Court that a cohort of approximately 13,000 group members were not sent settlement notices pursuant to the order of Delany J in December 2024. This was due to a technical error when preparing lists to distribute the notices, described by counsel for the plaintiffs as a 'glitch'. On the same date, the Court made orders by consent for such persons to receive the notices, and to extend the timeframe for such persons to object to the proposed settlement to 7 March 2025. As a result of a separate 'glitch', a further 2,000 group members who were inadvertently omitted from the notices were also later notified. For completeness, I note that the abovementioned 'glitches' did not affect earlier notification regimes in the proceeding, such as those concerning opt-out processes and registration.

22 The plaintiffs complied with the notification regime as ordered by Delany J and the correction in respect of the cohort of group members who were at first inadvertently omitted. Accordingly, the requirement in s 33X(4) of the Act is met.

23 The settlement approval hearing took place on 11 March 2025.

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17 The costs of the special referee's report are costs paid as part of the administration costs. This is dealt with later in the judgment.

C Summary of the claims

24 The claims in this proceeding relate to Allianz 'add-on' insurance products purchased by group members at the point of purchase of cars or motorcycles from motor vehicle dealers in the period between 1 June 2006 and 27 September 2021. The dealers were authorised to sell the insurance products on behalf of Allianz and, in essence, the plaintiffs alleged that Allianz operated a network of dealers as its sales agents; training dealership staff, giving the dealers access to online application forms for the insurance products, and monitoring the dealers' sales performance. This proceeding concerns allegations about how the insurance products were sold to consumers.

25 In respect of one category of sales, the plaintiffs claimed that these products were sold to consumers by including them in the paperwork for the purchase of a new car without disclosure to customers at all. The plaintiffs contended that this effectively amounted to a representation that the products were appropriate and useful for the customers with the causal consequence that customers acquired the products, even though the customer might not have been aware that the product was included at the time, albeit that they might have become aware shortly afterwards by reading the paperwork.

26 A second category of sales which the plaintiffs alleged occurred is where customers were incorrectly told by business managers at car dealerships that certain of the products were prerequisites for qualifying for the relevant loan or lease arrangements for a motor vehicle.

27 A third category of sales is where the business managers allegedly made representations to customers, either by their conduct or by their words, to the effect that the products provided sufficiently good cover at a sufficiently low cost, that they represented material value for customers, and it would be prudent for the customers to purchase the products.

28 The plaintiffs contended that any of those categories of sale involved unlawful conduct, relying on four causes of action.

29 At the hearing of the settlement approval application, counsel for the plaintiffs described the four causes of action alleged as follows (for the avoidance of doubt, I emphasise that these are allegations only):

(a) **Personal advice claims**: Because of the way Allianz trained the business managers to deal with customers and administered its sales network, and the way that the business managers actually dealt with customers, the business managers slipped into the role of financial advisors for the purposes of the *Corporations Act 2001* (Cth) (**Corporations Act**). The business managers were giving advice or making recommendations about the products, in circumstances where the customers would reasonably have expected that those recommendations took into account their personal circumstances and likely needs. Accordingly, the business managers were subject to Corporations Act obligations relating to the provision of personal financial advice, including an obligation to act in the customer's best interests. A financial advisor, properly acting in the customer's interests, could not reasonably have thought it was in the customer's interests to incur the expenditures necessary to acquire the products, because they provided too little cover at too high a price.

(b) **Misleading conduct**: The conduct of business managers in including the products in the paperwork (either without telling the customers, or by getting the customers' approval or acquiescence, by giving implicit representations that the products had sufficient value that a prudent person would acquire them, along with non-disclosure of certain matters) was misleading. In addition, where business managers represented to the customers that acquiring any of the products was a pre-requisite to getting vehicle finance, that was misleading.

(c) **Unconscionable conduct**: Allianz targeted certain vulnerabilities that the customers had or were likely to have in the way that set up its training systems and the online application process, the way it administered the sales network, and the way that the business managers actually dealt with customers. The vulnerabilities involved customers being distracted at the time of purchase of a new vehicle, not having these relatively complex add-on insurance

products at front of mind. Allianz targeted the customer's lack of familiarity and lack of forward planning regarding the insurance products. The sales tactics also preyed upon customers' decision fatigue.

(d) **Mistakes**: The way in which the products had been presented to the customers, if in fact they were presented at all, caused customers to develop mistaken beliefs either as to whether they were purchasing the products, or whether the products were necessary in order to get vehicle finance, or whether the products provided sufficient value. Those mistaken beliefs were induced by Allianz through the sales training system and network that it administered.

30 The claims concerning mistakes were raised generally in respect of the group, but were of particular importance for group members who had purchased the products more than six years prior to the commencement of the Fuller proceeding, because any limitation periods would not begin to run in respect of mistake claims until the customer became aware of their mistake.

31 Allianz denied all of these claims. Its defence was lengthy and detailed. Without attempting to set out all of Allianz's defences, it is worth noting that in particular, Allianz denied that:

(a) the business managers or others at the car dealerships gave anything other than general advice, as the paperwork usually contained an express reference to a 'general advice warning' which stated that the individual circumstances of customers were not taken into account, such that customers were not being provided with personal advice;

(b) the conduct of its agents when selling the products was misleading or likely to mislead. For example, the paperwork usually involved a written acknowledgment that the add-on insurance products being purchased were optional and not required as part of the loan package. To the extent the plaintiffs rely on a non-disclosure case, product disclosure statements were provided to customers for the relevant products. The schedule to each policy also included a statement that customers were to make their own assessment of the policies' suitability, based on the information provided to them;

(c) the alleged sales system was unconscionable or that their agents engaged in unconscionable conduct. On the contrary, the system by which the policies in question were sold accorded with general market practice, including in the insurance industry;

(d) the products did not provide value, or sufficient value. On the contrary, the policies transferred financial risk from the customer to Allianz, provided peace of mind, saved the customer time and effort by transferring responsibility for claims handling to Allianz, and offered convenience by being purchasable at the same time as customers purchased their vehicle; and

(e) the customers were mistaken as to what they had purchased. In this regard, Allianz refers to the relevant policies being subject to a cooling-off period during which customers could have cancelled the policies and obtained a full refund, as well as ongoing cancellation rights with a pro-rated refund. Allianz contends that group members who mistakenly believed they had not purchased the products could, with reasonable diligence, have discovered those mistakes at the time of purchase or shortly thereafter. To the extent that the mistake claim was relied on to circumvent limitation issues, such group members may still find that their claims were time-barred.

D **Proposed settlement**

32 At a high level, the elements of the proposed settlement are as follows:

(a) Allianz is to pay a fixed sum of $170 million, inclusive of all costs and interest in full and final settlement of the claims of the plaintiffs and all group members (see cls 2.5 and 2.6 of the Settlement Deed);

(b) The solicitors for the plaintiffs, JWS and MB, are to share in 25% of $170 million pursuant to the GCO (subject to any variation ordered by the Court);

(c) The plaintiffs are to receive $30,000 each, as compensation for their time and involvement in the litigation;

(d) The settlement is to be distributed according to the proposed SDS; and

(e) MB seeks to be appointed as settlement administer under the SDS and seeks approval of its associated costs, which are to come out of the Settlement Sum.

E Materials relied on by the plaintiffs

33 The plaintiffs rely on the following affidavit material:

(a) an affidavit of Rebecca Gilsenan, Principal at MB, affirmed on 22 November 2024, relating primarily to the notification of the proposed settlement;

(b) an affidavit of Andreas Peter Piesiewicz, Partner at JWS, sworn on 28 February 2025 (**Piesiewicz Affidavit**);

(c) an affidavit of Rebecca Gilsenan, Principal at MB, affirmed on 4 March 2025 (**Gilsenan Affidavit**);

(d) a supplementary affidavit of Ms Gilsenan, affirmed on 6 March 2025 (**Supplementary Gilsenan Affidavit**); and

(e) the confidential opinion of counsel (**Counsel Opinion**), exhibited to the Gilsenan Affidavit.

34 In addition, the plaintiffs rely on the Referee's report in respect of the reasonable costs likely to be incurred during the proposed administration of the settlement.

35 The following submissions were also before the Court:

(a) the plaintiffs' submissions dated 4 March 2025 in respect of the approval application;

(b) the plaintiffs' submissions dated 23 March 2025 in respect of group members who had lodged late applications to opt out of the proceeding; and

(c) submissions on behalf of MB and JWS in respect of the GCO.

36 Various materials were provided to the Court on the basis that the plaintiffs would seek for the materials to be kept confidential. I have previously described the principles relating to such confidentiality applications in the context of group

proceedings in *Andrianakis v Uber (Settlement Approval)*.[18] I apply those principles here, without setting them out again. I am prepared to make the confidentiality orders sought by the plaintiffs.[19] I am satisfied that the information over which confidentiality orders are sought is all either legally privileged or of commercial sensitivity and has the requisite confidential character, and that it is appropriate for those materials to be kept confidential.[20] That the plaintiffs identified particular passages in the evidence over which confidentiality orders were sought with precision, rather than making blanket claims, was of assistance to the Court and was appropriate to ensure that the requirements of open justice are also upheld.

F Objections

37 As outlined above at paragraph 19(g), group members who object to the settlement were required to submit a written notice of objection by 10 February 2025 and, unless the Court otherwise ordered, to attend or send a legal representative to attend the settlement approval hearing.[21] An extended deadline of 7 March 2025 applied for those group members who were inadvertently omitted from the first notices (described in paragraph 20 above).

38 Three written notices of objection were received by 10 February 2025 and, in respect of the extended deadline of 7 March 2025 for those who were inadvertently omitted from the first set of notices, only one notice was received. Subsequently, but prior to the approval hearing, two objectors corresponded with the Court Registry seeking to withdraw their objections. One of those objectors, Mr David Jefferies, withdrew his objection because he was not able to be represented at or appear at the hearing, but it was clear that he did not resile from his objection. In those circumstances, I consider

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18 [2024] VSC 733, [42]-[43] (***Andrianakis***).

19 For completeness, I note that at the hearing, I raised concerns about a blanket confidentiality order initially sought over the GCO submissions filed on behalf of MB and JWS. Counsel for MB and JWS readily conceded that this would be too broad and provided to my Chambers a version of the submissions identifying particular extracts of the submissions over which they pressed a confidentiality claim. I have reviewed the proposed confidentiality redactions and am content to order that those extracts of the submissions be kept confidential.

20 In this regard, I refer to the evidence set out in paragraph 8 of the Piesiewicz Affidavit in respect of the materials identified by JWS and to paragraph 7 of the Gilsenan Affidavit. I accept the submissions made in the plaintiffs' written outline of submissions at [15]–[19].

21 Arrangements were made for that attendance to take place remotely via audiovisual link, to accommodate any objectors or their legal representatives who were not able to attend the Court in person. All objectors were provided with the audiovisual link in advance of the hearing.

it appropriate to take his objection into account. The parties did not disagree with this approach. Only one objector, Ms Aber Karhani, appeared at the hearing on 11 March 2025 and addressed the Court.

39 I have reviewed the written objection notices and considered what was said by Ms Karhani at the hearing.

40 There being so few objections, all were canvassed individually in the plaintiffs' submissions. The plaintiffs submit that none of the objections lead to the conclusion that the settlement is not fair and reasonable and in the interests of group members. As is evident by the outcome of this application, I agree. Where relevant, I refer to the arguments of objectors in my consideration.

G Late Opt-Outs

41 On 20 December 2021, orders were made by Nichols J establishing the regime for opting out of the proceeding and the deadline for doing so (**Opt-out Orders**). The form and content of the opt-out notice (**Notice**) were set out in the annexures to those orders.[22]

42 The Opt-out Orders provided for the Notice to be:

(a) sent to those persons known to have purchased add-on insurance during the relevant period;

(b) posted on the websites of the solicitors for the plaintiffs;

(c) posted on the Supreme Court of Victoria website;

(d) made available for inspection at the Commercial Court Registry of the Supreme Court of Victoria; and

(e) advertised in specified state and national newspapers.

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[22] Prior to the Opt-out Orders being made, orders were made by Nichols J on 14 July, 13, 17 and 21 August, and 18 October 2021 removing a total of 99 persons as group members. These persons were granted liberty until the close of the opt-out period to apply to rejoin the proceedings as a group members. Following the Opt-out Orders, orders were made on 14 November and 20 December 2021 removing a further 51 persons as group members, with liberty to apply.

43 Opt-out notices were submitted by some group members after the Opt-out Deadline and the EWP Opt-out Deadline had passed.

44 On 17 February 2023, Nichols J made orders extending the Opt-out Deadline for, and removing as group members, a total of 78 persons who either:

(a) provided a valid late opt-out request with appropriate individual reasons for the lateness of their request;

(b) submitted an early opt-out request to the defendants (via ClaimFast Pty Ltd trading as Remediator) prior to the making of the Opt-out Orders; or

(c) submitted an opt-out notice to the defendants during the opt-out process and before the Opt-out Deadline.

45 Importantly, those orders also provided that any subsequent application by a group member pursuant to s 33J(3) of the Act to extend the date by which they are permitted to opt out of the proceeding must include a personally signed opt-out notice, as well as a brief statement of reasons why the group member did not opt out by the deadline and why they should now be permitted to opt out, in the form of a statutory declaration.

46 Orders were subsequently made between 14 April 2023 and 23 October 2024 removing a further 211 persons as group members who had provided valid late opt-out requests.

47 The Settlement Deed was signed on 25 October 2024.

48 Group members in this proceeding have had ample opportunity to opt out of the proceeding. The Opt-out Deadline passed almost three years ago and the EWP Opt-out Deadline passed over two years ago. The Court, and the parties, are entitled to proceed on the basis that deadlines ordered by the Court will be adhered to. Properly, the Court has a discretion to allow late opt-outs: specifically, s 33J(3) of the Act provides that the Court, on the application of a group member, the plaintiff or the defendant, may extend the period within which a group member may opt out of the group proceeding. However, allowing late opt-outs is the exception rather than the rule, and it is appropriate that group members wishing to apply to extend the date by which they can opt out do so on the basis of proper material. This is what the orders

made by Nichols J on 17 February 2023 (see paragraph 45 above) were designed to facilitate.

49 Since the proposed settlement was announced, some 183 group members sent late opt-out notices to the Court (**Post-Settlement Opt-outs**). Of these, 135 were received prior to the approval hearing. The remaining 48 notices were received after the hearing and prior to this judgment being delivered. Unless orders are made giving leave to any of the Post-Settlement Opt-out group members to opt out, their notices are ineffective and they will be bound by the proposed settlement if it is approved. Further, unless they are Registered Group Members, they will not be able to participate in the proposed settlement.

50 Group members who sent Post-Settlement Opt-outs were sent an email from the Court Registry informing them that the Opt-out Deadline and the EWP Opt-out Deadline had passed, that Delany J had determined to refuse the late opt-out, and that they therefore remained a group member.

51 The plaintiffs submit, and I agree, that the Court should not make further orders pursuant to ss 33KA or 33J(3) of the Act in respect of people who sought to opt out after the settlement was announced. For the reasons that follow, the existing opt-out deadlines stand, and Post-Settlement Opt-out notices are ineffective. I note that of the 135 Post-Settlement Opt-out notices received before the approval hearing, only two were accompanied by a statutory declaration. Hence, the remainder did not comply with the orders made on 17 February 2023 as set out at paragraph 45 above, which alone justifies their rejection.

52 The plaintiffs submit that, pursuant to cl 2.12 of the Settlement Deed, they accepted an obligation to oppose any application for further group members to opt out of the proceeding, except with the consent of the defendants. The plaintiffs submit that it does not have the consent of the defendants and therefore opposes the late opt-out applications. Furthermore, the obligation in cl 2.12 must be considered alongside cl 4.2(a)(ii), which allows the defendants to terminate the deed if the Court was to make an order allowing 200 or more group members to opt out of the proceeding after the date of the deed. The plaintiffs submit that cls 2.12 and 4.2 go to the finality of the settlement from the defendants' point of view. I accept these submissions.

53 Finality in the settlement of a group proceeding is crucial, especially from the perspective of the defendant. While plaintiffs seek compensation for their loss or damage, defendants seek to settle the claims of group members, with or without making an admission of liability. When a settlement is negotiated on the basis of the opt-out process having concluded, and by reference to the claims of Registered Group Members, allowing group members to opt out of the proceeding after settlement has been reached would undermine the bargain struck between the parties. Late opt-outs would not be bound by the terms of the settlement and therefore free to pursue their claims against Allianz, with the possibility of Allianz facing further litigation. In this case, Allianz considers the opting-out of 200 group members post-settlement to be significant enough to justify terminating the Settlement Deed. The plaintiffs agreed to these terms and I see no good reason to stray from them.

54 The plaintiffs also submit that other group members had to decide whether to stay in or opt out at a much earlier stage of the proceeding, long before settlement was even in prospect much less negotiated. Those who are applying late are effectively seeking a second 'bite of the cherry', equipped with vastly different information from that which anybody else had. Furthermore, by opting out, they could also circumvent the effects of the registration process. Having not only not registered, but now opting out, they would presumably assert that they retained the ability to bring claims against Allianz separately from the settlement. I accept these submissions for the same reasons given in the previous paragraph.

55 Allianz supports the submissions made by the plaintiffs on the topic of late opt-outs. Additionally, Allianz points out that pursuant to Recital E of the Settlement Deed, the deed was negotiated on the basis that the opt-out process had been completed.

56 In relation to the opt-out notices of Michelle Vincenzini and Jonathon Philip Wood (two group members whose Post-Settlement Opt-out notices were supported by statutory declarations), the plaintiffs submit that nothing in those declarations demonstrates any exceptional circumstance which would justify a further indulgence being granted. In their declarations, Ms Vincenzini and Mr Wood each state that they were either not aware of the proceeding, or of the process for opting out. The plaintiffs submit that notices distributed pursuant to Part 4A of the Act and in accordance with

Court orders are deemed to have been received by group members. As such, Ms Vincenzini and Mr Wood are deemed to have received adequate notice. I accept the plaintiffs' submissions as to why the opt-out notices by Ms Vincenzini and Mr Wood should be rejected. Both statutory declarations were short and contained little more than bare assertions as to why the Opt-out Deadline was missed.

57 In my view, opt-out notices lodged after the settlement was announced, irrespective of whether they were supported by a statutory declaration or otherwise met the requirements of the orders made on 17 February 2023, are simply too late. The relevant deadlines had long passed, and group members cannot just wait and see if they like the settlement before choosing whether to opt out.

58 The fact that group members who did not opt out or register within time are bound by the settlement (such that their claims against Allianz will be released) yet not able to participate in the settlement does not mean that the proposed settlement is unfair. This is the orthodox consequence of orders made in a group proceeding, providing for opt out and registration in a timely manner, including so that mediation and settlement discussions can occur in an informed way. In this case, group members had ample opportunity either to opt out or register.

59 Lastly, the plaintiffs submit that, should the Court receive further opt-out notices between the date of the settlement hearing and the Court's ruling on the settlement approval application, the plaintiffs' submissions as to why further opt-outs ought not be allowed should apply with even greater force with respect to any subsequent applications to opt out, and the Court should refuse to allow any such applications. I also accept these submissions. Given that I have accepted the plaintiffs' submissions in paragraphs 51 to 54 above in relation to Post-Settlement Opt-outs, I consider that those submissions would apply equally if not more so to opt-out notices received by the Court after the hearing of the settlement approval application.

H **<u>Late Registrants</u>**

60 The Gilsenan Affidavit states that, as of 4 March 2025, there are approximately 2,250 Late Registrants. Although the online portals remained open for registration, there was a prominent notice on the website of both of the plaintiffs' law firms informing

group members that the deadline to participate in any settlement had lapsed on 15 July 2024. The breakdown of those late registrations is as follows:

(a) 600 people who registered less than one week after the Registration Deadline and have been matched to the Registration Distribution List;

(b) 500 people who registered less than one week after the Registration Deadline and could not be matched to the Registration Distribution List; and

(c) 1,150 people who registered more than one week after the Registration Deadline, for whom no matching process has yet been undertaken.

61 According to the plaintiffs, based on an assumption, drawn from the late registrations received less than one week after the deadline, that roughly half of the 2,250 late registration application will be confirmed to be group members (ie, properly matched to the Registration Distribution List), the effect of including those late registrants as group members would be that the claims of timely registrants will be reduced by only about 0.6% to 1%. The plaintiffs submit that this diluting effect is tiny, or at least very marginal, given that there are roughly 204,000 timely registrants.

62 The plaintiffs submit that these metrics can be distinguished from those which pertained to the settlement approval in *Andrianakis*,[23] where there were 8,700 timely registrations and 6,500 late applications for registration, the acceptance of which would have had a very significant diluting effect on the settlement. In this case, on a cost-benefit analysis, the benefit of a more rigorous enforcement of the registration orders in terms of preserving the undiluted value of the compensation payments to the timely registrants is more than outweighed by the likely cost that would be incurred if the parties here had to do any form of the vetting exercise that was properly required in *Andrianakis*. In such circumstances, allowing Late Registrants into the class does not undermine the principle that court-ordered timetables ought to be enforced; it simply reflects the outcome of that cost-benefit analysis in this case.

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23 *Andrianakis* [2024] VSC 733.

63 Counsel for the plaintiffs went on to submit the following:[24]

> Our obligations are first to the plaintiffs and second, to the group as a whole and any obligation we have to an individual class member is only an obligation not to act contrary to their interests without first giving them notice and an opportunity to take such steps as may be available to them to protect their own interests.
>
> And where they have failed to comply with a court order that was made for the very serious purposes of putting the parties in a position to pursue settlement negotiations, we are not obligated to seek any exception or variation to an existing order in the interests of a class member who did not comply with the order. That would ordinarily be the case if this was otherwise going to disturb the settlement or have a material impact on the analysis that led to our conclusion that the settlement ought be recommended to the court but here . . . because of the cost benefit considerations I've outlined, in our respectful submission, the appropriate course ultimately in the interests of all of the group members is to avoid the additional legal cost and the delay of having to go through any variant of the exercise that was undertaken in Uber in order to work out whether some subset of this late registration group ought to be allowed in while others are allowed out.

64 In my view, the position taken by the plaintiffs in respect of whether or not Late Registrants should be able to participate in the settlement is an understandable one. It is a sensible and pragmatic approach to take, given that accepting roughly 1,100 late registration applications will have a minimal effect on how the 204,000-odd timely registrants are compensated under the SDS. The costs for the parties and the Court of individually considering the circumstances of each Late Registrant is disproportionate to the effect on those group members who registered within time, such that it is reasonable to treat those Late Registrants as having registered within time. However, this could well change if further late registration applications were received that impacted the settlement in a more significant way. As such, I consider it necessary and appropriate to order that late registrations be cut off as of the day before the settlement hearing, that date being 10 March 2025. The plaintiffs agree with this approach. Accordingly, only those Late Registrants who sought to register by 10 March 2025 can be treated as if they registered within time.

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24 Transcript, 84.31 – 85.30.

I Legal Principles

65 The guiding principles that apply in determining an application under s 33V are well-established.[25] In making its decision, the Court's primary concern is to protect the interests of group members.

66 The Court must turn its mind to whether the proposed settlement:

(a) is fair and reasonable, having regard to the claims made on behalf of the class members who will be bound by the settlement; and

(b) has been undertaken in the interests of group members as a whole.[26]

67 The matters to which a Court will typically turn its mind when considering whether a proposed settlement is fair and reasonable are also listed in the Practice Note as matters which the parties will usually be required to address in the application:[27]

(a) the complexity and likely duration of the litigation;

(b) the reaction of the group to the settlement;

(c) the stage of the proceeding;

(d) the likelihood of establishing liability;

(e) the likelihood of establishing loss or damage;

(f) the risks of maintaining a group proceeding;

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25 See *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459, 465–6 [19] (Goldberg J); *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2007) 236 ALR 322, 332–6 [30]–[40] (Jessup J) (***Darwalla***); *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) (No 3)* (2017) 343 ALR 476, 499–500 [81]–[85] (Beach J) (***Blairgowrie***); *Murillo v SKM Services Pty Ltd* [2019] VSC 663, [29]-[37] (John Dixon J) (***Murillo***). The approach of the Supreme Court of Victoria largely mirrors the approach taken by the Federal Court of Australia in respect of representative proceedings brought under Part IVA of the *Federal Court of Australia Act 1976* (Cth). See, for example, *Iddles & Anor v Fonterra Aust Pty Ltd & Ors* [2023] VSC 566, [22]–[26].

26 *Botsman v Bolitho* (2018) 57 VR 68, 111 [201] (Tate, Whelan and Niall JJA) (***Botsman***); *Elliott-Carde v McDonald's Australia Ltd* (2023) 301 FCR 1, 60-1 [386]–[388] (Lee J); *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468, [32]–[44] (Moshinsky J) (***Camilleri***); *Lifeplan Australia Friendly Society Ltd v S&P Global Inc (Formerly McGraw-Hill Financial, Inc) (A Company Incorporated in New York)* [2018] FCA 379, [12]–[15] (Lee J) (***Lifeplan Australia***); *Fowkes v Boston Scientific Corporation* [2023] FCA 230, [31]–[45] (Lee J).

27 SC GEN 10 Conduct of Group Proceedings (Class Actions) (Second revision), [16.6].

(g) the ability of the defendant(s) to withstand a greater judgment;

(h) the range of reasonableness of the settlement in light of the best recovery;

(i) the range of reasonableness of the settlement in light of all the attendant risks of litigation; and

(j) the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.

68 These matters are not mandatory considerations or an exhaustive list; the relevance or relative importance of particular factors will vary depending on the particular circumstances of the application before the Court. The principles outlined in various judgments provide helpful guidance but are a guide only.

69 It is not the place of the Court to second-guess or go behind the plaintiffs' legal representatives' tactical or other decisions.[28] However, the Court must satisfy itself that the decisions fall within the range of reasonable decisions in the known circumstances and the reasonably perceived risks of the litigation.[29] The Court will identify and consider aspects which may point to unreasonableness and will assess whether the decision to settle on the proposed terms is within the range of reasonable decisions.

70 As noted by Jessup J in *Darwalla*:[30]

> There will rarely, if ever, be a case in which there is a unique outcome which should be regarded as the only fair and reasonable one. In settlement negotiations, some parties, and some advisers, tend to be more risk-averse than others. There is nothing unreasonable involved in either such position and, under s 33V, the court should, up to a point at least, take the applicants and their advisers as it finds them. Neither should the court consider that it knows more about the group members' businesses than the applicants, or more about the actual risks of the litigation than their advisers. So long as the agreed settlement falls within the range of fair and reasonable outcomes, taking everything into account, it should be regarded as qualifying for approval under s 33V.

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28 *Murillo* [2019] VSC 663, [32] (citations omitted). See also *Bolitho* (2018) 57 VR 68, 112, [207]; *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* (2016) 335 ALR 439, 456 [74] (Murphy J).

29 Ibid.

30 (2007) 236 ALR 322, 339 [50].

71 The consideration for the Court is thus typically framed as being whether the proposed settlement is fair and reasonable:

(a) as between the parties, often referred to as *inter partes* fairness; and

(b) as between group members, often referred to as *inter se* fairness.

72 I will consider this proposed settlement in both of these ways, having regard to the principles summarised above.

J Fairness as between the parties

73 The plaintiffs submit that the *inter partes* aspects of the proposed settlement represent a fair and reasonable outcome to the litigation from the perspective of the class members as a whole, in respect of their claims against Allianz.

74 The plaintiffs have made submissions which address each of the factors set out in the Practice Note. I have taken all of these factors into account when considering whether to approve the proposed settlement.

75 In my view, the proposed settlement is well within the range of reasonable settlements. Indeed, it may be said that it is at the more favourable end of that continuum.

76 After the Registration Deadline had passed but prior to settlement negotiations with Allianz, the plaintiffs' solicitors engaged in extensive modelling exercises to estimate the possible value of the claims of Registered Group Members, which they used to evaluate settlement proposals and provide advice/recommendations to the plaintiffs.

77 As was addressed somewhat in the plaintiffs' submissions at the hearing, their case had both strengths and weaknesses. The plaintiffs' claims were complex and strongly contested by Allianz.

78 The Counsel Opinion has been an important resource for my deliberations. In these type of applications, it has become common practice for counsel who were briefed for the plaintiff to provide the Court, as officers of the Court rather than as advocates for a party, with a detailed opinion as to the reasonableness of the proposed settlement. Having the benefit of a frank opinion from counsel with intimate knowledge of the

claims, defences, evidence and arguments is an important tool for the Court when considering whether to approve a proposed settlement. However, the opinion from counsel is not accepted unquestioningly: the judge hearing the settlement application applies a critical eye to it.

79 For good reason, the Counsel Opinion is confidential, such that I am constrained in how to make reference to it in this judgment. In this instance, I found the Counsel Opinion to provide a thorough examination of the strengths and weaknesses of the plaintiffs' case and a clear-eyed assessment of the proposed settlement. As I said at the hearing, the Counsel Opinion is very detailed and comprehensive. Counsel's analysis is, in my view, sound, and supports a finding that the decision the plaintiffs made to settle on the terms of the proposed settlement was a reasonable one.

80 The plaintiffs' submissions on these *inter partes* factors, supported by the Counsel Opinion, were compelling. Their submissions emphasise the complexity of the proceeding, the length of its duration, and the uncertainty of a trial outcome. The proceeding had run almost to trial. The evidence was on (in that witness statements had been done), and the parties had prepared and served objections to evidence and responses. Six experts had filed reports (and reply reports) on topics including actuarial science, marketing, behavioural economics and the insurance industry, and two expert conclaves had been held, one of which led to a joint report and another which led to separate reports in the absence of agreement as to the content of a joint report. Allianz disputed all key elements of the causes of action pleaded by the plaintiffs, and the plaintiffs also confronted limitation issues. The trial was scheduled to last for 19 sitting days. Proceeding to trial and verdict would have involved significant uncertainty and there would likely have been no outcome at first instance until the second half of 2025, leaving aside the possibility of appeals. Even then, if the plaintiffs were successful on the common questions, there would still have remained a need to address the individual claims of group members. That process would likely have taken a good deal longer, and would have required significant time and resources. By settling, the plaintiffs have obtained certainty and a return to group members in the next 12 to 18 months.

81 The benefit of settlement in providing certainty to group members and ensuring at least some return should not be overlooked. However, certainty is not enough on its own. Any deal would provide group members with certainty. What is more important is whether the deal is fair. In this case, the proposed settlement can be understood as both fair and reasonable.

82 Because of the late stage of the proceeding at which the parties settled, the plaintiffs say they were well-placed to assess the strengths and weaknesses of their case. It is in this context that the Counsel Opinion was written, which ultimately concluded that the settlement was fair and reasonable. To my mind, the depth of analysis in the Counsel Opinion speaks to the truth of this submission. The decision to settle was not made lightly, and was instead made on the basis of thorough advice from experienced legal practitioners as to the strengths and weaknesses of the plaintiffs' case. It was reached after protracted negotiations between the parties and a mediation. The plaintiffs' solicitors had thoroughly modelled the claims of RGMs as a cohort, which informed their deliberations and negotiations.

83 While many costs had already been occurred in preparation for trial, it is clear that further significant costs would have been incurred had the trial actually taken place. The plaintiffs submit that the saving of these further costs ought to be taken into account in my assessment of the reasonableness of the Settlement Sum. I accept this submission.

84 The above analysis addresses most of the factors listed in the Practice Note. While the ability of the defendant(s) to withstand a greater judgment is one of the listed factors, in this instance the Counsel Opinion assesses Allianz's ability to withstand a greater judgment, and I am satisfied with this.

85 Now, I address the objections received by the Court relating to the proposed settlement.

86 The written objection of Mr Jefferies was as follows:

> I am objecting to the proposed settlement because I am not being given enough information in order to make an informed decision as to whether I accept it.
>
> In colloquial terms, I am being asked to 'sign a blank cheque'.

> Please give me full information as to the proposed settlement, then I will decide. The parties should thrash out ALL the details first before asking us whether we accept it or not.

87 In answer to Mr Jeffries' objection, the plaintiffs submit that group members were provided with sufficient information through the Court-approved notices of proposed settlement and access to the proposed SDS to consider the proposed settlement. The plaintiffs confirm that, as a registered group member, Mr Jeffries received personal notice of the proposed settlement to his nominated email address on 22 January 2025, and underscore that the notice itself advised group members to contact MB if they needed further information. The plaintiffs also submit that the important question is not whether Mr Jeffries feels that he has sufficient information, but is instead whether the Court is satisfied that it has sufficient information to approve the settlement, noting that the Court has access to confidential materials from the plaintiffs' legal team. If the Court is satisfied, the plaintiffs say Mr Jeffries can take comfort from my conclusions in that regard.

88 Respectfully, in my view, Mr Jeffries' objection reveals a misapprehension of the nature of group proceedings and the settlement approval process. Group members are not asked as individuals to approve the settlement. That is a matter for the Court, with a view to the interests of all group members. Insofar as this objection might be interpreted as a criticism of the adequacy of the notice regime undertaken in this case, I disagree. Group members were provided with sufficient notice of their rights to opt out of the proceeding at an earlier stage and well in advance of this settlement being reached, in order to pursue their claim separately to this proceeding. The notices sent to group members were expressed clearly and were adequate to inform group members of their rights, and the notice of proposed settlement provided sufficient detail as to the proposed settlement. Group members were also entitled to view confidential aspects of the SDS subject to signing confidentiality agreements. This objection has no merit.

89 The group member who lodged an objection and appeared at the hearing, Ms Karhani,[31] objects to the size of the settlement, which she describes as a 'grossly inadequate outcome', as not all affected group members may have been aware of the proceeding, given 'limitations in communication, awareness and participation'. Ms Karhani refers to the 'severity of Allianz's misconduct' and refers to the claims made in the proceeding. The plaintiffs rely on the Counsel Opinion in answer to this objection to the quantum of the settlement, and note that Ms Karhani is protected by the Court's role in approving the settlement. I acknowledge that group members may feel frustrated that they are not able to recoup all that they believe they have lost. However, the proposed settlement is, by its very nature, a compromise and there has been no finding that Allianz is liable. I do not consider the overall quantum to be too low. On the contrary, I consider the outcome to be a reasonable one, possibly even a good one (although I do not need to go that far), for group members.

90 Ms Karhani also objects to the proposed settlement as Allianz has not been held liable or admitted liability. In her written objection, she says that, because the settlement is reached without Allianz admitting liability, it 'undermines the principles of accountability, transparency, and justice enshrined in Australian law' and 'it fails to impose sufficient deterrence, accountability, or reparative measures'. One can empathise with a person who feels that they have been wronged and who wants to hold the alleged wrongdoer to account. However, that is not the ultimate purpose of this litigation, nor was the litigation brought with the aim of general or specific deterrence. This was a private claim, pursuing compensation for a group of persons in respect of the harms alleged. At the hearing, Ms Karhani made submissions in respect of this objection. She made arguments regarding accountability of the insurance industry more generally, with reference to a 2016 ASIC report, assertion of harmful conduct by Allianz and the industry more broadly, and commentary on how the industry might be improved for the benefit of consumers. None of the submissions

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31 The day after the hearing, Ms Karhani provided a statutory declaration to the Court Registry through which she purported to opt out of the proceeding. She appears to be attempting to make a conditional opt-out: unless she receives a specific amount she has identified, she wants to opt out. This is not a permitted way to opt out of a group proceeding. In any event, I refer to Section G above. Ms Karhani's application to opt out is refused.

at the hearing took her objection any further and her objection does not provide sufficient reason for me to reject the proposed settlement.

91 Similarly, the objection of the third objector, Alan Mounsey, focussed on the fact that there was no liability found in respect of 'deliberate actions taken to deceive and target innocent people on a large scale with no intention to be liable for their obvious actions'. Mr Mounsey seeks accountability.

92 The plaintiffs submit that Mr Mounsey wants Allianz to admit liability, but:[32]

> The short reality is that they haven't and the only way in which a finding of liability could reasonably be expected is if there was a trial and the trial attaches all of the risks that have been addressed in detail in the materials provided to [the Court].

93 I accept the plaintiffs submissions in respect of this objection. This proceeding was not an inquisition into the conduct of Allianz or a criminal trial. It was not commenced by a regulator in the public interest seeking a civil penalty or other remedy for alleged misconduct. It was a group proceeding seeking compensation. As outlined above, it was reasonable for the plaintiffs to settle as they have done, which was on the basis of no admission of liability on the part of Allianz. While I can appreciate that group members such as Mr Mounsey and Ms Karhani may have preferred to have their day in court against Allianz, as it were, that preference is not a reason for me to reject the proposed settlement. To reject the settlement so as to force the parties to trial in such circumstances, so that a finding of liability might be obtained, is not in the interests of group members.

94 Having addressed the specific objections, I also note that one of the factors listed in the Practice Note is the reaction of the group. In my view, it is significant that so few objections were received in respect of such a large group, and only one group member stood behind their objection to speak at the hearing. The fact that the vast majority of group members do not oppose the proposed settlement is a matter in favour of its approval.

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32 Transcript, 79.6-11.

K Fairness as between group members

95 Ultimately, the focus of my enquiry as to whether the proposed settlement is fair as between group members is the SDS. I must consider the fairness and reasonableness of the SDS, asking if it is 'within the bounds of reasonableness in achieving a broadly fair, "rule of thumb" distribution between the claimants', and whether it is procedurally fair.[33]

96 In *Camilleri*, Moshinsky J said that factors relevant to the assessment of whether a proposed distribution scheme is fair and reasonable having regard to the interests of the group as a whole included the following:[34]

> (a) whether the distribution scheme subjects all claims to the same principles and procedures for assessing compensation shares;
>
> (b) whether the assessment methodology, to the extent that it reflects 'judgment calls' …[such as calls between classes of claims], is consistent with the case that was to be advanced at trial and supportable as a matter of legal principle;
>
> (c) whether the assessment methodology is likely to deliver a broadly fair assessment (where the settlement is uncapped as to total payments) or relativities (where the task is allocating shares in a fixed sum);
>
> (d) whether the costs of a more perfect assessment procedure would erode the notional benefit of a more exact distribution;
>
> (e) to the extent that the scheme involves any special treatment of the applicants or some group members, for instance via 'reimbursement' payments – whether the special treatment is justifiable, and whether as a matter of fairness a group member ought to be entitled to complain.

97 In respect of the factor referred to in sub-paragraph (a) above, if there is differentiation in treatment, whether that differentiation is fair and reasonable is also a relevant consideration.[35]

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33 *Camilleri* [2015] FCA 1468, [42], [44].

34 Ibid [43]. See also *Ghee v BT Funds Management Ltd* [2023] FCA 1553, [59]–[60] (Murphy J) (***Ghee***); *Ellis v Commonwealth of Australia* [2023] NSWSC 550, [29] (Beech-Jones J).

35 *Downie v Spiral Foods Pty Ltd* [2015] VSC 190, [53] (J Forrest J) (***Downie***).

98 As to any procedural factors which relate to fairness, Moshinsky J in *Camilleri* referred to three factors:[36]

> (a) whether appropriate individuals have been nominated to administer the scheme;
>
> (b) whether the procedures for lodging and assessing claims are appropriate and to be conducted in a timely manner; and
>
> (c) whether the scheme includes appropriate checks and balances, such as procedures for ensuring consistency between assessments and meaningful opportunities for review (and objection) by group members.

K.1 Overview of the SDS

99 The SDS has seven key stages, as set out in the table below:

Stage	**Overview**
Eligibility Confirmation (SDS clause 5)	The scheme administrator will issue certain people with a request to provide additional registration information to confirm that they meet the Eligibility Criteria.[37] The scheme administrator will notify each person whether their eligibility has been confirmed. Group Members that do not provide further registration details by the required time will become Non-Responsive Group Members and will not be eligible to participate in the Settlement Scheme. Following from this eligibility confirmation, the scheme administrator will prepare a list of eligible group members.
Calculation of Assessed Losses and Estimated Distribution Amounts (SDS clause 7)	Eligible Group Members will have their Assessed Losses determined by the scheme administrator according to the Loss Assessment Formula.[38] Based on the Assessed Losses, the scheme administrator will determine the Estimated Distribution Amount for each Eligible Group Member. The scheme administrator will notify each person of their Assessed Losses and Estimated Distribution Amount, which is final and binding.
Collection of Bank Account Details (SDS clause 8)	Eligible Group Members whose Estimated Distribution Amount is more than the Minimum Distribution Amount of $30 will be required to provide their bank details to the scheme administrator if they wish to receive payment of their Distribution Amount. Eligible Group Members that do not provide their bank details by the required time will become Non-Responsive Group Members,

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[36] [2015] FCA 1468, [44]. Those factors were not expressed to be, and are not, an exhaustive list.

[37] The Eligibility Criteria is set out in clause 5.1. In brief, the criteria will be satisfied where the person is a Matching Group 1 RGM (in which case no additional information is required); or if they are a Matching Group 2 RGM or an Unmatched Registrant who provided additional information in order to be matched to purchaser data through the eligibility process set out in clause 5.2, and they have not become a Non-Responsive Group Member, as defined under the SDS.

[38] The loss assessment formula is set out in a confidential annexure to the SDS which group members could inspect upon meeting certain requirements, such as agreeing to keep the material confidential. The Court was provided with a copy of the loss assessment formula.

Stage	Overview
	and their payment will be forfeited and redistributed to all other Eligible Group Members.
Calculation of Distribution Amounts (SDS clause 9)	The scheme administrator will calculate each Eligible Group Member's Distribution Amount, based on the quantum of the Distribution Sum. The calculations will be final and binding.
Payment of Distribution Amounts (SDS clause 10)	The scheme administrator will pay Eligible Group Member's Distribution Amounts that exceed the Minimum Distribution Amount into their nominated bank account. The scheme administrator will provide Remittance Notices to those that receive a payment.
Residual Settlement Sum (SDS clause 11)	After all Distribution Amounts are paid, the scheme administrator will calculate the quantum of the Residual Settlement Sum and determine how that sum is to be distributed.
Conclusion of Scheme (SDS clause 12)	Once all payments are made, the scheme administrator will attend to finalisation of the Settlement Distribution Scheme.

K.2 The assessment methodology

100 With reference to the Counsel Opinion, the plaintiffs submit that the calculation methodology (which is the same for every group member) is fair and reasonable. Further, it is said to be consistent with the plaintiffs' damages case and reflective of applicable legal principles for cases of this kind, including that damages ought be awarded on a 'no transaction' basis.

101 The plaintiffs do not say that the methodology is perfect — perfection is not required. Again, relying on the Counsel Opinion, the plaintiffs submit that:[39]

> [T]he proposed assessment methodology is likely to result in broadly fair relativities as between group members and that it would not be reasonable to incur additional costs and delay in seeking a 'more perfect' process, to the extent that would be possible.

102 The plaintiffs note that it is well-established that, if the strength of claims varies in the group, differentiation on the basis of strength of claim should be reflected in the distribution scheme.[40] In this regard, certain discounting factors can come into play, as they have in this proposed mechanism.

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39 Plaintiffs' written outline of submissions, [51].

40 Citing *O'Dea v Westpac Banking Corporation* [2019] NSWSC 1078, [70] (Sackar J); *Lifeplan Australia* [2018] FCA 379, [32] (Lee J).

103 The SDS methodology is fair and reasonable. The methodology assesses losses based on the data available for each participating group member, and the proportion that the group member receives will be a share reflecting their loss relative to the amount of losses for the rest of the participating group. This is a large consumer class action in which the notional losses at issue are relatively modest. Given the additional work and cost that a more precise calculation would involve, and the modest level of a large number of the payments which will be made, the process proposed in the SDS strikes a good balance. The benefits of a more perfect process in these circumstances do not outweigh the costs; I accept the submission that the difference to a group member's actual recovery would likely be only a few dollars or tens of dollars.

104 I approve the loss assessment formula that the plaintiffs propose to adopt. Under it, like claims are treated alike. Discounts to be made are reasonable and sensible, reflecting different types of notional losses and accounting for the different strengths of mistake and statutory claims, based on the risks of proving those claims. I accept the evidence of Ms Gilsenan that the proposed approach ensures the highest proportion of Eligible Group Members receive the highest average returns, while still ensuring that those persons who were identified as having stronger claims received a higher proportionate return.

105 The SDS contains appropriate time limits so as to ensure the efficient administration of the settlement. I think it appropriate and sensible that group members who are not responsive to communication from the administrator, and therefore hinder the efficient distribution of the settlement, should be treated as Non-Responsive Group Members as defined under the SDS, such that they are not eligible to participate and any payments will be forfeited to be shared among the rest of the participating group. This allows the settlement to be distributed without undue delays or costs, and is to the benefit of group members as a whole. Any deadlines imposed by the administrator will allow group members an adequate opportunity to collate the information requested.

106 Where the settlement administrator requests further information to confirm eligibility and receives insufficient information to enable it to determine whether the Eligibility Criteria are met for a particular person, that person will not be eligible to participate.

This is also sensible. The administrator will outline clearly to them the information to be provided and it would not be fair for any distribution to be made to a person without confirmation that they meet the Eligibility Criteria.

107 Where the loss calculation formula is, in essence, a mathematical exercise without scope for the exercise of judgment or discretion by an administrator, there are minimal risks of unfairness in administration, as long as the formula itself is a sensible one, in line with the way the plaintiffs ran their case. Having reviewed the formula, I am satisfied that it will result in distributions to the group which are fair, and I agree with the plaintiffs that it strikes a proper balance between the competing needs of ensuring fairness as between the group and avoiding the erosion of the settlement in calculating more exact distributions.

108 I approve of miniscule notional losses (of less than $30) being rolled back into the settlement pool for distribution to group members who have suffered a more material loss, particularly given the costs to be incurred in distributing the settlement funds. In the event that there is a small remainder of the settlement which cannot be distributed to Eligible Group Members in an economical and efficient manner, the SDS provides a mechanism for the scheme administrator to determine how to deal with it. I would approve of the amount being donated to a suitable charitable organisation, such as to an organisation aimed at protecting or promoting consumer rights,[41] as contemplated by the plaintiffs. Similar provisions are often approved for small residual sums in the class actions context.[42]

K.3 Procedural factors

109 The plaintiffs say that the SDS reflects an appropriate balance of the rights of group members as between themselves, and I should approve it. They point to two procedural elements raising questions of fairness and submit that those elements are fair.

110 First, for persons who purported to register in-time, but whose status as group members remains unclear, the SDS contemplates that the scheme administrator will

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41 See clauses 11.4 and 11.8 of the SDS.

42 See, eg, *Ghee* [2023] FCA 1553, [61(e)].

request further information in order to confirm their eligibility. The SDS provides that this determination of group membership status is final and binding, ie, without any right of review.[43] Specifically, clause 5.9 of the SDS provides:

> Matching Group 2 RGMs and Unmatched Registrants are not entitled to seek a review of the decision or appeal to the Court or any other court or tribunal in relation to any asserted error of jurisdiction, fact or law arising from the Scheme Administrator's decision.

111 According to the plaintiffs, this process is fair as it appropriately balances the need to ensure all persons who registered in-time can participate, the need to avoid eroding the Settlement Sum with additional administration costs associated with reviews or appeals, and the desirability of distributing the settlement proceeds as swiftly as practicable.

112 Those submissions are accepted. Given the data available in the form of the Purchasers List, determining group member eligibility ought not be a controversial task.

113 The second aspect highlighted by the plaintiffs is the calculation of loss by reference to the claim data for group members. The SDS sets out a process whereby group members will be given a notice setting out key elements of their claim data and the calculation of their loss based on the claim data. If group members identify errors in that notice, they will have an opportunity to seek to correct the purported errors by objecting to the notice. The opportunity to raise an objection will be limited by time, and following resolution of the objection, the data will be treated as final and binding, as will the calculations based on the data. The SDS also provides for corrections to the claim data or loss calculation to be corrected by the scheme administrator in exceptional circumstances.

114 On the second aspect, the plaintiffs submit that the process set out in the SDS strikes an appropriate balance between the need to ensure accuracy in data and loss calculations with the need to avoid eroding the Settlement Sum by review processes and associated delays in distribution. Further, noting that the claim data is the most accurate record available of group member data in the proceeding and has formed the

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43 SDS cl 5.

basis for the settlement negotiations, the plaintiffs say that it is therefore appropriate for the SDS process to assume the accuracy of the data but allow for corrections in exceptional circumstances. The plaintiffs also emphasise that the calculations of loss and pro-rata allocations of the Settlement Sum to the group is a mathematical exercise and does not involve any exercise of discretion or judgment by the settlement administrator.

115 Insofar as there is any discretion reserved to the administrator, such as for the correction of mistakes, it is to be remembered that the administrator is required to conduct its role fairly according to the terms of the SDS, in accordance with its foremost duty to the Court. Insofar as the administrator exercises any discretion, it will do so in a practical, proportionate and cost-effective way, including with recourse to expert advice if necessary.

116 I consider that the mechanisms in the SDS are procedurally fair, with no other procedural elements giving me cause for concern. I am content to make orders approving the mechanisms set out in the SDS.

117 Further, the SDS contains an acknowledgment that the administrator performs that role not as the solicitor for the plaintiffs or any individual group member and that its duty to the Court takes priority over any obligation owed to the plaintiffs and any group members. It also requires the administrator to file a report every six months as to the performance of the settlement scheme, including costs incurred and distributions made.

L The identity of the settlement administrator and their costs

118 The plaintiffs propose that MB be appointed as the administrator of the SDS. MB estimates the total legal costs and disbursements likely to be incurred if it were appointed to be $5,183,120.97 inclusive of GST, a 10% contingency and the costs of the Referee's report.

119 I derived great assistance from the Referee's report. The Referee is highly qualified and experienced in costs assessment, including in a class action context; this was evident in her report which undertook a thorough investigation of the estimate provided by MB. At the outset, I confirm that I accept that the costs of the Referee's

report (in the amount of $9,180) should be paid from the Settlement Sum. As I have said, the report has provided valuable assistance to the Court in making a decision as to the administration of the settlement and it has been to the benefit of group members in that regard.

120 Two questions will be considered here:

(a) Whom should I appoint to administer the settlement?

(b) What provision from the Settlement Sum ought be made for the administrator's expenses?

L.1 Whom should I appoint to administer the settlement?

121 According to the plaintiffs, the evidence establishes that MB would be an appropriate scheme administrator because:

(a) MB has experience administering large and complex settlements in group proceedings and has developed administrative efficiencies for doing so; and

(b) it is proposed that the distribution would be managed by MB's dedicated settlement administration team, with access to staff and expertise, including data analysts and MB staff with detailed knowledge of this proceeding and the group member data set.

122 Counsel for the plaintiffs described MB as 'probably the most experienced' plaintiff class action firm in Australia, with 'unparalleled experience in administering class action settlements including settlements like this one'.[44] MB has a separate unit responsible for such administrations with efficient infrastructure and processes in place for doing so.

123 The plaintiffs submit that the evidence establishes that MB would be an appropriate scheme administrator and that a tender process would be highly unlikely to result in a more cost-effective distribution process.

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44 Transcript, 65.2-8.

124 I tend to agree with the plaintiffs on this point. In the circumstances of this case, I am not convinced that a tender process would result in an improved outcome for group members, in terms of lower costs of administration. It cannot be assumed that this would be the case, and there are countervailing negatives of putting it out to tender, such as the delays in distribution to Eligible Group Members and costs associated with the tender itself. There is no reason to think that another law or accountancy firm would perform the same role more cheaply: lawyers are expensive, but accountants are too. Insofar as the rates outlined by MB for completion of the work, while in some instances the rates are slightly in excess of the scale of costs for this Court, I am satisfied that they are not excessive, in the sense that they are rates which are commonly seen in litigation of this complexity and appear appropriate. In this regard, I rely on the Referee's report. Moreover, as is evident from the Referee's report, MB intends for the bulk of time spent on this process to be done by non-legal staff such as customer service officers and paralegals. That the estimated costs are so high is not indicative of excessive hourly rates; it is a function of the size of the task to be undertaken. I accept the conclusion of the Referee, that this particular administration process is likely to be towards the higher end of complexity and will involve significant cost.

125 There are also clear benefits in having the firm running a class action appointed to administer the settlement, arising from its detailed background knowledge of the proceeding. Where this background can be leveraged effectively, the administration process can be run most efficiently. The SDS itself is authored by those with responsibility for day-to-day conduct of the proceeding and the team at MB which specialises in settlement administration. They are across the finer details of the SDS and are in a position to hit the ground running, so to speak.

126 What is more, I have reviewed the Referee's report in detail, and I am satisfied that MB's appointment will provide efficiencies that will assist to keep costs down. The process will entail data matching and management processes of significant complexity which MB has already worked on to some degree and which it is otherwise well-equipped to manage.

L.2 What provision from the Settlement Sum ought be made for the administrator's expenses?

127 A related question is what costs should be paid to MB from the Settlement Sum for the administration process.

128 The plaintiffs seek approval of MB's administration costs prospectively. They seek a deduction of approximately $5.18 million for scheme administration costs. This amount comprises $4,703,582.70 for MB's likely professional costs and disbursements; a 10% contingency of $470,358.27, both inclusive of GST; taking the sub-total to $5,173,940.97; plus the costs of the Referee's report of $9,180 (including GST); giving a total of $5,183,120.97. The plaintiffs say this is the amount that the Referee's report estimates as the total legal costs and disbursements likely to be incurred in administering the settlement. The plaintiffs submit that, for the reasons outlined in the report, the amount sought is reasonable, noting that it is approximately 3% of the Settlement Sum and that the Referee considered it to be proportionate. I note that this is not a fixed amount but a pre-approved cap; the costs of administration must first be incurred before they are payable, up to the amount of the pre-approved cap.

129 The Court order appointing the Referee stated that the Referee was to conduct an inquiry and make a report to the Court as to the Referee's estimate as to the reasonable costs that are likely to be incurred during the settlement administration process. In performing her task, the Referee obtained an estimate from MB as to what it considered its costs of administering the scheme would be. MB's estimate included a detailed description of each phase of work, along with an estimated number of hours to be spent on each phase by particular MB employees, to which the applicable hourly rates was applied so as to arrive at a cost estimate. The Referee then considered all of this material, performing some calculations of her own, to arrive at an opinion as to the likely reasonable costs. Thus, the Referee's report is, in part, an opinion on MB's estimate.

130 I am comfortable relying on the Referee's report in reaching my decision on whether to approve the likely costs of administering the settlement. The methodology adopted by the Referee is sound: obtaining an estimate from MB is an appropriate starting point, and to do otherwise would really be operating in a vacuum. The Referee was

appointed pursuant to r 50.01 of the *Supreme Court (General Civil Procedure) Rules 2015* (**Rules**) as a special referee. Pursuant to r 50.04 of the Rules, the Court may, as the interests of justice require, adopt the special referee's report or decline to adopt it, in whole or in part, as it sees fit.

131 With one qualification, I accept the Referee's report. It outlines necessary work for the proper administration of the settlement and sets out anticipated costs that are proportionate and reasonable in the circumstances of the instant proceeding. The proposed allocation of resources is satisfactory, including the completion of various aspects by employees with appropriate levels of expertise, seniority and charge-out rates. I am comfortable in those circumstances that I am equipped with sufficient information to approve the fees to be charged by MB in advance of their being incurred. I also note that the Referee has expressly stated her conclusion that the estimate is both reasonable and not disproportionate, in light of the issues and the work involved.

132 The qualification to accepting the Referee's report relates to the contingency amount of 10%, being the amount of $470,358.27 (**Contingency Amount**). For reasons which I will shortly give, I do not consider it appropriate to give pre-approval for the Contingency Amount. Accordingly, I will approve the payment of up to the amount of $4.72 million for administering the SDS, which after rounding up is the amount sought less the 10% Contingency Amount.[45] This is certainly a large amount, but I am satisfied that it is appropriate. As was clarified during the hearing, the plaintiffs seek this figure as a cap; costs must first be incurred before the amounts will be paid to MB. Relevantly, the Court will retain a supervisory role in respect of the administration, receiving regular reports as to costs incurred and the work completed.

133 When I asked what the basis was for pre-approving the Contingency Amount, counsel for the plaintiffs submitted:

> Two things, Your Honour. Firstly, efficiency, avoiding the need for a further application where there is some reasonable likelihood that it will go over 4.7. That is, it's sufficiently — there is a sufficient contingency that the solicitors have built in that contingency provision and secondly, not to put too fine a point on it, the Court's trust [in]… responsible and experienced practitioners that the pre-approved cap with the contingency has been fixed to reduce the

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45 Noting that the amount approved includes the costs of the Referee's report.

> likelihood of the further application, but where the Court can be confident that the solicitors will administer this scheme as efficiently as it can be administered and will ultimately only claim the costs that have been efficiently incurred.

134 At the hearing, I also asked counsel for the plaintiffs to collate some instances where courts have pre-approved the costs of administration as sought here, either including or not including a contingency amount. On 13 March 2025, my Chambers received a note to the Court on this topic. Counsel's note contained a table with pinpoint references to cases in which proposed settlement administration costs were pre-approved at the settlement approval stage, and also relevantly included the following observation:

> We note that in those cases, whether or not the proposed administration costs included an 'in-built contingency' was likely to be noted in confidential material filed in support of the application (for e.g., in a costs referee report) and therefore not disclosed in any of the judgments or orders made.

135 I have no reason to doubt this explanation provided by the plaintiffs as to why a built-in contingency may not be apparent from or disclosed in published judgments or orders. However, it rather strengthens the need for me to say something here, especially as the contingency element was raised in open Court.

136 In *Allen*, Watson J made orders for Slater and Gordon to administer the settlement, approving a payment of $350,000. The plaintiffs sought that amount based on an estimate of $300,000 and an additional contingency amount of $50,000.[46] In approving that deduction, his Honour noted that the quantum of the amounts is 'properly regarded as modest'.[47]

137 In *Ashita Tomi Pty Ltd as trustee for Esskay Super Fund v RCR Tomlinson Ltd trading as RCR Tomlinson Ltd (No 2)*,[48] the Court approved a payment to an administrator in the amount of $269,940 (including GST), in circumstances where group members were previously advised that it was estimated that the costs of administering the settlement would be $230,000 (excluding GST) and three quotes had been obtained from three different potential administrators. It is not clear on the face of that judgment whether the approved payment was a fixed fee or capped amount. The total quantum is also

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46 *Allen v G8 Education Ltd (No 4)* [2024] VSC 487, [43]–[44] (***Allen***).
47 Ibid [51].
48 [2024] NSWSC 717, [68]–[69] (Nixon J).

much smaller than the one proposed in this proceeding, and I note that once GST is factored into the amount ultimately awarded, any contingency amount would also be very small.

138 In *Fakhouri v The Secretary for the NSW Ministry of Health (No 2)*,[49] Garling J stated:

> The costs of the settlement distribution scheme are in the order of $7.5 million. Again, those costs have been carefully assessed, and the reasonableness of them has been the subject of an expert opinion from a Costs Assessor. I also note that such interest as accrues on the settlement sum will defray part of these administration costs, and with the balance to be distributed to group members.

139 Compared to this proceeding, the pre-approved amount for administration costs is higher and it is clearly a cap, in that the balance was to be distributed to group members. However, it is not clear from the judgment whether this amount included a contingency above the estimate and if so, what the contingent amount was.[50]

140 In another recent decision in the Federal Court, Murphy J stated:[51]

> Grant Thornton estimated the costs of the administration at approximately $2.675 million which I consider to be reasonable. Having regard to the range in the tenders I am satisfied that is within the range of what is fair and reasonable. The settlement approval orders however set aside $3 million to ensure there are enough funds to complete the administration, and I approve the deduction of that amount from the Settlement Sum. The settlement administration costs are to be the subject of assessment by the Costs Referee to ensure that they are fair and reasonable.

141 The contingent amount to be set aside in that case is of a similar size to the proposal before me, albeit the estimate for the administration is lower. One distinction to the proposal before me is that Murphy J was approving that the amount be set aside and deducted, but subject to ongoing and regular assessment by a costs referee of the administration costs as they were incurred,[52] which is not the process in this case.

142 I am not presently willing to pre-approve the Contingency Amount. I do not disregard the significant work that will be involved, and I accept that unknown

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49 [2024] NSWSC 1171, [46].

50 Other cases to which I was referred where a pre-approved amount was ordered for settlement administration are: *Komlotex Pty Ltd v AMP Limited (No 4)* [2023] NSWSC 1378, [15] (Ward CJ in Equity); *Raad & Ors v The Cosmetic Institute Pty Limited & Ors* [2024] NSWSC 650, [86] (Weinstein J); *Williams & Kersten Pty Ltd v National Australia Bank Limited (No 5)* [2025] FCA 155, [22] (Lee J); *Wills v Woolworths Group Ltd* [2022] FCA 1545 (Beach J).

51 *Street v State of Western Australia* [2024] FCA 1368, [182].

52 Ibid, [368].

complications may arise, and some tasks may prove more complex and time-consuming than first thought. I accept that, as a result, it is possible that the estimated amount of $4,703,582.70[53] may be expended in a way that is reasonable and while there remains work to be done. The total reasonable costs of this settlement administration may end up being in excess of that amount. I do not doubt the trustworthiness of the practitioners who will administer the settlement, nor do I doubt that they will work hard to administer the settlement efficiently.

143 However, I also consider that $4,703,582.70 is, by itself, a very large sum. Ten per cent of the same is a large amount. I am concerned to avoid a situation in which the Contingency Amount is treated as already allocated to particular workflows, and I think the Court can and should play a useful supervisory role here. If all or any part of that money can go to group members then it should. I am mindful of the importance of protecting the interests of group members.

144 At this stage, I will not include the Contingency Amount in the pre-approved cap. In the event that it appears that the pre-approved cap may be exceeded, MB may approach the Court to seek further orders in respect of any additional amount required. It would then be in the hands of the Court, armed with further information as to how the settlement administration has progressed (including any unforeseen complexities which have arisen), to decide what further amount ought to be allowed to finalise the administration of the settlement.

145 Accordingly, I think it is appropriate to cap the amount to which MB is entitled for the purposes of settlement administration at $4.72 million, without prejudice to MB's right to seek from the Court approval of any additional costs over and above that amount. However, there is no impediment to the Contingency Amount being withheld from distribution to Eligible Group Members, as an interim measure, until the final costs of administering the settlement are known.

146 It is proposed as part of the settlement (at cl 17.2 of the SDS) that the appointed administrator provide regular reports on the progress of settlement administration at six monthly intervals, including in respect of costs and disbursements. This should

53 Which is the amount sought by the plaintiffs including GST for MB's professional fees and disbursements for administering the settlement.

provide group members with further comfort that the Court retains visibility over the administration process and can continue to ensure it is proceeding effectively and in the best interests of group members. That there will be ongoing judicial oversight of the settlement administration is also an important reason why I am content to approve the administration process, subject to the abovementioned qualification in respect of the Contingency Amount.

M **Payments to the plaintiffs**

147 When approving a settlement, the Court has power pursuant to s 33V(2) of the Act to make such orders as it thinks fit with respect to the distribution of any money, including interest, paid under a settlement. This includes payments to a plaintiff in a group proceeding.

148 As part of the settlement, it is proposed that $30,000 be paid to each plaintiff to compensate them for their expenses and the time, inconvenience and stress associated with their role and responsibilities as plaintiffs.

149 It is appropriate for those amounts to be paid. The amounts are relatively modest in light of the overall quantum of the proposed settlement. It is commonplace for a payment to be paid to the named plaintiff in group proceedings to provide compensation for the time and labour associated with their role.[54] I accept the submissions and evidence of the plaintiffs in respect of the level of involvement of the two plaintiffs in that regard. While the amounts are slightly in excess of the average reimbursement payments ordered in this Court,[55] the amounts are nevertheless appropriate. That average of $26,170 is calculated over a 20-year period. In my view, an average reached in that way likely produces a low figure in today's context. When one looks at the range of payments allowed by the Court over that period, from $3,075 to $100,000, it can readily be seen that the payments to these two plaintiffs are reasonable and well within that range.

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54 See, eg, *Rowe v AusNet Electricity Services Pty Ltd & Ors* [2015] VSC 232, [138]–[142].

55 See Gilsenan Affidavit at [152], Table 4; Vince Morabito, '*Group Costs Orders, Funding Commissions, Volume of Class Action Litigation, Reimbursement Payments and Biggest Settlements*' (Report, Department of Business Law and Taxation, Monash University, 4 February 2025), 46–55.

150 Over the four years of the proceeding, the plaintiffs took steps including discovery, preparing outlines of evidence, attending conferences with MB and JWS, and communicating with their solicitors on the mediation and settlement negotiations. I consider that the proposed amounts provide the plaintiffs with an appropriate level of compensation in light of their involvement described in the confidential materials before the Court, and that it is fair and reasonable in the interests of group members as a whole for the amounts to be ordered.[56] It is compensation for the time and effort spent by the lead plaintiffs, not an incentive payment for taking on that role.

N Group Costs Order

151 The next topic I must consider is the GCO for the payment of legal costs calculated as 25% of any award or settlement, inclusive of GST.[57]

152 On the basis of the GCO as ordered and the proposed Settlement Sum, JWS and MB would be entitled to share equally in the sum of $42.5 million, inclusive of GST (and subject to deductions). The deductions are for taxation amounts owing for GST and the remaining owed and agreed 'after the event' (**ATE**) insurance premium.

N.1 Applicable law and principles

153 Section 33ZDA(3) of the Act provides that '[t]he 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).' The Court is therefore empowered to vary the GCO, such as by varying the percentage of the amount in fact obtained which is to be payable to the solicitors. This power to amend allows the Court to ensure that the terms of the GCO remain appropriate, once it has information before it to inform an analysis of whether the percentage to be paid is proportionate.[58]

154 To date, there has only been one opportunity to consider the Court's role at the end of a proceeding involving a GCO, whether the end is reached by settlement or judgment.

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56 *Downie* [2015] VSC 190, [171].

57 See paragraph 6 above.

58 *Mumford v EML Payments Limited* [2022] VSC 750, [94]–[95].

The decision of Watson J in *Allen* outlines matters of principle in considering whether to exercise the power under s 33ZDA(3) of the Act, as follows: [59]

> (a) 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.
>
> (b) 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.
>
> (c) 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).
>
> (d) Close attention should be paid to the reasons for the original group costs order.
>
> (e) 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.

155 I agree with and adopt his Honour's summary of the relevant principles.

156 The absence of anyone urging departure from the GCO percentage as ordered does not relieve the Court of its obligation to consider whether there ought nevertheless to be amendment.[60] The Court is obliged to consider this question in the context of its protective jurisdiction in group proceedings. Importantly, a GCO is often made prospectively. Given this, the Court's task is to assess again whether the GCO, as made, remains proportionate, in light of the actual risks taken and other known matters as at the time when the Court carries out this further assessment. However, it is important to avoid hindsight bias.[61]

157 In their submissions, the plaintiffs provide a summary of the principles set out in *Allen.* The plaintiffs describe the Court's substantive enquiry as whether the circumstances that obtain at the time of the 'review' hearing — really, the s 33V application — are

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59 [2024] VSC 487, [63].

60 Ibid [67].

61 Ibid.

qualitatively different from those which can reasonably be expected to have been within the contemplation of the Court at the earlier time when the GCO was made.

158 In their written submissions, the plaintiffs submit that:

> [T]he enquiry to be undertaken by a Court in the post-settlement 'review' of the appropriateness of a GCO is an enquiry as to the reasonableness of the overall deduction *for costs and profit* that is reflected in the GCO rate. The enquiry is the basic *rate*, not how it might be divided as between costs and profit. If there were unreasonable costs but the rate is appropriate then the consequence is simply that the lawyers' profit component is reduced. If the costs were reasonable but the rate is inappropriate then likewise any downward adjustment could be regarded as impacting profit before cost. But these are ultimately arid enquiries. One of the benefits of a GCO is its simplicity in setting a single rate, and the Court's focus, in our submission, ought always be on the appropriateness of the single (and simple) rate.

159 Generally, I accept those submissions and agree that the Court will direct its focus on the overall GCO rate. However, the Court will also be mindful of questions of reasonableness and proportionality of costs incurred and risks assumed in considering whether to exercise the power to amend under s 33ZDA(3). As noted by Nichols J in *Allen v G8 Education Limited*:[62]

> As I said in Fox/Crawford, considerations of proportionality and reasonableness will assist in answering the statutory question raised by s 33ZDA, and because the statutory model engages with both risk and reward, it invites the question whether the costs allowed are, among other things, proportional to the risk undertaken by the law firm in funding the proceedings. That question is likely to assume significance on any review under s 33DZA(3).
>
> Although it is appropriate to fix the proposed rate it by reference to the presently available measures, the plaintiffs and their solicitors in particular, must be mindful of the need to assist the Court when the occasion arises for scrutinising the appropriateness of the rate now fixed, in the future. When that occasion arises, other measures and other paradigms beyond the general evidence of the kind led on this application (determined as it is at an early stage in the litigation), might well be informative. As I said in Fox/Crawford (by way of example) an insurance-based actuarial calculation might assist in assessing why a proposed return is likely to be reasonable for an investor with the particular funder's characteristics.
>
> The plaintiffs' solicitors should be mindful of the need to facilitate any future assessment on questions concerning the appropriate reward for the assumption of risk, which is by its nature a forward-looking decision made now, but which might be later evaluated by reference to the facts and assessments that informed the decision to assume the risk, made at this point in time. There may well be other measures of reasonableness and

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62 [2022] VSC 32, [90]–[92].

proportionality which will require reference to what will be past events, at the time at which any s 33ZDA(3) question arises.

160 Because GCOs are made prospectively, often very early in proceedings, there are:[63]

> …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*.

161 The Court must review and carefully consider the circumstances pertaining as at the time of the settlement approval application (including looking at matters such as costs actually incurred and risks in fact shouldered) in order to be satisfied that there has been a change in circumstances such as to justify a variation of the GCO, or that there has been no such change.

N.2 Submissions regarding the GCO

162 The plaintiffs' solicitors retained separate counsel to appear for them at the hearing to address the GCO, if the Court considered that necessary. Given that separate counsel provided a comprehensive written submission, they did more than simply respond to anything the Court raised. I was assisted by having this written submission. The plaintiffs' counsel team did not propose to address the GCO themselves, and the question of whether the GCO percentage ought be changed was not addressed in the Counsel Opinion.

163 Counsel for the plaintiffs conceived of their role as follows:[64]

> We consider [the provision of submissions as to matters of principle] to be the proper task of counsel for the plaintiffs in applications like the present. We do not consider it part of our role to advance positive submissions in support of any given GCO rate at this stage of the proceeding.
>
> That said, we recognise that it would, of course, be our duty to inform the Court if we considered that circumstances had arisen that rendered the extant GCO excessive and therefore contrary to the interests of the group members, as those interests stand with the order in place. It is therefore appropriate that we confirm that we are not aware of any such circumstances.

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63 *Fox v Westpac; Crawford v ANZ* (2021) 69 VR 487, 529–30 [148] (Nichols J).
64 Plaintiffs' written outline of submissions, [70]–[72].

164 I am not convinced that the role of a plaintiff's counsel is confined in this way. After all, in this case it was the plaintiffs who sought the making of the GCO in the first place and it is the plaintiffs who seek orders, as part of the settlement approval application, which give effect to that GCO as previously ordered.

165 Ultimately, it is not necessary for me to reach any concluded view on who is best placed to make submissions in such applications and what the role of counsel should be, and I was not asked to do so by counsel in this case. For the purposes of the present application, I had sufficient information and submissions before me to determine the GCO question. I agree that at a minimum, counsel for the plaintiffs have a duty to inform the Court if circumstances have arisen that render the GCO percentage rate excessive.

166 Turning to the submissions made by JWS and MB in this case, they say that there should be no change to the GCO because:

(a) the circumstances now obtaining are well within the range of circumstances that were in the contemplation of the Court when the GCO was first made. There is, accordingly, no proper occasion to reconsider the GCO; and

(b) in any event, the GCO remains likely to produce a proportionate and not excessive return to JWS and MB in consideration of the costs they have expended and risk they have assumed in conducting the proceeding for the benefit of the group members.

167 In respect of the principles at play, JWS and MB emphasise the following matters:

(a) The Court should not approach the crystallisation of a favourable outcome for a law practice as an occasion of itself to amend a GCO.

(b) Where the outcome falls within the range of estimates relied upon by the legal practice in support of the application for the original GCO, this weighs against amending the GCO on account of a lack of proportionality.

(c) A GCO should only be amended 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.

(d) Although in *Allen* the Court concluded that it was appropriate to take into account evidence of return on investment (**ROI**) and internal rate of return (**IRR**) metrics, it does not follow that it is always necessary or appropriate to provide evidence of such metrics. The Court in *Allen* noted limitations of the ROI and IRR metrics, including that in 'good' settlements the metrics will tend to be relatively high, and that a class actions law practice will have a portfolio of cases, in respect of which the ROI or IRR will take into account those which lose and result in significant negative returns, those which settle on unfavourable terms and those which settle favourably.

168 JWS and MB submit that the Court should be satisfied that the present circumstances fall within those that were in the Court's contemplation when the GCO was made. The proceeding did not settle unusually early or for an amount that was outside the foreseeable range of likely outcomes. Rather, it settled on the eve of trial, at a point in time where most of the foreseeable risks associated with the proceedings had materialised, with a quantum of settlement within the range of outcomes presented to Nichols J in support of the GCO, and with accrued costs in excess of the joint budget estimated at the time of the GCO application.

169 JWS and MB submit that the matters raised in evidence in the GCO application remain applicable, and say the GCO has 'achieved the goal of providing a fair, simple and equitable funding model, and providing the two firms with a basis upon which they could conduct the consolidated proceeding for the benefit of group members'.[65] Accordingly, it is submitted that there is no occasion for me to amend the GCO.

170 In any event, JWS and MB say that I can be 'comfortably satisfied that the GCO will provide a proportionate and not excessive return to JWS and MB in consideration of the costs they have expended and the risk they have assumed'.[66] This was a hard-fought, long-running proceeding, in which their legal costs had exceeded the original budget (mostly due to the roughly $940,000 required for soft class closure).

171 While MB was initially running the Wilkinson proceeding on a 'no win, no fee' basis, JWS was funded. JWS took on a non-recourse loan from Balance Legal Capital LLP.

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65 Written submissions of MB and JWS regarding the GCO, [24].

66 Ibid [26].

The loan from Balance was a form of litigation funding, with the amount that JWS was required to repay under the loan varying according to the value of settlement obtained in the proceeding. Balance agreed to indemnify JWS for adverse costs under the loan. Both firms and Balance took out an ATE insurance policy, under which upfront premiums were paid, and a further deferred premium is payable if settlement is approved. JWS also remained at risk in respect of some of its fees.

172 JWS and MB submit that:

(a) they took on substantial risk and diligently undertook the work involved in running the proceeding through to the eve of trial;

(b) the GCO rate is a 'mid-range' GCO percentage and compares favourably to potential third party funding outcomes;

(c) the GCO will not produce a disproportionate return to MB, JWS or Balance, noting that the return of MB should be viewed in the context of its overall portfolio; and

(d) it is significant that no application has been made by any person to amend the GCO and that the plaintiffs' counsel have confirmed that they are not aware of any circumstances having arisen that render the GCO excessive and therefore contrary to the interests of group members, nor has any objection been made in respect of the GCO rate.

N.3 Consideration regarding whether to amend the GCO

173 The reasons given by Nichols J for ordering the GCO in this proceeding included a finding that:

> [O]n predicted recovery sums over the estimated range of recoveries, Group Members were likely to be meaningfully better off under a Group Costs Order in almost all scenarios, and only very marginally worse off under scenarios at the highest end of the projected outcomes.[67]

174 The amount to be recovered under this proposed settlement falls within the estimated range of recoveries and modelling provided by the plaintiffs and on which Nichols J

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67 GCO Ruling, [30].

determined that group members would be better off or only very marginally worse off than under some other funding model.[68] I am satisfied that the GCO has been of benefit to the group, in comparison with outcomes that would have arisen under alternative funding models.

175 A key reason for the GCO being ordered was the certainty which it afforded group members of a recovery of no less than 75% of any settlement or judgment.[69] This was preferable to the genuine uncertainty as to what funding model would apply in the event a GCO was not ordered post-consolidation of the two proceedings.[70] The GCO was found to provide a 'fair, simple and equitable funding model' in circumstances where the alternative would involve group members being funded on different bases.[71]

176 As noted by Watson J in *Allen*, that no one seeks a departure from the GCO as initially ordered will often be a factor which supports no amendment being made.[72] In this case, there has been no objection made with respect to the percentage of the GCO. I have taken this into account in making my decision, but I have not treated it as determinative.

177 I am satisfied that the GCO percentage remains proportionate, having regard to the work and investment by JWS and MB, and the risks they assumed.

178 I have not described, in any detail, the evidence regarding accrued costs, risks, budgets and the like provided in Ms Gilsenan's affidavits and in the Piesiewicz Affidavit, as those aspects are confidential. I can say that I have been provided with sufficient information to allow me to evaluate the evidence and to reach this conclusion.

179 Both JWS and MB took on substantial risk in respect of the proceeding and, while I will not go into the finer details of risks and how they were partly managed, those risk management methods unsurprisingly also involved significant financial costs and risks for the firms. The firms ran the proceeding almost to trial. The information

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68 Piesiewicz Affidavit, [72].
69 GCO Ruling, [35].
70 Ibid [36].
71 Ibid.
72 *Allen* [2024] VSC 487, [62].

before the Court as to the work undertaken, costs incurred, and risks assumed leaves me satisfied that this outcome does not result in a disproportion rate return for the firms or Balance. Having regard to the extensive information before me on the work undertaken by the plaintiffs' legal team, I am satisfied that the costs are reasonable and proportionate to the issues in dispute and the overall amount in dispute. This was a very large and complex proceeding and it is unsurprising that the costs are substantial.

180 I did not consider it necessary to order an independent costs report addressing the legal fees and disbursements accrued in the conduct of this proceeding. The materials before me (including Ms Harris' reports), in the circumstances of this proceeding, were sufficient for me to form a view as the proportionality of costs in the context of the GCO. However, in another case, it is possible that a court might be assisted by such a report in satisfying itself that there is no need to vary the percentage of the GCO. This will be a matter for the court and will depend on the circumstances of the particular proceeding. I note that in *Allen*, Watson J's analysis involved scrutiny of the costs incurred and work undertaken in prosecuting the group proceeding, albeit that the lion's share of the information was confidential and could not be referenced in detail in the judgment, without an independent costs report.[73]

181 As far as I am concerned, the situation which has emerged in fact was within the range of outcomes contemplated at the time the GCO was made, and the assessment at that time was that it was in the interests of justice for the GCO to be made. The present circumstances are within those contemplated at that time, and there is no reason to amend the GCO percentage.

O Conclusion and disposition

182 For the reasons set out above, I will make orders:

(a) approving the proposed settlement;

(b) approving the settlement distribution scheme;

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73 See, eg, *Allen* [2024] VSC 487, [85]–[88].

(c) approving payments from the Settlement Sum:

(i) to each plaintiff of $30,000;

(ii) to MB and JWS of $42.5 million for the plaintiffs' costs and disbursements, being the amount payable under the GCO;

(iii) to MB for the costs of administering the settlement distribution scheme up to $4.72 million;

(d) deeming Late Registrants who are able to be matched to the Registration Distribution List and who sought to register by 10 March 2025 as RGMs;

(e) preserving confidentiality over specified materials; and

(f) dealing with various other consequential matters.

SCHEDULE OF PARTIES

S ECI 2020 02853

BETWEEN:

TRACY-ANN FULLER	First Plaintiff
JORDAN WILKINSON	Second Plaintiff
- v -	
ALLIANZ AUSTRALIA INSURANCE LTD (ACN 000 122 850)	First Defendant
ALLIANZ AUSTRALIA LIFE INSURANCE LTD (ACN 076 033 782)	Second Defendant

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CERTIFICATE

I certify that this and the 54 preceding pages are a true copy of the reasons for judgment of Justice Matthews of the Supreme Court of Victoria delivered on 2 April 2025.

DATED this second day of April 2025.

Amelia Simpson
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Associate