FEDERAL COURT OF AUSTRALIA

Zantran Pty Limited v Crown Resorts Limited (No 4) [2022] FCA 500

File number:	VID 1317 of 2017
Judgment of:	**BEACH J**
Date of judgment:	29 April 2022
Catchwords:	**REPRESENTATIVE PROCEEDINGS** – settlement approval – s 33V(1) of *Federal Court of Australia Act 1976* (Cth) – settlement distribution scheme – reasonableness of deductions – whether to make a common fund order under s 33V(2) - funding equalisation mechanisms – orders made
Legislation:	*Corporations Act 2001* (Cth) ss 674, 1041H *Federal Court of Australia Act 1976* (Cth) ss 33V, 33ZF
Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	89
Date of hearing:	28 April 2022
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Counsel for the Respondent:	ND Hopkins QC and H Whitwell
Solicitor for the Respondent:	Minter Ellison
Counsel for Maurice Blackburn:	LWL Armstrong QC with M Guo
Solicitor for Maurice Blackburn:	Maurice Blackburn
Counsel for International Litigation Funding Partners Pty Ltd	G Donnellan

Counsel for the Teachers Retirement System of Texas and California State Teachers Retirement System	BW Walker SC

ORDERS

VID 1317 of 2017

BETWEEN:	**ZANTRAN PTY LIMITED** Applicant
AND:	**CROWN RESORTS LIMITED** Respondent

ORDER MADE BY: **BEACH J**

DATE OF ORDER: **29 APRIL 2022**

THE COURT ORDERS THAT:

1. Pursuant to ss 33V and/or 33ZF of the *Federal Court of Australia Act 1976* (Cth) (the Act), the settlement of the Proceeding be approved on the terms set out in:
   (a) the Deed of Settlement entered into between the parties and executed on 29 October 2021 (as varied by the Deed of Variation dated 1 December 2021) (Deed); and
   (b) the Settlement Distribution Scheme annexed to the Affidavit of Michael Harold Donelly affirmed on 4 April 2022 (SDS) including the Loss Assessment Formula annexed to the Confidential Affidavit of Michael Harold Donelly affirmed on 4 April 2022.
2. Pursuant to s 33ZF of the Act, the Court authorises the Applicant, *nunc pro tunc* for and on behalf of persons who meet the definition of 'Group Member' in paragraph 1 of the Further Amended Statement of Claim dated 15 March 2021, and who did not file an opt-out notice in accordance with the orders made on 30 November 2018, all such persons being Bound Group Members, to enter into and give effect to the Deed, for and on behalf of all Bound Group Members.
3. Pursuant to s 33ZB and s 33ZF of the Act, the persons affected and bound by the settlement of the proceeding are:
   (a) the Applicant, the Respondent, the Bound Group Members, Maurice Blackburn Pty Ltd; and
   (b) International Litigation Funding Partners Pte Ltd.

4. Pursuant to s 22, s 23 and/or s 33ZF of the Act, rule 1.32 of *the Federal Court of Australia Rules 2011* (the Rules), and/or the Court's implied or inherent jurisdiction, the proceeding be dismissed as and from the date of completion of the administration of the SDS, being the date on which the final distribution under the SDS is confirmed to the Court by Maurice Blackburn (Completion Date).

5. Pursuant to s 33ZF of the Act, on and from the Completion Date, the Respondent and its Related Parties (as defined in the Deed) are released by the Applicant and each of the Bound Group Members from the Applicant's and Group Members' Claims (as defined in the Deed) made by or on behalf of the Applicant or any Bound Group Member in the Proceeding.

6. Pursuant to s 22, s 23 or s 33ZF of the Act, rule 1.32 of the Rules, and/or the Court's implied jurisdiction:

   (a) there be no order as to the costs of the proceeding (such that each party bear their own costs of the proceeding); and

   (b) all previous costs orders made in the proceeding be vacated with effect from the Completion Date.

7. Pursuant to rule 2.43(1) of the Rules, all amounts paid into Court by or on behalf of the Applicant as security for the Respondent's costs of the Proceeding, and any interest accrued on those amounts, be repaid at the direction of the Applicant.

Settlement Distribution Scheme

8. Pursuant to s 33V(2) and/or s 33ZF of the Act or otherwise, Maurice Blackburn is appointed Administrator of the SDS, and is to act in accordance with the SDS, subject to any direction of the Court, and be given the powers and immunities contemplated by the SDS from the date of the orders of the Hon. Justice Murphy dated 23 November 2021.

9. Pursuant to s 33V(2) and/or s 33ZF of the Act, for the purposes of the SDS the amount of the 'Applicant's Legal Costs and Disbursements' (as defined in the SDS), up to and including 28 April 2022, be approved in the amount of $11,521,954.55 as being reasonable.

10. Pursuant to s 33V(2) and/or s 33ZF of the Act, for the purposes of the SDS the amount of the 'Administration Costs' (as defined in the SDS) be approved in the amount of $440,606 as being reasonable.

11. Pursuant to ss 33V(2) and/or 33ZF of the Act, for the purposes of the SDS the amount of the 'Applicant's Reimbursement Payment' (as defined in the SDS) be approved in the amount of $25,000 as being reasonable.

12. Pursuant to ss 33V(2) and/or 33ZF of the Act, for the purposes of the SDS the amount of the 'Funder's Commission' (as defined in the SDS) be approved in the amount of $30,200,668.80 as being reasonable.

13. Maurice Blackburn has liberty to apply in relation to any matter arising under the SDS.

Other orders

14. Pursuant to s 33ZB of the Act, the persons affected and bound by these orders are the Applicant, the Respondent and all Bound Group Members.

15. Pursuant to s 37AF(1)(b) and s 37AG(1)(a) of the Act, on the ground that the order is necessary to prevent prejudice to the proper administration of justice and until further order:

    (a) the Confidential Affidavit of Michael Harold Donelly affirmed 4 April 2022 including the material annexed to it;

    (b) the Confidential Affidavit of Michael Harold Donelly affirmed 26 April 2022 including the material annexed to it;

    (c) the Confidential Affidavit of Andrew John Watson sworn 26 April 2022 including the material annexed to it;

    not be published or disclosed without the prior leave of the Court to any person or entity other than the Applicant and its legal representatives, and the Court.

16. Pursuant to s 37AF(1)(b) and s 37AG(1)(a) of the Act, on the ground that the order is necessary to prevent prejudice to the proper administration of justice and until further order, the Report (as defined in the orders of the Hon. Justice Murphy dated 23 November 2021) not be published or disclosed without the prior leave of the Court to any person or entity other than the Referee, the Applicant and its legal advisors and the Court.

17. Pursuant to s 37AF(1)(b) and s 37AG(1)(a) of the Act, on the ground that the order is necessary to prevent prejudice to the proper administration of justice and until further order, the supplementary submissions of counsel dated 4 April 2022 not be published

or disclosed without the prior leave of the Court to any person or entity other than the Applicant and its legal representatives, and the Court.

18. Pursuant to s 37AF(1)(b) and s 37AG(1)(a) of the Act, on the ground that the order is necessary to prevent prejudice to the proper administration of justice and until further order, the submissions of the Objector dated 20 April 2022, including the material annexed to the submissions, not be published or disclosed without the prior leave of the Court to any person or entity other than the Applicant and its legal representatives, and the Court.

19. Pursuant to s 33ZF of the Act, Alchin Superannuation Fund, Andy Troung and Frances Cowie be considered to have filed an opt-out notice in accordance with the orders made on 30 November 2018.

20. Pursuant to s 33ZF of the Act, those persons identified in the Affidavit of Michael Harold Donelly dated 4 April 2022 at paragraphs 112 and 115 be considered as Bound Group Members and Registered Group Members for the purposes of the Settlement Distribution Scheme.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT
(revised from transcript)

BEACH J:

1 Zantran Pty Ltd, the representative applicant in this representative proceeding against Crown Resorts Ltd, seeks my approval under s 33V of the *Federal Court of Australia Act 1976* (Cth) to a settlement embodied in a deed of settlement executed on 29 October 2021 as subsequently varied on 1 December 2021.

2 The terms of the settlement embodied in the deed (as varied) also include a proposed settlement distribution scheme (SDS), which includes the appointment of Maurice Blackburn as administrator of the scheme.

3 Under the settlement, Crown is to pay $125 million for the benefit of the applicant and the group members.

4 The SDS establishes a procedure for distributing the proposed residual settlement sum, which is approximately $81.6 million, among registered group members. The residual sum is approximately 65% of the settlement sum.

5 The SDS provides that the residual settlement sum will be distributed to registered group members in the proportion which their respective loss assessments bears to the aggregate losses assessed for all registered group members. Group members' losses are to be calculated by reference to a loss assessment formula, which is confidential but which in my view is not inappropriate. The SDS and loss assessment formula have the effect that group members' claims are treated equally, and there is no unfair discriminatory or preferable treatment as between group members.

6 Let me begin with some background to this proceeding.

Some background matters

7 This proceeding arose out of conduct by Crown alleged to have taken place between 6 February 2015 and 16 October 2016 (the relevant period). The proceeding was commenced on 4 December 2017 as an open class representative proceeding. The group members comprise all persons who:

(a) acquired an interest in ordinary shares in Crown during the relevant period; and

(b) suffered loss or damage which was causally connected to the pleaded conduct of Crown.

8 Crown carried on business as one of Australia's largest gaming and entertainment groups with operations and investments in Australia, Asia, the United Kingdom and the United States. This included ownership of casino and hotel resorts in Melbourne and Perth.

9 Customers of Crown Melbourne and Crown Perth included customers who travelled to Australia from other countries and placed bets in private gaming rooms, were extended credit to gamble at those casinos, provided with assistance with organising visas and travel plans, and provided with benefits including accommodation, meals and refreshments in those casinos.

10 Crown's international VIP gamblers included Chinese nationals who travelled to Australia to gamble at Crown Melbourne or Crown Perth.

11 Between 2014 and October 2016, Crown employed at least 19 employees who performed functions and tasks for the benefit of Crown in mainland China.

12 Between 2014 and October 2016, Crown derived a substantial portion of its revenue from VIP gaming, accounting for between 27% to 31% of its total revenue. During this time, a large number of Chinese VIP gamblers gambled at Crown Melbourne and Crown Perth, and a substantial portion of Crown's revenue was derived from Crown's Chinese VIP gamblers and from the implementation of Crown's China operations.

13 On 6 February 2015, the Chinese Government announced that the fact that Chinese citizens were being organised to gamble abroad was causing great harm, and that casinos in overseas countries which had set up offices in China to attract and recruit Chinese citizens to gamble abroad were to be the focus of a crackdown.

14 On 17 June 2015, employees of South Korean casino operators Paradise and Grand Korea Leisure were detained by Chinese authorities and charged with offences relating to marketing gambling to Chinese citizens.

15 On 9 July 2015, an employee of Crown was questioned by Chinese authorities and accused of organising Chinese nationals to gamble in Australia.

16 Between 13 and 24 October 2016, Chinese authorities detained 19 Crown employees. On 17 October 2016, Crown announced the detention of its employees by Chinese authorities, following which Crown's share price declined by approximately $1.80 per share or 13.9%.

17 In June 2017, these 19 Crown employees were charged with offences relating to the promotion of gambling contrary to Article 303 of the Criminal Law of the People's Republic of China.

On 26 June 2017, each of the 19 Crown employees were found guilty of these offences by the Shanghai Baoshan District People's Court.

18 Now arising from these facts and conduct, the applicant advanced a continuous disclosure claim and a misleading or deceptive conduct claim against Crown.

19 In its continuous disclosure claim, the applicant alleged that Crown was aware of information prior to and during the relevant period that Crown's China operations were in breach of Chinese law and Crown's China operations possessed characteristics which were a target of the Chinese gambling crackdown, and that Crown was aware that there existed various risks prior to and during the relevant period. Four risks were identified. First, Crown employees could be arrested, detained, prosecuted or convicted by Chinese authorities for commission of crimes in contravention of Chinese laws in relation to gambling. Second, in circumstances where Crown employees were arrested, detained, prosecuted or convicted by Chinese authorities for commission of crimes in contravention of Chinese laws in relation to gambling, Crown could be forced to terminate its China operations. Third, Crown could suffer a significant reduction in Crown's Chinese VIP revenue. Fourth, in circumstances where Crown suffered a significant reduction in Crown's Chinese VIP revenue, it would suffer a significant reduction in Crown's total revenue. The applicant alleged that Crown failed to disclose this information and these risks contrary to the ASX listing rules and s 674 of the *Corporations Act 2001* (Cth).

20 Further, in its misleading or deceptive conduct claim, the applicant alleged the following. First, it alleged that by reason of statements made in Crown's annual reports between 2014 and 2016, Crown represented that it had in place effective policies, systems and structures to identify, assess, monitor and manage risks to Crown and/or was able to and did effectively identify, assess, monitor and manage risks to Crown. Second, it alleged that by reason of statements made in such annual reports, Crown represented that it would continue to market itself as a luxury brand to Chinese VIP gamblers. And it was represented that as a result of Crown's continued marketing of itself as a luxury brand to China's VIP gamblers, Crown would in the future attract an even greater share of VIP gamblers including from China, and Crown's Chinese VIP revenue would continue to grow. By reason of such conduct and Crown's awareness of certain information and risks, each of these representations was said to be misleading or deceptive throughout the relevant period.

21 Now as I have said, this proceeding was commenced as an open class proceeding on 4 December 2017. On 30 November 2018, orders were made approving the form of an opt out

and claim registration notice to be distributed to group members. Limited class closure orders were made. The registration and opt out notice was distributed from 18 January 2019, at which date there were some 6,067 group members who had already registered to participate in the proceeding. The deadline for the opt out and claim registration was 4 March 2019. By that date, an additional 1,540 group members had registered their claims, and 377 group members had lodged opt out notices.

22 After the class deadline, a further four opt out notices were received. One of those notices was lodged by CPH Crown Holdings Pty Ltd, which is a related party of Crown, and so not a group member. I will make an order permitting the three remaining late opt out group members to opt out after the class deadline.

23 On 23 November 2021, orders were made that all group members be notified of the settlement and informed that they were required to register to participate in the settlement and/or to object to the settlement by 25 January 2022.

24 By this registration and objection deadline, a further 6,384 additional group members had registered to participate in the settlement, bringing the total number of registered group members to 14,011 holding 111.4 million damaged shares.

25 Since the registration and objection deadline there have been communications from group members who wish to participate in the proposed settlement but did not register within the permitted time. As at the time of the hearing before me yesterday, Maurice Blackburn had received correspondence from 10 such group members who together hold a total of 8,874 damaged shares. In the circumstances, and there being no objection, I will make an order permitting the late registrants to register to participate in the settlement after the registration and objection deadline.

26 Further, a number of group members who registered to participate in the proposed settlement had apparently already lodged opt-out notices. Maurice Blackburn has contacted those group members and requested that any of them who maintained that they ought be permitted to participate in the proposed settlement despite having lodged an opt out notice provide a sufficient reason for why they consider they ought be permitted to do so. Maurice Blackburn has received reasons from 12 opt out registrants. Together, these opt out registrants hold a total of 30,337 damaged shares. Again, and there being no objection, I will make an order permitting these opt out registrants to register to participate in the settlement.

Some legal principles

27 Before turning to some particular aspects of the settlement and SDS, I should say something about the relevant legal principles.

28 The principles by which one determines whether an order should be made under s 33V(1) are not in doubt. The primary focus is whether the settlement amounts to a fair and reasonable compromise of the claims made on behalf of group members considered as a whole, and as between the group members inter se.

29 Now there is no one or obvious way in which a settlement should be framed, either as between the group members and the respondent or in relation to sharing any compensation amongst the group members.

30 As to the first dimension, reasonableness is a range. The question is whether the proposed settlement falls within that range. It is not my task to second-guess the tactical or other decisions made by the applicant's legal representatives, but rather to satisfy myself that such decisions are within the reasonable range of decisions, having regard to the circumstances which are knowable to the applicant and its representatives and a reasonable assessment of risks based on those circumstances.

31 In relation to the second dimension concerning fairness inter se, a concern is to confirm that the interests of the applicant, signed-up clients of its solicitors or those who have signed up to funding agreements are not being preferred over the interests of other group members. And any distribution protocol should be framed to achieve a broadly fair division of the proceeds, treating like group members alike, as cost effectively as possible. I should say now that I am so satisfied concerning the SDS, and also as to the proposed distributions which I will authorise under s 33V(2) subject to some adjustments which I will discuss in a moment.

32 I should also say before proceeding further that I am satisfied that the confidential opinion of counsel has adequately addressed the complexity of the litigation, the risks of establishing liability, the risks of establishing loss or damage, the range of reasonableness of the settlement in light of the best recovery and the range of reasonableness of the settlement in light of all other attendant risks of litigation.

33 Counsel have provided an opinion that the settlement is fair, reasonable and adequate, both between the parties, and as between the group members. The applicant's case on liability against Crown was strong, and there were good prospects of establishing that Crown

contravened ss 674 and 1041H of the Corporations Act and cognate provisions. Counsel also discussed the question of quantum that I do not need to elaborate on. Suffice it to say that there were risks concerning whether the upper end of the applicant's principal quantum case would be realised, and other risks concerning causation. I should say that the views of counsel were very well informed. By the time the parties had agreed to settle the proceeding, the matter was ready for trial. *Merck* orders had been made identifying the questions for determination at trial, and the parties had filed their lay and expert evidence and exchanged detailed written opening submissions. These opening submissions were comprehensive and reflected insights into the strengths and weaknesses of both parties' cases. I should say that I have been provided with and read their submissions.

34 Further, I should note that the terms of settlement were agreed subject to a working assumption that the number of damaged shares to be compensated by the final distribution from the settlement sum would not exceed 117.5 million. This assumption has been realised. At the close of the registration deadline on 25 January 2022, the number of damaged shares registered to participate in the settlement is 111.4 million shares.

35 On the present calculations based on 111.4 million damaged shares, the gross return before costs deductions to group members is around $1.12 per share, and the net return after costs deductions in the amounts presently claimed is about $0.73 per share.

36 The returns reflected in the settlement are to say the least fair and reasonable as between the parties.

37 Moreover, as between group members, the settlement is also fair and reasonable. There is no discrimination in the SDS between group members according to whether group members retained Maurice Blackburn and/or entered into a contractual arrangement with the funder. Further, the claims process is reasonable, efficient and transparent and includes mechanisms to efficiently correct any administrative errors, or to review substantive complaints by independent counsel.

38 In summary, I will approve the overall settlement under s 33V(1) as between the applicant and Crown. Clearly it is a very strong and favourable settlement.

39 Let me then turn to the question of the settlement sum distribution.

Distribution of the settlement sum

40 The applicant seeks orders approving the following sums to be deducted from the settlement sum:

(a) legal costs and disbursements in an amount of $11,677,728.74;

(b) administration costs in an amount of $440,606;

(c) the applicant's reimbursement payment in an amount of $25,000; and

(d) the funder's commission to be paid to International Litigation Funding Partners Pty Ltd (ILFP) being 25 per cent of the settlement sum which works out to be $31.25 million.

41 If the amounts sought to be deducted are approved in full, then the residual settlement sum is approximately $81.6 million.

Legal costs and disbursements

42 Let me begin with the question of legal costs and disbursements.

43 On 23 November 2021, pursuant to s 54A of the FCA Act Ms Harris was appointed as a referee to prepare a report opining as to the reasonableness of the legal costs including disbursements. She provided her report on 31 March 2022.

44 Ms Harris disallowed a portion of the proposed legal costs. But in my view there are some difficulties. The evidence shows that the referee made some assumptions which were incorrect and also considered the wrong question in relation to aspects of the costs, namely, whether there was a cheaper way to do part of the work, instead of whether the costs of the method taken was reasonable. Further, she may have misunderstood the evidence in relation to the nature of the book-build work. Moreover, there were arithmetic errors.

45 I would reject the referee's conclusions on some of these items and substitute my own assessment. The substituted items combined with those of Ms Harris' conclusions that are not disputed, justify me fixing the reasonable legal costs at $7,634,341.82 for professional fees and uplift. Disbursements are not in dispute. So I will allow total legal costs of $11,521,954.55.

46 There is only one matter that I want to specifically comment on concerning the book-build. The referee disallowed 30% of the book-build costs that she characterised as advertising, mailout of funding packs, and responding to or signing up group members. She distinguished this work from related work that she accepted was for the benefit of group members. But I do not accept her disallowance. First, there was no paid advertising of this proceeding. Second,

it is unrealistic to regard the work of bringing the proceeding (or potential proceeding) to the attention of group members as not being work for their benefit. Third, there is little substantiation of the assumption that 30% of the total work related to the mechanical tasks of mailing out funding packs. Fourth, work responding to enquiries should be regarded as work for the benefit of the group members, both individually and, to the extent that it verifies group-wide loss estimates necessary for mediation purposes, for the whole class. Fifth, work undertaken by the firm for the purpose of securing funding was expressly identified in the costs agreement, as part of the "Legal Work" to which charges would apply.

47 In summary concerning the book-build and the other disallowances, I will add back some of the deductions made by the referee. So to be clear, I will allow total legal costs including disbursements at $11,521,954.55. And putting to one side the settlement administration fees and professional fees associated with that, I will allow Maurice Blackburn's professional fees including uplift at $7,634,341.82.

48 I should deal with another matter relating to this general topic. The referee concluded that counsels' fees were fair, reasonable and proportionate. In that regard, the referee found that counsel had disclosed their rates and fee agreements, counsels' rates were reasonable, counsels' invoices were delivered in a timely fashion and counsels' fee notes were sufficiently itemised. But the referee expressed the view that counsel did not disclose fee estimates to Maurice Blackburn, which arguably rendered their costs agreements void, although this did not have any practical impact as counsels' rates were well within the market rates. Now without elaborating, I do not accept the referee's arguable conclusion concerning the voidness of such agreements. Counsels' fee disclosures were more than adequate.

49 Let me deal shortly with 2 other topics before I get to the interesting question of the funder's commission.

50 First, as to the SDS administration costs, as part of her report Ms Harris assessed the reasonableness of the sum proposed for future settlement administration costs. Ms Harris' assessment is that the proposed administration costs are fair and reasonable. There is no other issue with the amount of $440,606 and I will allow it.

51 Second, as to the applicant's reimbursement fee, the SDS provides for the payment of an amount to Dr McCann, the director and shareholder of the applicant, by way of compensation for time and expenditure reasonably incurred by the applicant in the interests of prosecuting

the proceeding on its own behalf and also on behalf of group members. The amount sought is $25,000. I will approve this.

Funder's commission

52 A common fund order is sought calculated at 25% of the settlement sum which produces an amount of $31.25 million. No party or indeed the objectors queried my power to make such an order on settlement pursuant to s 33V(2) if I was of that mind.

53 Further, in terms of the notification to group members of the intention to seek such a CFO, I am satisfied that adequate notice was given under the protocol put in place by the orders made on 23 November 2021. The settlement notice contained the following statement:

> *Litigation funding charges*: The costs and adverse costs risks of the Crown (China Arrests) Class Action (including the provision of security for costs in the amount of $4.77 million) have been funded by ILFP pursuant to various Funding Agreements between ILFP and the Applicant and between ILFP and some of the Group Members. As contemplated in the original Notice sent to Group Members in early 2019, the Applicant will seek Court approval of a 'common fund order' or another form of cost sharing order for a payment of approximately $31.25 million to ILFP (representing approximately 25% of the Settlement Sum) in return for its funding of the Crown (China Arrests) Class Action. In simple terms, a common fund order requires Group Members who receive compensation to pay a percentage of it to the litigation funder who has funded the proceeding. Again, it will be a matter for the Court to determine whether a common fund order or another form of cost sharing order should be made and the amount of litigation funding charges which are reasonable in the circumstances of the case, and which may therefore be deducted from the Settlement Sum.

54 I am satisfied that the 25% rate is at the lower end of the originally stipulated contractual rates in the funding agreements and well under the average contractual rates now applicable, given the timing of the settlement. Further, the 25% is within the reasonable range permitted in other cases, although at best that is only a rough calibration.

55 But should I make a CFO? Before me are 2 objectors who contend that I should not make such an order. Rather, it is said that I should make a funding equalisation order resulting in commission of $26.6 million being permitted rather than $31.25 million, or 21.3% rather than 25% of the settlement sum.

56 The objectors are two group members known as the Teachers Retirement System of Texas and California State Teachers Retirement System. They are two large educator beneficiary pension funds. Moreover, in addition to asserting that only commission of $26.6 million should be permitted, they also complain that inadequate disclosure was made in the settlement notice.

57 Generally, the objectors complain that the proposed CFO changes the deal ILFP made with class members. It is said that the applicant proposes to replace ILFP's contractual compensation model with a flat fee model, yet the settlement notice provided no rationale why that change was necessary or in the interests of the class.

58 Further, it is said that there was no comparative basis in the settlement notice for the class to determine whether the proposed change to ILFP's compensation increased ILFP's return or diminished it. It was said that based on the settlement notice, it was impossible for the class to know whether the proposed 25% of the settlement fund to be paid to ILFP represented a discount from ILFP's contractual entitlements at the time or a premium. Other specific complaints were made concerning the level of disclosure.

59 Let me deal with these disclosure questions first before I turn to the form of commission that should be allowed.

60 First, it is said that neither the Maurice Blackburn retainer agreement nor the ILFP funding agreement disclosed that Maurice Blackburn and ILFP's principal were joint venture partners in funding cases outside Australia. It is said that there was a conflict of interest which had not been disclosed. And moreover it is complained that nothing about the conflicted relationship was set out in the settlement notice.

61 But in my view there has been adequate disclosure of the relationship. Such information was disclosed to group members in the document *Crown Class Action: Important Notice About Conflicts of Interest*, which was made publicly available on the online class member registration portal on the Maurice Blackburn website at all times since it was established in February 2017, including during the registration period following the distribution of the settlement notice. This complaint lacks substance.

62 Second, the objectors complain that Maurice Blackburn's uplift of $458,242 on its professional fees was not disclosed in the settlement notice. But a notice of a proposed settlement is not required to detail such information. Further, the settlement notice made clear the total approximate amount being $12.55 million sought by Maurice Blackburn as payment of its legal costs incurred in the proceeding. Further, the Maurice Blackburn retainer agreement specifically disclosed that an uplift fee would be applied to legal costs in the proceeding. And the Maurice Blackburn retainer agreement was available to review on the online registration portal on Maurice Blackburn's website since 2017. There is nothing in the objectors' point.

63 Third, it is complained that the settlement notice did not disclose that the claims registration website still offered class members after the settlement (in principle) the option of retaining Maurice Blackburn and also entering into funding agreements with ILFP or the rationale and potential costs of class members doing so. As a result of this option being availed of after the settlement notice had been given, this resulted in a post-settlement 91.54% increase in the number of funded group members.

64 But in my view, the notice did not need to say anything about this. There are a few points. There was no requirement to enter into any such funding agreements in order to register. This has always been made clear via the online registration portal. Further, it is not apparent why it would be necessary to include in the settlement notice that group members were being offered the option of executing funding agreements and the Maurice Blackburn retainer when the fact that they were being offered that option was evident from the registration site itself. No group member who wished to participate in the settlement could have been unaware that they had that option. And group members who did not wish to participate in the settlement did not need to be apprised of it. Further, I do not need to speculate on why some group members may have signed such agreements after receiving the settlement notice and their commercial rationale for doing so. That was a matter for them. Nothing that the applicant or Maurice Blackburn did encouraged such a course. And on no view did the notice have to go into the detail of the pros and cons of doing so, let alone based upon hypothetical scenarios.

65 Fourth, it is complained that although the settlement notice disclosed that a CFO was being sought of $31.25 million or 25%, the settlement notice contained no disclosure upon which the class could determine whether that amount was fair and reasonable. It is said that the settlement notice did not disclose the total amount that ILFP disbursed during the pendency of the case by which a return on investment could be calculated. It is said that the settlement notice did not disclose the $9,386,518.50 in legal fees paid to Maurice Blackburn that would pass through to ILFP and that the $4,771,712.50 in security for costs would be released to ILFP. It is said that the settlement notice contained no comparative analysis by which the class could evaluate whether the requested 25% flat fee would yield a premium to ILFP or amount to a discount from ILFP's contractual entitlement at settlement.

66 In my view the notice was adequate. It conformed to the practice note and was carefully considered by Murphy J. Further, at the time of the notice, what was known to the parties was that the CFO of 25% was overwhelmingly in favour of the class as compared to making a

funding equalisation order under either of the two methods then contemplated; I will discuss these in a moment. Further, it would have been pure speculation at the time of the notice as to how the calculus might have changed depending upon new registrants, their losses and whether they were funded or unfunded. In my view the notice was as informative and as accurate as it could have been at the time it was sent.

67 In summary then, I have little difficulty with the adequacy of disclosure in the settlement notice and I do not accept the objectors' points in this respect.

68 Let me turn to the more difficult issue of whether I should make a CFO or impose a funding equalisation mechanism, and if so in what amount.

69 Now given that I am exercising power under s 33V(2), I should consider this question on the best available information to me now, rather than at the time of the settlement notice. And perceiving the matter through this lens, the fact is that the relevant calculus has now changed. Whether it has changed in an unexpected or counter-intuitive way or because of the strategies taken by some group members, but I hasten to add not the objectors, is not really to the point. The fact is that the inputs and calculus has changed.

70 In this regard, at the time of settlement and the settlement notice, the calculus was the following.

71 At the time of settlement the losses of registered group members, calculated using a $1.69 inflation figure on a LIFO trade matching basis, were:

	Loss ($1.69 IPS)	**% of Total Loss**
Funded group members 6,782 group members 72,591,580 damaged shares	$122,679,770.20	91.49%
Unfunded group members 852 group members 6,751,282 damaged shares	$11,409,666.58	8.51%
TOTAL 7,634 group members 79,342,862 damaged shares	$134,089,436.78	100.00%

72 On the basis of calculated losses, ILFP's funding commission at the time of settlement was, based on various methods, the following:

Funding Commission ($125m Settlement Sum)		
Method	**$**	**% of Settlement Sum**
Contractual Commission/Funding Equalisation Order (Method 1)	$38,427,822.11	30.74%
Contractual Commission/Funding Equalisation Order (Method 2)	$37,359,656,40	29.89%
Common Fund Order (25% rate)	$31,250,000.00	25.00%

73 Under the contractual commission/funding equalisation method 1, the proportionate shares of funded and unfunded group members were adjusted so that after the application of the funding commission rate each cohort would receive in proportion to their share of total loss. Effectively the settlement sum would be divided into two pools, one for funded group members and the other for unfunded group members, so that after the application of contractual commission each group would be left with the same amount "in hand".

74 Under the contractual commission/funding equalisation method 2, each group member's initial pro rata share of the settlement sum would be calculated and then for funded group members the share would be multiplied by their contractual funding commission rate, to determine the commission payable by that group member to ILFP pursuant to their funding agreement. The commission payable by each funded group member would be added to determine the total funding commission payable to ILFP. The amounts to be distributed to each group member would then be recalculated in order to ensure that each received in proportion to their share of the settlement.

75 Now after the settlement notice was sent out, a significant number of additional group members registered to participate in the settlement as at the expiration of the registration deadline, being 4pm on 25 January 2022. The losses of those group members who newly registered, which were calculated using a $1.69 inflation figure on a LIFO trade matching basis, were:

	Loss ($1.69 IPS)	% of Newly Registered Loss
Funded group members 6,157 group members 7,678,361 damaged shares	$12,976,430.09	23.73%
Unfunded group members 238 group members 24,677,596 damaged shares	$41,705,137.24	76.27%
TOTAL 6,395 group members 32,355,957 damaged shares	$54,681,567.33	100.00%

76 After the registration deadline expired, the losses of all registered group members, which were calculated using a $1.69 inflation figure on a LIFO trade matching basis, were

	Loss ($1.69 IPS)	% of Total Loss
Funded group members 12,990 group members (82,376,014 damaged shares)	$139,215,463.66	73.94%
Unfunded group members 1,028 group members (29,029,678 damaged shares)	$49,060,155.82	26.06%
TOTAL 14,018 group members 111,405,692 damaged shares	$188,275,619.48	100%

77 On the basis of those losses, ILFP's funding commission after the registration deadline could be calculated, depending upon the method used, as:

Funding Commission ($125m Settlement Sum)		
Method	**$**	**% of Settlement Sum**
Contractual Commission/Funding Equalisation Order (Method 1)	$33,013,518.38	26.41%
Contractual Commission/Funding Equalisation Order (Method 2)	$30,200,668.80	24.16%

Common Fund Order (25% rate)	$31,250,000.00	25.00%

78 So, proceeding to a point after the registration deadline, the following observations can be made. The number of funded group members increased by 91.54% whilst the number of unfunded group members increased by 20.66%. Further, the total loss registered on behalf of funded group members increased by 13.48%, whilst total loss registered on behalf of unfunded group members increased even more substantially. Further, the proportion of total loss from funded/unfunded group members changed from 91.49% (funded) and 8.51% (unfunded) at the time of settlement to 73.94% (funded) and 26.06% (unfunded) after the registration deadline.

79 But this has all now produced a lower figure for commission if one applied funding equalisation method 2 rather than a CFO of 25%. Applying method 2 gives you a figure of $30.2 million at 24.16%, as compared with $31.25 million at 25.0% for the proposed CFO if one takes the figures at the point in time immediately after the registration deadline, rather than at the time of settlement or the settlement notice.

80 Now there are two matters to consider.

81 First, the objectors have contended for a funding equalisation method which provides for an even lower amount of $26.609 million or 21.3% of the settlement fund. But regrettably, their figure was an output of Mr Walker's formula that lacked symmetry or at least internal consistency. The formula was the following:

> Ce = (Lf / Lr)(c)(S) where Ce is the funder's contractual entitlement, Lf is the total losses by funded group members at the time of settlement, Lr is the total losses of all group members at registration deadline, c is the average commission rate and S is the settlement sum.

82 But there is a problem with the component Lf. The time used for the numerator Lf is different to the time used for the denominator Lr. If one leaves that infelicitous formula as it presently is, the output would be $26.609 million or 21.3% of the settlement fund, as the objectors would have it.

83 But if one is comparing like with like, Lf needs to be the total losses by funded group members at the registration deadline, and not at the time of settlement. And if that be so, as I think it should be, then one gets general consistency with the applicant's own calculation for funding equalisation method 2 on the applicant's up to date figures as I have set out in the last table.

84 So, if I am to use a funding equalisation method, it will be the second method suggested by the applicant's up to date figures.

85 Second, should I impose a funding equalisation methodology or make a CFO, in circumstances where the CFO delivers $1 million more commission, that is, $31.25 million rather than the $30.2 million?

86 I propose to go for the lower figure provided by the funding equalisation method 2, which delivers $30.2 million at 24.16%. ILFP is still adequately rewarded at that level and the lower figure is obviously more beneficial to the class. There is no compelling reason to give ILFP the higher figure.

87 So, I will allow commission of $30.2 million, which works out at 24.16% of the settlement sum.

Conclusion

88 In summary then, I will approve under s 33V(1) the settlement and provide for the distributions discussed in these reasons under s 33V(2).

89 I will make orders to accord with these reasons.

I certify that the preceding eighty-nine (89) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Beach.

Associate:

Dated: 4 May 2022