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

Not Restricted

S ECI 2020 00306

DAVID SHIMSHON — First Plaintiff

JULIAN COUGAN — Second Plaintiff

v

MLC NOMINEES PTY LTD
(ACN 002 814 959) — First Defendant

NULIS NOMINEES (AUSTRALIA) LTD
(ACN 008 515 633) — Second Defendant

JUDGE:	Waller J
WHERE HELD:	Melbourne
DATE OF HEARING:	16 April 2025
DATE OF JUDGMENT:	12 May 2025
CASE MAY BE CITED AS:	Shimshon v MLC Nominees Pty Ltd (Settlement Approval)
MEDIUM NEUTRAL CITATION:	[2025] VSC 249

PRACTICE AND PROCEDURE – Group proceeding – Settlement approval – Superannuation trustees – Statutory and general law duties – Failure to transition accrued default amounts – Application to approve settlement and distribution scheme – Approval of legal costs – Approval of settlement administration costs – Approval of plaintiff reimbursement payments – Appointment of administrator – Confidentiality – *Supreme Court Act 1986* (Vic) ss 33V, 33ZB, 33ZF – Practice Note SC GEN 10 – Settlement approved.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	K Loxley with R Howe	Maurice Blackburn Lawyers
For the Defendants	K Foley SC with G Ayres	Allens

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HIS HONOUR:

A. INTRODUCTION

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 MLC Nominees Pty Ltd and NULIS Nominees (Australia) Ltd.

2 Under the proposed settlement, the defendants are to pay the sum of $64.25 million in settlement of the claims of the plaintiffs and group members ('**Settlement Sum**'). The Settlement Sum, together with interest accruing on it, is proposed to be distributed on the terms described in the Settlement Distribution Scheme ('**SDS**'), following the deduction of amounts representing the plaintiffs' legal costs, settlement administration costs and plaintiff reimbursement payments.

3 This proceeding concerns claims arising out of alleged breaches by the defendants of their statutory and general law obligations in the management of superannuation assets held in the Masterkey Business Super and Masterkey Personal Super products within The Universal Super Scheme ('**TUSS**') for which they were trustees.

4 The plaintiffs claim compensation for themselves and on behalf of the group on the basis that the defendants failed to effect the government mandated transition of accrued default amounts ('**ADAs**') to MySuper, a simple, lower fee superannuation product, as soon as reasonably practicable, and that this resulted in the plaintiffs and group members suffering loss or damage in the form of higher fees and lower investment returns.

5 Group members in this proceeding are persons who held an ADA attributed to them that was transferred to MySuper in December 2016 or March 2017, as well as persons who received a payment from a deceased group member or were a spouse of a group member and received a transfer of their ADA interest.[1]

6 In response to the plaintiffs' claims, the defendants deny any breach of their relevant duties and further deny that the plaintiffs and group members are entitled to relief.

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[1] Open affidavit of Nina Abbey dated 26 March 2025, [82].

The defendants assert that they discharged each of their statutory and general law duties by effecting the ADA transition as soon as was reasonably practicable having regard to the risks, challenges and impediments involved.

7 For the reasons set out in this judgment:

(a) the proposed settlement will be approved;

(b) the proposed orders regarding the SDS are appropriate;

(c) the plaintiffs' costs and reimbursements are approved, including the appointment of Maurice Blackburn Lawyers as administrator and the administration costs; and

(d) confidentiality orders will be made over the materials sought.

B. PROCEDURAL HISTORY[2]

8 The proceeding was commenced by way of writ and statement of claim filed by the first plaintiff, Mr David Shimshon, on 22 January 2020.

Separate question and appeal

9 On 10 July 2020, the first plaintiff wrote to the defendants raising concerns in relation to whether the proceeding could continue as a group proceeding under Part 4A of the Act, having regard to s 33B(2)(b)(ii) which provides that Part 4A does not apply to a proceeding concerning property subject to a trust. Ultimately, the parties agreed that the issue should be determined by way of a separate question to be heard prior to the substantive trial.

10 The separate question was heard on 24 August 2020 and 29 October 2020 before John Dixon J. His Honour handed down judgment on 18 December 2020, concluding that the proceeding was not validly commenced under Part 4A.[3]

11 On 17 March 2021, the first plaintiff filed an application for leave to appeal.

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2 This procedural history is drawn from the open affidavit of Nina Abbey dated 26 March 2025.

3 *Shimshon v MLC Nominees Pty Ltd* [2020] VSC 640.

12 In order to preserve his claim and the claims of group members, the second plaintiff, Mr Julian Cougan, commenced a similar proceeding by way of originating application and statement of claim filed in the Federal Court of Australia on 25 March 2021. The statement of claim in the second plaintiff's proceeding was substantially similar to the amended statement of claim in the first plaintiff's proceeding. To avoid unnecessary costs, the parties agreed to a stay of the second plaintiff's proceeding until the determination of the appeal and the Federal Court made orders by consent to that effect on 20 April 2021.

13 The appeal was heard on 27 September 2021, and judgment was delivered on 20 December 2021.[4] The first plaintiff was granted leave to appeal and the appeal was allowed. Following the successful appeal, the second plaintiff's proceeding was cross-vested from the Federal Court to the Supreme Court of Victoria and the two proceedings were consolidated.

Trial preparation

14 Pursuant to the orders of Nichols J dated 21 February 2023, the proceeding was set down for a four-week trial, commencing 18 November 2024. Prior to reaching agreement to settle the proceeding at the mediation on 7 November 2024, the parties completed the following pre-trial steps:

Step	**Date completed**
Plaintiffs serve a detailed set of further and better particulars	20 September 2024
Plaintiffs file and serve an electronic court index	10 October 2024
Parties jointly file a statement of facts	11 October 2024
Parties jointly file and serve a revised list of issues for determination at the initial trial	17 October 2024
Plaintiffs file their outline of opening submissions	28 October 2024
Defendants file their outline of opening	4 November 2024

[4] *Shimshon v MLC Nominees Pty Ltd* [2021] 66 VR 277.

submissions	
Parties file a joint trial plan	4 November 2024

Opt-out

15 On 24 April 2023, Nichols J made orders fixing 15 August 2023 as the opt-out deadline. No orders were made requiring group members to register their participation.

16 On 4 March 2024, Delany J made orders that annexed a list of group members who were deemed to have opted out of the proceeding pursuant to s 33J(2) of the Act or who had ceased to be group members.

Mediation

17 On 20 August 2024, the parties attended a mediation facilitated by the Honourable TF Bathurst AC KC. The mediation was resumed on 7 November 2024, where the parties reached an in-principle agreement to settle the proceeding (subject to Court approval). This agreement was recorded and formalised in:

(a) a deed of settlement, executed by the parties on 4 December 2024; and

(b) a proposed settlement distribution scheme, which was published on Maurice Blackburn Lawyers' website on 21 February 2025.

Objections

18 On 18 December 2024, Delany J made orders requiring an approved settlement notice to be distributed to group members via a range of means including individualised communications, publications in state and national newspapers, publication on Maurice Blackburn Lawyers' website, and publication on the Supreme Court of Victoria website.

19 The orders required any group member who wished to oppose the proposed settlement to, by 4:00pm on 4 April 2025, either:

(a) complete and submit a notice of objection through the Supreme Court website; or

(b) submit a completed notice of objection in the form set out in annexure B to the notice of proposed settlement to the Supreme Court of Victoria.

20 The orders also required any group member who wished to oppose the proposed settlement to attend or send a legal representative to attend the hearing of the approval application on 16 April 2025.

21 There were ultimately five objections received by the Court, one of which was withdrawn.

Non-party application

22 By summons filed on 24 March 2025, Mervyn Lawrence Brady, an applicant in a representative proceeding in the Federal Court, sought leave to inspect the confidential deed of settlement and to intervene in the settlement approval application in this proceeding or to have his counsel and solicitor appointed as contradictors.

23 Mr Brady submitted that he had a direct interest in the settlement approval application in this proceeding because of the real possibility of overlap between some of the group members in his proceeding and group members in this proceeding. Consequently, he submitted that there was also a real possibility that the releases (and any ancillary clauses, such as bar to proceedings clauses in the settlement deed) may extinguish, or negatively affect, the rights and interests of those overlapping group members.

24 The application was dismissed on 11 April 2025.[5]

C. SUMMARY OF THE CLAIMS

25 As described above, the plaintiffs claim that the defendants breached their duties pursuant to the *Superannuation Industry (Supervision) Act 1993* (Cth) and at general law in relation to their assets held in the Masterkey Business Super and Masterkey Personal Super products within TUSS, for which the defendants were trustees.

26 The plaintiffs claim compensation for themselves and on behalf of the group on the basis that the defendants failed to effect the government mandated transition of ADAs

[5] *Shimshon v MLC Nominees Pty Ltd* [2025] VSC 208.

to MySuper as soon as reasonably practicable and in the best interests of all members, and that this resulted in the plaintiffs and group members suffering loss or damage in the form of higher fees and lower investment returns.

D. PROPOSED SETTLEMENT

27 On 4 December 2024, the parties executed a deed of settlement to resolve the proceeding subject to Court approval. The key aspects of the proposed settlement are summarised below.

(a) The proposed settlement requires the defendants to pay $64.25 million (inclusive of legal costs, interest and reimbursement payments of up to $30,000 to each of the plaintiffs) (the '**Settlement Sum**') in full and final settlement of the plaintiffs' claims (cl 3.1).

(b) Subject to Court approval and following the deduction of the plaintiffs' approved costs and any reimbursement payments to the plaintiffs, the Settlement Sum will be paid into the MLC Super Fund where it will be held on trust by the Trustee for the MLC Super Fund in accordance with the deed of settlement, SDS and approval orders, and invested in an interest-bearing bank account (cl 4.2).

(c) In accordance with the SDS, the distribution of the Settlement Sum is to be administered by the Trustee for the MLC Super Fund with an independent expert consultant ('**Expert Consultant**') appointed to perform calculations to apportion the Settlement Sum.

(d) The parties agreed to develop a methodology for the calculation and effecting of payments to group members (the proposed 'Apportionment Formula' annexed to the SDS). The Apportionment Formula is discussed in further detail in Section I below.

(e) In order to guard against any detriment to group members or other members of the MLC Super Fund, neither the Settlement Sum nor the costs of distributing

the settlement (including the costs of the Expert Consultant) will be met from the Trustee of the MLC Super Fund's operational risk financial requirement reserves or other assets of the MLC Super Fund (cl 3.2).

28 The quantum of the proposed settlement is as follows:

Item	**Amount**
Settlement Sum	$64,250,000
Legal costs, disbursements and administration costs	$19,593,763
Reimbursements to plaintiffs	$60,000
Net amount for distribution	$44,596,237
Net amount for distribution as percentage of Settlement Sum	69%

E. MATERIALS RELIED UPON BY THE PLAINTIFFS

29 The plaintiffs relied on the following affidavit material:

(a) the open affidavit of Nina Abbey, principal lawyer at Maurice Blackburn Lawyers, affirmed on 26 March 2025 and Exhibit NA-9;

(b) the confidential affidavit of Nina Abbey affirmed on 26 March 2025 and Exhibit NA-10; and

(c) the supplementary open affidavit of Nina Abbey affirmed 14 April 2025 and Exhibit NA-11.

30 In addition, the plaintiffs relied on the following affidavit material filed by the defendants:

(a) the affidavit of Irene Worrell, the General Manager of Remediation Insignia Financial Limited ('**RIFL**') which is the ultimate parent entity of the defendants, affirmed on 19 March 2025; and

(b) the affidavit of Kathryn Finch, the General Manager, Tax, for the Insignia Financial Group, for which RIFL is the parent company, affirmed on 18 March

2025.

31 The plaintiffs additionally relied on the deed of settlement executed by the parties on 4 December 2024, and the confidential opinion of Mr Kane Loxley and Ms Rebecca Howe of counsel ('**Counsel Opinion**').

32 The following written submissions were before the Court:

(a) the plaintiffs' submissions dated 26 March 2025;

(b) the plaintiffs' supplementary submissions dated 14 April 2025.

33 The Court also had before it the report of the independent costs referee, Mr Ian Ramsey-Stewart, Principal Consultant of Stewart Lawyers, dated 21 March 2025.

34 The plaintiffs sought confidentiality orders in respect of the confidential affidavit of Nina Abbey and its exhibits (including the Counsel Opinion and the deed of settlement) as well as the independent costs referee's report and its annexures.

35 The principles relating to such confidentiality orders in the context of group proceedings were described by Matthews J in *Andrianakis v Uber (Settlement Approval*) as follows:

> Confidentiality orders are not granted as of right. They will not be made automatically or by default. Open justice is an important principle and it is to be given effect to, unless it is necessary for the administration of justice for certain restrictions to be imposed.
>
> In instances such as this, where the Court's approval is being sought and where the Court relies on the frank and comprehensive disclosure of all relevant information, including material which is confidential and/or protected by legal professional privilege, the interests of justice are served by the Court making confidentiality orders. Enabling the Court to fulfil its task is the only purpose for which the information is being provided to the Court. If the risk of disclosure of such information served to discourage the information being provided to the Court, then that is clearly contrary to the administration of justice. This is an important context for the consideration of confidentiality orders.[6]

36 I am prepared to make the confidentiality orders sought by the plaintiffs. I am satisfied

[6] [2024] VSC 733, [42]–[43].

that the information over which confidentiality orders are sought should be kept confidential to ensure the proper administration of justice. I accept the plaintiffs' submissions that such orders encourage candour in the preparation of material; that the material is privileged and confidential and includes the candid assessments of legal practitioners acting for the plaintiffs in this proceeding of the risks associated with the claims in this case; and that the orders are limited to information that is strictly necessary for the administration of justice.

F. OBJECTIONS

37 As noted above, pursuant to the orders of Delany J made on 18 December 2024, an approved settlement notice was to be distributed to group members via a range of means including individualised communications, publications in state and national newspapers, publication on Maurice Blackburn Lawyers' website, and publication on the Supreme Court of Victoria website. Those steps were taken and group members were adequately notified of this application.

38 Group members were given the opportunity to oppose the proposed settlement by 4 April 2025 by either completing and submitting a notice of objection through the Supreme Court of Victoria website; or submitting a completed notice of objection in the form set out in annexure B to the settlement notice to the Supreme Court of Victoria.

39 Five objections were received. One of those objections was subsequently withdrawn. Of the remaining objections:

(a) one objection was submitted on the basis that the size of the proposed settlement was insufficient;

(b) one objection was in relation to a separate legal claim; and

(c) two objections had unclear grounds, being recorded as 'losing money out of my Super', and 'agree[d] every objection' respectively.

40 None of the objections were supported by any evidence or submissions, and none of

the objectors attended the settlement approval hearing.

41 The plaintiffs submit that the Settlement Sum is fair and reasonable, and as is evident from the outcome of this application, I agree. None of the objections displace this conclusion.

G. LATE OPT-OUTS

42 As noted above, on 24 April 2023, Nichols J made orders fixing 15 August 2023 as the opt-out deadline. The form and content of the opt-out notices were set out in the annexures to those orders. The notices were distributed to group members via a range of means including individualised communications, publications in state and national newspapers, publication on Maurice Blackburn Lawyers' website, and publication on the Supreme Court of Victoria website.

43 On 4 March 2024, Delany J made orders that annexed a list of group members who were deemed to have opted out of the proceeding pursuant to s 33J(2) of the Act or who had ceased to be group members.

44 The Court received two late opt-out notices, one on 11 March 2025, and one on 1 April 2025.

45 Group members in this proceeding have had ample opportunity to opt-out. The Court and the parties are entitled to proceed on the basis that the deadlines ordered by the Court will be adhered to. The two late opt-outs were very late, being lodged after the settlement was announced, and lacked any explanation for their failure to comply with the deadline. Group members cannot just wait and see if they like the settlement before choosing whether to opt out. These late opt-outs will remain bound by the settlement.

H. LEGAL PRINCIPLES

46 The principles that guide the determination of an application under s 33V are well-summarised by Matthews J in *Fuller v Allianz Australia Insurance Ltd (Settlement Approval)* ('*Fuller*') as follows:

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.

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:

(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;

(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.

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.

It is not the place of the Court to second-guess or go behind the plaintiffs' legal representatives' tactical or other decisions. 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. 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.

As noted by Jessup J in *Darwalla*:

> 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.

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.[7]

I. FAIRNESS AND REASONABLENESS OF THE PROPOSED SETTLEMENT

Fairness as between the parties

47 The plaintiffs submit that the overall Settlement Sum of $64.25 million is within the range of what is reasonable for the purposes of s 33V(1) of the Act. The substance of this submission is encapsulated in the confidential Counsel Opinion.

48 In group proceedings, counsel for the plaintiff commonly submit an opinion on the reasonableness of the proposed settlement. When doing so, counsel serve as officers of the Court rather than as advocates. While these opinions benefit from counsel's deep familiarity with the case, judges must scrutinise them independently rather than accepting them at face value.[8]

49 The Counsel Opinion is confidential, which restricts my detailed reference to it in this judgment. I note, however, that it comprehensively analyses the plaintiffs' case against the criteria established in the Practice Note.[9] It provides a thorough and compelling analysis of the complexity of the proceeding taking into account the potential duration had the proceeding gone to trial, and the late stage at which the proceedings settled. It gives careful attention to the potential risks of establishing liability, causation, loss and damage as weighed against the Settlement Sum. It also addresses the fairness of

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7 *Fuller v Allianz Australia Insurance Ltd (Settlement Approval)* [2025] VSC 160, [66]–[71] (Matthews J) (citations omitted) ('*Fuller*').

8 Ibid [78].

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

the releases granted under the deed.

50 Having regard to the Counsel Opinion, I accept that the Settlement Sum is well within the range of reasonable settlements, and fairly reflects the strengths and weaknesses of the plaintiffs' case.

Fairness as between group members

51 My assessment of the settlement's fairness and reasonableness as between group members centres primarily on the SDS. The question is whether the SDS is 'within the bounds of reasonableness in achieving a broadly fair, "rule of thumb" distribution between the claimants' and whether it is procedurally fair.[10]

52 The 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 were said by Moshinsky J in *Camilleri v The Trust Company (Nominees) Ltd* to include:

> (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.[11]

53 In addition, Moshinsky J referred to three procedural factors relevant to fairness:

> (a) whether appropriate individuals have been nominated to administer the scheme;[12]

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10 *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468, [42], [44] ('*Camilleri*').

11 Ibid [43].

12 The appropriateness of the settlement administrator is considered in section J below.

(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.[13]

54 The SDS includes the following relevant key clauses:

Clause	**Overview**
Clause 2 – Settlement administrator, expert consultant and distributor	The second defendant is appointed as settlement distributor ('**distributor**'). An expert consultant is appointed to perform calculations underlying the distribution of the 'Residual Settlement Sum' (the settlement sum less approved costs and reimbursements). Maurice Blackburn Lawyers is appointed as the settlement administrator to enforce the scheme on behalf of group members ('**administrator**').
Clause 4 – Payment of Settlement Sum	The defendants must pay within 14 days after the expiry of the 'Appeal Period' (63 days after the date of the making of approval orders) the approved legal costs to Maurice Blackburn Lawyers, the reimbursements to the plaintiffs and the Residual Settlement Sum to the MLC Super Fund. The Settlement Sum cannot be met from the defendants' operational risk financial requirement reserves or the assets of the MLC Super Fund.
Clause 5 – Calculation of residual settlement sum	A distinction is drawn between group members who held an ADA attributed to them that was transferred to MySuper in December 2016 or March 2017 ('**Transferred Member**') and persons who received a payment from a deceased group member or were a spouse of a group member and received a transfer of their ADA interest.
Annexure A - Apportionment Formula	The 'Apportionment Formula' adopts the methodology developed by the plaintiffs' expert, Mr Ahn Nguyen. In brief, the methodology compares the investment returns achieved by the MySuper investment option compared against the investment returns of the investment option in which the plaintiffs' and group members' ADA balance was in fact invested; the actual costs and fees (including insurance premiums) paid by the plaintiffs and group members compared against the fees and costs payable in MySuper; and the actual rebates, remediation and adjustments received by the plaintiffs and group members ('**Difference Calculation**'). It makes the Difference Calculation for each period in the period 1 June 2015 to 31 August 2015 (the period in which the plaintiffs' expert Mr Wayne Davey opined it would have been reasonable for the defendants to have transferred the ADA balances to MySuper). The Apportionment Formula then:

[13] *Camilleri* [2015] FCA 1468, [44].

	(a) averages the Difference Calculations for each Transferred Member in the period 1 June 2015 to 31 August 2015 (inclusive) arriving at the 'Individual Average Notional Apportionment'; (b) sums the Individual Average Notional Apportionment for all Transferred Members who are not 'Excluded Group Members' (group members whose Individual Average Notional Apportionment is between $0 and $20) or 'No Loss Group Members' (group members whose Individual Average Notional Apportionment is less than $0) to arrive at the 'Aggregate Average Notional Apportionment'; and (c) calculates the proportion of the Residual Settlement Sum payable to each Transferred Member by: (i) dividing the Individual Average Notional Apportionment by the Aggregate Average Notional Apportionment; and (ii) multiplying the result by the Residual Settlement Sum and the applicable tax rate, to arrive at the 'Apportioned Amount' for each Transferred Member. No Loss Group Members and Excluded Group Members are excluded from distribution. A further 25 group members who transferred their dollar balance of My Super to another investment option were also excluded. The Apportionment Formula calculates the entitlements of Transferred Members. Its allocation is apportioned in accordance with the definition of 'Payment Amount' set out in cl 1 which operates as follows: (a) Transferred Members who are not deceased and are not subject to an order or settlement under the *Family Law Act 1975* (Cth) ('Family Law Act') are to receive 100% of the Apportioned Amount; (b) group members who received a payment from a deceased Transferred Member are to receive a proportion of the Apportionment Amount equal to the proportion of their payment from the deceased Transferred Member (unless the Transferred Member is an Excluded Group Member or No Loss Group Member in which case the Payment Amount is $0); (c) Transferred Members who have been the subject of an order or settlement under the Family Law Act are to receive a proportion of the Apportioned Amount equal to the amount of the Transferred Member's interest that the Transferred Member retained following the order

	or settlement; and (d) group members who received an interest from a Transferred Member as a result of an order or settlement under the Family Law Act are to receive a proportion of the Apportioned Amount equal to the proportion of the Transferred Member's interest that the Group Member received (unless the Transferred Member is an Excluded Group Member or No Loss Group Member in which case the payment amount is $0).
Clause 6 - Allocation to group members	The distributor will use best endeavours to distribute the Residual Settlement Sum within 12 months of the expiry of the Appeal Period. The settlement distributor will report to the Court and the administrator on the reasons for delay and steps taken to address it if distribution within 12 months appears not to be possible. Group members with an active member account in their name in the MLC Super Fund will have their records adjusted by increasing their account balance by their payment amount by acquiring units in the investment option(s) in which that account balance is invested. If such attempts to distribute are unsuccessful, or if the group member does not have such an active member account, the distributor will make a trustee voluntary payment to the Australian Tax Office.
Clause 7 – Member communications	The distributor must first provide its proposed communications plan (including any telephone script or Q&A material) to the administrator for comment at least 30 days before the distribution of any part of the Residual Settlement Sum. The distributor is also required to respond to enquiries from group members as soon as practicable, including those referred by the administrator, and update group member contact details where advised before the settlement distribution. If a payment amount is to be distributed to a group member who does not have an active member account in the MLC Super Fund, the distributor must communicate with those group members by ordinary mail or email using the last known address to inform them that the payment relates to the distribution of a class action settlement in the proceeding. Pursuant to this clause, the distributor is not required to notify any group members who are found to be Excluded or No Loss Group Members.
Clause 8 – Reporting by distributor	The distributor is obliged to report to the administrator and expert consultant throughout the distribution process. Following completion of the distribution of the Settlement Sum, the distributor must report to the Court on the total quantum of amounts distributed to group member among other information.

55 I note that the SDS does not provide a process for group members to seek review of

their payment amounts.

56 I consider that the SDS is fair and reasonable as between the group members. In general terms, it is substantively similar to the SDS that was approved by the Federal Court of Australia in *Coatman v Colonial First State Investments Limited* ('*Colonial*').[14]

57 More specifically, I find that the Apportionment Formula provides a rational and sound basis for the calculation of payment amounts to group members. The threshold of $20 for exclusion of Excluded Group Members may appear somewhat arbitrary, but similar such thresholds have been applied in other superannuation group proceedings,[15] and it accords with the threshold adopted in the *Colonial* class action.[16] The total Individual Average Notional Apportionment Amount for all Excluded Group Members is $604,156, which is less than 1% of the Settlement Sum. Following pro-rata adjustment, the amounts included in any distribution would be significantly less than $20 for each of the Excluded Group Members. In such circumstances, a threshold is necessary given that the costs of distribution of small value payments may outweigh the payment itself.

58 It is also fair and reasonable to exclude from payment the No Loss Group Members, as they have suffered no relevant loss.

59 The design of the apportionment calculation renders a separate review process unnecessary. In particular, the appointment of an independent expert consultant to perform the individualised calculations in circumstances where the application of the Apportionment Formula is a mechanical computation is sufficient to ensure the accuracy of the calculations.

J. LEGAL COSTS AND DISBURSEMENTS AND SETTLEMENT ADMINISTRATION COSTS

60 The principles regarding the Court's role in approving legal costs and disbursements

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14 [2022] FCA 1611 ('*Colonial*').

15 *Marcel Eugene Krieger v Colonial First State Investments Limited* (Federal Court of Australia, VID1141/2019, commenced 18 October 2019); *Ghee v BT Funds Management Ltd* [2023] FCA 1553 (with a threshold of $10).

16 *Colonial* [2022] FCA 1611, [87] (Murphy J).

are summarised in the judgment of Nichols J in *Lenehan v Powercor Australia Ltd*.[17] Her Honour observed the following:

> The Court's function in scrutinising a claim for costs by the plaintiff and his solicitors is protective. Group members ordinarily benefit from the legal work undertaken by the plaintiff's solicitors in conducting and settling the proceeding and are typically required to pay a proportionate share of the plaintiff's costs. However, they have no control over the costs incurred during the conduct of proceeding and the information available to them about costs (including information that would allow them to effectively scrutinise a claim for costs) is generally limited. As Murphy J put it in *Petersen*, group members suffer a significant information asymmetry in this regard.
>
> The Court must be satisfied that the costs claimed are reasonable in all of the circumstances and proportionately incurred.
>
> The proportionality measure looks to the relationship between the costs incurred and the value and importance of the subject matter in issue. The requirement for proportionality as it concerns legal costs generally is expressed in s 172 of the *Legal Profession Uniform Law* (Vic) (the **Uniform Law**) and in s 24 of the *Civil Procedure Act 2010* (Vic). It is a forward looking assessment which compares the cost of the work with the benefit that could reasonably be expected from the work, at the time at which the work was performed.
>
> The Court may be satisfied as to the amount of costs that is reasonable and proportionate, in any one of a number of ways.
>
> As Moshinsky J observed in *Camilleri*, the precision with which a court will require a plaintiff to justify the quantum of costs incurred for the benefit of group members will vary according to the circumstances of the case. Thus, 'a very large costs sum might readily be approved in a settlement following a lengthy trial, while an apparently modest costs sum might require more exacting validation if it is associated with a modest sized proceeding and represents a significant proportion of the overall settlement sum'.
>
> Sufficient evidence must be tendered so as to enable the Court to make an assessment as to whether the costs were reasonably and proportionately incurred.
>
> Evidence on this question commonly comes from an independent solicitor or costs consultant or from an independent referee on a formal reference under the rules of Court; and at times with assistance from a contradictor. Even where an independent expert is appointed it is, however, the Court and not the expert who is required to determine whether the costs are reasonable.
>
> In *Matthews*, Osborn JA observed (citing *Re Medforce*) that the principles approving solicitor and client costs in this context are similar to those relevant to fixing a liquidator's remuneration. There, at minimum, what is required is a statement of the work undertaken, together with an expenditure account sufficiently itemised to enable the charges made to be related to the work done.

[17] [2020] VSC 82.

It is recognised that a balance should be struck, affording the Court sufficient information to discharge its function, without the assessment itself significantly diminishing the corpus of the settlement funds.

What is reasonable and proportionate will vary from case to case. Factors commonly considered in this assessment include:

(a) the reasonableness of the terms of the fee agreements and whether the costs actually charged have been calculated in accordance with those agreements;

(c) whether any significant portion of the fees charged have been inappropriately or unnecessarily incurred;

(d) whether the work in a particular area or in relation to a particular issue was undertaken efficiently and appropriately;

(e) whether the work was undertaken by a person of an appropriate level of seniority and whether the charge out rates were appropriate having regard to the seniority of the practitioners and the nature of the work undertaken;

(g) whether the tasks and associated charges were appropriate having regard to the nature of the work and the time taken to complete the work.

Considerations of this kind might be characterised as broadly reflecting the requirements of s 172 of the Uniform Law which applies to costs generally.

Ordinarily, the plaintiff's costs of the proceeding will have been incurred and charged pursuant to an agreement between the plaintiff and his or her solicitors. Often, the plaintiff's solicitors will also have entered costs agreements with at least some group members. Accordingly, those agreements will inform the assessment to be made by the Court on an application for approval of the costs of a representative proceeding, on settlement. A logical starting point for assessing the reasonableness of the costs claimed is to establish what costs have actually been incurred and pursuant to what terms.

However, costs agreements inform rather than determine the Court's assessment of the quantum and nature of costs to be approved. The Court may consider the reasonableness of the terms of the costs agreements. The considerations relevant to an exercise of the power to approve costs on a settlement of a representative proceeding are not limited to what is permitted by the costs agreement. The question remains whether in the Court's assessment the costs are reasonable and proportionate. The costs agreement may itself assist in evidencing reasonableness.

Those observations are subject to the proviso that legal costs and costs agreements are regulated by Part 4.3 of the Uniform Law. Accordingly, aspects of that law may become relevant on an assessment of this kind.[18]

61 Pursuant to the orders of Delany J dated 18 December 2024, Mr Ian Ramsey-Stewart

[18] Ibid [9]–[22] (Nichols J) (citations omitted).

of Stewart Lawyers was appointed as a special referee for the purposes of conducting an inquiry and preparing a report for the Court as to the referee's opinion on the following questions:

(a) the reasonableness of the plaintiffs' legal costs and disbursements incurred in the proceeding, up to and including the hearing of the settlement approval application (including the costs anticipated to be incurred as at the date of the report); and

(b) the reasonableness of the sum proposed for settlement administration costs.

62 In summary, Mr Ramsey-Stewart opines that:

(a) the reasonable total fees and disbursements inclusive of GST, uplift, the approval hearing costs and interest and settlement administration to be in the range of $19,548,044.28 to $19,593,763.18 (the uplift component (25%) is calculated to be $2,856,286,22);

(b) that overall amount comprises his assessment of reasonable solicitor and own client costs and disbursements of the plaintiffs, from the inception of proceedings up to the settlement approval hearing in the range of $18,260,988.17 to $18,294,458.93 (excluding interest);

(c) the interest of $1,164,568.77 claimed by Maurice Blackburn Lawyers on costs incurred up until 28 February 2025 is:

(i) consistent with Maurice Blackburn Lawyers' entitlement under the costs agreement;

(ii) has been calculated in accordance with the costs agreement and regulation 75 of the *Legal Professional Uniform General Rules 2015*; and

(iii) has been calculated correctly; and

(d) the range for fair and reasonable settlement administration costs inclusive of

professional fees and disbursements and GST is $122,486.80 to $134,735.48.

63 I have carefully considered Mr Ramsey-Stewart's report and accept his opinions.

64 Mr Ramsey-Stewart is an experienced assessor of legal costs in group proceedings. He undertook a thorough examination of Maurice Blackburn Lawyers' legal costs. After discounting certain amounts, he concludes that these costs are reasonable and proportionate to the work performed, considering the complexity and importance of the dispute and the amount in controversy. His opinion draws on his extensive experience with court-approved costs in similar class actions and is based on a comprehensive review of extensive documentation.

65 Regarding settlement administration costs, Mr Ramsey-Stewart notes that the cost per group member ranges from $0.37 to $0.41 (including GST) based on 330,000 group members, which is significantly lower than typical settlement administrations which often exceed $45.00 per person. This efficiency is attributed to the second defendant engaging in the distribution itself. I accept that the proposed deduction for settlement administration costs is reasonable.

66 The fairness and reasonableness of the proposed deductions for legal costs, plaintiff reimbursement payments and settlement administration costs can also be assessed having regard to the proportion these amounts represent to the total Settlement Sum. After deducting these amounts group members will receive 69% of the total Settlement Sum. I accept that this proportion supports the fairness and reasonableness of the proposed deductions and compares favourably to other class action settlements.

67 A significant factor in this proportionality assessment is that Maurice Blackburn Lawyers conducted the case without litigation funding. The absence of external funding means no funding commission deductions are required, allowing a greater amount to be distributed to group members. This circumstance also supports Mr Ramsey-Stewart's acceptance of the interest amount sought by Maurice Blackburn Lawyers, as the firm did not have its fees paid progressively as typically occurs under litigation funding arrangements.

68 As noted above, Maurice Blackburn Lawyers seeks also to be appointed as administrator for the distribution of the settlement. In circumstances where its appointment effects a reasonable administration cost, and given it is common for the solicitors to administer the settlement, I consider it appropriate to appoint Maurice Blackburn Lawyers as settlement administrator.

K. PAYMENTS TO THE PLAINTIFFS

69 When approving a settlement, the Court has the 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.[19]

70 The proposed settlement includes a $30,000 payment to each plaintiff as compensation for their expenses, time, inconvenience, and stress associated with fulfilling their representative role.

71 These payments are appropriate. The amounts represent a modest portion of the overall settlement value. Such compensation for named plaintiffs in group proceedings is standard practice to recognise their additional time and effort.

72 I accept the submissions of the plaintiffs that the amount of $30,000 is within the range of amounts approved by way of reimbursement payments in other group proceeding settlements and that this is a reasonable amount having regard to the burdens assumed by the plaintiffs and their responsibility in acting in a representative capacity.

L. CONCLUSION AND ORDERS

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

1. Pursuant to s 33V of the Act:

    (a) the settlement of this proceeding is approved on the terms set out in the settlement deed appearing at pages 14 to 34 of confidential exhibit NA-

[19] *Fuller* [2025] VSC 160, [147] (Matthews J).

10 of the confidential affidavit of Nina Abbey dated 26 March 2025 and the SDS appearing at pages 77 to 89 of Exhibit NA-9 of the open affidavit of Nina Abbey dated 26 March 2025;

(b) the SDS is to be given effect; and

(c) the settlement monies advanced by the defendants under the settlement deed and SDS are to be distributed to group members in accordance with the SDS.

2. Pursuant to s 33ZF of the Act, the plaintiffs be authorised *nunc pro tunc*, to enter into and give effect to the settlement deed for and on behalf of all group members (being those persons who meet the definition of group members as set out in paragraph 3 of the second further amended statement of claim dated 24 September 2024 and who have not previously opted out of the proceeding).

3. Pursuant to s 33ZB(a) of the Act, the persons affected and bound by the settlement are the parties to the settlement deed and the group members.

4. Pursuant to s 33ZF of the Act:

(a) Maurice Blackburn Pty Ltd is appointed as Settlement Administrator (as defined in clause 1 of the SDS);

(b) The Trustee for the MLC Super Fund, NULIS Nominees (Australia) Limited, is appointed as Settlement Distributor (as defined in clause 1 of the SDS); and

(c) Mr Joseph Robert Desoisa of Ernst & Young is appointed as Expert Consultant (as defined in clause 1 of the SDS), and each is to act in accordance with the SDS, subject to any direction of the Court.

5. The Settlement Administrator and Settlement Distributor have liberty to apply in relation to any matter arising under the SDS.

6. The plaintiffs and defendants are, as soon as practicable and within 30 days following receipt of the Final Report (as defined in the SDS) by the Settlement Distributor and its provision to the Court, jointly to apply to the Court for orders dismissing the proceeding with no order as to costs ('**Final Orders**').

7. Pursuant to ss 33V(2) and/or 33ZF of the Act, for the purposes of the SDS the plaintiffs' costs of the proceeding and the costs of the Settlement Administrator be approved in the amount of $19,593,763.18, such amount comprising:

   (a) the amount of $19,459,027.70 for the costs payable to Maurice Blackburn Lawyers in its capacity as solicitor for the plaintiffs up to and including 16 April 2025 (including the costs of the report of Ian Ramsey-Stewart, the Court appointed costs referee); and

   (b) the amount of $134,735.48 for the costs of Maurice Blackburn Pty Ltd in acting as the Settlement Administrator, (being the 'Plaintiffs' Approved Costs' as defined in the SDS).

8. Pursuant to ss 33V(2) and/or 33ZF of the Act, for the purposes of the SDS, the 'Plaintiffs' Reimbursement' (as defined in the SDS), be approved in the amount of $30,000 payable to each of the plaintiffs.

9. All previous costs orders made in the proceeding prior to the date of these orders be vacated with effect from the date on which the Final Orders are made.

10. Pursuant to r 28A.06 of the *Supreme Court (General Civil Procedure) Rules 2015* and/or ss 17(b) and 18(1)(a) of the *Open Courts Act 2013* (Vic) and/or the Court's inherent jurisdiction, the following documents are confidential and are to be held on the Court file and are not to be published or disclosed without the prior leave of the Court to any person or entity other than the plaintiffs and their legal advisors and the Court:

    (a) the confidential affidavit of Nina Abbey (including any annexures, exhibits or appendices) dated 26 March 2025; and

(b) the report of the independent costs referee Ian Ramsey-Stewart (including any annexures, exhibits or appendices) dated 21 March 2025.

CERTIFICATE

I certify that this and the 24 preceding pages are a true copy of the reasons for judgment of Waller J of the Supreme Court of Victoria delivered on 12 May 2025.

DATED this twelfth day of May 2025.

.....
Associate