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

Not Restricted

S ECI 2023 01521

JAMES KENDALL MCCOY — Plaintiff

v

HINO MOTORS LTD — First Defendant

HINO MOTORS SALES AUSTRALIA PTY LTD
(ACN 064 989 724) — Second Defendant

JUDGE:	Delany J
WHERE HELD:	Melbourne
DATE OF HEARING:	18 July 2025
DATE OF RULING:	23 July 2025
CASE MAY BE CITED AS:	McCoy v Hino Motors Ltd & Anor
MEDIUM NEUTRAL CITATION:	[2025] VSC 447

REPRESENTATIVE PROCEEDINGS — Part 4A Group proceeding — Application for approval of settlement — Settlement at a relatively early stage — Warranties by defendants as to compliance with their disclosure obligations pursuant to s 26 of the *Civil Procedure Act 2010* (Vic) — Whether settlement fair and reasonable as between the parties and as between group members — *Supreme Court Act 1986* (Vic) Part 4A, s 33V — *Botsman v Bolitho* [2018] VSCA 278, *Gehrke & Anor v Noumi Ltd and Anor* [2025] VSC 373, applied, *Somers v Box Hill* [2022] VSC 730, referred to.

PRACTICE AND PROCEDURE — Part 4A Group proceeding — Importance of plaintiff law firms appreciating their role and the role of the Court concerning Opt Out and other processes impacting participation by group members — Approval for payment of legal costs from settlement sum — *Supreme Court Act 1986* (Vic) Part 4A, 33ZDA — *Allen v G8 Education Ltd (No 4)* [2024] VSC 487, applied.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr D Barnett with Mr L Moretti	Maurice Blackburn
For the Defendant	Mr G Rich SC with Ms C Winnett and Ms L Mills	Clayton Utz

For the Intervenor	Mr W Edwards KC with Mr D Fahey	Maurice Blackburn

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HIS HONOUR:

A. Introduction

1 These reasons concern an application by summons dated 17 February 2025 to approve a proposed settlement of a group proceeding under s 33V and s 33ZF of the *Supreme Court Act 1986* (Vic) ('Act') against Hino Motors Ltd ('Hino Japan') and Hino Motors Sales Australia Pty Ltd ('Hino Australia'). The proposed settlement provides for the payment of costs pursuant to a Group Costs Order ('GCO') and for the distribution of the remainder of the $87 million settlement sum ('Settlement Sum') between group members.

2 These reasons follow the hearing on 18 July 2025. They support the Order which I have already made.

3 For the reasons set out below, paying particular regard to the comprehensive confidential opinion of counsel for the plaintiff and group members dated 27 June 2025 ('confidential opinion'), I consider the settlement is fair and reasonable as between the parties to the proceeding. I also consider the settlement is fair and reasonable as between the group members.

4 On 12 March 2025, after the settlement deed was entered into, I made an Order that group members who wish to participate in the settlement must register to do so prior to 2 May 2025 ('Class Deadline') and that group members who wished to opt out of the proceeding were required to opt out by the Class Deadline. Registration by group members to participate required them to register with Maurice Blackburn, the solicitors with the conduct of the proceeding on behalf of the plaintiff and group members, by completing the online registration process on Maurice Blackburn's website or contacting Maurice Blackburn directly. Any group members who wished to opt out were required to do so by completing the Opt Out Notice or the Online Opt Out Notice through the Supreme Court website. The options available to group members were contained in the Notice to be distributed pursuant to the 12 March 2025 Order ('Notice').

5 As discussed later in my reasons, there has been an element of confusion associated with these processes and with the distinction between the role of the Court and the role of the solicitors representing the plaintiff and group members which it is desirable not occur in the future.

6 In the interests of ensuring that all group members are treated fairly, with the agreement of the plaintiff that persons who sought to participate in the settlement offer after the Class Deadline should be permitted to do so, and having regard to the confusion that has occurred concerning late registration I determined to permit those persons who have registered late, or who do so within seven days of the hearing, to participate in the settlement.

7 I consider that the proposed allowance of $20,000 for the time, trouble and inconvenience to the lead plaintiff, Mr McCoy, is an appropriate allowance.

8 The contentious issue arising on the approval application concerns whether or not there should be a variation to the GCO made pursuant to s 33ZDA of the Act on 15 December 2023. The GCO provides that liability for the payment of legal costs of the proceeding is to be shared amongst the plaintiff and other group members.

9 The GCO specified applicable percentages of the Settlement Sum payable to the solicitors for the plaintiff and group members, Maurice Blackburn Pty Ltd, on a sliding scale by reference to the dollar amount of any award or settlement recovered. Based on the amount of the Settlement Sum, unless reviewed, as Osborne J contemplated might occur when his Honour determined the applicable percentages in late 2023, and varied pursuant to s 33ZDA(3) of the Act, Maurice Blackburn is entitled to 24.66% of the Settlement Sum.

10 The 12 March 2025 Order also provided for any group member who wished to object to the proposed settlement to do so by submitting an Online Objection Notice or a Notice of Objection to the Supreme Court, and then by appearing at the hearing. No group member objected to the proposed settlement at the hearing. Nor has there been any objection by any person to the percentage specified in the GCO.

11 While not contending for a variation, in their reply submissions, counsel for the plaintiff highlighted a number of matters which might make it appropriate for the Court to consider variation of the GCO rate. Amongst the matters referred to in the submissions is the fact the proceeding has settled at a comparatively early stage. As acknowledged by Maurice Blackburn in its submissions, this has significant consequences for the scale of the costs that have been incurred compared to a law firm or litigation funder that has prosecuted a proceeding up to or beyond trial. While that is so, it is equally the case that early resolution of a group proceeding, as has occurred in this case, is to be encouraged.

12 Although no person contended for a variation to the GCO percentage, as Watson J said in *Allen & Anor v G8 Education Ltd (No 4)*:[1]

> The absence of any party or contradictor contending for an amendment of the rate does not relieve the Court of its burden in a settlement approval context to consider whether or not the GCO should be amended.

13 Having regard to the matters identified in the reply submissions by counsel for the plaintiff it is appropriate to consider whether or not there should be any amendment to the GCO pursuant to s 33ZDA(3) of the Act. To aid the proper consideration of that question I have determined to appoint a contradictor.

14 As discussed during the hearing, the issue of whether there should be any amendment to the GCO can be determined later and need not hold up the hearing and determination of the approval application. Counsel for the parties confirmed that to order an approval on the basis that the percentage to be deducted from the Settlement Sum for legal costs is to be determined later but in any event is to be no more than 24.66% will not cut across the terms of the settlement deed including clause 7.5(d) which specifies the obligations of the parties when applying for approval orders.

15 Before turning to the reasons why it is appropriate to approve the proposed settlement on the terms set out in the settlement deed and also to approve the Settlement Distribution Scheme ('SDS') it is appropriate that the Court acknowledges the very

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1 [2024] VSC 487 [62].

substantial contribution made by the parties and their legal practitioners in bringing about the settlement of this proceeding and the critical role played by the obligations in s 26 of the *Civil Procedure Act 2010* (Vic) ('CPA') in the settlement.

16 The settlement was reached at a relatively early stage of the proceeding when compared to other comparable complex class actions. The material filed in support of the application, including material that remains confidential, discloses that the early settlement is in no small part due to the actions of the defendants and their advisors who have acted in timely way consistent with their statutory disclosure obligations provided for in s 26 of the CPA.

17 The prompt compliance with the defendants with their s 26 disclosure obligation obviated the need for discovery, often a very costly and time-consuming process in class actions such as the present.

18 The express warranties in clause 16.2 of the settlement deed, including that the defendants have disclosed by way of production of documents pursuant to s 26 or by communications or exchanges on a without prejudice basis all relevant information that they consider or ought reasonably consider critical to the settlement or resolution of the dispute between the parties underpins the settlement.

19 It is clear to me that the practitioners involved in the proceeding and their clients have acted through their engagement in the without prejudice conferral process that took place between August and December 2024 and in the mediation that followed in a manner consistent with their overarching obligations in ss 19, 20, 24 and 25 of the CPA to cooperate in the conduct of the proceeding,[2] to take steps that are necessary to facilitate the resolution or determination of the proceeding[3] and that they have done so in the lead up to the settlement of the proceeding acting promptly[4] and in a manner that ensures that the costs of the proceeding are reasonable and proportionate.[5]

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2 *Civil Procedure Act 2010* (Vic) s 20.
3 *Civil Procedure Act 2010* (Vic) s 19.
4 *Civil Procedure Act 2010* (Vic) s 25.
5 *Civil Procedure Act 2010* (Vic) s 24.

20 The group members are the beneficiaries of the prompt compliance by the defendants with their s 26 obligations and the timely provision of information by them, enabling those acting for the plaintiff and group members to recommend entry into the settlement deed on an appropriately informed basis.

21 The efficient manner in which this commercial dispute has been conducted has also meant that, unlike a number of other group proceedings, the case management of this proceeding has not required a large number of case management conferences and has not taken up substantial judicial resources along the way to resolution or judicial determination.

The parties and the proceeding

22 The proceeding is brought by Mr McCoy on his own behalf and on behalf of all persons who, by 17 April 2023, purchased, leased or otherwise acquired an interest in Australia in a Hino branded vehicle fitted with a diesel engine that was manufactured during the period from 1 January 2003 to 22 August 2022 ('Affected Vehicles').

23 There are 95,340 vehicles that fall within the definition of 'Affected Vehicles' in statement of claim.

24 The first defendant, Hino Motors Ltd, is a company incorporated in Japan, engaged in the business of designing and manufacturing vehicles and automative products.

25 The second defendant, Hino Motor Sales Australia Pty Ltd, as its name suggests, is an Australian company. It is a wholly-owned subsidiary of Hino Japan. The business of Hino Australia involves the importation, distribution and marketing of Hino vehicles and automotive products in Australia.

26 The claims advanced by the plaintiff and group members concern alleged misreporting and misrepresentation of the fuel efficiency and emissions performance of the Affected Vehicles. The group proceeding summary statement contains the following summary:

> **2. Who is the Hino Class Action against, and what is the claim for?**

> The claim is against Hino Motors Ltd and Hino Motor Sales Australia (together, **Hino**) in relation to misreporting and misrepresenting the fuel efficiency and emissions performance of certain Hino diesel vehicles. The Hino Class Action seeks compensation on behalf of group members with affected vehicles who suffered loss and damage, resulting from Hino's alleged misconduct and breaches of Australian consumer laws.
>
> On 4 March 2022, in a press release, Hino admitted that it had falsified engine performance data in applications for vehicle certification in Japan as far back as 2016. On 11 March 2022, Hino announced that a Special Investigation Committee, composed of outside experts, would be commissioned to investigate the issue, and, on 2 August 2022, Hino published the Committee's findings. The Committee concluded that Hino had misreported the engine performance of various diesel vehicles from as far back as 2003.
>
> An investigation by the Japanese Ministry of Land, Infrastructure, Transport and Tourism then revealed that misconduct had also related to a light-duty engine produced by Hino. This additional finding was published by Hino in a press release on 22 August 2022.

27 The statement of claim recites a series of announcements made by the defendants between 4 March 2022 and 16 September 2022, in which Hino Japan disclosed that it had identified misconduct in relation to the applications for certification of certain engines that it had manufactured, which misconduct particularly related to the durability testing and measurement of fuel economy performance undertaken as part of seeking certification approval for certain Hino engines.

28 The allegations made against the defendants regarding that alleged misconduct fall into five categories:

(a) misleading and deceptive conduct allegations including by silence, being the alleged:

(i) 'First Compliance Representation' made to the Commonwealth in seeking approval for the import of the Affected Vehicles, as to the compliance of the Affected Vehicles with certain standards; and

(ii) 'Second Compliance Representation' made to consumers, that certain tests had been completed and standards had been met;

(b) the tort of deceit;

(c) equitable misrepresentation;

(d) breaches of consumer guarantees; and

(e) unconscionable conduct.

29 The defendants deny liability for the claims made by the plaintiff and group members. That denial of liability is maintained notwithstanding the proposed settlement of the proceeding.

30 It is important to note that the definition of group members does not confine itself to persons who purchased Affected Vehicles first hand. For that reason it is possible for the number of group members to exceed the number of Affected Vehicles.

31 The fact that some group members purchased new vehicles and others purchased second-hand vehicles is a matter taken into consideration in the confidential loss assessment methodology incorporated into the proposed SDS.

32 As at 25 June 2025, 39,527 claims have been registered or were expected to be registered by group members including 11,105 claims by fleet operators.

33 During a mediation on 10 and 11 December 2024 before the Hon Patricia Bergin AO SC, the parties reached an in-principle agreement to settle the proceeding subject to Court approval, for the Settlement Sum amount. On 12 December 2024, the parties executed heads of agreement. On 14 February 2025, the parties and Maurice Blackburn executed the settlement deed.

34 The settlement deed was executed only six months after the plaintiff's reply was filed.

35 As earlier noted, opt out and registration processes occurred after the settlement was reached. The 12 March 2025 Order required group members who wished to participate in the proposed settlement to register prior to the Class Deadline.

36 After the Class Deadline passed a number of persons sought to register late to participate in the settlement ('late registrants'). Because there has been some

confusion and ambiguity involved in the process of the correct identification of the late registrants and communications with them I determined to allow a further seven days from the hearing date for group members to register to participate. In order to be permitted to participate in the settlement those persons will need to file a short affidavit explaining why they failed to register prior to the Class Deadline.

37 I proceed on the basis as advised by counsel for the plaintiff that if each of the late registrants who have so far sought to participate in the settlement are permitted to participate, that their participation will not have a material impact upon what would otherwise be the entitlement of registered group members. That being the case, it is appropriate to permit those persons and those who apply to register within the next seven days and to provide an appropriate explanation on affidavit to also participate in the settlement.

B. The settlement approval application

38 The parties filed extensive evidence and submissions in support of the approval application. Parts of the evidence and submissions were confidential to the parties on whose behalf such evidence was filed and such submissions were advanced.

39 Some of the material relied on at the hearing, including as might be expected, the confidential opinion of counsel in support of settlement approval, the confidential submissions of counsel filed in support of settlement on behalf of the defendants and also parts of the evidence, including the confidential loss assessment methodology forming part of the SDS were the subject of a claim of confidentiality.

40 A proceeding suppression order was sought by the parties pursuant to the *Open Courts Act 2013* (Vic) ('OCA'). It covers the confidential opinion, the confidential submissions of counsel filed in support of settlement on behalf of the defendants, parts of the evidence filed by the parties and the confidential loss assessment methodology forming part of the SDS, as detailed in the Order.

41 As I indicated during the hearing, it is appropriate to make a proceeding suppression order in the form proposed by the parties. I made that Order on 18 July 2025.

42 It is appropriate in this case to make a proceeding suppression order as sought by the parties pursuant to ss 17 and 18 of the OCA. The proceeding suppression order sought is confined only to certain aspects of certain materials, detailed in my Order of 18 July 2025.

43 I am satisfied that the proceeding suppression order as made is necessary to prevent a substantial risk of prejudice to the proper administration of justice, which cannot be prevented by other reasonably available means. The material the subject of the proceeding suppression order is appropriately confined and is clearly confidential. Some of that material, being communications discussing resolution of the proceeding, is subject to without prejudice privilege and its disclosure would have a negative impact on the administration of justice and would be contrary to public policy.

44 The receipt of confidential material and the making of an order to protect that material is typical and usually necessary in applications such as this. I was aware from the commencement of the application that I would need to consider confidential material to decide the application and received various materials (those now the subject of the proceeding suppression order) on a confidential basis. I anticipated making an order at or around the time of the hearing regarding those materials. However, the parties did not provide 3 days' notice to the Court of the application for a proceeding suppression order in accordance with s 10(1) of the OCA. Rather, the application was made in reliance on s 10(3) of the OCA. For that reason, the Court did not give notice to the media under s 11(1) of the OCA.

45 I heard the application for a proceeding suppression order despite the applicants not giving notice in accordance with s 10(1) because I considered it to be in the interests of justice to do so. The application for a proceeding suppression order was mentioned by counsel in open court during the approval hearing. That being the case while not specifically notified in accordance with s 11(1), the public, and thereby the media were on notice of the application from the time it was made.

46 Pursuant to clause 11(a) of the settlement deed, the parties agreed to keep the deed

strictly confidential until the approval orders have been made. As those Orders have now been made no restriction remains upon the availability of any person to access or inspect a copy of the settlement deed. The same is the case concerning the SDS although the confidential loss assessment methodology set out in schedule B to the SDS remains confidential and is only to be provided upon written request to registered group members who have first signed a confidentiality undertaking.

47 The material relied on by the plaintiff in support of the approval application comprises the following:

(a) the affidavit of Lee Taylor dated 17 February 2025 ('first Taylor affidavit') which addresses the background and procedural history of the proceeding, detail about the settlement approval summons, detail of the Group Members and the basis for the proposed orders regarding opt out, registration, notice and SDS and their timing;

(b) the affidavit of Lee Taylor dated 27 June 2025 ('open second Taylor affidavit') which addresses the background to the proceeding, group membership, the process surrounding opt out, class closure, distribution of the notices of settlement and registrations, the proposed SDS and proposed deductions from the settlement;

(c) the wholly confidential affidavit of Lee Taylor dated 27 June 2025 ('confidential third Taylor affidavit') which exhibits a confidential opinion of counsel, outlines the settlement process and analyses the factors relevant to the settlement approval application;

(d) the affidavit of Lee Taylor dated 15 July 2025 ('fifth Taylor affidavit') which addresses applicants for late registration and updates the information before the Court regarding the GCO;

(e) the plaintiff's confidential submissions dated 27 June 2025; and

(f) the plaintiff's confidential supplementary submissions regarding the GCO and

group members who sought to register late, dated 15 July 2025.

48 Because the inclusion of late registrants, including those who register within seven days of the hearing, is not anticipated to have a material adverse impact on the interest of existing group members, to the extent otherwise contemplated it is not necessary for Maurice Blackburn or any other person to file any further evidence or submission regarding late registration.

49 Maurice Blackburn, as intervenor, relies on submissions dated 27 June 2025 and on:

(a) the open second Taylor affidavit;

(b) the confidential third Taylor Affidavit;

(c) affidavit of Lee Taylor affirmed 27 June 2025 ('Fourth Taylor Affidavit') in relation to GCO-specific issues;

(d) the evidence relied upon by Mr McCoy when the GCO was sought in 2023, namely:

(i) the confidential affidavit of Mr McCoy dated 6 October 2023, filed in support of Mr McCoy's application for a GCO;

(ii) the confidential first affidavit of Rebecca Gilsenan dated 6 October 2023, filed in support of Mr McCoy's application to resolve a multiplicity dispute carriage and Mr McCoy's application for a GCO; and

(iii) confidential second affidavit of Rebecca Gilsenan dated 6 October 2023, filed in support of Mr McCoy's application for a GCO.

50 The defendants rely on their confidential submissions dated 13 June 2025 and on:

(a) the first Taylor affidavit;

(b) the confidential affidavit of Gregory Williams dated 13 June 2025; and

(c) the affidavit of Gregory Williams dated 17 July 2025.

C. Principles

51 In my recent decision of *Gehrke & Anor v Noumi Ltd & Anor*[6] I summarised the principles that concern an application of this kind. For convenience I restate those principles in this section.

52 Section 33V of the Act provides as follows:

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

53 Section 33V confers two distinct powers upon the Court. Section 33V(1) gives the Court power to approve settlement. Section 33V(2) confers power to approve the distribution of payments.

54 The principles to be applied on an application for approval under s 33V are well established. The Court must consider whether the proposed settlement is fair and reasonable as between the parties having regard to the claims of the group members bound by the settlement; whether it is in the interests of group members as a whole and not just in the interests of the plaintiff and the defendant; and whether the assessment and distribution of the Settlement Sum to individual group members *inter se* is fair and reasonable.[7]

55 In *Botsman v Bolitho*, the Court of Appeal relevantly stated as follows:[8]

> It is an essential starting point to identify the settlement and its terms. It is commonplace that a deed of settlement may address more than the settlement of the claims against the defendant and will also deal with the distribution of settlement money, including to a litigation funder. The structure of sub-ss 33V(1) and (2) suggests that such payments may be distributions of money that has been paid under a settlement to which the Court has given approval under

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6 *Gehrke & Anor v Noumi Ltd & Anor* [2025] VSC 373 (First Revision (27 June 2025) ('*Noumi*').

7 *Lynden Iddles & Anor v Fonterra Aust Pty Ltd & Ors* [2023] VSC 566 [17], citing *Williams v FAI Home Security Pty Ltd [No 4]* (2000) 180 ALR 459, 465–6 [19]; *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2007) 236 ALR 322, 332–6 [30]–[40]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) [No 3]* (2017) 343 ALR 476, 499–500 [81]–[85]; *Lenehan v Powercor Australia Ltd (No 2)* [2020] VSC 159 [20] (Nichols J).

8 [2018] VSCA 278; (2018) 57 VR 68 [203]–[207] (Tate , Whelan and Niall JJA) (citations omitted).

> s 33V(1). Those distributions are the subject of separate Court approval under s 33V(2).
>
> The question of fairness interposes itself at various levels. Most obviously, there will need to be consideration of the fairness of a proposed settlement sum.
>
> The Court is being asked to approve a compromise of litigation. Inevitably, that will require an assessment of whether the plaintiff is likely to succeed in the action, the measure of damages that a successful judgment would yield, the prospects of recovery, and the expenditure in costs, time and effort that would be required to bring the proceedings to a conclusion.
>
> That assessment does not involve a simple calculus but calls for matters of judgment based on imperfect knowledge and is influenced by the appetite for risk. It will be informed by the complexity and duration of the litigation and the stage at which the settlement occurs. It is important to acknowledge that it is the state of imperfect knowledge and the existence of risks that will have likely induced the settlement. It follows that those matters should be accorded a degree of prominence in any assessment of the reasonableness of the settlement.
>
> Those considerations mean that there will rarely, or ever, be a single correct settlement. Strategic decisions must be factored into account but it is not the role of the Court to second guess those decisions.

56 As Matthews J stated in *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)*:[9]

> [t]he same considerations apply as for the settlement of a class action under Part IVA of the *Federal Court of Australia Act 1976* (Cth), and the statements of legal principles in Federal Court decisions are generally apposite.

57 As Matthews J said in *Uber*:[10]

> [t]he reasonableness of a settlement must necessarily involve consideration of the approval of any funding commission and legal costs, as this will affect what money group members obtain from the pool in the event that I approve the settlement.

58 The factors which may be taken into account in assessing whether the proposed settlement represents a fair and reasonable compromise of the claims made on behalf of group members have been considered in a number of other decisions of this Court.[11]

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9 [2024] VSC 733 [48], fn 28 (*'Uber'*).

10 [2024] VSC 733 [49] (citations omitted).

11 *Allen & Anor v G8 Education Ltd (No 4)* [2024] VSC 487 (*'Allen v G8'*); *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)* [2024] VSC 733; *Bopping & Anor v Monash IVF Pty Ltd & Ors* [2024] VSC 785; *Botsman v Bolitho* [2018] VSCA 278; *Fuller & Anor v Allianz Australia Insurance Ltd & Anor (Settlement Approval)* [2025] VSC 160.

59 The Court's Practice Note SC GEN 10 Conduct of Group Proceedings (Class Actions) (second revision) ('Practice Note') lists factors which parties applying for Court approval of a settlement are required to address. The parties in this case have addressed each of those factors, where relevant, in their evidence and submissions filed in support of the approval application. It is unnecessary to discuss each of the factors listed in the Practice Note when determining whether or not the settlement should be approved.

60 An important consideration in this case is that the settlement has been reached at a relatively early stage in the proceedings.[12] No lay or expert evidence has been filed in the proceeding. Pleadings have closed, there has been compliance with the disclosure obligation in s 26 of the CPA and the settlement deed includes warranties in that regard to which I have already referred. The parties participated in a without prejudice conferral process that included the provisions by the defendants of information material to the proposed settlement and the proceeding settled following mediation conducted by a retired judge, who is also an experienced mediator.

61 While that is the case, as John Dixon J said in *Somers v Box Hill Institute*:[13]

> The statutory task calls for matters of judgment based on imperfect knowledge and is influenced by appetite for risk. It is that state of imperfect knowledge and the existence of risks that will have likely induced the settlement and those matters should be accorded a degree of prominence in any assessment of the reasonableness of the settlement.

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

62 In considering whether the settlement is fair and reasonable as between the parties I have primarily had regard to the comprehensive confidential opinion. The opinion discusses each of the causes of action pleaded and the defences taken in the proceeding. It identifies and evaluates the strengths and weaknesses of each of the pleaded claims and it identifies and evaluates risks.

63 While the settlement occurred before evidence, including expert evidence, and without discovery, the confidential evidence and submissions set out in detail the

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12 *Davison v Commissioner of Police, NSW Police Force* [2021] FCA 1324 [2], [50], [53] (Griffiths J).

13 *Somers & Ors v Box Hill Institute* [2022] VSC 730 [20] (Dixon J) (citations omitted).

nature and significance of documents and information provided by the defendants as part of the without prejudice conferral process that took place over a number of months. The comprehensive nature of the information provided and integrity of that process is expressly recognised in the warranties in clause 16.2 of the deed.

64 Given their significance for the settlement it is appropriate to reproduce those warranties:

> **16.2 Warranties as to documents and without prejudice communications**
>
> (a) The Defendants warrant that they have disclosed by way of:
>
> (i) the production of documents pursuant to section 26 of the *Civil Procedure Act 2010* (Vic); or
>
> (ii) communications or exchanges on a without prejudice basis,
>
> all relevant information in the possession, custody or control of the Defendants that they consider, or ought reasonably consider, are critical to the settlement or resolution of the dispute between the Parties.
>
> (b) The Defendants warrant that they are not aware of any information which would materially undermine or be materially inconsistent with: (a) the fairness and reasonableness of the in-principle settlement reached by the Parties; (b) any information and/or representations communicated to date by the Defendants (including through Clayton Utz and its foreign legal representatives) to the Plaintiff and his Solicitors in accordance with clause 16.2(a).

65 The inclusion of these warranties:

(a) provides express confirmation of compliance by the defendants with their s 26 of the CPA disclosure obligations;

(b) provides confirmation of the comprehensive nature of the disclosure by the defendants of relevant information as part of the without prejudice process;

(c) gives confidence to the parties, including group members, and to the Court, that all relevant information that the defendants consider, or ought reasonably consider critical to the settlement or resolution of the dispute has been disclosed.

66 Although the settlement occurred at an early stage in the proceeding in relative terms it is a settlement agreed upon by the parties based on the sharing of all information critical to the resolution of the dispute.

67 The confidential opinion of counsel identifies the benefits of an early settlement to the plaintiff and group members, including as is obvious, achieving certainty without undue delay.

68 During the hearing I was told the anticipated time to implement the SDS if the settlement is approved is 12–18 months. If this case proceeded to trial, given the need for the translation of documents from the Japanese language to the English language and the need for specialist expert evidence, it is unlikely it would be ready for trial within that timeframe.

69 The confidential opinion considers what will occur if the settlement is approved concerning the claims by group members having regard to the proposed SDS. It compares those outcomes with what would likely otherwise occur concerning the claims by the plaintiff and individual group members if the matter proceeds to trial and the plaintiff and group members are successful in relation to liability.

70 The settlement involves releases from the approval date by the plaintiff on his own behalf and on behalf of each group member in favour of the defendants, all Hino Group companies and suppliers and others as provided for in clause 4 of the deed, limited to a 'Claim' that 'was, or could have been, made in the Proceeding'.

71 I consider the releases included in the deed are appropriate. The form of release adopted, one which involves releases by the plaintiff 'on his own behalf and on behalf of each Group Member' is an approach that has been endorsed by the Court of Appeal.[14] The releases are limited to claims which were or could have been made in

[14] *Byrne v Javelin Asset Management Pty Ltd* [2016] VSCA 214 [55]-[58] (Hansen, Ferguson and McLeish JJA); *Bendigo and Adelaide Bank Ltd v Pekell Delaire Holdings Pty Ltd* [2017] VSCA 51; (2017) 118 ACSR 592 [58] (Santamaria, Ferguson and McLeish JJA). Note that while that is the case, this form of release has been disapproved of in some decisions of the Federal Court, eg, *Compumod Investments Pty Ltd atf Compumod Pty Ltd Staff Superannuation Fund v Universal Equivalent Technology Ltd (Settlement Approval)* [2024] FCA 571 [8] (Lee J) citing *Dyczynski v Gibson* (2020) 280 FCR 583 [389]-[400].

the proceeding, reflecting the form of the release approved by the full Federal Court in *Dyczynski v Gibson*.[15]

72 I am in no doubt the proposed settlement as provided for in and in accordance with the deed is fair and reasonable as between the plaintiff and the defendants and that approval of the settlement is in the interests of group members. In arriving at that opinion:

(a) I have had regard to the evidence and submissions filed on behalf of the parties including the confidential evidence and submissions;

(b) I have been very much assisted by the comprehensive confidential opinion prepared by senior and junior counsel on behalf of the plaintiff and group members; and

(c) I have also been very much assisted and have had regard to the submissions in support of the approval of the settlement prepared by senior and junior counsel on behalf of the defendants and the confidential affidavit of Mr Williams, parts of which are now agreed not to be confidential. Those submissions and that affidavit provide detailed confidential information concerning the 'without prejudice' conferral process engaged in by the parties between August and December 2024 that is so important to, and I have no doubt led in no small part to this settlement.

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

73 The key to the question of whether the assessment and distribution of the Settlement Sum to individual group members *inter se* is fair and reasonable[16] lies in the confidential loss assessment methodology.

74 As Moshinsky J observed in *Fisher (atf Tramik Super Fund Trust) v Vocus Group Ltd*

15 [2020] FCAFC 120; (2020) 280 FCR 280 [249] (Murphy, Lee and Colvin JJ).

16 *Somers & Ors v Box Hill Institute* [2022] VSC 730 [17] (Dixon J), see also *Gehrke & Anor v Noumi Ltd & Anor* [2025] VSC 373 (First Revision (27 June 2025)) [103].

(No 2):[17]

> …there will rarely be one single or obvious way in which a settlement should be framed … in relation to sharing the compensation among claimants.

75 The confidential loss assessment methodology is and remains confidential and subject to the limitations concerning access by group members to which I have earlier referred. Confidentiality constraints mean that I am restricted in what I can say publicly about this aspect of the settlement.

76 The amount of compensation payable to each group member will not be equal. That is the point of the confidential loss assessment methodology. The starting point for the calculation of compensation for each individual group member will not always be the same. The methodology differentiates between such matters as whether the group member purchased the vehicle in question as a new or a used vehicle. It takes into consideration the type of interest held by the group member as well as differentiating between level of risk that attends the claim of each individual group member across the almost 20 year period throughout which the Affected Vehicles were manufactured.

77 The confidential loss assessment methodology has been well thought through. I am satisfied both that it is appropriate having regard to the advice concerning risk and that it is able to be applied without undue complication in a consistent and fair manner to the claims of individual group members. Adopting the language of the plaintiff's submission in *Fuller & Anor v Allianz Australia Insurance Ltd & Anor (Settlement Approval)*.[18]

> …it would not be reasonable to incur additional costs and delay in seeking a 'more perfect' process, to the extent that would be possible.

78 I am satisfied that the assessment and distribution of the Settlement Sum by the application of the confidential loss assessment methodology treats each group member fairly and that, accordingly, this aspect of the settlement should be approved.

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17 [2020] FCA 579 [17(b)].

18 *Fuller & Anor v Allianz Australia Insurance Ltd & Anor (Settlement Approval)* [2025] VSC 160 [101].

F. The administration of the SDS

79 The 'Scheme Administrator' has an important role to play in the administration of the settlement, in particular, so as to ensure that each group member is fairly treated via the application of the confidential loss assessment methodology.

80 Clause 3.2(b) of the SDS expressly provides that in acting as Scheme Administrator, including discharging any function or exercising any discretion conferred by the SDS, the Scheme Administrator will administer the scheme fairly and according to its terms and in doing so will act in accordance with a duty owed to the Court in priority to any obligation owed to the plaintiff or in any individual group member, and will balance the interests of any individual group member against the interests of group members as a whole.

81 I am satisfied that Maurice Blackburn, the proposed Scheme Administrator, is relevantly very experienced, and, as is obvious, is intimately familiar with the proceeding. Maurice Blackburn is appropriately resourced to administer the SDS.

82 From the Settlement Sum the Scheme Administrator is to pay:

(a) the 'Plaintiff Reimbursement Payment' being the sum of $20,000 to Mr McCoy;

(b) the amount allowed in respect of costs pursuant to the GCO or such lesser amount as may result from an amendment to the GCO to Maurice Blackburn; and

(c) the approved Administration Costs.

83 The amount remaining after these payments is referred to in the SDS as the 'Distribution Settlement Sum'.

84 The Scheme Administrator is to determine the amount to be paid to each individual group member out of the Distribution Settlement Sum. While the amount to be paid to Maurice Blackburn pursuant to the GCO or any amendment to the GCO is not yet known, and therefore the amount of the Distribution Settlement Sum is not yet known, the delay in determining that issue will not prevent the Scheme Administrator from

commencing work on the administration process, the first step in which will be to send a 'Notice of Eligibility' to each registered group member.

85 The 13 June 2025 report by Ms Kerrie-Ann Rosati ('Costs Report'), who was appointed as a special referee to enquire and report as to her estimate of the reasonable costs that are likely to be incurred during the settlement administration process, identifies $2,785,244.55 inclusive of GST as the reasonable maximum amount of the costs of Maurice Blackburn for undertaking this work.

86 While at first blush $2,785,244.55 appears to be a very large amount, what is clear is that the process to be followed by Maurice Blackburn to accurately identify and assess the share of the Distribution Settlement Sum of each individual registered group member is relatively complex. As mentioned earlier, it is anticipated that it will take 12 – 18 months for the SDS to be completely administered. During that period the Scheme Administrator is to provide reports to the Court on a six monthly basis. Within 12 weeks of all distributions having been made the Scheme Administrator is to provide a final report to the Court. The provision of these reports ensures that the Court maintains the ability to monitor and supervise the implementation of the SDS and the appropriateness of the costs of the Scheme administration.

87 As noted by Ms Rosati in the Costs Report, the maximum allowance for the costs of Scheme administration equates to just over 3.2% of the settlement sum. It is a maximum amount which may not be reached, depending, by way of example, on how many group members seek a review of the Scheme Administrator's determination of the eligible interest or lack thereof of a group member in an Affected Vehicle and the number of occasions on which the Scheme Administrator, following a request, might need to revisit decisions and actions taken in administering the SDS.

88 Once group members have provided the Scheme Administrator with their bank details, the Scheme Administrator will allocate the Distribution Settlement Sum among group members in the proportion that their 'Scaled Loss Assessment' (calculated in accordance with the confidential loss assessment methodology) bears to

the aggregate Scaled Loss Assessments for all group members. Where the amount calculated is less than the 'Minimum Distribution Amount', being $30, nothing will be allocated to the group member. While having regard to the costs involved in scheme administration treating amounts of $30 in the manner proposed is reasonable, in practice that issue is unlikely to arise because Mr Taylor has given evidence that he does not anticipate any group members are likely to have pro-rated assessments less than the Minimum Distribution Amount.

89 Payments will be made to group members in the manner contemplated in the SDS.

G. Late registration and opt out

90 On 12 March 2025, the Court made an Order requiring group members register to participate in the settlement or to opt out by the Class Deadline. The Order provided that any group member who did not opt out and who was not a registered group member by the Class Deadline would remain a group member for all purposes of the proceeding but shall not without leave of the Court be permitted to seek any benefit pursuant to any such settlement.

91 The 12 March 2025 Order approved the form and distribution method of a Notice advising group members of the proposed settlement and of their rights, including their right to participate or opt out, but also to object to the proposed settlement by 30 May 2025, the Class Deadline.

92 In the open second Taylor affidavit, Mr Taylor gave evidence that Maurice Blackburn received enquiries from a number of persons claiming to be group members and expressing interest to register to participate in the proposed settlement notwithstanding that they did not register by the Class Deadline. Maurice Blackburn took steps to communicate with those persons.

93 As at 27 June 2025, 244 persons who had not registered prior to the Class Deadline had contacted Maurice Blackburn advising they wished to participate in settlement. None of those persons had provided supporting evidence such as an affidavit or statutory declaration in support of their claim to participate. Maurice Blackburn

provided a spreadsheet to the Court which categorised the responses by the applicants for late registration in similar categories to those discussed by the Court in *Uber*.

94 On 27 June 2025, the Court published reasons for its decision in *Noumi* in which an Order was made requiring late claimants to provide an explanatory affidavit and submissions in support of their claims to participate in the settlement.

95 After identifying that some of the persons who had applied for late registration were already registered, on 4 July 2025 Maurice Blackburn sent correspondence to 231 claimants for late registration advising that consistent with the decision in *Noumi*, such persons should provide an affidavit and any submissions in support of late registration to Maurice Blackburn which would then be provided to the Court.

96 By 15 July 2025 not all of the persons to whom correspondence was sent had responded and some persons had provided informal responses rather than an affidavit.

97 By the hearing date not all the persons who had previously given notice to Maurice Blackburn of their desire to participate in the settlement notwithstanding that the Class Deadline had passed had provided affidavits or submissions in support of late registration.

98 In the course of the hearing the parties informed the Court there was no opposition to those persons participating in the settlement notwithstanding their failure to register by the Class Deadline. In those circumstances it is appropriate in this case to permit those persons to participate.

99 As earlier mentioned I determined during the hearing and made an Order on 18 July 2025 permitting unregistered group members who wished to participate in the settlement to register within seven days of the hearing. I approached the issue of late registrations in this way noting that the parties anticipated the inclusion of additional group members, certainly those who had indicated a desire to participate prior to the hearing, would not have a material impact upon the entitlement of existing group

members to participate in the settlement.

100 While late participation by group members has been permitted in this case, it is important to note that consistent with the decision in *Noumi*, in future, the Court will not permit late registrants to participate in a settlement unless the person wishing to do so provides a short affidavit explaining the reason(s) for their failure to comply with the relevant deadline or unless there are exceptional circumstances concerning that person, such as that person being under a disability meaning that they are unable to provide evidence.

101 In addition to complexities relating to late registrations there were difficulties in compliance by group members with the opt out process provided for in the 12 March 2025 Order to which communications from Maurice Blackburn contributed. Paragraph 13 of the Order made 12 March 2025 relevantly provided:

> If, on or before the Class Deadline, the defendants or solicitors for any party receives a written communication or document purporting to be an opt out form that is referable to this proceeding, the defendants or solicitors must provide a copy of the written communication or document to the Registry by email to hinoclassaction@supcourt.vic.gov.au, within two (2) business days of the Class Deadline, and that shall be treated as an opt out form received by the Court at the time it was received by the defendants or solicitors.

102 In purported compliance with the Order of 12 March 2025, on 6 May 2025 Maurice Blackburn emailed the Commercial Court Registry attaching a zip folder containing 79 'written communications or documents [Maurice Blackburn] construed to be an opt out notice' in accordance with paragraph 13 of that Order ('MB construed opt outs'). Maurice Blackburn classified those communications as 'MB construed opt outs' for one of three reasons:

(a) they expressly used the words 'opt out'; or

(b) they expressly used the words 'option 2' as the Notice states that Option 2 is to opt out; or

(c) the communication stated an intention or desire to not take part in the class action and/or make a claim against Hino.

103 The responsibility given to the plaintiff's solicitors by paragraph 13 of the 12 March 2025 Order was to provide my Chambers with documents 'purporting to be an opt out form' not to make judgment calls regarding the validity of communications as purported opt outs. Opt outs are the domain of the Court.

104 Following consideration of the communications in the MB construed opt outs category, my Chambers corresponded with Maurice Blackburn to understand:

(a) whether Maurice Blackburn had communicated with the group members in the category of MB construed opt outs, in response to which Maurice Blackburn confirmed it had responded to some, reiterating the options available to those individuals to either opt out or register; and

(b) whether Maurice Blackburn considered each of those MB construed opt outs to be valid opt outs and had provided them to the Court on that basis.

105 On 30 June 2025, the Court sought clarification as to why Maurice Blackburn had responded to the majority of the members listed providing the opt out form but not to others. On the same day Maurice Blackburn replied noting that there were nine individuals to whom they did not respond on the basis that they had expressly stated to Maurice Blackburn that they wanted to opt out of the proceeding (with the exception of one who sent their opt out notice after the Class Deadline). The reply referred to paragraph 13 of the 12 March 2025 Order and stated that Maurice Blackburn had understood those persons to be deemed to have opted out of the proceeding. However, later that evening, Maurice Blackburn sent a further email to the Court stating a different position, namely that it 'considers that all [MB construed opt outs] are deemed to have opted out of the proceeding and accordingly have provided their details to the Court on that basis'.

106 The Court then considered the individual position concerning communications with group members in the category of MB construed opt outs and either took them as a valid opt out or communicated with them to provide information regarding their options.

107 Upon considering the Maurice Blackburn construed opt out communications, many of the communications were not deemed by the Court to be valid opt outs. That was the case for a variety of reasons including that some sought further information about the proceeding, some did not provide sufficient detail (as was required by the opt out form) and one even appeared to seek to register for the proceeding.

108 Concerning opt out and other processes that impact or having the potential to impact upon the interests of group members, it is vital that particular care is taken to ensure that practitioners involved are aware of their role and the role of the Court and that information provided to group members is accurate and appropriate. I encourage law practitioners having the present or future conduct of group proceedings to be aware of and to understand their role, responsibilities and duties to the Court and to group members concerning opt out and other processes relating to participation by group members and to act accordingly.

H. The Plaintiff Reimbursement Payment

109 Mr Taylor has given evidence in support of an order approving reimbursement of an amount of $20,000 in favour of the lead plaintiff, Mr McCoy.

110 Mr Taylor refers in his evidence to Professor Morabito's 2025 report, entitled 'Group Costs Orders, Funding Commissions, Volume of Class Action Litigation, Reimbursement Payments and Biggest Settlements',[19] In which it was reported that across four jurisdictions payments to lead plaintiff ranged from $285 to approximately $268,000 and that the average payment is $23,849.77. Professor Morabito reported the median lead plaintiff payment in Victoria is $20,000.

111 Noting the comparatively early stage of the proceeding at which the settlement was reached I nevertheless accept the submission that it is appropriate having regard to the time, trouble and inconvenience occasioned to Mr McCoy in acting as the lead plaintiff in the proceeding to allow the proposed amount of $20,000.

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19 Prof. Vince Morabito, 'Group Costs Orders, Funding Commissions, Volume of Class Action Litigation, Reimbursement Payments and Biggest Settlements' (Report, Monash University, 4 February 2025) 49.

CERTIFICATE

I certify that this and the 25 preceding pages are a true copy of the reasons for ruling of Delany J of the Supreme Court of Victoria delivered on 23 July 2025.

DATED this twenty-third day of July 2025.

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Associate