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

Not Restricted

S ECI 2020 03365

DANIEL CHRISTIAN O'BRIEN — Plaintiff

v

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522) — First Defendant

MACQUARIE BANK LIMITED (ACN 008 583 542) — Second Defendant

JUDGE:	Harris J
WHERE HELD:	Melbourne
DATE OF HEARING:	9 May 2025
DATE OF JUDGMENT:	3 July 2025
CASE MAY BE CITED AS:	O'Brien v ANZ & Anor
MEDIUM NEUTRAL CITATION:	[2025] VSC 389

GROUP PROCEEDING – Application for approval of settlement of group proceeding – Approval of settlement under s 33V of the *Supreme Court Act 1986* (Vic) – Whether settlement distribution scheme is fair and reasonable – Settlement distribution between classes of group members – Deductions from the settlement fund – Whether group costs order should be varied - Settlement approved – *Supreme Court Act 1986* (Vic) Part 4A, s 33V.

PRACTICE AND PROCEDURE – Confidentiality orders.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	J Stoljar SC with D Fahey	Maurice Blackburn Lawyers
For the Defendants	E Dias	Herbert Smith Freehills

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HER HONOUR:

The application for settlement approval and the issues for consideration

1 This is a representative proceeding brought by Mr O'Brien on behalf of group members who claim to have suffered loss by reason of having entered into car loans through car dealerships in respect of which Australia and New Zealand Banking Group Limited (**ANZ**) was alleged to have paid the dealers an undisclosed 'flex commission'.

2 The parties have resolved to settle the proceeding on the basis that there are no admissions and no acceptance of liability by the defendants. The parties now seek approval of the settlement pursuant to s 33V of the ***Supreme Court Act*** *1986* (Vic). The settlement sum is $85 million to be distributed among the plaintiff and group members and to provide for costs associated with the proceeding.

3 Section 33V provides:

> **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.

4 The purpose of s 33V is to ensure that the Court can review whether a proposed settlement is in the interests of all group members who will be bound by the settlement, and is to that end fair and reasonable having regard to the claims of those group members.[1]

5 Procedural orders were made for the advertisement of the proposed settlement and registration of group members to enable participation in the settlement, and any objections to be made to the settlement of the proceeding. The plaintiff's affidavit

[1] *Matthews v AusNet Electricity Services Pty Ltd & Ors* [2014] VSC 663, [34] (Osborn JA); *Iddles v Fonterra Aust Pty Ltd* [2023] VSC 566, [22]-[27] (Delany J).

evidence demonstrated that these orders had been complied with.[2]

6 The affidavits in support of the application included the following key documents, some of which were provided on a confidential basis:

(a) information as to the proposed **Settlement Distribution Scheme**, which had been published on the website of the plaintiff's solicitors, Maurice Blackburn, pursuant to the orders of the Court relating to advertisement of the proposed settlement;

(b) the deed of settlement and release between the plaintiff and the defendants;

(c) an expert report of a costs consultant, Ms Kerrie-Ann Rosati of DGT Costs Lawyers, addressing the reasonableness of the estimate made by the proposed Scheme Administrator of the costs and disbursements involved in the administration of the proposed settlement (**Costs Report**); and

(d) an opinion obtained from counsel (**Counsel Opinion**) addressing matters relevant to the appropriateness of accepting the settlement.

7 The Costs Report and the Counsel Opinion were filed confidentially given the legally privileged assessment of the plaintiff and group members' claims, and the merits and the risks facing the establishment of the claims.

8 There were limited objections made by group members to the proposed settlement, and the defendants supported the orders giving effect to the proposed settlement. The primary issues for consideration in determining whether to approve the settlement are:

(a) Whether the quantum of the settlement sum is fair and reasonable having regard to the risks in establishing liability and entitlement to relief, both in respect to the plaintiff himself and in respect to all group members, as known at the time of settlement.

[2] Affidavit of Richard Erle Ryan affirmed 29 April 2025 (**Ryan Affidavit**), [53]-[55].

(b) Whether the distribution of the settlement sum is reasonable and fair as between the parties and as between group members.

(c) Whether the group costs order, which provides for legal costs of 24.5% of the settlement sum to be paid to the solicitors for the plaintiff,[3] remains appropriate, and whether other deductions from the settlement sum are appropriate.

The nature of the claims in the proceeding

9 The group members in the proceeding are persons who, between 1 January 2011 and 31 March 2016, entered into a car loan with ANZ through a car dealer, in respect of which ANZ paid the car dealers an undisclosed 'flex commission'.

10 The charging of the 'flex commission' was alleged to involve the following conduct, which was not disclosed by ANZ or the car dealers to borrowers:

(a) ANZ notified car dealers from time to time of a 'base rate', being the minimum rate of interest which ANZ would accept on car loans entered into through that dealer;

(b) dealers then had discretion to set the actual rates of interest payable by customers on their car loans with ANZ (the **contract rate**); and

(c) ANZ paid the dealers a commission on the difference between the base rate and the contract rate selected by the dealer in respect of those loans (the **flex commission**).[4]

11 A consequence of the arrangement was that, the higher the rate of interest set by the dealer, the greater the flex commission and the greater the return to ANZ.

12 The plaintiff's claims were put on three bases:

(a) The undisclosed conduct was unfair conduct for the purposes of s 180A of the

[3] Orders of Justice Nichols dated 9 March 2023, Order 1(b).
[4] Second Further Amended Statement of Claim dated 24 August 2024, [10] (**2FASoC**).

National Consumer Credit Protection Act 2009 (Cth) (**NCCPA**). Given that the car dealers were the credit representatives of ANZ, ANZ was said to be liable for the same remedies that the plaintiff and group members have against the car dealers, by operation of s 78 of the NCCPA. [5]

(b) The plaintiff or any person in his position would have a reasonable expectation that ANZ would disclose that the interest rate had been set by the car dealers at their discretion, in circumstances where the dealers had an interest in the rate and the term, and would receive a flex commission affected by the rate and the term. Non-disclosure of the flex commission arrangement was said to be misleading or deceptive conduct on ANZ's part, contrary to s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).[6]

(c) The plaintiff and group members entered into the loans unaware of the flex commission affecting the transaction. The ignorance of this matter was an operative cause of entering into the loan contracts constituting a mistake at law, entitling the plaintiff and group members to recission of the loan contracts or rendering the contracts void or voidable.[7]

13 Claims for compensation were made against ANZ. On 8 October 2015, ANZ sold its car loan book to **Macquarie** Bank Limited, the second defendant, and Macquarie then held the rights to payment of interest and repayment of principal under the loans. Claims in restitution were made against Macquarie as well as ANZ.

14 The defendants identified a number of defences. One primary defence to the statutory claims pursuant to the NCCPA taken by ANZ was that the claims relating to loans entered into prior to 21 August 2014 were statute barred by s 180A(5) of the NCCPA. That section provides that applications for an order for a remedy for unfair or dishonest conduct by credit service providers must be made within six years of the day the defendant first started engaging in the conduct.[8] It was also pleaded that

5 2FASoC, [23]-[34], [75]-[83].
6 2FASoC, [35]-[41], [84]-[90].
7 2FASoC, [42]-[50A], [91]-[99].
8 **Amended Defence of the First Defendant to Second Further Amended Statement of Claim** dated

because s 180A of the NCCPA commenced operation only on 1 March 2013, any group member who entered into a car loan prior to that date had no claim pursuant to s 180A.[9]

15 Further, ANZ pleaded that the claims under the ***Corporations Act*** *2001* (Cth), the NCCPA, and the ASIC Act were apportionable claims with respect to which each car dealer was a concurrent wrongdoer. As a consequence ANZ's liability was said to be limited to an amount reflecting that proportion or percentage of the loss and damage, the subject of the relevant claims, that the Court considers just, equitable or fair having regard to the extent of ANZ's responsibility.[10] The primary basis of Macquarie's defence was that it had no involvement in or knowledge of the manner in which interest rates were set, and that any mistake was not such as to give rise to any right of relief against Macquarie.[11]

Relevant procedural background including the group costs order

16 Some limited aspects of the procedural history of the proceeding are relevant to an understanding of the issues arising for consideration in the application for approval of the settlement.

Group costs order

17 The plaintiff sought a group costs order in the proceeding, pursuant to s 33ZDA of the *Supreme Court Act*, to the effect that the legal costs payable to Maurice Blackburn, the solicitors for the plaintiff and group members, be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding. The first application for a group costs order was made in February 2021 where the percentage of the award which was sought was 25%.[12] Justice Nichols appointed a contradictor for the purposes of the application, and after a hearing in June 2021, dismissed the

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11 September 2024, [34(b)(i)].

9 Amended Defence of the First Defendant to Second Further Amended Statement of Claim, [34(b)(ii)], referring to ss 2 and 3 of the *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth).

10 Amended Defence of the First Defendant to Second Further Amended Statement of Claim, [34B]-[34D], [41C], [41D], [41F], [41G].

11 Defence of the Second Defendant to the Second Further Amended Statement of Claim dated 11 September 2024.

12 Plaintiff's Summons filed 26 February 2021.

application on the basis that the plaintiff had not established a sufficient basis for the exercise of her Honour's discretion to make a group costs order.[13]

18 A second application was made in September 2022, seeking a group costs order at a rate of 24.5%.[14] Affidavits of the plaintiff and of Andrew Watson, a partner of Maurice Blackburn, as his Honour then was, were filed in support of the application. The application was heard by Justice Nichols in February 2023, and was unopposed by the defendants.

19 On 9 March 2023, a group costs order was made by Justice Nichols following delivery of reasons for her Honour's decision on 3 March 2023.[15] The group costs order provided for the solicitors for the plaintiff to recover costs at the rate of 24.5% of any award or settlement, subject to further order. One issue for determination in the context of the settlement approval is whether any further order is necessary or appropriate.

20 'Soft' class closure orders were made by Justice Nichols on 20 July 2023, which provided for group members who wished to opt out of the proceeding to do so by 28 September 2023. The orders also provided for group members who wished to participate in any in principle settlement to be reached at a mediation, to be conducted by 15 December 2023, to register using a registration form on the website of Maurice Blackburn. The proceeding did not settle at that mediation.

21 The proceeding was listed for trial to commence on 14 October 2024 and the parties completed most procedural steps before trial. On 3 October 2024, the parties entered into a heads of agreement to settle the proceeding. On 2 December 2024, the plaintiff on behalf of an open class, entered into a deed of settlement with the defendants to settle the proceeding for a payment by ANZ of $85 million, with no admission of liability.

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13 *Fox v Westpac; Crawford v ANZ* [2021] VSC 573.

14 Plaintiff's Summons dated 2 September 2022.

15 The orders were made in this proceeding and related proceedings against Westpac Banking Corporation and Macquarie Leasing Pty Ltd, also based on claims arising from the charging of 'flex commissions'; ***Fox v Westpac Banking*** *Corporation* ***(No 2)*** [2023] VSC 95.

22 On 20 December 2024, I made orders approving the terms of a notice of proposed settlement to be sent to the parties; requiring the proposed settlement distribution scheme to be displayed on the website of solicitors for the plaintiff; making provision for registration of any group members who wished to participate in the settlement and were not already registered; and providing a process for the making of objections to the proposed settlement by group members.

Boomerang Claims registrations

23 Four objection notices were received.[16] One of the objection notices was completed by Richard Thomas on behalf of **Boomerang Claims** Pty Ltd. In the notice, Mr Thomas identified the relevant group members as 'Boomerang Claims, authorised representative for 3,042 group members (listed in appended documents)' and attached a spreadsheet. The 'grounds of objection' identified in the objection notice were as follows:

> We do not oppose the approval of the settlement in principle; however, we object to the manner in which the Settlement Distribution Scheme is being administrated by MB. In particular, MB refuses to recognise Boomerang Claims' authority as an authorised representative under Clauses 14.2 and 14.4, causing uncertainty and potential exclusion or confusion for vulnerable claimants.[17]

24 The objection notice also attached further grounds for objection in which it was stated that Maurice Blackburn had 'expressed reluctance to accept bulk registrations via third-party representatives such as Boomerang Claims, instead insisting on individual registrations through an online portal or telephone. This approach may exclude or burden many of [Boomerang Claims'] clients, particularly older (average age 50, with nearly 500 aged over 60), vulnerable, or time-poor individuals who face substantial barriers to independent registration).' Boomerang Claims also stated that 'allowing authorised representatives to submit bulk registrations avoids unnecessary administrative burdens and ensures vulnerable, time-poor or less tech-savvy claimants receive the redress they are due'. The notice referred to but did not attach

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16 One further objection notice was completed by a group member who later confirmed that the objection notice was submitted in error and that no objection to the settlement was in fact made: Ryan Affidavit, [53.6], [177(d)].

17 Objection Notice of Boomerang Claims dated 10 March 2025.

'individual Letters of Authority' on the basis that this would 'avoid disclosing private client data'. The notice did not provide information on the manner in which clients had provided Letters of Authority or had registered with Boomerang Claims.

25 The Boomerang Claims objection notice stipulated that the objector did not intend to appear at the settlement approval hearing.

26 On 27 March 2025, I held a mention of the proceeding to hear the parties on whether the issues raised by Mr Thomas required any further action. An affidavit was filed for the plaintiff to inform the Court of correspondence with Mr Thomas acting on behalf of Boomerang Claims, and steps which had been taken to ascertain which persons identified in the list provided by Boomerang Claims had already individually registered to participate in the proceeding.[18] The correspondence exhibited to that affidavit included copies of Letters of Authority submitted by Boomerang Claims' clients and 'Terms and Conditions' relating to provision of 'Advocacy Services' to support a claim for a 'Refund' by Boomerang Claims. The Terms and Conditions included an obligation to pay a 'Fee' of 36% of the 'Refund' amount payable to Boomerang Claims upon successful claim resolution.[19]

27 The evidence was also that of the 2,618 persons listed in Boomerang Claims' spreadsheet, 1,266 had already individually registered using the portal on the Maurice Blackburn website, or by telephone, consistent with the orders made on 20 December 2024.[20]

28 The plaintiff proposed at the mention that there be a further opportunity for persons who had provided their information to Boomerang Claims to register using the process provided in the Court's orders of 20 December 2024. It was proposed that a communication be sent to the persons listed in Boomerang Claims' spreadsheet, using the email addresses in that spreadsheet, in terms authorised by the Court. That communication would notify the person that they could register in the class action

18 Affidavit of Katherine McCallum affirmed 26 March 2025 (**McCallum Affidavit**).
19 McCallum Affidavit, Exhibit KM-1, 104-106.
20 McCallum Affidavit, [15].

directly through the Maurice Blackburn online registration portal or by telephone to Maurice Blackburn, in which case compensation would be paid directly to that person, or register through Boomerang Claims, in which case compensation would be paid to Boomerang Claims. The defendants did not oppose those orders being made.

29 I therefore made orders on 3 April 2025 providing an extension of the time in which group members could register to participate in the settlement until 11 April 2025, and for the emails with an approved notice advising of the registration options to be sent to the persons listed on Boomerang Claims' spreadsheet. The plaintiff's solicitors advised that they would provide the transcript of the hearing to Mr Thomas of Boomerang Claims, and confirmed that they did so on 3 and 9 April 2025.[21]

30 On 10 April 2025, Mr Thomas of Boomerang Claims sent an email to my chambers, without copying the email to the legal representatives of the defendants. The email contained submissions about why the spreadsheet of registrations should be accepted, asserting a conflict of the orders made on 3 April 2025 with the 20 December 2024 orders, and contending that the orders providing an extension of time in which to register constituted 'a second layer of registration'.[22] Mr Thomas sought orders providing for Boomerang Claims to appear before the Court to advocate for its clients and also advised that:

> We clarify our previous Notice of Objection filed 10 March 2025, which unintentionally implied non-attendance at future hearings. To the contrary, Boomerang fully intends to appear at the hearing scheduled for 9 May 2025 unless our procedural concerns are satisfactorily resolved beforehand.

31 My chambers responded to the email of Mr Thomas, copied to all parties, advising that it was inappropriate to correspond with chambers without copying in all parties

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21 Email from Katherine McCallum of Maurice Blackburn Lawyers to Chambers of Justice Harris on 11 April 2025.

22 For completeness I also note that Mr Thomas asserted that in the notice sent pursuant to the 3 April 2025 orders, Maurice Blackburn had made a 'misrepresentation of our fee as 36% (rather than the correct 15% in this matter)'. It is appropriate to record that this information as to a 'Fee' of 36% was included in the 'Terms and Conditions' sheet that Ms McCallum of Maurice Blackburn stated in her affidavit had been provided by Mr Thomas to Maurice Blacburn, and I do not regard it as appropriate to describe it as a misrepresentation. This appears in fact to be implicitly acknowledged by Mr Thomas' email of 10 April 2025, as the email referred to 'a misrepresentation of our fee as 36% (rather than the correct 15% in this matter)', and later sought from the Court '[a]pproval of our reduced rate fee for clients explicitly represented by Boomerang'.

to a proceeding. My chambers subsequently replied to Mr Thomas' email informing him that the orders of 3 April 2025 did not create any additional step but provided a further opportunity for any group member to register according to the process identified in the orders of 20 December 2024. The email also stated that if Mr Thomas sought to appear at the settlement approval hearing, it would be necessary to identify the capacity in which he wished to do so, given that the complaints appeared to be made on behalf of Boomerang Claims rather than any group member. If the objection to the settlement was made on behalf of a group member, it would be necessary to provide to the Court, in advance of the hearing, evidence of the authorisation by that group member for Boomerang Claims to make that objection.

32 My chambers and the Court registry did not receive any response to that email, and no appearance was made at the settlement approval hearing by Mr Thomas or by any person representing group members registered with Boomerang Claims.

33 Following the orders of 3 April 2025, 545 group members from Boomerang Claims' spreadsheet registered through Maurice Blackburn, and 41 elected to register through Boomerang Claims.[23]

Reinstatements and late registrations

34 Orders were made on 21 August 2024 for reinstatement of persons who signed and submitted an opt out form under the mistaken belief that they were opting in to the proceeding. Following the close of the registration period, 23 potential further group members including clients of Boomerang Claims (**Late Registrants**) contacted Maurice Blackburn to seek late registration on the basis that they had exceptional circumstances which had impeded their registration during the relevant period. The plaintiff proposed that the Court make orders allowing these Late Registrants to register to participate in the settlement because they had given reasons as to the exceptional circumstances which had led to them not being registered. It was also submitted that the registration of this limited number of Late Registrants would not

[23] Ryan Affidavit, [57].

make a material difference to the distributions received by eligible group members.[24]

35 I accept that it is appropriate to make orders permitting the registration (and therefore the participation in the settlement) of the Late Registrants.

Confidentiality orders

36 The plaintiff sought orders that certain parts of the affidavit material filed in support of the application for settlement approval should be the subject of confidentiality orders prohibiting their publication or disclosure other than to the Court, the plaintiff's counsel and solicitors, and representatives of the third party funder, **Vannin** Capital Investments (Australia) Pty Ltd, with which Maurice Blackburn had a costs sharing arrangement.

37 Confidentiality orders are frequently made in settlement approval applications given the nature of the material relied on, including information subject to legal professional privilege. It is always, however, necessary to consider the basis for the making of confidentiality orders and the scope of the material over which they are sought, given the importance of the principles of open justice.

38 In *Andrianakis v Uber Technologies Inc and Ors (Settlement Approval)*[25] Matthews J observed:

> 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.
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> 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.[26]

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24 Ryan Affidavit, [62].
25 [2024] VSC 733.
26 [2024] VSC 733, [42]-[43].

39 The aspects of the affidavits with respect to which the plaintiff sought the confidentiality orders were identified in a schedule to the proposed orders, and primarily related to:

(a) legally privileged information, including the advice of the plaintiff's counsel on the proposed settlement and other risk and prospects assessments; and

(b) evidence of risk assessments, claims value methodologies and litigation budgets and expenditure.

40 This evidence is information which, if disclosed, would cause prejudice to the plaintiff if the settlement was not approved or did not proceed, and the matter had to proceed to trial. It is information which is disclosed only for the purpose of the Court determining, in its function pursuant to s 33V of the *Supreme Court Act*, whether the settlement should be approved on behalf of group members. The advice of a legal adviser to a plaintiff as to prospects of success in a proceeding, and on particular issues going to the risks and the merits of causes of action, is quintessentially privileged and therefore confidential as between that litigant and their legal adviser. It is important that this advice can be given candidly and without concern as to any part of it being disclosed to the opposing party or the public,[27] whether the advice is given in the normal course of litigation or given in the context of a settlement which requires approval in the knowledge that it will be provided to the Court. Disclosure of such advice to the Court for the purpose of assisting it to assess the appropriateness of a settlement does not diminish the interests of the plaintiff in confidentiality and it is appropriate that the confidentiality of that material be maintained, with the exception of its disclosure to the Court, by appropriate orders.

41 In this case, it is also relevant that applications for settlement approval have been made in proceedings also involving flex commission,[28] and in which Maurice Blackburn represent the plaintiffs. There is potential for prejudice to those proceedings

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27 *Esso Australia Resources Ltd v Federal Commissioner for Taxation* (1999) 201 CLR 49, 64 (Gleeson CJ, Gaudron and Gummow JJ).

28 ***Nathan v Macquarie Leasing*** *Pty Ltd* S ECI 2020 03924; ***Fox v Westpac*** *Banking Corporation* S ECI 2020 02946.

if the information, including legal advice and risk assessment, did not remain confidential.

42 In reviewing the relevant parts of the affidavit evidence, I did identify some information which did not in my view justify confidentiality orders, given that it was not information which, if disclosed, would prejudice the plaintiff or group members in their conduct of the proceedings if it did not settle. Counsel for the plaintiff accepted that the paragraphs of the affidavits I had identified did not have the requisite confidential or sensitive character. Some related to a summary by Mr Richard Ryan in his affidavit of the evidence in support of the group costs order of Mr Andrew Watson (as his Honour then was). While I accepted that details of his assessment of claim value should remain confidential, the conclusions reached by Mr Ryan – that Mr Watson's estimate of the group wide loss was reasonable given the information available at the time and that risks he anticipated eventuated – were material to my decision in this case and not prejudicial to the plaintiff if made public. Another part of the affidavit over which confidentiality was sought referred to the retainer of the independent costs expert, Ms Rosati, to prepare a report of her opinion on the reasonableness of the plaintiff's estimated costs to be incurred by the scheme administrator in connection with the administration of the settlement distribution scheme. While I accepted that the information and opinions in that report were sensitive and should remain confidential, the fact of the report having been obtained was a material matter in support of the settlement approval application and should not be confidential. I raised these aspects of the material with the plaintiff at the hearing and it was accepted that the confidentiality orders should not extend to those parts of the material.

43 The remaining information was in my view sensitive and would entail prejudice to the plaintiff and group members if disclosed, and warranted the making of confidentiality orders.

Principles for considering appropriateness of the settlement

44 In considering the application to approve the settlement pursuant to s 33V, a number of factors have been identified in the authorities as informing the central questions of

whether the proposed settlement is fair and reasonable, having regard to the claims made on behalf of the relevant group members, and whether the settlement has been undertaken in the interests of the group members as a whole.[29] The factors recognised in the authorities as being potentially relevant for the Court to consider in approving the settlement have been listed in the Court's Practice Note for the *Conduct of Group Proceedings*:

(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.[30]

45 The significance of the various factors will vary from case to case. Ultimately, the outcome must be assessed as being within a range of what would be fair and reasonable outcomes, there being no single unique outcome that would constitute a 'correct' settlement or the only fair and appropriate settlement.[31]

Proposed settlement

46 To put the settlement in context, it is relevant to understand the size of the class and

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29 ***Botsman*** *v Bolitho* (2018) 57 VR 68, 111 [201]-[202] (Tate, Whelan and Niall JJA); ***Camilleri*** *v The Trust Company (Nominees) Ltd* [2015] FCA 1468, [32]-[44] (Moshinsky J).

30 Supreme Court of Victoria, *Practice Note GEN 10*: *Conduct of Group Proceedings (Class Actions) (Second Revision)*, 13 October 2020, [16.6].

31 *Botsman*, 112 [207] (Tate, Whelan and Niall JJA); *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (no 2)* (2007) 236 ALR 322, 339 [50] (Jessup J); ***Fuller*** *&* *Anor* ***v Allianz*** *Australia Insurance Ltd & Anor (Settlement Approval)* [2025] VSC 160, [70] (Matthews J).

of the members of the class who were registered. At the time of the mediation on 3 October 2024, the defendants estimated that there were approximately 335,000 unique car loan contracts held by group members in the class and 360,000 group members.[32] At that time, the group members who had registered represented 97,246 unique matched loan contracts, being 29% of the total number of loan contracts.[33]

47 The central terms of the proposed settlement agreed at the mediation were as follows:[34]

(a) ANZ agreed to pay a total resolution sum of $85 million inclusive of costs, interest and taxes in full and final settlement of their claims, which was paid on 29 January 2025;

(b) group members are eligible to participate if they have registered in accordance with the Court's orders of 20 December 2024 or 3 April 2025, and have their registration details matched by ANZ or the Scheme Administrator by reference to ANZ's loan records (to which the Scheme Administrator has access); and

(c) the plaintiff is to prepare the settlement distribution scheme which must, amongst other things, provide for payment of (i) the amount specified by the group costs order, (ii) a payment to the plaintiff for time and expenditure reasonably incurred, and (iii) payment of the Scheme Administrator's costs, and then distribute the settlement funds to the plaintiff and group members in accordance with the methodology of the settlement distribution scheme.

48 The evidence was that the proposed settlement and distribution scheme was the subject of extensive modelling by the plaintiff's legal team of the estimated value of the plaintiff and group members' claims in the proceeding.[35] The modelling addressed the range of scenarios encompassing participation in settlement by reference to loan contracts of:

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32 Ryan Affidavit, [68].
33 Ryan Affidavit, [70].
34 Ryan Affidavit, [95]-[96].
35 Ryan Affidavit, [66].

(a) the group members who had registered by mediation pursuant to the soft class closure orders;

(b) the additional cohorts of group members who would register if the class reopened following mediation; and

(c) all potential group members.[36]

49 The starting point identified by the plaintiff for assessing the quantum of group member claims was a loss methodology identified by a forensic expert Martin Cairns, in his expert report dated 26 June 2023 and filed 27 June 2023. That report was filed as evidence for the trial of the proceeding pursuant to procedural orders for the preparation of the proceeding.[37]

50 The plaintiff's primary case on quantum of his claim, based on Mr Cairns' analysis, was as follows.[38]

(a) He was unaware that his car dealer had set the interest rate of his car loan at 12.38%, which was 4.03% over the base rate of 8.35% (and also in excess of the average market rate prevailing at around the time the loan was entered into of 8.40%). ANZ owed and would pay the dealer a flex commission in the amount of $2,765 excluding GST. The result of the dealer's charging of the higher rate providing for the flex commission was that the plaintiff would, and did, pay $3,459.92 more over the life of the loan than he would have had he paid at the base rate.

(b) The quantum of the benefits to the dealer and the defendants from the undisclosed conduct was measured by the amount that the contract rate exceeded the base rate of interest set by ANZ.

(c) The unfairness of the conduct would be redressed by an order compensating the plaintiff for the difference between the amount of interest he in fact paid

36 Ryan Affidavit, [70].
37 Orders of Nichols J made 18 November 2022.
38 Ryan Affidavit, [72].

under the loan contract, and the amount he would have paid had the rate of interest been the base rate.

(d) Mr Cairns in his report also calculated the interest amount the plaintiff would have paid had the base rate been applied.

51 To facilitate a calculation of loss for group members in the same way as Mr Cairns' calculation with respect to the plaintiff, the defendant provided data about car loan contracts held by registered group members, including:

(a) the contract interest rate of each loan;

(b) the base rate applicable to each car loan;

(c) the amount financed under each car loan; and

(d) the term of each car loan.

52 Using that data, the plaintiff's legal advisors, with consulting forensic accountants, prepared a model of group member losses for the purposes of mediation.

Group member participation

53 Prior to distribution of the settlement notices, approximately 110,568 potential group members registered with Maurice Blackburn, representing 97,246 car loans matched with data made available by the defendants. Importantly, for the purposes of the analysis of potential success associated with the claims:

(a) 68,072 (70%) were entered into prior to 21 August 2014, being six years before the proceedings were commenced on 20 August 2020; and

(b) 29,174 (30%) were entered into on or after that date.[39]

54 After the distribution of the settlement notices, and following a data matching process, a further 18,120 potential group members registered. An additional 14,301 group members matched to approximately 15,837 loan contracts were identified as group

[39] Ryan Affidavit, [77].

members, of which:

(a) 9,224 loan contracts were entered into prior to 21 August 2014; and

(b) 6,613 were entered into on or after that date.[40]

55 At the time of the application for settlement approval, there were 128,688 registered persons, but 18,133 who were unable to be matched to a loan contract. The proposed settlement distribution scheme provided for those unmatched registrants to have an opportunity to provide further information to the Scheme Administrator to enable assessment of their eligibility.[41]

Modelling of the group losses

56 The plaintiff's evidence described the way in which the aggregate loss of registered group members at the time of settlement was estimated. This was then the basis of an assessment of a reasonable settlement sum, having regard to the assessment of the likely participation of eligible group members in the settlement.

57 At the time of the settlement, the plaintiff modelled the loss of all registered group members at the time (97,246) at a particular amount, which was calculated by calculating the total amount of interest paid by the group members and subtracting the interest which would have been paid at the base rate. Pre-judgment interest was then added to the principal loss. That pre-judgment interest was calculated on a simple interest basis, at the rate specified by the *Supreme Court Act* and *Penalty Interest Rates Act 1983* (Vic) which was 10% per annum across the relevant period, from the commencement of the proceeding to 30 September 2024.[42]

58 The plaintiff's loss model for mediation assumed a potential 11% increase in the participation rate following settlement (arising from increased registrations after announcement and notification of settlement, and from further matching of loan contracts). This would give an approximate participation rate of 40%.[43] The evidence

40 Ryan Affidavit, [78], [80].
41 Ryan Affidavit, [81].
42 Ryan Affidavit, [83]-[85].
43 Ryan Affidavit, [88].

was that this identification of a participation rate was based on the past experience of Mr Ryan and Mr Watson (as his Honour then was) in conducting consumer class actions, and their consideration of the likely participation in the circumstances of this proceeding.[44]

Settlement distribution between group members

59 The plaintiff's material described how the Settlement Distribution Scheme provided for the settlement sum to be distributed as between group members. In particular the methodology provided for different loss calculations by reference to the difference between the claims of the 70% of matched loan contracts registered at the time of settlement with who, on the defendants' case, would have been subject to a statutory time limitation, and had only 'mistake' claims, and the 30% of matched loan contracts giving rise to statutory claims which had not been time barred.

60 The Settlement Distribution Scheme provided that the losses of group members with contracts entered into on or after 21 August 2014 would be assessed by reference to the '**Loss Assessment Formula**' provided in the Scheme.[45] That formula provided for the Scheme Administrator to calculate the maximum theoretical loss in the following way:

(a) calculate the total amount of interest paid by the group member under the loan contract;

(b) deduct the total amount of interest the group member would have paid if the applicable base interest rate had been applied, with other terms of the loan being unchanged; and

(c) calculate interest at the statutory rate from the mid-point of the group member's contract loan term.

61 For group members with car loans entered into before 21 August 2014, for which the

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44 Ryan Affidavit, [90].

45 Ryan Affidavit, Exhibit RER-12, 83, 98 (**Amended Settlement Distribution Scheme**, clause 7.1(b) and Schedule B).

group members only had claims in mistake, the Settlement Distribution Scheme stipulated that their losses would be assessed by reference to the '**Nominal Assessed Loss'**, defined as being 10% of the average assessed loss for eligible group members who entered their loan contract *on or after* 21 August 2014 (and who had statutory claims which were not statute barred). The reasons for the significantly lower assessment of the loss entitlement for the group members with mistake claims only were based on the assessments of the risks associated with those claims, having regard to the more limited basis of the claims, and the defences pleaded. Those matters were more fully explained in the evidence of the instructing solicitor and in the Counsel Opinion which addressed the factors relevant to the acceptance of the settlement and why it should be approved.

Objections to settlement

62 Three objections to approval of the settlement were made by group members. As noted above, an objection was also raised by Boomerang Claims. The nature of the objections were as follows.

63 Ms Rose Graham objected to the settlement on three bases:

(a) the sum of the proposed settlement does not adequately compensate group members for losses incurred;

(b) there is no admission of guilt or liability by the defendants, which was unreasonable in circumstances where her experience of ANZ's conduct was said to demonstrate irresponsible lending and predatory practices. In Ms Graham's case, she said:

> In 2014, after making over a year's worth of payments totalling more than $11,000, my car was repossessed, leaving me with six more years of payments on a $42,000 loan. I had traded in my previous car for $11,000, with $5,000 allocated to paying off an ANZ credit card that was never cancelled. At the time, I was earning only $30,000 per year while paying nearly $350 in weekly rent, making the loan terms unmanageable.
>
> After the repossession, I received a letter stating the car had been sold at auction for just $5,000. … The financial strain and stress left me unemployed, unwell, and even hospitalized due to [health issues]

> caused by the severe hardship.
>
> At just 23 years old, with limited financial literacy, I was pressured into this loan by the dealership, unaware of the exploitative flex commission scheme that incentivized high interest lending.[46]
>
> …

(c) the group members with claims prior to 21 August 2014 which are 'out of time' for the statutory claims have reduced entitlements.

64 Ms Graham was present by remote hearing link during the settlement approval hearing, and appeared to make submissions which confirmed these objections and her personal experience which gave rise to them. In the course of the hearing, senior counsel for the plaintiff submitted that it would be unlikely to be able to obtain a settlement of a proceeding of this nature if it was conditional on an explicit admission of liability or guilt, and that it would not be something that the plaintiff could properly insist on in the broader interest of group members.[47] He also explained that one of the reasons that a defendant in this position would wish to enter a settlement is to obviate the risk of adverse findings as to their conduct, and that to make any admission of liability prior to trial, would give away that advantage and make it less likely that a significant settlement sum would be paid prior to trial.[48] In Ms Graham's submissions, she acknowledged this rationale and explained that she understood why a settlement would be entered into without admissions on liability. However she did reiterate the serious consequences that the loan arrangement had for her; the distress it caused for her when she had entered into the loan as a young person; and the distress caused to other people. She submitted that she would like these lending practices and the consequences they have to be taken into account.[49]

65 Mr Trevor Van Kempen made an objection dated 25 February 2025. He objected on the basis that the statutory limitations periods applied to his claims. Consequently he had claims in mistake only. He requested that the limitation date be extended. He

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46 Email from Rose Graham to Maurice Blackburn on 10 March 2025 attaching Objection Statement.
47 Transcript 09/05/2025, T37.09-20.
48 Transcript 09/05/2025, T37.26-T39.01.
49 Transcript 09/05/2025, T42.14-T44.21.

observed that some people in the class action were vulnerable people and that the 'engineers of Flex' would have been 'able to reasonably foresee that implementing this would cause pain and suffering, mental anguish and enhanced injury to vulnerable people'.[50]

66 Ms Julie Marshall objected to the settlement on the bases that:

(a) the amount of fees proposed to be paid to the lawyers is unfair and exorbitant;

(b) her 'proposed share of the settlement is $8' which did not cover what she paid nor the interest paid on the loan; and

(c) ANZ had breached the NCCPA and the group members 'should be compensated what we are owed and then the lawyers should be paid.'[51]

67 As noted above, the objection notice lodged by Boomerang Claims and associated documents made 'objections' to the manner of the registration process and Maurice Blackburn's response to Boomerang Claims' submission of a list of registrants in the registration process. Its objection notice stated expressly that '[w]e do not oppose the approval of the settlement in principle'.[52] As Boomerang Claims did not submit any objection to the proposed settlement made on behalf of any group member it was authorised to represent, it is unnecessary to consider Boomerang Claims' objection notice further in this context.

Fairness of the settlement

68 In this context it is appropriate to consider both the reasonableness of a settlement in the circumstances in which the settlement was reached in this proceeding, the fairness and reasonableness of the settlement terms, the fairness and reasonableness of the settlement sum as between the plaintiff and the defendants, and the fairness of the proposed settlement distribution between group members.

69 In this context of assessing the overall fairness of the settlement, it is relevant to

50 Letter from Trevor Van Kempen to the Court on 25 February 2025, attached to Objection notice.
51 Notice of Objection dated 2 March 2025.
52 Notice of Objection dated 10 March 2025.

consider the response of group members to the advertised proposed settlement. The few objections made by group members to the settlement relate to two aspects – the discounted amount to be distributed to those group members who have mistake claims, and whether the amount of the legal fees and distribution costs are unreasonable. These are taken into account as relevant below. A third issue, the absence of any admission of liability by the defendants, which was raised by Ms Graham, was not further pursued in submissions as she fairly accepted that there was an understandable reason why in a settlement process, a defendant may not admit liability.

The reasonableness of a compromise

70 There are some matters which are relevant in general terms to the reasonableness of a settlement of the proceeding before trial, and which are appropriate to consider before considering the reasonableness of the settlement sum.

71 First, it is relevant to consider the timing of the settlement, at a very late stage of the pre-trial processes in this proceeding. The proceeding settled at a time when the pleadings had been amended on multiple occasions, discovery made, and evidence filed and served. The parties had filed their written outlines of opening submissions. The proceeding had been mediated in December 2023, over a year before this settlement, without an outcome.

72 Settlement at this late stage of the proceeding is relevant because it indicates that the defendants had relatively robust views of their ability to defend the proceeding. It is also relevant to the ability of counsel who prepared the Counsel Opinion to evaluate the strengths and weaknesses of the case and thus the appropriateness or otherwise of the proposed settlement.

73 The likely length and complexity of the trial is also relevant. Orders had been made in this proceeding for it to be heard with two other proceedings dealing with flex commission based claims.[53] The orders provided that the trial was to be conducted

[53] *Fox v Westpac* and *Nathan v Macquarie Leasing*.

according to a joint trial protocol for the conduct of the hearing which set the matters down for hearing on an estimate of 30 hearing days, with a four day sitting week.[54] This proceeding was thus anticipated to have been a relatively lengthy trial which would have entailed significant cost for all parties.

74 Associated with the relative complexity of the trial of the proceeding is the consideration that a settlement prior to trial could be anticipated to result in receipt of financial recovery for group members at a significantly earlier time, than had the proceeding proceeded to trial and final judgment by this Court.

The reasonableness of the settlement sum

75 I accept that the methodology of arriving at an appropriate settlement figure, through the process described above of modelling the aggregate loss of group members and identifying the likely participation rate of group members, was a rational and appropriate step in arriving at an appropriate settlement sum. I also take into account that the matter was strongly defended by the defendants until shortly before trial was listed to commence.

76 Having considered the confidential information relating to assessments of claim amounts, the evidence as to the rational and informed process by which group member participation in the settlement was estimated, and other information available to the solicitors for the plaintiff at the time of settlement, the figure is comfortably within the range of what is a reasonable and fair settlement amount for group members.

Reasonableness of other aspects of the settlement distribution process

77 The process of estimating total group member loss was informed by the matching of data relating to group members and loans undertaken by ANZ, with a further opportunity for group members who have not been matched in that process to provide additional information to enable Maurice Blackburn, as Scheme

[54] Orders of John Dixon J made 30 April 2024, annexing the Flex Commission Proceedings Joint Trial Protocol.

Administrator, to match the group member to loan information.[55] The Settlement Distribution Scheme provides that the decision of the Scheme Administrator as to matching is final.

78 I accept that this is an appropriate process, in that it gives a further opportunity to group members whose data was not able to be matched by ANZ to provide further information, but then provides finality to the process in making the Scheme Administrator's decision final. It is fair and reasonable to provide a final opportunity of participation for group members with relevant loans, but also to ensure that there is a finite end to the process in order to facilitate distribution in as timely way as possible.[56]

79 After the deduction of costs (in categories addressed at [90]-[139] below), the Scheme Administrator will calculate the proportion of the balance of the settlement sum each eligible group member is to receive, in the proportion which their assessed loss (according to the Loss Assessment Formula and the Nominal Assessed Loss) bears to the aggregate assessed losses for all eligible group members. Losses assessed as falling below a minimum distribution amount of $20 will be excluded from that process, and will be included in the distribution pool for distribution to other eligible group members.[57] The sums calculated after that process will then be paid to eligible group members by electronic funds transfer.[58]

80 The rationale for excluding losses below $20 is that the administrative measures and associated costs expense involved in distributing amounts under $20 would exceed the total value of those claims, and a minimum of $20 is proportionate to the time and effort group members would be required to expend to receive payments (including to provide bank account details as required by the settlement distribution scheme).[59] This is fair and reasonable in prioritising return to group members over expenditure

55 Ryan Affidavit, [118]-[119].
56 Se the observations of Matthews J in *Fuller v Allianz*, [112]-[116].
57 Amended Settlement Distribution Scheme, clauses 9.2-9.6.
58 Amended Settlement Distribution Scheme, clause 10.
59 Ryan Affidavit, [128].

on administrative costs.

81 Finally, the Settlement Distribution Scheme provides for the return of any residual settlement sum – after costs deductions and payments of distributions to group members – to ANZ, if it is uneconomical to be further distributed to group members. If it would be economical to be further distributed to group members, that will be done on a pro rata basis.[60] This is a sensible and reasonable solution for a potential residual amount that cannot be accurately predicted in advance.

Fairness between group members

82 The question for the Court in considering the fairness of the proposed settlement between group members is to consider whether the proposed settlement distribution scheme is framed to achieve a broadly fair division of the proceeds, treating like group members alike.[61] In the present case, there are two broad classes represented amongst the group members, whose proposed entitlements under the proposed distribution are materially different. Observations made by Justice Moshinsky in *Camilleri v Trust Company (Nominees) Ltd* are helpful in informing my consideration of the fairness between these two broad classes in this case:

> In this case, as in many representative proceedings, the manner in which the settlement sum is to be distributed requires assumptions to be adopted and judgment calls to be made. There are different classes of claimants within the body of group members here, and it is necessary to arrive at some model that fairly and reasonably divides the settlement sum between those classes, recognising the differences in their respective claims. There is no single approach which alone can qualify as reasonable for sharing the fixed pool of funds among the claimants. Inevitably, adjustments in a given approach will be favourable for certain group members at the expense of others.
>
> The question, therefore, can only be whether the model is within the bounds of fairness and reasonableness in its attempts to balance what are, unavoidably, conflicts between the interests of the different claimants.[62]

83 In the present case, there were some difficult judgments to be made as to distribution of the sum between the group members, primarily relating to the appropriate approach to the entitlements of the class of group members who had statutory claims

60 Amended Settlement Distribution Scheme, clauses 11.4 and 11.5.
61 *Camilleri*, [5(e)] (Moshinsky J).
62 *Camilleri,* [40]-[41] (Moshinsky J).

not subject to a statute bar, and those group members with claims in mistake only. I accept that the proposed distribution is fair as between those two classes and more generally as between group members for the following reasons.

84 First, to be entitled to participate in the settlement distribution, all group members are subject to the same eligibility criteria of having registered in accordance with orders of the Court,[63] and having had their data matched to loan data stored on ANZ's records either by ANZ, or by the Scheme Administrator. These criteria are appropriate measures, with the data matching exercise specifically being a reasonable measure to verify an entitlement to participate. The inclusion of a specific process for the Scheme Administrator to try to match registered group members who have not yet been matched to loan data on ANZ's loan records, provides a fair opportunity for eligible individuals who have not, for reasons out of their control, been matched to ANZ data to be recognised as group members. The design of the process for providing this further data matching opportunity is directed to an efficient process with minimal delay, and provides for the Scheme Administrator to make a final and binding decision.[64]

85 It is then necessary to consider the basis on which losses will be assessed, first for the group members who entered into their loan contracts on or after 21 August 2014, and for those group members who entered into their loan contracts before that date. The former group will have their losses calculated by reference to the Loss Assessment Formula referred to at [60] above.

86 The class of group members who entered into their loans prior to 21 August 2014 have a significantly smaller entitlement, calculated as the Nominal Assessed Loss which is 10% of the average assessed loss for the class of group members who entered into their loans on or after that date.

87 The reason for that significantly lower calculation of loss entitlement is primarily the

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63 Either the orders made 20 December 2024 or 3 April 2025, and including the orders for late registration of a small group of group members who had identified good reason for not registering on time, which I will make in response to the plaintiff's application made with this application for settlement approval.

64 Amended Settlement Distribution Scheme, clauses 5.2 to 5.9.

fact that group members who entered into their loans prior to 21 August 2014 have mistake claims only, as any statutory claim under the NCCPA is statute barred. The factors relevant to consideration of those claims in mistake and the rationale for discounting the eligible loss are fully explained in the Counsel Opinion and the affidavit of the instructing solicitor.[65] In summary, the claims in mistake were assessed as involving significantly larger risks, so that the prospects of establishing the claims were significantly lower.[66] I have considered the detailed analysis of the mistake based claims identified in the Counsel Opinion. It clearly identifies the matters of legal principle and authority, and the issues of factual proof affecting the claims and I consider that they provide a rational analysis of the risks facing the success of these claims.

88 I note, in assessing the significantly lower amounts which will be distributed to those group members who are entitled to the Nominal Assessed Loss under the Settlement Distribution Scheme, that Mr Van Kempen, Ms Marshall, and Ms Graham are all in the class of group members who entered into loan contracts prior to 21 August 2014. They will be entitled to participate on the basis of the Nominal Assessed Loss rather than the alternative Loss Assessment Formula applicable to group members with loans on or after that date. It is certainly the case that these group members and others in the class of group members with loans entered into prior to 21 August 2014 will receive significantly lower proportionate amounts than those group members who entered into the loans on or after that date and have statutory claims. However, the reasons for that reduced amount include the more significant barriers to establishing those group members' claims which lie only in mistake. I consider that the difference between the two classes has a rational and fair basis, and that the proposal for the differential distribution formulae between the two classes is a fair and reasonable method for distributing the total settlement sum.

89 Mr Van Kempen requested in his objection that the Court extend the limitations period for the statutory claims. The settlement approval process is not a forum in which it is

65 Ryan Affidavit, [108]-[109].
66 Ryan Affidavit, [109.1], [109.3].

possible to do this. It was put forward, as I understand it, more as a reason why this settlement should not be approved. There was, understandably for a self-represented litigant in the context of an objection process, no legal argument as to how the statutory time bar could be extended. The NCCPA does not provide a mechanism by which the six year period in s 180A(5) could be extended. Further, even if there was discretion to extend time it would be a complex question in every case as to whether that time should be extended. In the settlement of a proceeding on behalf of a very large pool of group members, the difficulty of establishing any such entitlement would be a matter undoubtedly to be taken into account in accepting a settlement.

Deductions from the settlement sum

90 It is proposed that the following deductions be made from the total settlement sum:

(a) $20,825,000 to be paid to Maurice Blackburn as payment for legal costs and disbursements, in accordance with the terms of the group costs order;

(b) $2,701,515 to be paid to Maurice Blackburn as payment of the settlement administrator costs; and

(c) $30,000 to be paid to Mr O'Brien in consideration of the time and inconvenience involved in being the lead plaintiff.

The legal costs and the group costs order

91 The effect of the group costs order made by Nichols J in March 2023 pursuant to s 33ZDA(1) of the *Supreme Court Act* was that Maurice Blackburn could recover costs at a rate of 24.5% of the settlement, subject to further order. The question now arises as to whether there is any reason why that order should be varied.

Considerations on whether the group costs order should be varied

92 Section 33ZDA(3) provides:

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

93 This is the third occasion on which the Court, in a settlement approval application,

has been required to consider whether there should be any variation to a group costs order. The Court in *Allen v G8 Education Ltd (No 4)*[67] and in *Fuller v Allianz*[68] considered the exercise of the Court's discretion as to whether to vary a group costs order. The following observations from those cases are particularly relevant.

(a) The power of amendment of a group costs order allows the Court to ensure that the terms of the order remain appropriate, having regard to the information available to the Court which can inform an analysis of whether the percentage to be paid continues to be appropriate.[69]

(b) The consideration of whether to exercise the power to amend a group costs order under s 33ZDA(3) does not involve a *de novo* hearing regarding the appropriateness of the group costs order.[70] That has already been considered by the Court when the group costs order was made. For that reason, it is relevant to consider the reasons for which the Court made that order.

(c) The Court should ensure that costs payable to the legal representatives under the group costs order remains proportionate, in that they continue to represent an appropriate reward in the context of the effort and investment of the legal practice, the duration of the proceedings and the risks which were undertaken.[71]

94 In this case, the plaintiff's solicitors did not retain separate counsel to respond to any queries from the Court on the group costs order at the hearing on the settlement approval. That had been done in previous proceedings[72] to provide an independent source of submissions on the group costs orders apparently in view of the potential conflict of interest for the plaintiff's solicitor and counsel. As noted by Matthews J in *Fuller v Allianz,* it is the duty of the counsel for the plaintiffs to inform the Court if any

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67 ***Allen v G8 Education*** *Ltd (No 4)* [2024] VSC 487 (Watson J).
68 [2025] VSC 160 (Matthews J).
69 *Fuller v Allianz*, [153] (Matthews J); *Mumford v EML Payments Limited* [2022] VSC 750, [94]-[95] (Delany J).
70 *Allen v G8 Education,*[63(b)] (Watson J); *Fuller v Allianz* [154]-[155] (Matthews J).
71 *Allen v G8 Education,*[63(e)] (Watson J); *Fuller v Allianz* [154]-[155] (Matthews J).
72 See *Fuller v Allianz,* [162]-[165] (Matthews J).

circumstance has arisen which would render the group costs order percentage rate excessive.[73] I agree, and note that at the hearing of the settlement approval I raised with the plaintiff's solicitors and counsel their obligation to raise any matter which may be regarded as relevant to the question of whether the group costs order should be varied including any material change of circumstance. Counsel for the plaintiff agreed that this was the case and (as discussed below) confirmed that there were no such circumstances.[74] There was no need, in my view, for any separate counsel or solicitor to be briefed to address this issue.

The reasons for making the group costs order

95 In making the group costs order,[75] Justice Nichols emphasised a number of considerations which it is appropriate now to note.

96 First, her Honour observed that the group costs orders in this and the related proceedings would 'guarantee to group members recovery of 75.5% of any settlement sum or damages award' which would protect against costs and funding fees disproportionately eroding compensation. This was a real and substantial benefit to group members. In making this observation Nichols J noted the potential for the percentage to be varied if that was in the interests of group members.[76]

97 The group costs order would provide certainty to group members on the basis that the other alternative funding model would require an application for a common fund order at the conclusion of the proceeding, and at the time of making the group costs order, there was an unsettled controversy as to the Court's power to do so.[77]

98 A further important consideration was that the group costs order would provide, from the outset, equality between group members in the sharing of liability for legal and funding costs.

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73 *Fuller v Allianz*, [165].
74 Transcript 09/05/25 T28.03-T29.11.
75 The orders were made in this proceeding, and in the *Fox v Westpac* and *Nathan v Macquarie Leasing* proceedings: see *Fox v Westpac (No 2)*.
76 *Fox v Westpac (No 2)*, [45]-[46].
77 *Fox v Westpac (No 2)*, [47], [50]-[52].

99 The rate of the group costs order was superior to the alternative funding rate. The alternative funding arrangement with Vannin (entailing 25% of the recovered amount, subject to obtaining a common fund order) was itself a 'good deal' as assessed by reference to publicly available data establishing the mean and average returns to group members in class actions with third-party funding.[78]

The plaintiff's submissions

100 It was submitted that there was no change of circumstance or other matter which would justify varying the terms of the group costs order, and that the rate of 24.5% of the settlement sum, at $20,825,000, remained an appropriate payment for legal costs in all the circumstances.

101 The plaintiff submitted that the group costs order percentage rate remained appropriate for the following reasons.[79]

102 First, Maurice Blackburn (rather than Mr O'Brien as plaintiff) had borne considerable risk in the proceeding. The confidential Counsel Opinion identified the risks to recovery, particularly with respect to the group members with claims in mistake only, but also with respect to Mr O'Brien and other group members with statutory claims. The proceeding was strongly defended and settled shortly before the listed trial, after full preparation for trial and many contested interlocutory applications.

103 Secondly, very significant costs had been incurred over the period of the litigation, which were disclosed to the Court confidentially in the affidavit of Mr Ryan in support of the application.[80] Pursuant to Maurice Blackburn's cost sharing arrangement with private financier Vannin, as agreed prior to the group costs order application, Vannin was obliged to pay 50% of the proceeding costs including professional fees and disbursements, and 50% of any adverse costs or of security for costs. However Maurice Blackburn is obligated to pay Vannin 50% of any contingency fee payment it

78 *Fox v Westpac (No 2)*, [49].
79 **Plaintiff's Outline of Submissions** Section 33V Application dated 29 April 2025, [64]-[71].
80 Ryan Affidavit, [138]-[147].

receives in the proceeding.[81]

104 Thirdly, the outcome in this proceeding was within the estimated confidential range which was provided to the Court for the group costs order application.[82]

105 Fourthly, although one objector had submitted that the legal fees are unfair and exorbitant, 'no substance to that complaint' was provided, notwithstanding that the percentage rate and amount of legal costs had been disclosed in the Notice of Proposed Settlement issued pursuant to the Court's orders.

106 Fifthly, the group costs order rate remains mid-range based on empirical research provided to the Court in the form of a report from Professor Vince Morabito dated 4 February 2025, *Group Costs Orders, Funding Commissions, Volume of Class Action Litigation, Reimbursement Payments and Biggest Settlements.*[83] Professor Morabito identified 24.5% as being the median rate, and Mr Ryan in his affidavit stated that taking into account further group costs order decisions made since the Morabito report, the median rate for recent orders was 28.75%.[84]

107 Sixthly, the structural benefits of the group costs order of fair and equitable distribution of costs remains undisturbed.

108 Seventhly, counsel and solicitors for the plaintiff were unaware of any circumstances that had arisen that render the group costs order excessive and contrary to the interests of group members.

109 The plaintiff acknowledged that it was a basis of the group costs order that it contemplated legal costs calculated as a fixed percentage of 24.5% with no additional funding costs, which would result in a recovery by group members of 75.5% of the settlement sum or damages award. However, the proposed deductions including the settlement administration costs would now mean that group members would recover

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81 *Fox v Westpac (No 2)*, [13].

82 Ryan Affidavit, [151], referring to the affidavit of Andrew Watson sworn 2 September 2022, [55].

83 *Group Costs Orders, Funding Commissions, Volume of Class Action Litigation, Reimbursement Payments and Biggest Settlements*, Professor Vince Morabito, 4 February 2025 (**Morabito Report**). The Report is exhibit to the Ryan Affidavit, Exhibit RER-12, 55-112.

84 Ryan Affidavit, [161].

73.82% of the settlement sum. It was submitted that this was not a material difference that would change the substance of the Court's findings in making the original group costs order.[85]

There is no basis on which the group costs order should be varied

110 I have concluded that there is no reason to vary the percentage rate in the group costs order already made, or to otherwise vary that order.

111 I accept, first, that as submitted by the plaintiffs, Maurice Blackburn undertook a significant risk in the proceeding. I reach that conclusion having regard first to the confidential Counsel Opinion which describes the merits of the claims and also the risks to the claims of group members being established; and secondly to the strong way in which the proceedings were defended until shortly before the date for trial. I also take into account the significant amount of legal costs actually incurred, given that the proceeding had continued through all interlocutory steps, many of which involved contested applications. The costs risk was shared with Vannin, but the consequence of the successful settlement outcome also means that Maurice Blackburn must account to Vannin for 50% of the contingency fee component of the legal costs amount which will be paid under the group costs order.

112 I also take into account that in material respects, the outcome is as anticipated and intended by the group costs order. The settlement sum was, as submitted by the plaintiff, within the estimated range which was provided confidentially to the Court in the material in support of the group costs order. The benefits of certainty and transparency have been served throughout the interlocutory phase of the proceeding and for the purposes of informing a mediated compromise. The fact that the 24.5% percentage rate remains in the mid-range of percentages in group costs orders, or potentially at the lower end of that range taking into account the most recent group costs orders at higher percentages,[86] also favours keeping the percentage rate at the

85 Plaintiff's Outline of Submissions, [61(a)].
86 Ryan Affidavit, [161]; Morabito Report, 9-10.

original rate.[87]

113 Finally, I take into account that there was one objection from a group member to the legal fees to be paid. Ms Marshall objected that they are unfair and exorbitant. I appreciate that the proportion of the settlement and the total amount allocated for legal costs must seem very high to a group member. However there is no indication from Ms Marshall's objection whether she understands the factors involved in arriving at that amount, including the scale of the legal work which had to be performed over the course of the proceeding, or the nature of the risks that the law firm (with a funder) undertakes in taking the costs burden of the proceeding until its resolution. The risk with respect to Ms Marshall's claim is particularly relevant as she entered into her car loan on 13 January 2011, and accordingly only has claims in mistake.[88] In the absence of further explanation, it is difficult to give significant weight to an objection that the costs are unfair.

114 Ms Marshall also observes that her share of the proposed settlement is $8. It is unclear how she arrives at that amount, and the evidence of the plaintiff is that the Nominal Assessed Loss is estimated to be more than $8.

115 It is relevant that of all group members, there was one objection only to the legal costs component of the settlement. That is certainly not a determinative factor, but it is relevant in assessing whether the group costs order percentage remains in the interests of group members.[89]

116 One matter which requires some more detailed consideration is that the 24.5% rate approved for legal costs in the group costs order contemplated that the remainder, 75.5%, would be shared amongst group members. This was a material matter referred to by Nichols J in her Honour's reasons for making the group costs order. Her Honour referred to the evidence of one of the plaintiffs in the related proceeding *Fox v Westpac* that this was her understanding in instructing Maurice Blackburn to file the

87 *Allen v G8 Education (No 4)*, [92] (Watson J).
88 Ryan Affidavit, [177(c)].
89 *Fuller v Allianz*, [176] (Matthews J); *Allen v G8 Education (No 4)*, [62] (Watson J).

application for the group costs order seeking the 24.5% rate.[90] Her Honour's reasons also referred to the plaintiff in this proceeding, Mr O'Brien, as having instructed Maurice Blackburn to apply for the group costs order 'on the understanding that if the application is granted, all the costs in the case will be capped at 24.5% of the amount of any settlement or damages award, subject only to any further order'.[91] The judgment does not identify whether administration costs were the subject of any evidence or submission in the application.

117 Although it remains the case that, as anticipated by the plaintiff, the entitlement of Maurice Blackburn to legal costs remains at 24.5%, the fact that there will be a further deduction from the settlement sum to pay for the not insignificant costs of the settlement administration means that the related assumption of the plaintiffs in this and the related cases that 75.5% of the settlement sum would be available for distribution will not be fulfilled. The proportion of the settlement amount available for distribution will be 73.82%.

118 The plaintiff submits that this is not a material difference that changes the substance of the Court's conclusions in making the group costs order. As it is not apparent whether submissions were made to the Court about the impact of settlement administration costs at the time of the making of the group costs order, that may entail some speculation. However I note Justice Nichols' observations in her judgment about the mean and median funding commission rate of 25% in analysis of data from proceedings between 1997 to 2016, and the median proportion of an award or settlement deducted for legal fees and funding commission being much higher at 47%. Her Honour accepted that although this data has some limitations, it remains a meaningful measure of *prima facie* reasonableness.[92] Taking this into account, I consider it unlikely that her Honour would have declined to make the group costs order had it been expressly put to her that there would be the further deduction for settlement administration and that the total amount available for distribution to

90 *Fox v Westpac (No 2)*, [21].
91 *Fox v Westpac (No 2)*, [24].
92 *Fox v Westpac (No 2)*, [49].

members would be for that reason 1.68% less than 75.5%, at 73.82%.

119 Further, it is also unlikely that had the effect of deduction of settlement administration costs been expressly brought to account in the proposal put to the Court for the group costs order, that it would have made a difference to her Honour's conclusion that the group costs order was preferable to the alternative funding solution which involved seeking a common fund order at the conclusion of the proceedings. In the case of either funding model, the settlement administration expenses would need to be deducted.

120 For that reason, I accept the plaintiff's submission that this difference was one which was unlikely to change the substance of the Court's conclusions in granting the group costs order. It does, however, remain a matter that is relevant to consider in determining whether there is any reason to vary the order given that it was not expressly considered by the Court at the time of granting the order.

121 Although the reduction in the distributable settlement amount is in relative terms, a very small change, it represents a total amount of money which is not insignificant and should be considered. One important consideration is whether that amount is justified, which arises for consideration independently and is discussed below. For the reasons set out below, I do consider the amount to be justified by reference to the scale of the work involved, and is a cost effective solution to the undoubted need for a significant amount of administrative work in ensuring that the settlement is distributed efficiently to group members in the correct amounts. It is also relevant that the Notice of Proposed Settlement, which was disclosed to group members in compliance with the orders of the Court, did identify expressly the settlement administration costs, which in that notice were estimated at a higher amount of $3.5 million.[93]

122 Further, the significance of the deduction for settlement administration costs for which approval is now sought is much less pronounced when the effect on individual entitlements is considered - the degree to which individual distributions will be lower

[93] Notice to Group Members as amended to be distributed pursuant to the orders of Justice Harris made 6 February 2025, see annexed Notice of Proposed Settlement, [18].

than had a full 75.5% of the funding pool been available will be minimal.

123 I take into account the possibility that one way in which the cost of settlement administration could have been paid without impacting on group members receiving the anticipated proportion of the settlement sum would be for the law firm and funder to absorb the cost. I do not consider that such a solution would be fair, or necessary to ensure that the interests of the group members are protected. The impact of requiring the amount to be paid from the 24.5% of legal costs would be high for Maurice Blackburn, and a much greater impact than if settlement administration expenses are shared amongst group members. Costs of the settlement administration scheme is an essential cost to ensure the efficient and correct distribution of the settlement to group members and it is, in my view, ultimately fair that it be an adjustment to the settlement sum deducted which impacts the amount available to group members, rather than a reduction in the anticipated proportion of legal costs payable.[94]

Conclusion on group costs order

124 For these reasons, I do not consider that there is any matter which makes it necessary or appropriate to vary the percentage in the group costs order, and I am satisfied that it remains an appropriate payment to the solicitors for the plaintiff in the context of the effort and investment of the legal practice, the duration of the proceedings and the risks which were undertaken.

The costs of the settlement administration

125 It is proposed that Maurice Blackburn be the Scheme Administrator, and that it be paid the costs of settlement administration from the settlement sum.

126 The evidence is that the steps involved in settlement administration will include:

(a) responding to group member inquiries,

(b) analysing and assessing group member data including in the case of unmatched group members, matching group members to ANZ loan data;

94 *Allen v G8 Education*, [48]-[51].

(c) calculating group member distribution amounts;

(d) notifying group members of their distribution entitlement;

(e) collecting and verifying group members' bank account information in order for payments to be made;

(f) distributing the settlement sum through payments into group member bank accounts, and

(g) reporting to the Court about the implementation of the settlement distribution scheme.[95]

Maurice Blackburn as Scheme Administrator

127 The plaintiff's evidence included evidence as to Maurice Blackburn's experience in administering settlements from group proceedings, in particular the expertise and experience of the staff in the settlement administration team and the efficient systems and processes that team has developed.[96] The evidence also included the confidential Costs Report including the instructions from Maurice Blackburn which included detail of the work involved in the settlement administration process which are referred to above.

128 I accept that if Maurice Blackburn is appointed as Scheme Administrator, the experience of this settlement administration team, their specialised systems, and the fact that they will have ready access to staff at Maurice Blackburn who conducted the proceeding in the event that any factual or legal issues involving entitlements arise means that the administration will be conducted efficiently and effectively. It is appropriate that Maurice Blackburn be appointed Scheme Administrator.

Costs of scheme administration

129 It is estimated that the settlement administration costs will be $2,701,515 comprising:

(a) $2,693,100 (including GST) for Maurice Blackburn's professional costs and

95 Ryan Affidavit, [132], [179]. The confidential Costs Report also addressed these steps.
96 Ryan Affidavit, [180]-[187].

disbursements as Scheme Administrator; and

(b) $8,415 (including GST) for the Costs Report of Ms Rosati which provided an opinion as to the estimated costs likely to be incurred in the settlement administration process and the reasonableness of those costs.[97]

130 The plaintiff's evidence addressed the steps which would be involved in administration of the settlement to the point of payment of the settlement sum. It is clear that there will be some complexities in administering the settlement, including because of the large number of group members, the remaining data matching tasks, and the challenges of obtaining bank account information from group members in the context of prevalent online scams and caution about providing such information. There may well need to be significant engagement with group members on aspects of the settlement administration.

131 The Settlement Distribution Scheme provides for the Scheme Administrator to report to the Court every six months during the settlement administration process, including as to the costs incurred and distributions made.[98]

132 I considered the confidentially filed Costs Report of Ms Rosati and her detailed assessment of the proposed settlement administration process and estimate provided by Maurice Blackburn of the costs. She has provided clear reasoning for her conclusion that while the estimated costs of the settlement administration are considerable, they are reasonable having regard to the nature and number of tasks and assessments which are involved in the settlement administration process.

133 The information provided in relation to settlement administration costs was to the effect that tasks were allocated to non-lawyers where possible, or to be performed by automated processes to the extent feasible. I accept that the proposed approach to the administration is designed to make the administration as cost effective as possible.

134 It is appropriate to note again at this point the objection made by Ms Marshall as to

97 Ryan Affidavit, [171].
98 Amended Settlement Distribution Scheme, clause 17.2.

the amount to be paid to lawyers in respect of the settlement, given that the settlement administration costs will be paid to Maurice Blackburn. While I accept that the costs are significant in amount, there is plainly a significant amount of work involved in administering the settlement for a group of this size. It is also relevant to reiterate that the Notice of Proposed Settlement which was disclosed to group members including Ms Marshall, identified an estimated $3.5 million in settlement administration costs. The settlement administration costs are significantly less than that amount.

135 Having regard to Ms Rosati's assessment, the information as to the nature of the work involved in the settlement administration and the distribution of that work cost-effectively amongst the members of the settlement administration team, as well as to the provision for supervision of the administration through reporting by the Scheme Administrator to the Court, I consider that the settlement administration costs are of an acceptable amount.

Representative plaintiff payment to Mr O'Brien

136 It is submitted that it is appropriate to pay an amount to Mr O'Brien as the representative plaintiff in recognition of and reimbursement for the time and labour associated with the role. It has been recognised in prior authority on settlement approvals that such a payment may be fair and reasonable given the particular burden borne by the representative plaintiff.[99]

137 Evidence was provided of the significant contribution made by Mr O'Brien to the proceeding over the nearly three years of his involvement, including by way of giving instructions and evidence, producing documents on discovery and providing instructions in response to subpoenas issued to third parties in relation to Mr O'Brien's financial affairs. Mr Ryan of Maurice Blackburn gave evidence that he had observed Mr O'Brien to be highly responsive, and to have provided 'insightful and measured instructions including in relation to the settlement reached'.[100]

138 I accept that it is appropriate to make a payment to reimburse Mr O'Brien for the time

99 *Fuller v Allianz*, [147]-[150] (Matthews J).
100 Ryan Affidavit, [163]-[164].

and work involved in being the representative plaintiff. The appropriateness of such payments generally has been recognised in prior authority,[101] and the evidence demonstrates that he performed this role diligently.

139 I also accept that the amount of $30,000 is an appropriate reimbursement. Professor Vince Morabito's report included an analysis of reimbursement payments which had been approved by courts in group proceedings between December 2024 to February 2025.[102] That report included the information that payments have been made in a very wide range in the Victorian, Federal and New South Wales jurisdictions. The average payment being $26,170 in Victoria, $23,843 in the Federal Court, and $22,151 in New South Wales. The evidence was also that payments were rising over the period of that analysis. I consider that having regard to the duration of Mr O'Brien's role as representative plaintiff, the time involved in that role, and the associated burden including disclosure of his personal financial information, an amount of $30,000 is an appropriate reimbursement payment.

Appropriate orders

140 The plaintiff provided detailed orders to give effect to the proposed settlement, which I consider are appropriate to make. I will provide the plaintiff and the defendants with a final opportunity to consider the proposed orders before they are formally made and authenticated.

101 *Fuller v Allianz*, [149].
102 Morabito Report, 46-55.

CERTIFICATE

I certify that this and the 42 preceding pages are a true copy of the reasons for judgment of the Honourable Justice Harris of the Supreme Court of Victoria delivered on 3 July 2025.

DATED this third day of July 2025