

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

Not Restricted

S ECI 2020 02946

ALANNAH FOX

First Plaintiff

BRIDGET NASTASI

Second Plaintiff

-and-

WESTPAC BANKING CORPORATION
(ACN 007 457 141)

First Defendant

ST GEORGE FINANCE LIMITED
(ACN 001 094 471)

Second Defendant

<u>JUDGE:</u>	Harris J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	27 August 2025
<u>DATE OF JUDGMENT:</u>	15 October 2025
<u>CASE MAY BE CITED AS:</u>	Fox v Westpac Banking Corporation
<u>MEDIUM NEUTRAL CITATION:</u>	[2025] VSC 643

PRACTICE AND PROCEDURE - Group Proceeding - Application for approval of settlement- Whether confidentiality orders should be made - 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 - no variation to group costs order - Settlement approved - *Supreme Court Act 1986* (Vic) Part 4A, s 33V, s 33ZDA.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiffs	Mr D Fahey	Maurice Blackburn
For the Defendants	Ms C Hamilton-Jewell	King & Wood Mallesons



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HER HONOUR:

Background

- 1 The plaintiffs, Ms Alannah Fox and Ms Bridget Nastasi commenced this group proceeding on behalf of group members who entered into car loans with either of the defendants, **Westpac** Banking Corporation or **St George** Finance Limited (Westpac's wholly owned subsidiary), as arranged through car dealers. The plaintiffs and group members claimed to have suffered loss as a result of undisclosed 'flex commissions' paid by the defendants to the car dealers based on the difference between the base rate of interest the defendants would accept on the loans and the interest rate set by the dealers at their discretion. The 'flex commissions' were claimed to have the effect of inflating the interest rate paid on the loan by group members.
- 2 The parties have agreed to settle this proceeding for the **settlement sum** of \$130 million, which is inclusive of legal and settlement administration costs as well as the amount to be distributed to the plaintiffs and group members. The settlement was agreed expressly on the basis that it is without admission or acceptance of liability by the defendants. The plaintiffs now apply for the Court's approval of the settlement pursuant to s 33V of the *Supreme Court Act 1986 (Vic)*.
- 3 On 27 August 2025, I heard the approval application and on the same day I made the orders sought. These orders are set out in Annexure A. The following are my reasons for making those orders.

The nature of the claims

- 4 This proceeding is the final of three related group proceedings in respect of 'flex commissions' in which settlements have been approved by this Court.¹
- 5 The group members are persons who:
 - (a) entered into a car loan with Westpac or St George as arranged through a car dealer where an undisclosed 'flex commission' was paid by the defendants to

¹ *O'Brien v Australia and New Zealand Banking Group Limited* [2025] VSC 389 and *Nathan v Macquarie Leasing Pty Ltd* [2025] VSC 594.



those dealers;

- (b) executed a financial agreement in connection with the loan or commenced discussions with the dealer concerning such finance between 1 March 2013 and 31 October 2018, and
- (c) suffered loss in these circumstances.²

6 The plaintiffs claimed that the payment of the 'flex commissions' involved undisclosed conduct of the defendants, by which they:

- (a) set a **base rate** of interest to be charged on car loans for specific dealers, being the minimum rate of interest the defendants would accept on the loans;
- (b) authorised the dealers to set a discretionary rate of interest, on a case by case basis, payable under the car loans (the **contract rate**); and
- (c) paid the dealers a proportion of the difference between the base rate and contract rate (the **flex commission**).³

7 The effect of this arrangement was that the higher the contract rate, the greater the flex commission paid to the dealers and the greater the return to the defendants.

8 The plaintiffs and group members in this proceeding claim that:

- (a) by not disclosing matters relating to the flex commission, the car dealers engaged in unfair conduct within the meaning of s 180A of the *National Consumer Credit Protection Act 2009* (Cth) (*NCCPA*), for which the defendants are liable pursuant to s 78 of that Act;
- (b) by failing to disclose matters relating to the flex commissions, the defendants engaged in misleading and deceptive conduct in breach of s 1041H of the *Corporations Act 2001* (Cth) and/or alternatively s 12DA of the *Australian*

² **Amended Writ and Statement of Claim** filed on 28 August 2024, [1]; Affidavit of Richard Ryan affirmed on 15 August 2025 (**Ryan Affidavit**), [14].

³ Amended Writ and Statement of Claim, [9].



Securities and Investments Commission Act 2001 (Cth) (ASIC Act); and

- (c) the plaintiffs and group members were unaware of matters relating to the flex commissions, which were operative causes of the entry into the loan contracts, constituting a mistake at law entitling the plaintiffs and group members to rescind their contracts, or rendering the contracts void or voidable.⁴

9 The purpose of section 33V of the *Supreme Court Act* is to ensure that settlement of a group proceeding is fair and reasonable and in the interests of all group members as a whole, and not just in the interests of the plaintiffs, who will be bound by the settlement terms, having regard to group members' claims.⁵ Section 33V provides:

33V 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.

10 The plaintiffs' affidavits in support of the application included the following key documents:

- (a) the proposed Settlement Distribution Scheme;⁶
- (b) the settlement deed between the parties and the third party litigation funder;⁷
- (c) an extract of Professor Vince Morabito's empirical research report on class actions dated February 2025, dealing with group costs orders and plaintiff compensation rates (**Morabito Report**);⁸
- (d) an opinion prepared by counsel on matters relevant to the appropriateness of

⁴ Amended Writ and Statement of Claim, [21]-[22], [34]-[38], [41]-[44]; **Plaintiffs' Outline of Submissions** dated 15 August 2025, [6].

⁵ *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).

⁶ Information of the proposed Settlement Distribution Scheme was published on the plaintiffs' solicitor's website pursuant to orders of Justice Harris made on 16 May 2025, order 7.

⁷ Exhibited confidentially (Exhibit RER-13) to the Ryan Affidavit.

⁸ 'Group Costs Orders, Funding Commissions, Volume of Class Action Litigation, Reimbursement Payments and Biggest Settlements', 4 February 2025 (**Morabito Report**) Exhibit RER-12, 108-112.



accepting the settlement, dated 15 August 2025 (**Counsel Opinion**),⁹ and

- (e) an expert report of Ms Kerrie-Ann Rosati, costs consultant of DGT Costs Lawyers dated 30 July 2025 on the likely costs to be incurred during the settlement administration process (**Costs Report**).¹⁰

11 There were limited objections made by five group members to approval of the proposed settlement, which are set out in more detail below at [54]-[60].

12 The defendants supported the approval of the settlement and provided written submissions prior to the hearing that supplemented the plaintiffs' written submissions.¹¹ The defendants maintained their denial of each of the plaintiffs' and group members' claims.¹²

13 The primary issues for consideration in the application to approve the proposed settlement are:

- (a) whether the settlement sum is fair and reasonable having regard to the risks to establishing liability and any entitlement to relief of the plaintiffs, and of the group members, as known at the time of settlement;
- (b) whether the settlement sum distribution is fair and reasonable as between the parties, and as between group members; and
- (c) whether the group costs order, settlement administration costs and plaintiff compensation payments proposed to be deducted from the settlement sum are appropriate.¹³

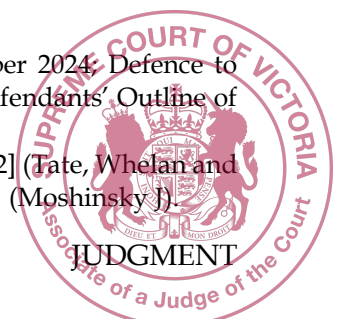
⁹ Exhibited confidentially (Exhibit RER-13) to the Ryan Affidavit given the privileged nature of the opinion.

¹⁰ Exhibited confidentially (Exhibit RER-13) to the Ryan Affidavit, given the inclusion of privileged costs related information.

¹¹ **Defendants' Outline of Submissions** filed on 22 August 2025.

¹² Defence to Amended Statement of Claim (of first defendant) dated 11 September 2024; Defence to Amended Statement of Claim (of second defendant) dated 11 September 2024; Defendants' Outline of Submissions, [10].

¹³ Noting the principles discussed in *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).



Procedural background

- 14 In considering whether the settlement is fair and reasonable, it is necessary to take into account the lengthy procedural history of this proceeding.
- 15 This group proceeding was commenced in July 2020 and the trial of the proceeding was heard by Justice John Dixon jointly with related proceeding *Nathan v Macquarie Leasing Pty Ltd* for six weeks from 14 October 2024.¹⁴ The trial concluded and his Honour reserved judgment.

Group Costs Order

- 16 The effect of a group costs order made pursuant to s 33ZDA of the *Supreme Court Act* is that the liability of the plaintiffs and group members to pay their solicitor's legal fees is shared amongst them, and is calculated as a percentage of the damages or compensation awarded, or settlement received in the proceeding.
- 17 The plaintiffs made two applications for a group costs order in this proceeding. The first, which was at a rate of 25%, was refused by Justice Nichols following a hearing on 3 June 2021, as her Honour was not persuaded that the plaintiffs had established a sufficient basis for exercise of the Court's discretion under s 33ZDA to make the group costs order sought.¹⁵ The second group costs order application was heard together with applications in the related proceedings and was granted in March 2023 by Justice Nichols at a rate of 24.5%.¹⁶ The defendants opposed the first application but did not oppose the second.¹⁷

Opt out and registration

- 18 Group members were permitted to opt out of, or register for, this proceeding by 28 September 2023 pursuant to orders of Nichols J made on 20 July 2023. On 1 August 2023, Nichols J made orders extending the date for registration to 12 October 2023. These 'soft' class closure orders were made to facilitate settlement at mediation by

¹⁴ Ryan Affidavit, [46.15].

¹⁵ Ryan Affidavit, [27], [30]; see *Fox v Westpac*; *Crawford v ANZ* [2021] VSC 573, [8].

¹⁶ Ryan Affidavit, [31]-[32]; Orders of Justice Nichols made on 9 March 2023.

¹⁷ Ryan Affidavit, [28]-[31].



identifying the participating class and corresponding claim size.¹⁸

Mediation

19 The parties attended a total of four unsuccessful mediations on:

- (a) 6 December 2023, pursuant to orders of Justice Nichols;
- (b) 30 April 2024, pursuant to orders of Justice John Dixon;
- (c) 7 November 2024, after the tenth day of trial; and
- (d) 20 December 2024, after judgment was reserved.¹⁹

Trial and settlement

20 The trial of the proceeding was held over 6 weeks from 14 October to 21 November 2024, with judgment reserved.²⁰

21 On 14 March 2025, following the trial and a further mediation and whilst judgment remained reserved, the parties reached an in-principle agreement to settle the proceeding for the settlement sum, on the basis that there was no acceptance or admission of liability by the defendants.²¹

22 On 2 May 2025, the deed of settlement and release was exchanged by the parties and the third party litigation funder, **Vannin** Capital Investments (Australia) Pty Ltd for the settlement sum of \$130 million.²²

23 On 16 May 2025, I made orders approving the distribution of the notice of proposed settlement to group members and its advertisement in newspapers and on the websites of Maurice Blackburn and the Court. The orders required that the Settlement Distribution Scheme be displayed on Maurice Blackburn's website and provided for processes by which group members could register to participate in, or object to, the

¹⁸ *Fox v Westpac; O'Brien v ANZ; Nathan v Macquarie* [2023] VSC 414, [38].

¹⁹ Ryan Affidavit, [39]-[43].

²⁰ Ryan Affidavit, [41].

²¹ Ryan Affidavit, [44].

²² Ryan Affidavit, [45], and Exhibit RER-13, 269.



proposed settlement of the proceeding.

- 24 Richard Ryan, principal lawyer of Maurice Blackburn, gave evidence by affidavit that those orders had been complied with.²³ I am satisfied that the procedural fairness requirements associated with the settlement of the proceeding have been satisfied.

Reinstatements and late registrations

- 25 After the soft closure orders made by Justice Nichols, the Court made further orders on several occasions reinstating as group members persons who had opted out of the proceeding by mistake and who wished to be reinstated.²⁴
- 26 After the post-settlement registration deadline, 23 July 2025, a further 38 potential group members contacted Maurice Blackburn seeking late registration due to extenuating circumstances which they had identified as preventing them from registering by the deadline.²⁵ A further 49 potential group members contacted Maurice Blackburn seeking reinstatement to participate in the settlement on the basis they had opted out by mistake, or were unaware they had opted out.²⁶
- 27 The plaintiffs submitted, and I accepted, that the Court should make orders for the reinstatement or late registration of those potential group members. This was appropriate given that the potential group members either had special circumstances preventing them from registering within the specified time (such as illness, or family, travel or workplace issues), or had inadvertently opted out of the proceeding.²⁷ It was also consistent with the Court's approach in *O'Brien v ANZ*.²⁸ The addition of the 87 group members would also not make a material difference to the distribution of the settlement proceeds.

- 28 As I observed in *Nathan*,²⁹ it will not be appropriate to make orders for reinstatement

²³ Ryan Affidavit, [47].

²⁴ Orders of Nichols J made on 28 September, 31 October and 5 December 2023 and 15 April 2024; Orders of Delany J made on 3, 10, 11 and 12 October 2023; Orders of John Dixon J made on 21 August and 4 December 2024.

²⁵ Ryan Affidavit, [50]-[51].

²⁶ Ryan Affidavit, [53]-[54].

²⁷ Ryan Affidavit, [52], [55].

²⁸ *O'Brien*, [34]-[35].

²⁹ *Nathan*, [30].



or late registration of potential group members in every case as it may not be fair and reasonable in circumstances where it will materially impact on individual entitlements of eligible group members who did comply with registration requirements. It is important that group members in group proceedings comply with orders of the Court, including as to timely registration. Timely registration of group members assists the parties in settlement of the proceeding by allowing accurate estimations of potential returns to individual group members, thereby informing the appropriate settlement sum.

29 However, in this case, I considered that in the circumstances it was appropriate to make the orders sought permitting the registration of the 38 persons who had not yet registered and had provided reasons for not doing so, and for the reinstatement of the 49 persons who had mistakenly opted out.

Confidentiality orders

30 Orders were sought with respect to certain material filed by the plaintiff in support of its application for settlement approval, providing for prohibition on publication or disclosure of the material other than to the Court, the plaintiffs' legal team and Vannin. The confidentiality orders sought are substantially in the same terms as the confidentiality orders made in *O'Brien* and *Nathan*.³⁰ I made orders in those cases, having regard to the observations as to the appropriateness of confined confidentiality orders in the context of settlement applications made by Matthews J in *Andrianakis v Uber Technologies Inc and Ors (Settlement Approval)*.³¹

31 In summary, as I observed in *O'Brien* and *Nathan*:³²

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.

³⁰ Transcript 27/08/25, T4.17-25.

³¹ [2024] VSC 733, [42]-[43]; cited in *Fuller v Allianz Australia Insurance Ltd (Settlement Approval)* [2025] VSC 160, [36] (Matthews J), *O'Brien*, [38] and *Nathan*, [34].

³² *O'Brien*, [37]; *Nathan*, [33].



32 The plaintiffs sought confidentiality orders on the basis that the material was legally privileged or so commercially sensitive as to warrant protection. The material consisted of legally privileged advice, including the Counsel Opinion, and evidence concerning risk assessments, claim value estimates and methodologies and litigation budgets and expenditure.³³

33 I made the confidentiality orders as sought on 27 August 2025, and the reasons for making those orders are materially similar to those expressed in *O'Brien and Nathan*, where disclosure of that material would cause real and substantial prejudice to the plaintiffs and group members if the settlement was not approved or did not proceed, and the matter proceeded to judgment. Further, the material would ordinarily not be disclosed to the Court but was disclosed in support of the settlement approval application to assist the Court to perform its function under s 33V of the *Supreme Court Act* in determining the fairness and reasonableness of the proposed settlement. Legal professional privilege exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers.³⁴ The public disclosure of legal advice, being quintessentially privileged information provided to the Court to facilitate the determination of an application to approve settlement of a group proceeding, would prejudice the proper administration of justice.

Settlement approval - Applicable principles

34 The considerations for the Court in exercising its power to approve a group proceeding settlement pursuant to s 33V are well established. The essential questions are whether the proposed settlement is fair and reasonable (as between the parties, and as between group members³⁵) having regard to the group members' claims, and whether it is in the interests of the group members as a whole.³⁶

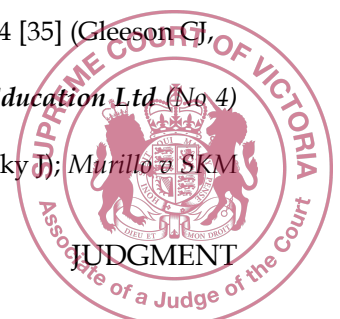
35 The Court must assess the outcome as being within a range of what would be fair and

³³ Plaintiffs' Outline of Submissions, [16]-[17].

³⁴ *Eso Australia Resources Ltd v Federal Commissioner for Taxation* (1999) 201 CLR 49, 64 [35] (Gleeson CJ, Gaudron and Gummow JJ).

³⁵ *Fuller v Allianz (Settlement Approval)* [2025] VSC 160, [71], [73], [95]; *Allen v G8 Education Ltd (No 4)* [2024] VSC 487, [25(a)] (Watson J).

³⁶ *Botsman*, 111 [201]-[202] (Tate, Whelan and Niall JJA); *Camilleri*, [32]-[44] (Moshinsky J); *Murillo v SKM Services Pty Ltd* [2019] VSC 663, [29(b)] (John Dixon J).



reasonable, there being no single unique outcome that would constitute a ‘correct’ settlement.³⁷ Factors relevant to approval of a settlement, as drawn from authorities, are set out 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.³⁸

36 These factors were addressed in the plaintiffs’ affidavit material, the confidential Counsel Opinion, and the parties’ submissions.

Proposed settlement

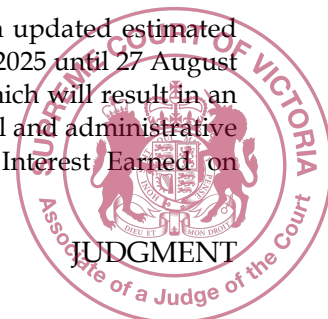
37 The proceeding settled after judgment was reserved and included the following material terms:

- (a) Westpac and St George would pay a total sum of \$130 million plus interest accrued from 14 June 2025,³⁹ into a controlled moneys account, by the expiry of

³⁷ *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 v Allianz (Settlement Approval)*, [70] (Matthews J).

³⁸ Supreme Court of Victoria, *Practice Note GEN 10: Conduct of Group Proceedings (Class Actions) (Second Revision)*, 13 October 2020, [16.6]; see *Fuller v Allianz (Settlement Approval)*, [67].

³⁹ The plaintiffs filed a supplementary affidavit on 25 August 2025 deposing to an updated estimated amount of interest to be earned from the settlement sum from the period 14 June 2025 until 27 August 2026 (estimated date of when distribution to group members will commence) which will result in an estimate of 76.66% of the settlement sum to be distributed after deductions of legal and administrative costs and plaintiffs’ compensation. See Supplementary Affidavit Regarding Interest Earned on Settlement Sum of Richard Ryan affirmed on 25 August 2025, 3 .



- the date by which any appeal of the settlement approval orders would have to be made;
- (b) Westpac and St George would make no admissions as to liability;
 - (c) the plaintiffs were to prepare the Settlement Distribution Scheme which was to provide for:
 - (i) payment to Maurice Blackburn of 24.5% of the settlement sum pursuant to the group costs order made on 9 March 2023;
 - (ii) payment to the plaintiffs for time spent and expenditure reasonably incurred in bringing the proceeding;
 - (iii) payment to the scheme administrator for costs and disbursements in administering the scheme; and
 - (iv) distribution of the remainder of the settlement sum to eligible group members.⁴⁰

38 The plaintiffs' solicitors have made three notable amendments to the proposed Settlement Distribution Scheme that was displayed on their website pursuant to the 16 May 2025 orders:

- (a) the minimum distribution amount has been amended from \$30 to \$20, for consistency with *O'Brien* and *Nathan*;
- (b) the definitions of 'Registered Group Member' and 'Registration Data' have been amended to include additional registrants deemed by Court orders to be registered group members; and
- (c) the clause relating to eligible group members was amended to include additional registrants deemed by Court orders to be registered group

⁴⁰ Ryan Affidavit, [98].



members.⁴¹

39 The plaintiffs sought orders including that Maurice Blackburn be appointed as the scheme administrator, and amounts to be fixed for the plaintiffs' legal costs and disbursements and costs of administering the scheme.⁴² The orders sought also included provision for the plaintiffs to receive \$40,000 each as compensation.

40 The plaintiffs' evidence was that the settlement sum was reached following extensive modelling by the plaintiffs' legal team of the claims values, starting with the expert report of Martin Cairns, forensic accountant of Sapere, dated 27 June 2023.⁴³

41 The plaintiffs' primary case as to calculating quantum of loss was set out as follows:

[The plaintiffs] were unaware that their car dealers, respectively Lakeside Hyundai and Springwood Nissan, had set the interest rate on their car loans at 12.99%; that the defendants accordingly owed and would pay each of Lakeside Hyundai and Springwood Nissan flex commissions in the amounts of \$6,139 and \$6,671 (excluding GST); and that the result of the dealers' conduct was that the plaintiffs' would, and did, pay \$11,964 and \$8,236 more over the life of their loans than they would have paid had the interest rate been the base rate set by the defendants for the dealers (see Mr Cairns' report at [19] - [21]). Mr Cairns then calculated pre-judgment interest on that loss to 31 December 2023, subsequently updated to 31 December 2024.

[T]he quantum of the benefits to the dealers and the defendants from this undisclosed conduct was measured by the amount that the contract rate of the plaintiffs' car loans exceeded the base rate which the defendants had set for each of Lakeside Hyundai and Springwood Nissan...

[T]he unfairness was to be redressed by an order compensating the plaintiffs for the difference between the amount of interest they in fact paid under their loan contracts; and what they would have paid had the rate of interest on their loan contracts been the base rate.⁴⁴

Group member eligibility

42 At the time of settlement, the defendants identified 428,131 potential group members, and 388,073 unique loan contracts held by group members.⁴⁵ Pursuant to the Court's orders, the parties had undertaken a data matching program, through which the defendants provided certain information for all registrants they identified as group

⁴¹ Ryan Affidavit, [100].

⁴² Ryan Affidavit, [99].

⁴³ Ryan Affidavit, [56]-[57].

⁴⁴ Ryan Affidavit, [58].

⁴⁵ Ryan Affidavit, [60].



members including, in respect of each car loan, the contract interest rate, the base rate, the amount financed, and the loan term.⁴⁶ Partially matched group members were any registrants matched at a later stage of the data matching process via a different methodology of matching, and for settlement distribution purposes are treated as eligible group members.⁴⁷

43 Prior to settlement, the key data identified by the plaintiffs from information the defendants provided as at 5 September 2024 (being the date the plaintiffs last provided the defendants with registrant data for matching) was as follows:⁴⁸

Registration and Group Member Figures at time of Loss Model for Settlement		
1.	Number of group members in the proceeding	428,131
2.	Number of unique car loans in the proceeding	388,073
3.	Number of registrants in the proceeding	109,112
4.	Number of matched registered group members	94,128
5.	Number of partially matched registrants	3,425
6.	Number of unmatched registrants	11,559
7.	Number of unique matched car loans	93,258
8.	Number of unique matched car loans entered prior to 15 July 2014 [six years prior to commencement of the proceedings]	15,388
9.	Number of unique matched car loans entered on or after 15 July 2014	77,870

44 The plaintiffs' legal team prepared a loss model for settlement based on this data, extrapolated from scenarios of estimated losses which took into account:

- (a) 93,258 unique matched loan contracts (noting some group members entered into multiple loans, and some loans had joint or multiple account holders), which constituted 24.03% of all loan contracts entered into over the relevant

⁴⁶ Ryan Affidavit, [64].

⁴⁷ Ryan Affidavit, [80]-[84].

⁴⁸ Ryan Affidavit, [65].



period;⁴⁹ and

- (b) the fact that additional cohorts of group members were likely to seek to register after a settlement notice is distributed;⁵⁰ and
- (c) estimated losses on *all* 388,073 loan contracts entered into over the relevant period.⁵¹

45 Following a further data matching process, after distribution of the settlement notice, the plaintiffs identified a total of 105,817 loan contracts which were matched or partially matched to group members in this proceeding. This represents a participation rate of 27.27% of the total number of unique car loans (388,073).⁵²

46 Out of the total matched or partially matched loan contracts:

- (a) 17,741 (16.77%) are loan contracts entered into prior to 15 July 2014 which gave rise only to claims in mistake, the statutory claims having been subject to a defence that they were statute barred; and
- (b) 88,076 (83.23%) are loan contracts entered into on or after 15 July 2014, for which the statutory claims under the *NCCPA*, the *Corporations Act* and the *ASIC Act* were maintained.⁵³

47 As was the case in *Nathan*, and unlike the *O'Brien* proceeding,⁵⁴ the greater proportion of the claims involved statutory claims. This reflected the fact that the relevant period for entry into contracts for this proceeding was at a later time than in the *O'Brien* proceeding, and therefore more contracts were entered into within the six years prior to the proceeding being commenced.

⁴⁹ Ryan Affidavit, [68.1].

⁵⁰ An additional 18,380 potential group members did in fact register with Maurice Blackburn to participate in the settlement after the distribution of the settlement notices in June 2025, and a further 167 potential group members had registered after 5 September 2024 but before settlement was reached; Ryan Affidavit, [69].

⁵¹ Ryan Affidavit, [66]-[68].

⁵² Ryan Affidavit, [78].

⁵³ Ryan Affidavit, [79].

⁵⁴ *O'Brien*, [53]-[54]; *Nathan* [51], [53].



48 After distribution of the settlement notice, the numbers relevant to assessing participation in the settlement were as follows:⁵⁵

Registration and Group Member Figures <i>after</i> settlement notice distribution		
1.	Number of group members in the proceeding	428,131
2.	Number of unique car loans in the proceeding	388,073
3.	Number of registrants in the proceeding	127,659
4.	Number of matched or partially matched registered group members	113,218 (with 13,635 partially matched)
5.	Number of unmatched registrants	14,441
6.	Number of unique matched or partially matched car loans	105,817
7.	Number of unique matched car loans entered prior to 15 July 2014	17,741
8.	Number of unique matched car loans entered on or after 15 July 2014	88,076

Aggregate loss calculation

49 At the time of settlement, the plaintiffs calculated the aggregate loss for all registered group members based on the total number of matched loan contracts by calculating the total interest actually paid on the loans, against the amount that would have been paid had the interest instead been set at the base rate. Pre-judgment interest as specified by the *Supreme Court Act* was added to the principal loss.⁵⁶ The calculated aggregate loss was used to inform the settlement sum. Although adjustments were not made in that process for the difference between the ‘statutory claims’ and ‘mistake claims’, the data did enable identification of the distribution of the claims between those two categories.⁵⁷

Loss assessment formula

50 There is a key difference in the methodology of the aggregate loss calculation

⁵⁵ Ryan Affidavit, [79].

⁵⁶ Ryan Affidavit, [85]-[87].

⁵⁷ Ryan Affidavit, [88], [92].



undertaken for the purposes of informing the settlement sum, and the loss assessment formula for the purposes of distributing settlement proceeds amongst eligible group members. The loss assessment formula takes into account the fact that some group members have 'mistake claims' only and adjusts those claims to an entitlement of essentially 10% of the net interest paid by that eligible group member.⁵⁸ The rationale for this was to reflect the material difference in the prospects of success of the mistake claims, as opposed to the stronger prospects for the statutory claims.

51 The loss assessment formula used the plaintiffs' loss model for settlement as a basis in that it calculates the net interest paid on the car loan by the eligible group member and adds pre-judgment interest. It also took into account potential deficiencies in the claim data available for all group members claims, by providing for entitlements of group members for whom there was insufficient data to calculate loss, using the primary method, to have losses assessed by reference to average losses for the 'mistake claims' only or the 'statutory claims' group, as relevant.⁵⁹

52 The loss assessment formula as contained in Schedule B of the settlement distribution scheme provided:⁶⁰

SCHEDULE B - LOSS ASSESSMENT FORMULA

An Eligible Group Member who entered a car loan contract:

- (a) before 15 July 2014 will have their Assessed Losses associated with that contract calculated using method 1 or 2 below;
- (b) on or after 15 July 2014 will have their Assessed Losses associated with that contract calculated using method 3 or 4 below.

Method 1: Where the Group Member Data in respect of the Eligible Group Member is sufficient to calculate the Eligible Group Member's Assessed Losses, their Assessed Losses will be calculated using the following formula.

$$\text{Loss} = ((\text{Contract Rate} - \text{Base Rate}) + \text{Pre-judgment Interest}) \times 10\%$$

Method 2: If no Group Member Data has been provided to the Scheme Administrator in respect of the Eligible Group Member or it is insufficient to calculate the Eligible Group Member's Assessed Losses, their Assessed Losses will equal the average Assessed Losses of all Eligible Group Members who

⁵⁸ Ryan Affidavit, [111]-[114].

⁵⁹ Ryan Affidavit, [113]-[114].

⁶⁰ Ryan Affidavit, [115].



entered their loans before 15 July 2014.

Method 3: Where the Group Member Data in respect of the Eligible Group Member is sufficient to calculate the Eligible Group Member's Assessed Losses, their Assessed Losses will be calculated using the following formula.

$$\text{Loss} = (\text{Contract Rate} - \text{Base Rate}) + \text{Pre-judgment Interest}$$

Method 4: If no Group Member Data has been provided to the Scheme Administrator in respect of the Eligible Group Member or it is insufficient to calculate the Eligible Group Member's Assessed Losses, their Assessed Losses will equal the average Assessed Losses of all Eligible Group Members who entered their loans on or after 15 July 2014.

Term	Meaning
Contract Rate	The total amount of interest paid by the Eligible Group Member under their car loan contract as set out in the Group Member Data.
Base Rate	The total amount of interest that the Eligible Group Member would have paid under their car loan contract if: (a) the applicable rate of interest under their car loan contract was the base rate as set out in the Group Member Data; and (b) all other terms of the loan contract were the same.
Pre-judgment Interest	The simple interest which has accrued on the Eligible Group Member's loss (i.e., Contract Rate - Base Rate) since the commencement of the proceeding, being 15 July 2020, to the date of the Approval Orders.

53 Assessed Losses are then adjusted on a pro-rata basis by reference to the proportion that the Assessed Loss bears to the aggregate of the Assessed Losses for all Eligible Group Members, to arrive at the estimated distribution amount.⁶¹

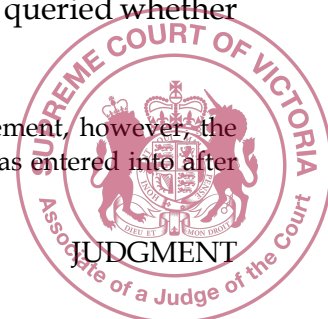
Objections to settlement

54 Five group members who had 'mistake' only claims, made objections to approval of the proposed settlement.⁶²

55 Caroline Groth entered into her car loan on 24 May 2013 and objected to the settlement on the basis that the structure of the proposed settlement distribution 'unfairly disadvantages group members' who have claims in mistake only and queried whether

⁶¹ Settlement Distribution Scheme cl 6; Ryan Affidavit, [129].

⁶² Ryan Affidavit, [198]; Ms Gemma Kennedy also objected to the proposed settlement, however, the defendants have advised that Ms Kennedy is not a group member as her loan was entered into after the relevant period, see Ryan Affidavit, [151].



a 'more equitable' distribution model could be applied between the group members.⁶³

56 Sabrina Thomas had a loan contract date of 7 June 2013 and objected on the basis that those with mistake claims only would receive a substantially lower distribution compared to those with statutory claims and that this was unfair where group members with 'mistake claims' had been waiting longer to receive compensation.⁶⁴

57 Paris Arthur entered into a car loan on 19 February 2014 and objected on four grounds:

- (a) the distribution unfairly discounts compensation to group members with mistake claims in circumstances where the harm suffered was identical to those with statutory claims;
- (b) the proposed settlement does not account for the possibility of extending the statutory limitation period on the basis that the harm continued beyond the date of the loan;
- (c) by discounting compensation to group members with earlier in time claims, the defendants are essentially being allowed to retain profits from their wrongful conduct which undermines the remedial purpose of the proceeding and penalises earlier in time group members; and
- (d) unequal treatment between the group members renders the settlement legally and ethically inadequate where borrowers were unaware of the misconduct and had no meaningful opportunity to act sooner.⁶⁵

58 Justin Butterfield obtained his car loan on 26 July 2013 and primarily objected on the basis that the entitlements of group members with claims in mistake only were significantly lower than that of group members with statutory claims. Mr Butterfield submitted this unfairly discriminated those group members with only claims in mistake and that the reliance on the six-year statutory limitation period was flawed as the limitation period under the *NCCPA* only began to run from the time the

⁶³ Objection Notice of Caroline Groth dated 23 June 2025; Ryan Affidavit, [198(a)].

⁶⁴ Objection Notice of Sabrina Dawn Thomas dated 16 July 2025; Ryan Affidavit, [198(c)].

⁶⁵ Objection Notice of Paris Arthur dated 17 July 2023; Ryan Affidavit, [198(d)].



misconduct was discovered, being some time in 2020. Mr Butterfield placed some reliance on the *Limitation of Actions Act 1958* (Vic) which provides for the extension of the limitation period in certain specific circumstances. Mr Butterfield also submitted that the lengthy time between the date of commencement of this proceeding (in 2020) to the date of settlement (in 2025) eroded the 'statutory limitation window' for claimants.⁶⁶

59 Toby Potter submitted an objection notice and appeared at the settlement approval hearing remotely by audio-visual link. Mr Potter signed his loan contract on 4 September 2013, and alleged that the interest rate on that loan was only made known to him on 13 September 2013.⁶⁷

60 Mr Potter made submissions at the hearing consistent with those identified in his objection notice.⁶⁸ He objected to the proposed settlement on the basis that group members with mistake only claims were being disadvantaged and were not treated equally to those with statutory claims, despite having to also be bound by the settlement terms and relinquish their legal right to recourse upon approval of the settlement.⁶⁹ He submitted that he and his then wife who had entered into the loan had trusted the dealer who had assured them they would offer a better interest rate than the banks, and only later found out that the rate was much higher than would have been offered by banks. He noted that the high interest rate had placed them under significant financial stress, and that they were adversely affected by the relevant conduct in just the same way as those who entered their loans later and had statutory claims.⁷⁰

61 Three other group members with objections had indicated that they wished to appear at the hearing by audio-visual link. However, no further submissions were made by those group members.

⁶⁶ Objection Notice of Justin Butterfield dated 17 July 2025; Ryan Affidavit, [198(e)].

⁶⁷ Transcript 27/08/25, T35.13-27.

⁶⁸ Objection Notice of Toby Potter dated 24 June 2025.

⁶⁹ Transcript 27/08/25, T36.3-25.

⁷⁰ Transcript 27/08/25, T35.27-T36.13.



Was the settlement fair and reasonable?

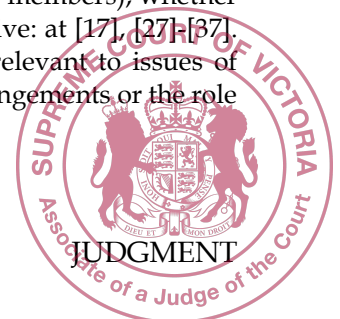
Fairness inter partes

- 62 Westpac and St George were represented by experienced solicitors and counsel and supported the settlement. The defendants submitted that the claims advanced by the plaintiffs in this proceeding were novel and untested and involved complex factual and legal issues, which attracted a greater deal of uncertainty. The defendants emphasised in their submissions that settlement was reached following a lengthy trial, which proceeded to judgment being reserved, after adverse rulings against some of the plaintiffs' evidence were made by the trial judge in the interlocutory phase. In particular, the evidence of two of the plaintiffs' experts was ruled to be inadmissible.⁷¹ These matters were said to demonstrate further the complexity of the proceeding and the risks for the plaintiffs.⁷²
- 63 I accepted, based on the evidence and submissions, that the settlement sum was fair and reasonable. It was within the range of reasonable outcomes to resolve the plaintiffs' and group members' claims,⁷³ and was arrived at rationally, having been informed by the extensive modelling described above of all the group members' losses. The confidential Counsel Opinion further demonstrated the range of factors the plaintiffs' solicitors took into account in evaluating the strengths and weaknesses of the claims and thus the appropriateness of the settlement sum. I accepted the defendants' submissions above in respect of the risks and complexity involved in the proceeding.
- 64 It was also relevant that of the group members who objected to approval of the proposed settlement, none of those objectors objected on the basis that the settlement

⁷¹ The evidence of Professor Robert Slonim, a behavioural economist, and Dr Cynthia Schneider, a linguistics expert, was ruled inadmissible by John Dixon J: *Nathan v Macquarie Leasing; Fox v Westpac (No 2)* [2024] VSC 643, [3]. With respect to the evidence of Professor Slonim, his evidence was not accepted on the basis that it was irrelevant as it could not rationally affect the assessment of the probability of facts relevant to the bargaining position of the plaintiffs (and group members), whether the flex commission system involved a technique which was unfair or manipulative: at [17], [27]-[37]. In the case of Dr Schneider's report, her evidence was not accepted as being relevant to issues of whether the loan documentation was capable of bringing the flex commission arrangements or the role of the dealers to the attention of the plaintiffs: [43], [45]-[52].

⁷² Defendants' Outline of Submissions, [11]-[14].

⁷³ *Murillo v SKM Services Pty Ltd* [2019] VSC 663, [32] (John Dixon J).



sum itself was not fair or reasonable.

Fairness *inter se*

65 In determining whether the proposed settlement is fair as between group members the main considerations for the Court are whether the distribution scheme treats like group members alike and broadly achieves a fair division of the proceeds,⁷⁴ and has a rational explanation for any differential treatment of group members, having regard to the differences in their respective claims.⁷⁵

66 As in *O'Brien* and *Nathan*, there were two broad classes of group members whose proposed entitlements were materially different: those who had claims in mistake only because they had entered into their car loans prior to 15 July 2014, and were statute barred from bringing statutory claims; and those who had entered into their car loans on or after 15 July 2014 and also had the pleaded statutory claims under the NCCPA, the *Corporations Act* and the *ASIC Act*.

67 As was the case in *O'Brien* and *Nathan*, for the purposes of the settlement approval the Counsel Opinion addressed the strengths and weaknesses of the plaintiffs' claims, and the claims of group members more generally. That opinion took into account the evidence that was tendered and given at the trial (and the fact of some expert evidence not being admitted) and the arguments put forward by the defendants in their defence. Counsel were in a strong position to assess the prospects on the individual causes of action.

68 I considered the Counsel Opinion, which (without disclosing the privileged content of the opinion) gave detailed reasons for the conclusion that there was a significantly higher risk that the claims in mistake would not be established than the more limited risks that faced the statutory claims.⁷⁶ I accept that this opinion expressed by both counsel and instructing solicitors was open and had a clearly expressed foundation. This significant difference in the strengths of the legal claims of the group members

⁷⁴ *Camilleri*, [5(e)].

⁷⁵ *Camilleri*, [40].

⁷⁶ As noted in the Ryan Affidavit, [117].



who entered into their loans on or after 15 July 2014 and had the benefit of the statutory claims as well as mistake claims, to those who entered their loans before that date and had claims in mistake only, was a reasonable, rational and fair basis for the differential treatment of the two groups in the loss assessment formula.

Objections of group members relating to differential treatment of group members with 'mistake' claims only

69 It is relevant in this context to consider the limited objections made by group members to the proposed settlement set out above, which primarily related to objections on the basis of the differential treatment of the two classes of group members. The five objectors to this proposed settlement all had entered into their loan contracts before 15 July 2014 and had 'mistake' only claims.⁷⁷ The focus of the objections was that the impugned conduct of dealers and the banks had been wrongful and caused loss regardless of whether the loan contract was entered into before or after 15 July 2014. Considered from the perspective of those group members, the damage was the same if the loan contract had been entered into earlier, and was perhaps greater, given the longer period the claimants in the 'mistake' only group had to wait for resolution.

70 The main difficulty of these objections is that they do not acknowledge the significance to a fair distribution as between group members of the legal risks of not establishing particular claims. The legal limitations applying to the 'mistake' claim only group members such as the application of limitations periods were understood as being at their highest a legal technicality.⁷⁸ It is understandable that group members focus on considerations of substantive or practical fairness. However a settlement responds to the *legal* claims made against a defendant in a proceeding. The strength of a legal cause of action, taking into account defences such as statutory time bars, is plainly relevant to the achievement of any settlement, given the lesser likelihood that defendants will settle weak claims, and the fact that strengths or weaknesses in claims will be taken into account by a defendant in determining an acceptable settlement sum. It must also be relevant to questions of fairness in distribution of that settlement amongst a group

⁷⁷ Transcript 27/08/25, T33.19-22.

⁷⁸ Transcript 27/08/25, T38.12-15.



where some group members do not have the same legal claims open to them as others, or have claims of materially different legal merit. Had the group members with ‘mistake’ only claims brought a separate proceeding, it may have been that no settlement sum at all would have been offered, given the weaknesses identified with those claims.

- 71 Given the significance of the statutory time limitation periods in differentiating between the two groups, it is appropriate to address the specific objection made by Justin Butterfield and to some degree by Paris Arthur that the limitation period should have been calculated from the date on which they became aware of the cause of action, or that it should have been extended.
- 72 The statutory limitation provision in s 180(5) of the *NCCPA* provides that a Court may only make an order for relief under s 180A ‘if the application is made within 6 years of the day the defendant first started engaging in the conduct’. That section does not permit the time limit to be calculated from the time the conduct was discoverable.
- 73 In relation to the *ASIC Act* misleading or deceptive conduct claims, relief is available under s 12GF and s 12GM. Pursuant to s 12GF(2) and s 12GM(5), an application for such relief must be made ‘within 6 years after the day on which the cause of action that relates to the conduct accrued’. The time limitation for actions under s 1041I of the *Corporations Act* is, pursuant to s 1041I(2), to similar effect, that the action ‘may be begun at any time within 6 years after the day on which the cause of action arose’.
- 74 The plaintiffs submit,⁷⁹ citing *Wardley Australia Limited v Western Australia*⁸⁰ that the cause of action accrues at the time actual loss or damage was sustained, and that the appropriate analysis is that loss or damage of the kind alleged by group members was sustained when they entered into the contract and obligations to pay interest were incurred, or at the very latest, when the group member began to pay interest.
- 75 The plaintiffs also submitted, having regard to their alternative position that the cause

⁷⁹ Plaintiff’s Outline of Submissions, [33(b)]; Transcript 27/08/25, T29.3-27.

⁸⁰ *Wardley Australia Limited v Western Australia* (1992) 175 CLR 514, 525 (Mason CJ, Dawson, Gaudron and McHugh JJ).



of action accrued on the first payment of interest, that it would be too difficult administratively to determine what that date was, and thereby which group members would have statutory claims in addition to mistake claims. If the point at which the limitation period was determined to run and thus the point of distinction between the two groups was taken as the date of that group member's first payment of interest, it 'adds another layer of significant complexity to the issues in disputation between the parties'.⁸¹

76 The defendants submitted that the effect of *Wardley* is instead that the point at which actual loss arises is when the loan is drawn down by the group member and paid to the dealer, which was described as being the time at which the car is picked up by the purchaser.⁸² It was not submitted that there was a material difference for the purposes of the distinction between the two categories of group members, those with mistake claims only and those who also had statutory claims.

77 I accept the plaintiffs' submission that to treat the statutory claims as having accrued from a time other than entry into the contract, for the purposes of settlement, would give rise to complex further administrative arrangements and significant additional expense. It is not in the interests of group members to use an alternative date as the date for distinguishing between those group members who have statutory claims and those who have 'mistake' claims only.

78 It is true that it is possible that there are group members for which the difference between the date of signing of the loan contract and that of the first interest payment would be material. If the loan was entered into by the group member shortly before 15 July 2014, but interest was first paid *after* that date, the group member would currently be identified as having their statutory claims barred and having 'mistake' claims only. If the date of the first interest payment was instead taken as the relevant date, that group member would fall within the group which does have statutory claims. Similarly, it is *possible* that there may, for some group members, be a material

⁸¹ Transcript 27/08/25, T29.12-31.

⁸² Transcript 27/08/25, T46.23-T47.5, relying on *Wardley*.



difference between the date on which the contract was entered into and the date of the drawdown of funds (although the time between those two events would presumably be very limited and less than that between entry into the contract and the first interest payment). The evidence does not enable an assessment of whether any group member does in fact fall within either such category. In the case of Mr Butterfield, who raised the objection relating to any statutory claim being treated as barred, it is clear that using the date of the first interest payment or the date of drawdown of funds would make no difference, given that he entered into his loan on 26 July 2013, many months before the relevant date of 15 July 2014. It can safely be assumed that the funds were drawn down and his first interest payment was before that date.

79 In any event, I do not consider that it was inappropriate to select the date on which the contract was entered into as the date on which loss was incurred and the cause of action accrued, and thus as the point of distinction between group members with ‘mistake’ claims only, and those with statutory claims. Although it is not necessary in the context of settlement approval to determine definitively when the cause of action accrued, I consider that the better view is that the time of entry into the loan contract is the time at which actual loss or damage was incurred and the cause of action was complete. The loss or damage was identified as the amount by which the interest rate payable, as set by the loan contract, exceeded the base rate (or a prevailing market rate).⁸³ The payment of interest at that contract rate – inflated by reason of the flex commission arrangements – was fixed by the terms of the loan contract when entered into. The obligation to pay that interest rate arose at that time and was not relevantly contingent.⁸⁴ The loss was of an amount which was ascertainable or capable of calculation.⁸⁵

80 Further, even if there was some doubt about whether it is appropriate to treat actual loss as having been incurred on entering into the contract, rather than as at the date of the first interest payment, or when the loan was drawn down, I consider that it is

⁸³ Amended Statement of Claim, [129(d), (e) and (f)], [136], [144], [145].

⁸⁴ See *Wardley*, 524, 527, 531 (Mason CJ, Dawson, Gaudron and McHugh JJ).

⁸⁵ *Wardley*, 536-537 (Brennan J).



appropriate to use the readily ascertainable date of entry into the loan contract as the relevant date. In a case involving many thousands of group members, it may be necessary to adopt practical solutions with respect to distribution of a settlement. Using the date that the loan was entered into as the date on which statutory claims arose is appropriate, given that the date is relatively easily ascertained from loan documentation held by the group member as well as the defendants. Identifying the date on which the first interest payment was actually made would involve further inquiry, and significant associated expense. That is not, in my view, in the interests of group members as a whole.

81 With respect to any suggestion implicit in Mr Butterfield’s reasons for objection that the statutory limitation period could be extended, there was no mechanism to do this with respect to the statutory claims in this case. Unlike some statutory schemes, neither the *NCCPA* nor the *Corporations Act* or *ASIC Act* provide for mechanisms to extend limitation periods for relevant causes of actions.⁸⁶ Mr Butterfield’s submission to the effect that the limitation period should be calculated from the date on which the cause of action was discoverable, referring to s 27F of the *Limitations of Actions Act 1958* (Vic), is misconceived. That Act does not apply to causes of action under Commonwealth legislation, and s 27F relates to personal injury actions only. That Act and the equivalent legislation in other States and Territories was relied on by the plaintiffs with respect to mistake claims⁸⁷ but can provide no assistance with respect to the statutory claims. Mr Butterfield’s reference to the High Court of Australia authority of *Commonwealth v Cornwell*⁸⁸ also did not support his submission that the accrual of the cause of action could be treated as delayed until it was discoverable. That case concerned a claim in negligence relating to advice an employee had received concerning his eligibility to participate in a Commonwealth superannuation fund. The High Court accepted that the claim accrued when the employee sustained actual loss, which was not until his retirement when the superannuation entitlement would arise

⁸⁶ Transcript 27/08/25, T25.25-T27.10

⁸⁷ Amended Reply of the Second Plaintiff dated 16 September 2024, [2].

⁸⁸ (2007) 229 CLR 519.



pursuant to the relevant statutory provisions.⁸⁹ The conclusion did not turn on any acceptance that the time such a cause of action accrues is the time that it is discoverable.

82 Having considered the objections made to the approval of the settlement, I was satisfied that the matters raised did not justify declining to approve the settlement and its proposed distribution.

Conclusion – fairness and reasonableness inter se

83 In these circumstances, I accepted that the proposed distribution is reasonable and fair between the two classes of group members, having regard to the fact that group members who entered into loan contracts prior to 15 July 2014 had claims in mistake only. Those claims, for reasons clearly explained in the Counsel Opinion, faced significantly larger risks and significantly lower prospects of success. It is appropriate that this be reflected in the distribution.

Other relevant matters

84 The amended settlement distribution scheme provides for a minimum distribution amount of \$20, consistent with the settlement distribution scheme approved in *O'Brien* and *Nathan*. Entitlements under \$20 will not be distributed to group members and will be included in the residual distribution amount to be redistributed to other group members. The rationale for this is that the administration costs associated with distributing settlement funds will exceed the minimum distribution amount.⁹⁰ This was a fair and reasonable approach, to ensure that expenditure on administration costs was not disproportionate to returns to group members.

85 The scheme also provides for returns to Westpac and St George of any residual settlement sum if it is uneconomical to be further distributed among eligible group members on a pro rata basis.⁹¹ This is also a sensible and reasonable solution for a potential residual amount that cannot be accurately predicted in advance.

⁸⁹ (2007) 229 CLR 519, [18]-[19] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

⁹⁰ Ryan Affidavit, [136].

⁹¹ Plaintiffs' Outline of Submissions, [59].



Deductions from the settlement sum

Group costs orders

86 The effect of the group costs order made by Nichols J in March 2023 is that Maurice Blackburn would be paid \$31,850,000 for legal costs from the settlement sum.⁹² It is necessary, in determining whether to approve the settlement, to also determine whether that group costs order should be varied for any reason.

Considerations on whether a group costs order should be varied

87 Section 33ZDA(3) allows the Court at its discretion to make orders amending a group costs order at any time during the course of the proceeding, which has recently been considered in the context of settlement approval applications.⁹³ I also considered this issue in the settlement approval applications in *O'Brien* and *Nathan*, which involved the same group costs order as made in this proceeding. The authorities to date (which have considered the question of whether a group costs order should be varied in the context of a settlement approval application) have identified the following important considerations:

- (a) the discretionary power allows the Court to ensure that the terms of the order remain appropriate having regard to updated information available to the Court;⁹⁴
- (b) exercise of this power does not involve a *de novo* hearing, rather, it involves consideration of the reasons for which the Court made the order in the first instance,⁹⁵ and
- (c) the Court should ensure that the costs payable under the order remain appropriate in the context of the effort and investment of legal practice,

⁹² Plaintiffs' Outline of Submissions, [68].

⁹³ *Allen v G8 Education Ltd*; *Fuller v Allianz (Settlement Approval)*; *Anderson-Vaughan v AAI Limited* [2025] VSC 469 (Matthews J); *Gehrke v Noumi Ltd* [2025] VSC 373 (Delany J).

⁹⁴ *Fuller v Allianz (Settlement Approval)*, [153]; *Mumford v EML Payments Limited* [2022] VSC 750, [94]-[95] (Delany J); *Gehrke v Noumi*, [190]-[192] (Delany J).

⁹⁵ *Allen v G8 Education*, [63(d)]; *Fuller v Allianz (Settlement Approval)*, [154]-[155]; *Gehrke v Noumi*, [190]-[191].



duration of proceedings and risks undertaken.⁹⁶

88 Counsel for the plaintiffs are under an obligation to notify the Court of any matters which they consider would render the group costs order excessive and therefore require a variation pursuant to s 33ZDA(3).⁹⁷ At the settlement approval hearing, counsel for the plaintiffs expressly acknowledged this obligation and confirmed that they were aware of no circumstances that suggested the order should be varied.⁹⁸ In this case, as was the case in *O'Brien* and *Nathan*, it was unnecessary for any separate counsel or contradictor be appointed to address this issue.

Reasons for making the group costs order

89 Justice Nichols made the group costs order in this proceeding and in the two related proceedings, *O'Brien* and *Nathan*, emphasising the following considerations:

- (a) the group costs order (which may be later varied if no longer appropriate) would ‘guarantee to group members recovery of 75.5% of any settlement sum’ protecting against legal costs and fees disproportionately eroding compensation;⁹⁹
- (b) the group costs order would provide certainty to group members as opposed to the alternative funding model which would require a common fund order at the conclusion of the proceeding (where the Court’s power to do so was unsettled at the time the group costs order was made);¹⁰⁰
- (c) the group costs order would provide from the outset, equality between group members in sharing liability for legal and funding costs;¹⁰¹
- (d) the group costs order rate was superior to the alternative funding rate (of 25% subject to obtaining a common fund order), which was itself a ‘good deal’ as assessed by reference to publicly available data that established the mean and

⁹⁶ *Allen v G8 Education*, [63(e)]; *Fuller v Allianz (Settlement Approval)*, [154]-[155].

⁹⁷ *Fuller v Allianz (Settlement Approval)*, [165].

⁹⁸ Transcript 27/08/25, T41.1-14.

⁹⁹ *Fox v Westpac Banking Corporation (No 2)* [2023] VSC 95 (Nichols J), [45]-[46].

¹⁰⁰ *Fox v Westpac (No 2)*, [47], [50]-[52].

¹⁰¹ *Fox v Westpac (No 2)*, [51].



average returns to group members in class actions with third-party funding;¹⁰² and

- (e) the group costs order could reasonably be regarded as promoting the alignment of interests of lawyers and group members ensuring maximum recoveries and efficiency.¹⁰³

Plaintiffs' submissions

90 The plaintiffs submitted that the current circumstances fall within those that were contemplated by the Court at the time that the group costs order was made, and that the group costs order remained appropriate for the following reasons.¹⁰⁴

- (a) Maurice Blackburn bore considerable risk in this proceeding in place of the plaintiffs. The risk was evidenced by the fact that the proceeding ran to completion and was strongly defended by the defendants, involving contested interlocutory applications and a prolonged mediation process with settlement occurring only after judgment had been reserved.
- (b) Significant costs have been incurred by Maurice Blackburn over the litigation period. As disclosed before the Court on the group costs order application, Maurice Blackburn had a private funding arrangement with Vannin in respect of this litigation pursuant to which Maurice Blackburn is obligated to pay Vannin 50% of any contingency fee it receives in this proceeding.
- (c) The settlement occurred within the range confidentially estimated in the evidence before the Court on the group costs order application.
- (d) The rate of the group costs order has not been objected to by any group member, notwithstanding that the rate and actual dollar sum to be deducted from the settlement sum was disclosed in the settlement notice.
- (e) The rate of the group costs order, being at 24.5%, remains mid-range in the

¹⁰² *Fox v Westpac (No 2)*, [49].

¹⁰³ *Fox v Westpac (No 2)*, [53].

¹⁰⁴ Plaintiffs' Outline of Submissions, [73]-[81].



context of contemporary group costs orders, based on empirical research in the Morabito Report.

- (f) The structural benefits of the group costs order remain undisturbed where the funding model remains fair and equitable and provides certainty and transparency to the plaintiffs and group members throughout the proceeding as to the legal costs.
- (g) There have been no circumstances that have arisen that would render the group costs order excessive and contrary to group members' interests.

Conclusion – there is no reason to vary the group costs order

91 There is no reason here to vary the rate in the group costs order made by Nichols J.

92 I accept that the risk undertaken by Maurice Blackburn was significant, having regard to the claims and defences pleaded by Westpac and St George and the very late stage of the proceeding in which it settled, after judgment was reserved. The strongly defended proceeding involved multiple interlocutory applications, some of which were resolved against the plaintiffs (including the application to exclude the evidence of two of the plaintiffs' experts, referred to at [62] above). It is relevant to note, as counsel did at the hearing, that this proceeding was the first to be commenced of the three related proceedings, but was the last to settle.¹⁰⁵

93 I also take into consideration the opinions expressed in the confidential Counsel Opinion which addresses both the strengths and the weaknesses of the claims.

94 Although the risk of establishing the plaintiffs' claims was shared with Vannin by reason of the funding agreement, Maurice Blackburn now must account to Vannin for 50% of the contingency fee component of the costs amount which will be paid.

95 I accept that significant costs were incurred. This is demonstrated by the fact that the litigation proceeded through numerous interlocutory applications to a fully contested

¹⁰⁵ Transcript 27/08/25, T13.17-19.



trial and confirmed by the plaintiffs' confidential evidence.¹⁰⁶

96 It is also relevant that although five group members objected to the settlement of this proceeding, no group members objected to the settlement on the basis that the percentage rate of the group costs order was unreasonable or inappropriate, despite the rate and actual sum having been disclosed in the settlement notice.

97 More generally, the rate of the group costs order remains within the range of what has been regarded as reasonable, having regard to contemporary data about orders in this and other jurisdictions. The Morabito Report, as at February 2025, identified 24.5% as the median rate for group costs orders in 2022, 2023 and 28.75% for group costs orders in 2024.¹⁰⁷ Orders made in 2025 have been of a similar or higher percentage.¹⁰⁸

98 Further, it would not be appropriate to vary the percentage rate of the group costs order where the settlement itself is within the estimated range of settlement outcomes as considered by the Court at the time of the group costs order application. The proceeding has proceeded in the course broadly anticipated by the plaintiffs' solicitors and by reference to which the Court made the group costs order. It would undermine the purposes served by the group costs order of transparency and certainty now to vary the order, where there has been no material alteration to the circumstances anticipated when the order was made.

Scheme Administrator

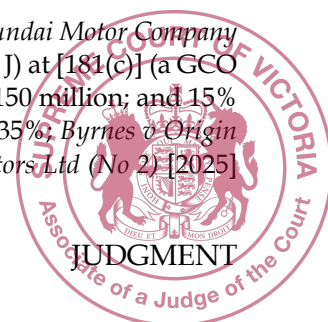
Appointment of Scheme Administrator

99 I was satisfied that it was appropriate that Maurice Blackburn be appointed Scheme Administrator. The plaintiffs adduced evidence indicating Maurice Blackburn's extensive experience in administering the settlement of group proceedings, in

¹⁰⁶ Ryan Affidavit, [190].

¹⁰⁷ Morabito Report, 9; Ryan Affidavit, Exhibit RER-12, 109.

¹⁰⁸ *Clarke v JB Hi-Fi Group Pty Ltd* [2025] VSC 288 (Nichols J), [2] at 30%; *Edwards v Hyundai Motor Company Australia Pty Ltd*; *Sims v Kia Australia Pty Ltd (Ruling No 3)* [2025] VSC 429 (Osborne J) at [181(c)] (a GCO at the rate of 24.75% up to \$120 million in return; 20% between \$120 million and \$150 million; and 15% over \$150 million); *Laricchia v WiseTech Global Ltd* [2025] VSC 482 (Croft J), [61] at 35%; *Byrnes v Origin Energy Ltd* [2025] VSC 504 (Waller J), [41] at 30%. See generally *McCoy v Hino Motors Ltd (No 2)* [2025] VSC 553 (Delany J).



particular the experience and expertise of its staff in the settlement administration team and the systems and processes implemented by that team.¹⁰⁹

100 The plaintiffs' evidence was that since advertisement of settlement, there had been approximately 2,700 email enquiries and 5,500 telephone calls and voicemail messages to Maurice Blackburn in the period between 20 June 2025 and 23 July 2025, querying various matters including as to the registration process, requests for assistance in identifying car loan details, and about the settlement distribution scheme.¹¹⁰ This experience of staff in responding to queries about this proceeding and the proposed settlement will provide a further benefit in Maurice Blackburn administering the scheme.

101 Evidence of this nature was also before the Court in *O'Brien* and *Nathan*. I concluded in those cases that the experience of Maurice Blackburn's team, their specialised systems and the fact that they will have ready access to legal staff at Maurice Blackburn who conducted the proceeding in the event any factual or legal issues arise, meant the administration would be conducted efficiently and effectively.¹¹¹

Settlement administration costs

102 The plaintiffs sought approval for \$3,012,901.10 (inclusive of GST and costs in preparing the Costs Report of Ms Rosati) to be paid to Maurice Blackburn as settlement administration costs. Ms Rosati was appointed as the special referee for the purposes of estimating the reasonable costs likely to be incurred during administration of the settlement.¹¹²

103 Ms Rosati's report was provided to the Court on a confidential basis and analysed the costs of the work that Maurice Blackburn had instructed would be involved in the settlement administration process. Ms Rosati was satisfied that the rates proposed, and the allocation of work between staff of differing degrees of seniority, were fair and reasonable, and that the settlement administration would involve the significant

¹⁰⁹ Ryan Affidavit, [103]-[106].

¹¹⁰ Ryan Affidavit, [48]-[49].

¹¹¹ *Nathan*, [89]-[93].

¹¹² Orders of Harris J made on 16 May 2025, orders 22-23.



amount, and categories, of work estimated by Maurice Blackburn. The work involved is extensive, involving multiple phases including data transformation and assessment to confirm eligibility of group members to receive distributions, calculation of distribution amounts and distribution of assessment notices, and collection of bank account details from group members.

104 As noted above at [100] the plaintiffs also gave evidence of the extensive work already undertaken in responding to queries of group members. This provides some indication of the volume of queries that may arise in the course of administration of the settlement.

105 In these circumstances, I accept that the settlement administration sum sought to be deducted from the settlement sum of \$3,012,901.10 (inclusive of GST) is within the range of what is a fair and reasonable cost of administration.

Plaintiffs' reimbursement payments

106 The settlement agreement involved a deduction from the settlement sum of \$40,000 to be paid to each of the plaintiffs, Ms Alannah Fox and Ms Bridget Nastasi, as compensation for the time, inconvenience and stress involved in the discharge of their responsibilities as representative plaintiffs.

107 The evidence of Mr Ryan was that each plaintiff played an important role in the proceeding and spent significant time engaging and working on the case. In his opinion they undertook their roles as representative plaintiffs conscientiously over the five years the proceeding was on foot. The plaintiffs both attended trial, gave evidence and were extensively cross examined. The plaintiffs each provided comprehensive instructions throughout the proceeding and in relation to settlement, and produced documents for use in evidence and in response to discovery orders and to prepare affidavits.¹¹³

108 The Morabito Report reviewed compensation payments to representative plaintiffs in group proceedings, which are frequently made, in the Federal Court of Australia,

¹¹³ Ryan Affidavit, [170]-[174].



Supreme Court of NSW and Supreme Court of Victoria. The data covers payment to both corporate plaintiffs and individuals. The median payment is \$20,000 since December 2004 with payments ranging from \$2,000 to \$268,243.¹¹⁴

109 The compensation sum was disclosed in the settlement notice published pursuant to the Court's orders on 16 May 2025 and there has been no objection by any group member to this sum.

110 I accept that the compensation payment is appropriate considering the role the plaintiffs have had to discharge over the five years of the proceeding. The role involved a significant amount of responsibility in circumstances where the proceeding ran to trial and each plaintiff gave evidence and was cross examined. I also accept the plaintiffs' submission that the sum is fairly modest and only a small degree higher than the average calculated over a 20-year period, which is likely not significant having regard to inflation.¹¹⁵

Conclusion

111 For the reasons above, I was satisfied that the settlement was fair and reasonable and in the interests of the group members as a whole and made the orders sought by the plaintiffs on 27 August 2025, which are set out in Annexure A.

112 Having regard to all the circumstances, the settlement sum was within the appropriate range and the proposed distribution of that sum between the two classes of group members was fair and reasonable. I was satisfied the deductions sought from the settlement sum were appropriate and the process by which the settlement was reached satisfied the relevant procedural fairness requirements, ensuring group members had a fair opportunity to participate in and / or object to the settlement.

¹¹⁴ Ryan Affidavit, [175].

¹¹⁵ Plaintiffs' Outline of Submissions, [90].



CERTIFICATE

I certify that this and the 35 preceding pages are a true copy of the reasons for judgment of the Honourable Justice Harris of the Supreme Court of Victoria delivered on 15 October 2025.

DATED this fifteenth day of October 2025.



.....
Associate



ANNEXURE A

THE COURT ORDERS THAT:

Confidentiality

- 1 Pursuant to s 18(1)(a) of the *Open Courts Act 2013* (Vic) and/or the Court's inherent jurisdiction, and subject to any further order of the Court:
- (a) the documents or parts of documents identified in Schedule A to this Order (**Confidential Materials**) be confidential and, absent prior order of the Court, not be published or disclosed to any other person other than:
 - (i) her Honour Justice Harris (**Settlement Judge**), staff of the Settlement Judge, and staff in the Court Registry necessarily involved in the filing or administration of the Confidential Materials (**Approved Persons**);
 - (ii) the plaintiffs' solicitors and counsel; and
 - (iii) representatives of Vannin Capital Investments (Australia) Pty Limited (**Vannin**) with involvement in the proceeding.
 - (b) the plaintiffs file in the Registry unredacted copies of the documents being or containing the Confidential Materials, such documents to be marked as confidential on RedCrest;
 - (c) the plaintiffs have leave to file, and serve on the defendants, copies of the documents being or containing the Confidential Materials, redacted to conceal the Confidential Materials; and
 - (d) the plaintiffs be otherwise excused from any requirement to file or serve the Confidential Materials.

Settlement approval

- 2 Pursuant to s 33V(1) and (2) of the *Supreme Court Act 1986* (Vic) (the Act), the:



- (a) settlement of the proceeding is approved on the terms set out in:
- (i) the deed of settlement dated 2 May 2025; and
 - (ii) the Amended settlement distribution scheme exhibited at page 76 to exhibit RER-12 to the affidavit of Richard Erle Ryan dated 15 August 2025 (**SDS**); (together, the **Settlement**);
- and

- (b) the SDS is to be given effect.

3 Pursuant to s 33ZB of the Act, the persons affected and bound by the Settlement are the plaintiffs, defendants, and persons described in [1] of the Amended Statement of Claim filed on 28 August 2024, other than such persons who opted out of and have not been reinstated in the proceeding (**Group Members**).

4 The claims of the plaintiffs and Group Members in the proceeding be dismissed.

5 Pursuant to s 33ZB and s 33ZF of the Act, each of the defendants and their related bodies corporate, present and former directors, officers, partners, servants, contractors, insurers and agents be released by the plaintiffs and each of the Group Members from the claims made by the plaintiffs and/or on behalf of the Group Members in the proceeding.

6 Pursuant to s 33V(2) of the Act, the following amounts are approved for the purposes of the SDS:

- (a) the sum of \$31,850,000 as the “plaintiffs’ legal costs and disbursements”;
- (b) the sum of \$3,012,901.10 for “administration costs”; and
- (c) the sum of \$40,000 to each of the plaintiffs as the “plaintiffs’ reimbursement payment”.

Scheme Administrator

7 Pursuant to s 33ZF of the Act, Maurice Blackburn be appointed as the administrator



of the SDS (**SDS Administrator**), with the powers and immunities set out in the SDS.

8 Pursuant to s 9.06 of the of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) (**Rules**), the SDS Administrator be joined as a party to the proceeding for the limited purpose of exercising the SDS Administrator's liberty to apply for the purposes of order 9 below and to give effect to orders 2(b) and 6 above.

9 The SDS Administrator has liberty to apply in respect of any matter arising in or in relation to the administration of the SDS, on not less than three clear business days' notice to each party to the proceeding and the Court.

Administration and dismissal

10 The SDS Administrator shall report to the Settlement Judge regarding the performance of the SDS, including the costs incurred and distributions made, every six months.

11 Upon the SDS Administrator being satisfied that the implementation of the SDS has been completed, within 30 business days:

- (a) inform the parties in writing that this has occurred;
- (b) the SDS Administrator shall deliver to the Court, addressed to the Associate to the Settlement Judge – a report outlining:
 - (i) the distributions made to Group Members, in an itemised format;
 - (ii) time taken for distributions;
 - (iii) amounts charged to each group member for distributions; and
 - (iv) what amounts, if any, were unclaimed by Group Members and what, if anything, has been done with those amounts; and
- (c) the SDS Administrator shall notify the defendants that the steps in order 11(b) above have been taken.

12 The proceeding be dismissed with effect as and from the date of the completion of the



administration of the SDS, being the date on which the final distribution under the SDS is made by the SDS Administrator.

Costs

- 13 There be no order as to the costs of the proceeding.
- 14 All inter partes costs orders in the proceeding as between the plaintiffs, the solicitors for the plaintiffs, and the defendants be vacated. This order does not affect the group costs order (being order 1 made by the Honourable Justice Nichols on 9 March 2023).

Group members (registration and reinstatement)

- 15 The persons listed in Schedule B be deemed to have registered to participate in this proceeding.
- 16 The persons listed in Schedule C be reinstated as group members in this proceeding pursuant to s 33J(6) of the Act.

