IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT

Not Restricted

S ECI 2023 05830

Jeremey Clarke — Plaintiff

v

JB Hi-Fi Group Pty Ltd (ACN 093 114 286) — Defendant

JUDGE:	Delany J
WHERE HELD:	Melbourne
DATE OF HEARING:	6 October 2025; aide memoires dated 7 and 9 October 2025.
DATE OF RULING:	23 October 2025
CASE MAY BE CITED AS:	Clarke v JB Hi-Fi Group Pty Ltd
MEDIUM NEUTRAL CITATION:	[2025] VSC 664

PRACTICE AND PROCEDURE — Group proceedings — 'Soft class closure' orders — Whether appropriate or necessary to ensure that justice is done — Lack of available contact information for approximately 60 percent of group members — No satisfactory proposal for communicating notice of class closure to those persons — Class closure unlikely to assist parties to resolve proceedings — *Supreme Court Act 1986* (Vic), ss 33V, 33X, 33Y, 33ZF, 33ZG – *Lendlease Corporation Ltd v Pallas* (2025) 423 ALR 23; [2025] HCA 19; *Fox v Westpac; O'Brien v ANZ; Nathan v Macquarie* [2023] VSC 414; *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2017) 252 FCR 1, applied; *Anderson-Vaughan v AAI Limited* [2024] VSC 65, referred to.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Rachel Doyle SC with James Page	Maurice Blackburn
For the Defendant	Andrew McRobert	Herbert Smith Freehills Kramer

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HIS HONOUR:

A The application

1 These reasons concern an application by the defendant ('JB Hi-Fi') for 'soft class closure' in a group proceeding pursuant to ss 33ZF and 33ZG of the *Supreme Court Act 1986* (Vic) ('Act').

2 A soft class closure order is used to describe an order which requires group members to register as a precondition to an entitlement to share in a settlement reached at or following a mediation and prior to a date shortly prior to the commencement of the trial. A soft class closure order does not remove group members who do not register from the represented class and does not affect the entitlement of any unregistered group member to benefit from any judgment in favour of the plaintiff or any settlement arrived at after the end of the soft class closure period.[1]

3 In *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited*,[2] the Full Court of the Federal Court of Australia said:[3]

> [74] … if a class closure order operates to facilitate the desirable end of settlement, it may be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding and therefore appropriate under s 33ZF of the Act. The courts have accepted on numerous occasions that, in order to facilitate settlement, it is appropriate to make orders to require class members to come forward and register in order to indicate a willingness to participate in a future settlement, and to make orders that class members be bound into the settlement but barred from sharing in its proceeds unless they register …
>
> [75] The rationale behind such class closure orders is that a requirement for class members to register their claims will facilitate settlement, because it allows both sides to have a better understanding of the total quantum of class members' claims, permits the settlement amount to be capped by reference to the number of class members, and assists in achieving finality (to the extent the Pt IVA regime permits). A class closure order that precludes class members, who neither opt out nor register, from sharing in a subsequent settlement may facilitate settlement, and

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1 See the description of the effect of a soft class closure order by Murphy and Lee JJ in *Parkin v Boral Ltd* [2022] FCAFC 47; (2022) 291 FCR 116.

2 (2017) 252 FCR 1; [2017] FCAFC 98.

3 *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* (2017) 252 FCR 1; [2017] FCAFC 98, [74]–[79] (Jagot , Yates and Murphy JJ) ('*Treasury Wine*') (citations omitted).

therefore be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding.

[79] Whether it is appropriate to order class closure is a question of balance and judicial intuition. The Court must take into account the interests of the class as a whole in requiring class members to take steps to facilitate settlement, and consider the surrounding circumstances including the point the case has reached, the attitude of the parties, and the complexity and likely duration of the case. This will often involve striking a balance between the conflicting interests of class members.

4 This proceeding is a group proceeding seeking compensation on behalf of group members who purchased extended warranties from JB Hi-Fi ('Extended Warranties'). The proceeding alleges that JB Hi-Fi engaged in misleading or deceptive conduct or unconscionable conduct and/or that group members purchased the warranties on the basis of a mistake as to value.

5 The Extended Warranties relate to 12 broad categories of goods ranging from refrigerators and televisions to gaming consoles and fit/smart watches made by a wide variety of manufacturers.

6 The claim period extends over nearly 13 years, between 1 January 2011 to 8 December 2023 ('Claim Period'). The principal claim period concerns persons who purchased Extended Warranties between 9 December 2017 and 8 December 2023 ('Principal Claim Period'). The mistake claim period concerns persons who purchased Extended Warranties between 1 January 2011 and 8 December 2017 and who held a particular (mistaken) state of mind at the time of purchase of an Extended Warranty ('Mistake Claim Period').

7 The Extended Warranties comprise 'Extended Care products' sold between 1 January 2011 and February 2022 and 'Extra Care products' sold between February 2022 and 8 December 2023.

8 Based upon the sale of approximately 6.7 million Extended Care products and approximately 2.1 million Extra Care products during the Claim Period which were not subsequently cancelled, the plaintiff estimates the size of the class is likely to be approximately 8 million persons. That is less than the total number of Extended Warranty transactions which occurred during the Claim Period because it may be the case that some customers purchased Extended Warranties in respect of more

than one product on the same day or purchased more than one Extended Warranty during the Claim Period.

9 On 23 September 2025 I made timetabling orders for the further conduct of the proceeding, including fixing the proceeding for an initial trial of common issues commencing on 5 October 2026. I made orders concerning the proposed form of opt out notices and the process for distribution of those notices with any dispute as to those matters to be determined on the papers after 28 November 2025. I ordered that any application by the defendant for soft class closure be filed and served by 25 September 2025.

10 By its summons dated 25 September 2025 ('Summons'), JB Hi-Fi seeks orders including the following:

> [1] Subject to further order, pursuant to ss 33ZF and 33ZG of the *Supreme Court Act 1986* (Vic) (**Act**):
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> (a) a date be fixed by the Court as the date by which group members must register their claims in the proceeding (**Registration Deadline**), such date to be the same as the date by which group members may opt out of the proceeding;
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> (b) the proposed form of notice which the plaintiff is to serve on the defendant pursuant to paragraph 10 of the orders made on 23 September 2025 (**Opt Out Notice**), shall also contain the plaintiff's proposed wording by which group members are given notice of the Registration Deadline;
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> (c) the process for distributing the Opt-Out Notice, which the plaintiff is to serve on the defendant pursuant to paragraph 10 of the orders made on 23 September 2025, shall also contain:
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> (i) the plaintiff's proposed process by which group members are to register their claims in the proceeding by the Registration Deadline; and
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> (ii) the plaintiff's estimate of the costs of distribution and any proposal as to who shall bear those costs;
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> (d) any dispute in relation to the matters in sub-paragraphs (b) and/or (c) above is to be dealt with by the process set out in paragraphs 11 and 12 of the orders made on 23 September 2025, except that each party may file an additional submission of no more than two A4 pages in support of that party's position on the matters in sub-paragraphs (b) and (c) above;
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> (e) only group members who are registered in accordance with the orders of the Court to be made in respect of the matters in sub-

paragraphs (b) and (c) above shall be entitled to any relief or payment arising from an agreement to settle the proceedings where that agreement is reached at any time between the date of the Opt-Out Notice and the day prior to the commencement of the trial (and which agreement is subsequently approved by the Court) (**Registered Group Members**);

(f) any group member who by the Registration Deadline does not opt out and who is not a Registered Group Member, will remain a group member for all purposes of this proceeding (including for the purpose of being bound by any judgment in this proceeding and being entitled to participate in any award of damages by the Court) but shall not, without leave of the Court, be permitted to seek any benefit pursuant to any such settlement (subject to Court approval) of this proceeding.

11 The plaintiff opposes the orders sought by JB Hi-Fi. The plaintiff's primary position is that the Court should not make soft class closure orders. He submits that opt out for which provision was made in the 23 September 2025 orders should be undertaken using the group member contact details which are presently available to JB Hi-Fi, combined with general advertising. The plaintiff submitted, in the alternative that if the Court is minded to make orders embodying a soft class closure regime, it should not do so prior to JB Hi-Fi being required to provide more information in relation to all potential sources of information and data concerning group members.

12 There is significantly greater contact information available in respect of the Principal Claim Period group members than is the case in respect of the Mistake Claim Period group members. That being the position, during the hearing I raised the possibility of a soft class closure order being made in respect of the Principal Claim Period group members only. Neither party sought to pursue that option as an appropriate means of disposing of the application.

13 In light of submissions made by the plaintiff that additional contact information for group members might be available from the Scheme Administrators and/or Underwriters, I invited JB Hi-Fi to seek some short additional time to file evidence addressing whether additional group member contact information could be obtained from those sources. JB Hi-Fi did not seek to avail itself of that opportunity. Similarly, JB Hi-Fi did not seek additional time to provide group member contact information from an internal JB Hi-Fi database called Solvup, which the plaintiff

apprehended may be an additional source of contact information based on earlier communications between the parties.

14 For the reasons that follow I do not consider a soft class closure order is appropriate or necessary in the interests of group members to ensure that justice is done in this proceeding.

B The legislation and the principles

15 Section 33ZF of the Act provides:

> **33ZF General power of court to make orders**
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> In any proceeding (including an appeal) conducted under this Part the Court may, of its own motion or on application by a party, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

16 As Gordon and Steward JJ recently noted in *Lendlease Corporation Ltd v Pallas*,[4] concerning the New South Wales equivalent to s 33ZF of the Act,[5] the section 'confers a broad power' to make orders in a group proceeding brought pursuant to Part 4A of the Act, including orders which oblige group members to take positive steps in the proceeding.[6]

17 Section 33ZG of the Act expressly provides:

> **33ZG Order may specify a date by which group members must take a step**
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> Without limiting the operation of section 33ZF, an order made under that section may—
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> (a) set out a step that group members or a specified class of group members must take to be entitled to—
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> (i) any relief under section 33Z; or
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> (ii) any payment out of a fund constituted under section 33ZA; or
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> (iii) obtain any other benefit arising out of the proceeding—

4 (2025) 423 ALR 23; [2025] HCA 19 ('*Lendlease*').
5 *Civil Procedure Act 2005* (NSW) s 183.
6 *Lendlease Corporation Ltd v Pallas* (2025) 423 ALR 23; [2025] HCA 19, [65] (Gordon and Steward JJ) citing *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469, 482–483, [47]–[52] (Beach J).

irrespective of whether the Court has made a decision on liability or there has been an admission by the defendant on liability;

(b) specify a date after which, if the step referred to in paragraph (a) has not been taken by a group member to whom the order applies, the group member is not entitled to any relief or payment or to obtain any other benefit referred to in that paragraph.

18 Section 33X of the Act is concerned with notices. Sections 33X(4) and (5) are in the following terms:

(4) Unless the Court is satisfied that it is just to do so, an application for approval under section 33V must not be determined unless notice has been given to group members.

(5) The Court may, at any stage, order that notice of any matter be given to a group member or group members.

19 Section 33Y is concerned with the form and content of notices. Sections 33Y(3) and (4) are in the following terms:

(3) An order under subsection (2) may require that notice be given by means of press advertisement, radio or television broadcast, or by any other means.

(4) The Court must not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.

20 It is well established that the Court has power to make orders for registration and for soft class closure pursuant to s 33ZF(a)(i) of the Act.

21 In *J Wisbey & Associates Pty Ltd v UBS AG (No 2)*,[7] Beach J said:[8]

> The relevant considerations in this context can include whether it is in the interests of group members as a whole to require registration before any prospective settlement is on the table, the point which the proceeding has reached, the attitude of the parties, the complexity and likely duration of the case, with protracted litigation and greater complexity increasing the interests of group members in avoiding litigation risk through achieving a settlement, whether group members have adequate notice of the change and reasonable time to decide whether to register, and whether an estimate of the size and number of claims can be made.

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7 [2024] FCA 147 (*J Wisbey*).

8 *J Wisbey & Associates Pty Ltd v UBS AG (No 2)* [2024] FCA 147, [69] (Beach J).

22 The principles to be applied on an application for soft class closure are those set out by Nichols J in *Fox v Westpac; O'Brien v ANZ; Nathan v Macquarie* ('*Fox*').[9] In *Anderson-Vaughan v AAI Limited*,[10] I applied those principles when determining in that case that it was 'appropriate or necessary' to make a soft class closure order.[11] It is unnecessary to repeat the statements of principle in *Fox*.

23 In *Lendlease*, Gageler CJ, Gleeson and Jagot JJ made the following observations concerning registration in the context of group proceedings:[12]

> [18] In contrast, being "registered" or "unregistered" as a group member is not a part of the statutory scheme. The concept of "registering" as a group member is a result of the practical operation of several aspects of the statutory scheme. The statutory process of a group member opting out of group membership means that the representative plaintiff and the representative plaintiff's lawyers will know the number of people who are not group members but, without something more, will not know the number of group members. In some cases, estimating the number of group members with a reasonable degree of accuracy may be simple. In other cases, estimating the number of group members with a reasonable degree of accuracy may be impossible. The representative plaintiff and the representative plaintiff's lawyers have an interest in being able to estimate the number of group members with a reasonable degree of accuracy for several purposes, including: negotiating an appropriate settlement (for example, to ensure that the settlement negotiated involves an amount appropriate for distribution between all participating group members); facilitating the Court approving the settlement; […].
>
> [19] The defendant and the defendant's lawyers also have an interest in being able to estimate the number of group members with a reasonable degree of accuracy for the same reasons as the representative plaintiff and the representative plaintiff's lawyers.. From the perspective of the defendant and the defendant's lawyers, facilitating registration of group members' participation in the representative proceeding enables the defendant and the defendant's lawyers, in particular, to: (a) better estimate the defendant's total potential liability to those who are group members (and its potential liability to those who opt out of the representative proceeding in order to preserve their own cause of action against the defendant); (b) negotiate a settlement with the representative plaintiff with greater confidence as to that total potential liability, including by minimising the risk of group members who have neither registered their participation in nor opted out of the representative proceeding, after settlement, seeking to benefit from the terms of the settlement; and (c) by maximising the number of group

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9 [2023] VSC 414, [15]–[30] (Nichols J) ('*Fox*').

10 [2024] VSC 65 ('*AAI*').

11 *Anderson-Vaughan v AAI Limited* [2024] VSC 65, [31] (Delany J).

12 *Lendlease Corporation Ltd v Pallas* (2025) 423 ALR 23; [2025] HCA 19, [18]–[19] (Gageler CJ, Gleeson and Jagot JJ).

> members known to the defendant and the defendant's lawyers before a settlement is negotiated, ensuring the settlement can be tailored accordingly and ensuring that the maximum number of group members are bound by any approved settlement in accordance with s 179(b) of the CPA. From the perspective of the defendant and the defendant's lawyers, for example, it would be undesirable: to negotiate a settlement with a relatively small proportion of the potential group members; and after negotiating such a settlement and seeking approval for it, to become aware of numerous other group members who either want to share in or increase the settlement amount or want to be permitted to opt out of the proceeding in order to preserve their own cause of action against the defendant.

24 The critical question is whether the making of a soft class closure order, which requires group members to register in order to participate in any settlement reached at mediation prior to the trial, is 'appropriate or necessary to ensure that justice is done in the proceeding'.[13]

C **The evidence and the submissions**

25 There are certain matters which are either agreed or largely agreed between the parties, or which are not factually in dispute.

26 First, if a soft class closure order is made, registration should occur concurrently with opt out such that the time period by which group members must either opt out or register is the same.

27 Second, the majority of class actions settle prior to judgement. Ruth Overington, a partner of Herbert Smith Freehills Kramer, gave evidence that every class action that she has been involved in, of which there have been a large number in this Court, in the Supreme Court of New South Wales and in the Federal Court of Australia, have all settled prior to judgement. Rebecca Gilsenan, a Principal of Maurice Blackburn, gave evidence that Maurice Blackburn has conducted approximately 18 consumer finance, banking, superannuation and insurance class actions, all of which have been through opt out processes, some of which have been through registration processes, and all of which have settled.

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13 *Supreme Court Act 1986* (Vic) s 33ZF.

28 Third, in the event a settlement is reached, registration by group members who wish to participate in that settlement will be required to take place before any settlement approval hearing pursuant to ss 33V and 33ZF of the Act.

29 Fourth, the class in this case is very large in terms of the actual number of group members (up to approximately 8 million persons). The class is also very large when compared to other group proceedings.

30 Fifth, the transaction data discovered or to be discovered by JB Hi-Fi by 31 October 2025 records every transaction involving an Extended Warranty during the Claim Period including:

(a) the date of each transaction;

(b) the details of the primary consumer goods purchased, including manufacturer and model;

(c) the price of the primary consumer good;

(d) the type of Extended Warranty which was purchased (being a repair or replacement warranty);

(e) the price paid for the Extended Warranty;

(f) the store where the transaction occurred; and

(g) where available, the mobile telephone number, and/or email address of the purchaser.

31 Sixth, JB Hi-Fi estimates that it holds the contact details in relation to approximately 3,020,000 unique potential group members, comprising:

(a) 2,960,000 unique phone numbers; and

(b) 1,610,000 unique email addresses.

32 While such contact details are held, JB Hi-Fi is unable to guarantee that in each instance the information held is current, complete or accurate. For example,

approximately 11,000 phone numbers are not mobile phone numbers and approximately 4,000 mobile phone numbers are longer than 11 digits.

33 Seventh, the level of contact information available concerning individual group members differs materially between the Mistake Claim Period group members and the Principal Claim Period group members. Subject to qualifications as to the accuracy and completeness of the information, some form of customer contact information is available for approximately:

(a) 95% of Extended Warranty products purchased and not subsequently cancelled during the Principal Claim Period, being 9 December 2017 to 8 December 2023; and

(b) 1.7% of Extended Warranty products purchased and not subsequently cancelled during the Mistake Claim Period, being 1 January 2011 and 8 December 2017.

34 Eighth, the level of contact information available concerning individual group members also differs materially between the Extended Care cohorts and Extra Care cohorts. While a value is held in the 'first name' and 'last name' fields for approximately 99.997% of the product sales recorded:

(a) in relation to the approximately 6.7 million Extended Care products sold and not subsequently cancelled, JB Hi-Fi holds a value in the 'postcode' field for each transaction and approximately 1,740,000 unique phone numbers;

(b) whereas, in relation to the approximately 2.1 million Extra Care products sold and not subsequently cancelled, JB Hi-Fi holds no postcode (or suburb name), a phone number for approximately 97% of the cohort and an email address for nearly 100% of the cohort.

35 Ninth, in at least two cases where orders have been made requiring registration pursuant to soft class closure orders, *Nathan v Macquarie Leasing Pty Ltd*[14] and *O'Brien v ANZ*,[15] orders were later made permitting registration following and as

[14] [2025] VSC 594 ('*Macquarie Flex Commissions case*').
[15] [2025] VSC 389 ('*ANZ Flex Commissions case*').

part of a settlement approval process. That is, allowing persons who were group members who do not register pursuant to soft class closure orders, to register later and to participate in the settlement.

C.1 JB Hi-Fi submissions

36 JB Hi-Fi relied on two affidavits made by Ms Overington, the first dated 25 September 2025 and the second dated 6 October 2025. It relied upon written and oral submissions. On 9 October 2025, JB Hi-Fi provided a note in response to the plaintiff's revised aide memoire concerning late registration by group members in a selection of proceedings.

37 JB Hi-Fi advanced seven written submissions in support of its contention that orders should be made requiring registration to occur concurrently with opt out and that the class should be closed until the eve of trial.

38 First, soft class closure would furnish the parties' legal advisors with more complete information as to member participation rates and the nature and quantum of their claims. This would facilitate an effective mediation and maximise the prospects of a consensual resolution for a proceeding which is factually and legally complex. If the proceeding is resolved on terms that meet Court approval, group members will have obtained an outcome judged to be in their interests while avoiding the significant costs of trial and saving Court resources.

39 Second, registration will provide the parties and the mediator with critical information about the participating class and the size of the total claim, removing a barrier to settlement. Registration will enable the parties to 'know their actual maximum exposure with some precision'.[16]

40 Third, all group members will need to take a positive step in the proceeding if it settles or the plaintiff succeeds at trial. Absent the proceeding being dismissed, registration is not a question of whether members should be required to take a positive step but rather when that should occur.[17]

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16 *Anderson-Vaughan v AAI Limited* [2024] VSC 65, [67] (Delany J).
17 *Anderson-Vaughan v* AAI *Limited* [2024] VSC 65, [77] (Delany J).

41 Fourth, there is no real prejudice to group members and, to the contrary, maximising the prospects of a successful settlement is in their best interests.

42 Fifth, the class closure orders proposed by JB Hi-Fi are expressed as being subject to further order. The Court has power to allow a group member to participate in a settlement even if the group member does not register, so long as the group member can establish that they should be permitted to participate. That is also a matter that can be addressed when the Court comes to exercise its discretion in approving any settlement reached.

43 Sixth, it will advance the interests of group members to tell them of their right to participate in a potential settlement at the same time as they are told of their right to opt out.

44 Seventh, the registration process and mediation will occur at an advanced stage of the proceeding. The parties will be in an informed position to assess their respective prospects prior to a mediation in August 2026, ahead of the trial scheduled to begin in October 2026. Closing the class until the day before trial will maximise the window of opportunity for a settlement.

45 During the hearing, JB Hi-Fi suggested that the plaintiff has failed to grapple with the likely success of settlement negotiations if participation rates remain unknown. It submitted that, although the estimated size of the class is larger than was the case in *AAI*, there is similarly significant uncertainty about 'how many potential group members will register to participate in the proceeding if the plaintiff succeeds in obtaining a favourable settlement or judgment following a trial', both overall, and as between the two categories of group members.[18] It submitted that, as was found to be the case in *AAI*, participation rates in other cases do not constitute a reliable proxy for this proceeding.[19] Without registration, a divergences of views is likely between the parties concerning participation rates, particularly having regard to the size of the overall class and the size of group members' claims, which vary

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18 *Anderson-Vaughan v AAI Limited* [2024] VSC 65, [41] (Delany J).

19 *Anderson-Vaughan v AAI Limited* [2024] VSC 65, [70] (Delany J).

substantially depending on the cost of the Extended Warranty purchased (which, in turn, is influenced by the product(s) purchased).

46 JB Hi-Fi drew attention to observations made by Nichols J when determining the Group Costs Order application in this proceeding:[20]

> 21. In relation to this proceeding in particular, the evidence was, or addressed:
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> (a) The estimated number of group members. Although there is considerable uncertainty about the size of the class, it is clear that it is potentially greater by an order of magnitude than the size of the class in any of the other class actions in which MB has acted (generally) and also than in those cases in which MB has obtained a Group Costs Order. MB has (for the reasons given in the evidence) estimated the class size at 8.5 million group members. For the reasons given, which appear reasonable to me, MB expects to communicate with up to about 3 million group members in relation to the proceeding, throughout its life. Ms Gilsenan correctly emphasised the importance of MB devising ways of streamlining communications with group members, and working with the Court to make that communication as effective and efficient as possible. It was put and I accept, that the size of the group is significant in two respects. First, it means that the estimated costs of taking certain steps in the proceeding are greater than they would be for a materially smaller group. Second, the size of the group is a major determinant of the estimated recovery sum and, this being a case where there are very many small claims, the estimated recovery sum is subject to very significant uncertainty.

47 JB Hi-Fi submitted that by advancing its primary and alternative cases in opposition to the application, the plaintiff is advocating for an approach which is both inefficient and unfair. JB Hi-Fi submitted that by putting forward two alternatives the plaintiff is seeking to engineer two 'shots' at resisting soft class closure. It submitted the Court should either adjourn the application and deal with registration as part of the opt out process scheduled to occur in November 2025 or decide the application and determine the form of notice to be given to group members in conjunction with opt out at a later time.

48 JB Hi-Fi drew attention to the fact that both parties accept there will be a need for registration. The issues raised by the plaintiff in opposition to the application

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20 *Jeremey Clarke v JB Hi-Fi Group Pty Ltd* [2025] VSC 288, [21(a)] (Nichols J).

concerning the quality of the contact information relating to group members held by JB Hi-Fi, the ability to data match to assess the eligibility of group members, the form of notices and the extensive information that group members may be required to provide are all issues which exist and will need to be addressed, irrespective of whether registration occurs before or after a settlement. If there is a problem with data matching such that a proportion of group members cannot be contacted directly, it is better to identify that problem now rather than after any settlement.

49 JB Hi-Fi took issue with the plaintiff's contention that group members are more likely to register when there is 'money on the table' following the announcement of a settlement, compared to the position where registration is required for group members to participate in any settlement reached at mediation. It was submitted that settlement discussions cannot get off the ground if the outer monetary limit figure, based on the transaction data, bears no reasonable relationship to the real claim in the proceeding following registration. Participation rates can therefore have a profound impact on any recovery sum.

50 JB Hi-Fi submitted that what has occurred in other cases in relation to late registrations does not provide a reliable indicator when parties are seeking to negotiate a resolution a settlement. A number of factors may contribute to the phenomenon of late registration by group members. It is difficult to identify individual causes. Late registration is simply an issue which arises whenever there is a requirement for registration and is one that is particularly acute when the class is large. It is not one which stands against the making of a soft class closure order.

51 While there may be group members who apply to register after the last date for registration has passed, JB Hi-Fi submitted the experience of cases such as the *Macquarie Flex Commissions case* and the *ANZ Flex Commissions case*, both of which involved approximately 100,000 registered group members, suggests that late registration is not an issue likely to adversely impact a settlement that has earlier been agreed to – nor is it likely to be particularly burdensome for the parties and the Court. In the *Macquarie Flex Commissions case*, following the closure of the post-settlement registration period, the Court permitted the late registration of 30

additional group members.[21] Similarly, in the *ANZ Flex Commissions case*, only 23 people sought to register after the post-settlement registration period.[22]

C.2 The plaintiff's submissions

52 The plaintiff relied on an affidavit of Rebecca Gilsenan dated 3 October 2025, together with written and oral submissions. During the hearing the plaintiff handed up an aide memoire concerning late registration by group members in a selection of group proceedings. That aide memoire was superseded by an amended aide memoire dated 7 October 2025.

53 The plaintiff submitted that, having regard to the circumstances of the proceeding and the information presently available regarding group member data held by JB Hi-Fi, it is neither appropriate nor necessary to make orders for soft class closure.

54 In support of his primary position that the Court should not make soft class closure orders, the plaintiff advanced five submissions.

55 First, the plaintiff relied on the size of the class. He submitted the Court ought not make orders requiring registration as a pre-condition to participation in any settlement without care first being exercised to ensure that any such process will be consistent with the overarching purpose stated in s 7(1) of the *Civil Procedure Act 2010* (Vic) ('CPA'), fair to group members as a whole, and will not be disproportionate to any asserted benefits.

56 Second, the assertion by JB Hi-Fi that the parties will otherwise be forced to participate in a mediation beset by 'considerable divergence' as to the total claim value of group members who will participate in a settlement is exaggerated. The plaintiff submitted that the transaction data provides an objective, sufficiently clear and common foundation upon which the parties can prepare for mediation and make meaningful estimates in relation to the outer limits of the quantum.

57 Third, based on the information which JB Hi-Fi has supplied in relation to group member contact data to date, it appears unlikely that the vast majority of the class

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21 *Nathan v Macquarie Leasing Pty Ltd* [2025] VSC 594, [27], [31] (Harris J).

22 *O'Brien v Australia and New Zealand Banking Group Ltd* [2025] VSC 389, [34], [53]–[55] (Harris J).

would receive any direct notice ordered by the Court at this stage of the proceeding. This issue is particularly acute for the Mistake Claim Period cohort, for whom JB Hi-Fi says it holds contact information for only 1.7% of group members. Group members should not be shut out from advancing claims because of JB Hi-Fi's poor customer records, and JB Hi-Fi ought not be permitted to take advantage of that circumstance.

58 Fourth, even assuming a high proportion of group members ultimately receive a registration notice, there will be no way of matching registered claims with the transaction data for a majority of group members who register unless those group members also provide a suite of detailed information about their individual transactions. For adequate data matching to occur in circumstances where there is no available contact information for more than 60% of group members, any registration form would need to require group members to provide unusually detailed information. Based on Ms Gilsenan's experience, this requirement goes beyond what has been required of group members in other consumer proceedings, and is likely to discourage registration, particularly where the quantum of individual claims are low and there is no 'money on the table' to incentivise the effort required to register.

59 Fifth, if soft class closure orders are made, there is a substantial risk that a significant number of 'late registrants' will come forward following a settlement. Ms Gilsenan's experience is that there are typically a number of registration requests made by unregistered group members following the announcement of any pre-trial settlement when there is 'money on the table' and increased publicity. This is particularly true where the quantum of each individual claim is very low and prospect of 'free money' incentivises the effort of registering. Based on the vast size of the cohort and the current dearth of contact details for group members, the sheer number of potential post-settlement registrants risks being unmanageable, carries a significant risk of rendering any in-principle settlement fragile and may simply prevent the Court from having any confidence that any agreed settlement sum is fair and reasonable and in the interests of all group members (in the instance of an approval application pursuant to s 33V of the Act).

60 In the alternative to his primary contention, the plaintiff submitted that if the Court is minded to make orders for a soft class closure regime, several safeguards are required to render the form of orders appropriate to ensure justice is done with respect to the group members and as between the group members. The plaintiff submitted the Court should require JB Hi-Fi to, amongst other things:

(a) provide the plaintiff with all group member data it holds, including first and last names, phone numbers, email addresses, postal addresses and receipt numbers or other unique datapoints which enable the above data to be matched with the transaction data;

(b) undertake reasonable searches to identify additional contact details for group members which might be held in repositories other than those already identified in correspondence; and

(c) exercise its contractual rights and/or rights of compulsory production to seek additional contact data held by the Administrators and Underwriters of JB Hi-Fi.

61 During the hearing, the plaintiff drew attention to the limited contact information held by JB Hi-Fi in this proceeding compared with other group proceedings. For example, as at the time of bringing the soft class closure application, an email, phone number and/or postal address (albeit, not necessarily current or accurate) were held in respect of:

(a) 100% of the 373,200 potential group members in the *ANZ Flex Commissions case*;[23]

(b) 100% of the 193,900 potential group members in the *Macquarie Flex Commissions case*;[24]

(c) approximately 99.9% of the 428,378 potential group members in the *Westpac Flex Commissions case*;[25] and

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23 *Fox v Westpac; O'Brien v ANZ; Nathan v Macquarie* [2023] VSC 414, [147] (Nichols J).
24 *Fox v Westpac; O'Brien v ANZ; Nathan v Macquarie* [2023] VSC 414, [148] (Nichols J).
25 *Fox v Westpac; O'Brien v ANZ; Nathan v Macquarie* [2023] VSC 414, [146] (Nichols J).

(d) 100% of the 198,460 potential group members in *AAI*.[26]

62 Based on the varying levels of contact information held by JB Hi-Fi, the plaintiff submitted it will be difficult to have a level of confidence about the proportion of potential group members who would receive a notice.

63 That issue aside, the plaintiff submitted a soft class closure order will not provide the parties with any greater certainty as to the ultimate registration rate (and therefore the durability of any settlement reached) compared to if no such order is made. In the case of a soft class closure order, the number of registered group members would undoubtedly inform settlement discussions. However, a sizeable volume of post-settlement registrations due to the 'money on the table' phenomenon might jeopardise any settlement reached. In the case of no soft class closure order, the parties would rely on their own estimates when engaging in settlement discussions. However, if, following registration, those estimates turn out to be severely understated, any settlement reached could again fall over.

64 In light of the above, the plaintiff submitted there is little utility in the Court making a soft class closure order. It would effectively result in two registration periods, the first being pursuant to a soft class closure order and the second being pursuant to court order following the achievement of an in-principle settlement. That, in turn, would expose the 'inseparable problem' of doing fairness as between the two cohorts of group members: the extant registered group members who are entitled to be concerned about any dilution of their prima facie in-principle settlement pool and those who failed to register by the soft class closure deadline, particularly those who had a good excuse and who subsequently agitate the question of their entitlement to the same settlement pool.

65 Maurice Blackburn estimates the average professional fees and disbursements of conducting group member registration, communication and processing (including data matching) is approximately $500,000 per 100,000 group members when this process is conducted in the 'usual manner'. The plaintiff submitted that the total cost might be even higher if a soft class closure regime is ordered. That is because

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26 *Anderson-Vaughan v AAI Limited* [2024] VSC 65, [11] (Delany J).

soft class closure would result in a process of data matching however, if a settlement is reached, all group members would have to have their claims verified.

66 Finally, the plaintiff submitted it is not beyond the skill or capability of practitioners to settle this proceeding without registration data derived from a soft class closure order. Whereas, if such an order was made, there is a risk that the focus of settlement discussions is pulled away from the merits of the plaintiff's claim and towards questions of how many group members are likely to register and in what circumstances might they be discouraged from doing so. That is not what ss 33ZF and 33ZG of the Act demand.

D Consideration

67 There are a number of reasons why the application must be refused.

68 First and foremost, JB Hi-Fi has not articulated a satisfactory proposal about how notice of soft class closure orders is to be communicated to group members for whom no contact information is held. In the absence of an effective notice regime, it is not in the interests of group members to make the orders sought.

69 The purpose of s 33X is to 'ensure that group members are kept informed of all matters relevant to them in the representative proceeding'.[27]

70 As Gageler CJ, Gleeson and Jagot JJ said in *Lendlease*, the doing of justice between the parties includes ensuring group members are kept informed of matters relevant to them and their interests.[28] JB Hi-Fi has not shown how that is to occur in relation to soft class closure.

71 The application is based around direct notification of group members for whom some form of contact information is held. However, for more than 60% of potential group members there is no available contact information which could be used to contact those persons, whether that be via text message, phone call, email or mail to their physical residential or other postal address. The level of contact data

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27 *Lendlease Corporation Ltd v Pallas* (2025) 423 ALR 23; [2025] HCA 19, [40] (Gagelar CJ, Gleeson and Jagot JJ).

28 *Lendlease Corporation Ltd v Pallas* (2025) 423 ALR 23; [2025] HCA 19, [39] (Gageler CJ, Gleeson and Jagot JJ).

available is not uniform across group members as a whole. There is a vast gulf between the level of available contact information concerning the Principal Claim Period group members compared with the Mistake Claim Period group members. There is a difference between contact data relating to Extended Care and Extra Care product purchases.

72 Leaving to one side issues relating to the quality of available contact information, as outlined at paragraph 31 above, JB Hi-Fi holds a phone number or email address for approximately 3,020,000 unique group members. This amounts to approximately 37.75% of the overall class of approximately 8 million group members. For the remaining 62.25% of group members there is, at best, a customer name and/or postcode. In addition, as outlined at paragraph 33 above, while some level of information is available for 95% of the Principal Claim Period group members, some level of contact information is only available for 1.7% of the Mistake Claim Period group members.

73 Given there is no available contact information for more than 60% of potential group members, let alone a clear and detailed regime which can be shown as likely to be effective in giving notice to group members of the need to register to participate, I do not consider the interests of justice are served by making the orders sought. That is, orders which, if made, may not come the attention of at least 60% of the group members who would be bound if they fail to register and a settlement is achieved during the soft class closure period.

74 While personal notice to each group member is not required, s 33Y(4) expressly provides 'the Court must not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so', I am not satisfied that the arrangements proposed by JB Hi-Fi will ensure that, at the very least, the majority of group members receive appropriate and sufficient notice of the requirement to register in order to participate in any settlement that is achieved during the soft class closure period.

75 The evidence in support of the application did not include any evidence about proposed alternative forms of notice to group members other than those for whom telephone or email addresses are held. Whether advertising via press, radio or

television, to which s 33Y(3) expressly refers, was not addressed. There was no evidence concerning the efficacy of methods of communication with group members other than to their telephone numbers or email addresses.

76 This case is factually very different to *AAI* where I made a soft class closure order.[29] In that case there was a high level of confidence that the requirement for group member registration would be brought to the attention of the vast majority of the approximately 200,000 group members.[30] That case involved two cohorts, including, as is the case here, one cohort whose claim involved an allegation of mistake.[31] However, unlike in this case, in *AAI* contact details were available for 100% of group members across both cohorts. Mobile telephone numbers were held in respect of 155,000 persons and email addresses were available for 64,370 persons.[32] While there were approximately 45,347 policies where no email address or mobile telephone number was available for the policyholder, in respect of each there was a unique postal address.[33] This contact information was sufficient to enable bespoke notices to be directed to individuals describing the type of add-on insurance product and the date the product was purchased by that person.[34]

77 In addition, as highlighted at paragraph 61 above, a telephone number, email address and/or postal address was held for:

(a) 100% of the potential group members in the *ANZ Flex Commissions case*;[35]

(b) 100% of the potential group members in the *Macquarie Flex Commissions case*;[36] and

(c) approximately 99.9% of the potential group members in the *Westpac Flex Commissions case*.[37]

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29 *Anderson-Vaughan v AAI Limited* [2024] VSC 65, [23], [86] (Delany J).
30 *Anderson-Vaughan v AAI Limited* [2024] VSC 65, [66] (Delany J).
31 *Anderson-Vaughan v AAI Limited* [2024] VSC 65, [1]–[2], [37] (Delany J).
32 *Anderson-Vaughan v AAI Limited* [2024] VSC 65, [5] (Delany J).
33 *Anderson-Vaughan v AAI Limited* [2024] VSC 65, [5] (Delany J).
34 *Anderson-Vaughan v AAI Limited* [2024] VSC 65, [6] (Delany J).
35 *Fox v Westpac; O'Brien v ANZ; Nathan v Macquarie* [2023] VSC 414, [147] (Nichols J).
36 *Fox v Westpac; O'Brien v ANZ; Nathan v Macquarie* [2023] VSC 414, [148] (Nichols J).
37 *Fox v Westpac; O'Brien v ANZ; Nathan v Macquarie* [2023] VSC 414, [146] (Nichols J).

78 In contrast to the facts in those cases, in this case some form of such contact information is only held for 1.7% of the Mistake Claim Period group members.

79 Although the power exists in s 33ZG of the Act to require group members to take a step in the proceeding, including to register, the Court should not exercise that power to order soft class closure without first being satisfied that it is likely that at the very least the majority of group members will receive some form of notice of the requirement to register.

80 JB Hi-Fi submitted that the precise form of notice to group members is a matter that should be considered later, after a soft class closure order has been made. I do not agree.

81 A similar issue about how notice was to be drawn to the attention of group members arose in *Adrianakis v Uber Technologies*.[38] Upon considering the application Nichols J was not satisfied the notification regime proposed was adequate. Her Honour required the plaintiff to submit evidence about how arrangements could be made with industry organisations to bring the proposed order to the attention of group members.[39] It was only following the filing of further evidence that her Honour was satisfied, particularly via industry organisation publications, that group members would receive appropriate and sufficient notice of the requirement to register.[40]

82 As part of his alternative case the plaintiff submitted that if soft class closure is ordered, JB Hi-Fi should be ordered to publicise the registration process, including advertisements prominently displayed at each of its stores and on its website, in newspapers (print and online) and on social media platforms. When questioned about JB Hi-Fi's attitude to such an order, counsel said JB Hi-Fi was open to different ways of bringing a registration requirement to the attention of group members but that he did not have specific instructions. I can understand that being

38 [2023] VSC 415.

39 *Andrianakis v Uber Technologies & Ors; Salem v Uber Technologies & Ors* [2023] VSC 415, [23]–[24] (Nichols J).

40 *Andrianakis v Uber Technologies & Ors; Salem v Uber Technologies & Ors* [2023] VSC 415, [28] (Nichols J).

the case, particularly when the form of any notice proposed to be published has not been considered, let alone agreed upon.

83 As Yates J cautioned in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland (No 2)*,[41] the Court should be astute to avoid visiting commercial harm on an ongoing business by requiring them to, in effect, advertise unproven allegations made against them.[42] A defendant who has settled a proceeding of which there is likely to be some broad publicity might have a different view about publishing a notice in its stores and on its website, than a defendant who, as in this case, denies liability and who is being asked, in advance of any determination of liability, to notify its customers that it is being sued for what is alleged to be the sale of worthless or near worthless Extended Warranties – warranties which it may be continuing to sell.

84 I accept the submission by JB Hi-Fi that the likely number of group members who may wish to participate in any settlement of the proceeding is difficult to estimate without registration. I also accept that there is considerable uncertainty about the size of the class with an estimated maximum of more than 8 million persons. However in the absence of a clear plan that provides for the effective giving of notice to group members, there can be no confidence that registrations which occur following a soft class closure order will be representative of the number of group members who would wish to participate in any settlement.

85 In *Lendlease*, facilitating registration of group members' participation in representative proceedings was identified by Gageler CJ, Gleeson and Jagot JJ as a step which:[43]

> enables the defendant and the defendant's lawyers, in particular, to … negotiate a settlement with the representative plaintiff with greater confidence as to [their] total potential liability, including by minimising the risk of group members who have neither registered their participation in nor opted out of the representative proceeding, after settlement, seeking to benefit from the terms of the settlement.

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41 [2017] FCA 1231.

42 *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 2)* [2017] FCA 1231, [19] (Yates J).

43 *Lendlease Corporation Ltd v Pallas* (2025) 423 ALR 23; [2025] HCA 19, [19] (Gageler CJ, Gleeson and Jagot JJ).

86 In this case, because of the lack of contact information available concerning the majority of group members and the absence of any detailed proposal to effectively communicate with those persons, I am not persuaded that a soft class closure order is likely to result in JB Hi-Fi and its representatives obtaining the benefit identified by their Honours.

87 It is true the issues identified in the plaintiff's submissions concerning effective notice to group members and data matching will arise in the case of a later settlement requiring court approval – just as they arise on this application. However, both the approach of the Act and the likely response of group members are different in those circumstances.

88 Section 33V of the Act mandates approval by the Court of any proposed settlement.[44] Whereas, to state the obvious, there is no requirement in the Act for soft class closure. An order for soft class closure will only be made where to do so is 'appropriate or necessary to ensure that justice is done in the proceeding'.[45]

89 The making of a soft class closure order to promote settlement discussions may be desirable and consistent with both the interests of the parties and group members and the objects of Part 4A of the Act.[46] However, the making of such an order is not necessary in the same way as class closure is necessary before any approval application pursuant to s 33V can fairly be determined by the Court.

90 Registration is necessary at that point to allow the Court to consider whether the settlement is reasonable as between the plaintiff and the defendant, as well as between the group members. In those circumstances, even if there are difficulties bringing the proposed settlement to the attention of all group members due to incomplete contact information, the parties must do their best to communicate the proposed settlement to all group members in advance of the approval hearing. Section 33X(4) provides that '[u]nless the Court is satisfied that it is just to do so, an

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44 *Supreme Court Act 1986* (Vic) s 33V.

45 *Supreme Court Act 1986* (Vic) s 33ZF.

46 *Lendlease Corporation Ltd v Pallas* (2025) 423 ALR 23; [2025] HCA 19, [94], [99] per (Gordon and Steward JJ).

application for approval under s 33V must not be determined unless notice has been given to group members'.[47]

91 The prospect of significant costs being incurred in this proceeding if a soft class closure order is made, followed by a second data matching process upon any settlement being reached (as referred to in paragraph 65 above), with the real prospect of duplicated costs, is a further factor against the making of a soft class closure order.

92 Of more significance is the prospect of a conflict of interest emerging between group members if an order is made now for soft class closure and there is a later opportunity for group members to register in advance of a s 33V hearing.

93 The potential for a conflict of interest is particularly significant where there are considerable registrations at the time of a s 33V approval application. That is because admitting a large number of group members to participate in a settlement for a fixed monetary sum relative to the number of members who registered by the soft class closure deadline is, subject to the amount of their individual claims, likely to materially dilute the amount of any settlement otherwise available to the latter group. In the *Macquarie Flex Commissions case* and the *ANZ Flex Commissions case*, a significant number of group members registered during the s 33V approval processes, that is, after the settlements were announced and there was 'money on the table'.

94 In the *Macquarie Flex Commissions case*, soft class closure orders permitted group members to opt out of, or register for, the proceeding by 3 October 2023.[48] Maurice Blackburn (who also acted for the plaintiff in that case) submitted that approximately 73,400 group members registered prior to the 3 October 2023 deadline. On 26 February 2025, following the trial and whilst judgment was reserved, the parties reached an in-principle settlement.[49] On 10 April 2025, the parties entered into a deed of settlement.[50] On 12 May 2025, orders were made providing for the registration of any non-registered group member who wished to

47 *Supreme Court Act 1986* (Vic) s 33X(4).
48 *Nathan v Macquarie Leasing Pty Ltd* [2025] VSC 594, [18] (Harris J).
49 *Nathan v Macquarie Leasing Pty Ltd* [2025] VSC 594, [22] (Harris J).
50 *Nathan v Macquarie Leasing Pty Ltd* [2025] VSC 594, [23] (Harris J).

participate in the settlement.[51] Approximately 24,500 additional group members registered pursuant to those orders.[52]

95 In the *ANZ Flex Commissions case*, combined opt out/soft class closure orders were made permitting those steps to be taken by 23 September 2023.[53] On 3 October 2024, two weeks before the date fixed for trial, the parties entered into heads of agreement to settle the proceeding.[54] On 20 December 2024, Harris J made orders permitting registration by any group member who wished to participate in the settlement and had not already registered.[55] Prior to the distribution of the settlement notices, approximately 110,568 persons had registered.[56] After the distribution of the settlement notices, and following a data matching process, a further 18,120 potential group members registered.[57]

96 While, as noted in *Treasury Wine*, a balancing exercise is required,[58] it is not in the interests of group members to make a soft class closure order that, due to the large number of group members for whom no contact information is available, may well give rise to a substantial conflict between the interests of group members.

97 I have very real concerns that there would be a significant number of further registration requests during a s 33V settlement approval application in this proceeding due to (a) the huge size of the class, (b) the lack of a detailed proposal to communicate the fact and effect of any soft class closure orders made now to at least the majority of group members and (c) JB Hi-Fi's status as a high profile retailer with a significant online and physical store presence. The latter is relevant because JB Hi-Fi would most likely be required to give notice of a settlement on its website and in its physical stores in the lead up to a s 33V settlement approval application. That post-settlement wave of registrations would undoubtedly include persons who previously did not know about the proceeding and, for that

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51 *Nathan v Macquarie Leasing Pty Ltd* [2025] VSC 594, [24] (Harris J).
52 *Nathan v Macquarie Leasing Pty Ltd* [2025] VSC 594, [48(3)], [52(3)] (Harris J).
53 *O'Brien v ANZ* [2025] VSC 389, [20] (Harris J).
54 *O'Brien v ANZ* [2025] VSC 389, [21] (Harris J).
55 *O'Brien v ANZ* [2025] VSC 389, [22] (Harris J).
56 *O'Brien v ANZ* [2025] VSC 389, [53] (Harris J).
57 *O'Brien v ANZ* [2025] VSC 389, [54] (Harris J).
58 *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* (2017) 252 FCR 1; [2017] FCAFC 98, [79] (Jagot , Yates and Murphy JJ).

reason, did not register in time. This additional wave of registrations would have the potential to undermine any settlement reached by reference to a single monetary sum. It would also set up a significant conflict between group members which would not otherwise arise if effective notice of soft class closure to group members, or at least the majority of them, was assured.

98 Given the issues concerning the effectiveness of notice to group members to which I have referred, contrary to JB Hi-Fi's submissions, I am not persuaded that requiring registration pursuant to soft class closure orders will enable the parties to 'know their actual maximum exposure with some precision'.[59] Registration would enable the parties to know their actual maximum exposure in relation to those persons who register. It will not provide information concerning the number of persons who have not registered but who might later register if a settlement is drawn to their attention. Those persons may register as of right if an order is made permitting them to do so, or they may register when they learn about the settlement and, upon doing so, wish to participate in it.

99 There is a separate 'interests of justice issue' which may arise if soft class closure orders were to be made in this case due to the absence of a detailed and effective plan to communicate with group members. It concerns the 'hurdle' that group members who have not registered many face if, as part of a s 33V approval process, the Court does not accommodate a further opportunity for group members to register to participate in the proposed settlement 'as of right'.

100 In those circumstances, group members with no notice of the soft class closure order, due to no fault on their part, would nevertheless be required to demonstrate that they would suffer unfair prejudice if not permitted to participate — what Matthews J has observed to be a 'high threshold'.[60] Making the class closure order sought by JB Hi-Fi in the absence of an effective notice regime would create a significant hurdle for group members who do not receive notice to overcome, especially if the value of their individual claims is so small. It cannot be in the

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59 *Anderson-Vaughan v AAI Limited* [2024] VSC 65, [67] (Delany J).

60 *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)* [2024] VSC 733, [63] (Matthews J).

interests of justice to make orders that may lead to that consequence for a large number of group members.

101 In *Fuller & Anor v Allianz Australia Insurance Ltd & Anor (Settlement Approval)*,[61] contact details were held for 849,918 potential group members.[62] Approximately 204,000 persons (or 24%) registered to participate in the settlement.[63] There were at least 2,250 late registrants representing 0.26% of the 849,918 potential group members and a 1.1% increase in registrations.[64] In *Gehrke & Anor v Noumi Ltd & Anor*,[65] orders were made for claim registration, opt out and soft class closure. I approved the settlement reached at mediation after admitting most, but not all, of the group members who did not register their claims prior by the registration deadline but who subsequently applied to participate in the settlement.[66] The first group, 57 persons who registered within a few days of the cut-off date, represented group members with significant monetary claims.[67] Admitting that group and a later group, 61 persons with much smaller claims,[68] to participate in the settlement (which was not opposed by either of the parties) diluted the fund available to group members by 6.41%.[69] Given the potential size of the class in this case, late registration applications can reasonably be expected to exceed hundreds of group members, as was the case in *Allianz* and *Noumi*. To make an order which may impose a significant burden on the Court in the form of large numbers of late registration applications is not consistent with these statutory processes.

102 Section 9(d) of the CPA provides that one of the objects to which the Court is to have regard in furthering the overarching purpose, namely, 'to facilitate the just,

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61 [2025] VSC 160 ('*Allianz*').

62 *Fuller & Anor v Allianz Australia Insurance Ltd & Anor (Settlement Approval)* [2025] VSC 160, [13] (Matthews J).

63 *Fuller & Anor v Allianz Australia Insurance Ltd & Anor (Settlement Approval)* [2025] VSC 160, [15] (Matthews J).

64 *Fuller & Anor v Allianz Australia Insurance Ltd & Anor (Settlement Approval)* [2025] VSC 160, [160] (Matthews J).

65 [2025] VSC 373 ('*Noumi*').

66 *Gehrke & Anor v Noumi Ltd & Anor* [2025] VSC 373, [11]–[12] (Delany J).

67 *Gehrke & Anor v Noumi Ltd & Anor* [2025] VSC 373, [150], [156]–[157] (Delany J).

68 *Gehrke & Anor v Noumi Ltd & Anor* [2025] VSC 373, [150], [164] (Delany).

69 *Gehrke & Anor v Noumi Ltd & Anor* [2025] VSC 373, [139] (Delany J).

efficient, timely and cost-effective resolution of the real issues in dispute', is 'the efficient use of judicial and administrative resources'.[70]

103 There are two further factors that go against soft class closure in this case. While by no means determinative of the application, soft class closure orders are generally made on the joint application of the parties, albeit noting there have been some exceptions including in *AAI* and *J Wisbey*.[71] The Full Court of the Federal Court has said that the attitude of the parties is a relevant consideration.[72] In this case the plaintiff opposes the application for the reasons set out in section C2. I also note the significance of the expected costs referred to in paragraph 65, a final factor that goes against the making of the orders sought by JB Hi-Fi.

104 Had I been persuaded to make a soft class closure order, I would not have provided for the opt-out/registration deadline to be on the eve of trial. While it is true that the closer cases are to trial, the greater the pressure on parties to settle, it is also the case that class actions such as the present require the trial judge to set aside an extended period of time to hear the case – in this case six weeks – and then additional time to write their decision. The need to set aside such a long period of time, the large number of group proceedings in the Commercial Division of the Court and the desirability of affording all parties with cases in the Division with certain commencement dates for their trials means that reallocating work to a Judge to fill a gap where a case settles on the eve of a trial presents practical resourcing difficulties.

105 In *Nelson v Beach Energy*,[73] Nichols J fixed the end date for class closure on a date two weeks before the commencement of the trial.[74] A similar approach was adopted in *Bogan v The Estate of Peter John Smedley (Dec'd) (Soft Class Closure Ruling)*.[75] I agree with the following observations of Nichols J in *Beach Energy*:[76]

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70 *Civil Procedure Act 2010* (Vic) ss 7(1), 9(d).
71 *J Wisbey & Associates Pty Ltd v UBS AG (No 2)* [2024] FCA 147, [90] (Beach J).
72 *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2017) 252 FCR 1; [2017] FCAFC 98, [79] (Jagot, Yates and Murphy JJ).
73 [2025] VSC 339.
74 *Nelson v Beach Energy Ltd* [2025] VSC 339, [20] (Nichols J).
75 [2025] VSC 434, [30]–[31] (Matthews J).
76 *Nelson v Beach Energy Ltd* [2025] VSC 339, [20] (Nichols J).

> The parties' lawyers' experience is that meaningful negotiations are mostly likely to occur shortly before trial. That generally accords with the Court's observations about the time at which settlements in group proceedings tend to occur. This is of course not a universal rule. By the date which is two weeks before the trial is due to commence the parties should well and truly have crystallised the issues and made assessments about whether and at what amount they are prepared to settle. 'Re-opening' the class two weeks before the trial is to commence ought provide some incentive to the parties in the form of the opportunity to avoid a two week period of heavy costs expenditure. It will also assist the Court to reallocate available hearing time in the event the proceeding settles. The allocation of judicial resources between litigants is a matter properly to be taken into account in the administration of justice.

E Disposition

106 The Summons is dismissed.

107 I order that JB Hi-Fi pay the plaintiff's costs of the application on a standard basis.

CERTIFICATE

I certify that this and the 29 preceding pages are a true copy of the reasons for ruling of Delany J of the Supreme Court of Victoria delivered on 23 October 2025.

DATED this twenty-third day of October 2025.

C. Pagliaro

Associate