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

Not Restricted

S ECI 2023 04365

SAMANTHA JANE EDWARDS	First Plaintiff
JOSEPHINE DOLORES HOPPNER	Second Plaintiff
v	
HYUNDAI MOTOR COMPANY AUSTRALIA PTY LTD (ACN 008 995 588)	First Defendant
HYUNDAI MOTOR COMPANY	Second Defendant
ANNE-MAREE JOHNSTON	Intervener

S ECI 2023 04370

DAVID JOHN SIMS	Plaintiff
v	
KIA AUSTRALIA PTY LIMITED (ACN 110 483 353)	First Defendant
KIA CORPORATION	Second Defendant
JANE VICTORIA MORONEY	Intervener

JUDGE:	M Osborne J
WHERE HELD:	Melbourne
DATE OF HEARING:	30 June 2025
DATE OF RULING:	18 July 2025
CASE MAY BE CITED AS:	Edwards v Hyundai Motor Company Australia Pty Ltd; Sims v Kia Australia Pty Ltd (Ruling No 3)
MEDIUM NEUTRAL CITATION:	[2025] VSC 429

GROUP PROCEEDINGS – PRACTICE AND PROCEDURE – Proposed revised statement of position filed pursuant to ruling granting leave to amend in part – Whether proposed revised statement of position complies with ruling – Further application for leave to amend summons and further revised statement of position – Multiplicity of proceedings – Competing carriage applications – Overlap between claims and common defendants – Experience of legal teams – Funding and available resources – Which arrangement is in the best interests of the group members – *Gehrke v Noumi Ltd* [2022] VSC 201.

GROUP PROCEEDINGS – Costs – Application for a group costs order – Costs to be calculated as a percentage of the amount of any award or settlement recovered – Principles applied – *Supreme Court Act 1986* (Vic) s 33ZDA – Application granted.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	K Foley SC with R Zambelli	Banton Group
For the Defendants	B Quinn KC with B Mostafa	Quinn Emanuel Urquhart & Sullivan
For the Interveners	W A D Edwards KC with P Strickland	Maurice Blackburn

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HIS HONOUR:

Introduction

1 On 22 December 2022, Anne-Maree Johnston issued an open group proceeding against Hyundai Motor Company Australia Pty Ltd ('Hyundai') in this Court. On 10 March 2023, Jane Moroney issued an open group proceeding against Kia Australia Pty Limited **('**Kia') in this Court. Johnston and Moroney are represented in their respective proceedings ('Johnston and Moroney proceedings') by Maurice Blackburn.

2 On 26 May 2023, Samantha Jane Edwards and Josephine Delores Hoppner (for convenience 'Edwards') issued an open group proceeding against Hyundai and Hyundai Motor Company and David John Sims issued an open group proceeding against Kia and Kia Corporation[1] ('Edwards and Sims proceedings') in the Federal Court of Australia. The Edwards and Sims proceedings have been transferred to this Court. Edwards and Sims are now represented by Banton Group. They were previously represented by Bannister Law.

3 Both the Johnston and Moroney proceedings and the Edwards and Sims proceedings concern alleged defects in the anti-lock braking system in vehicles supplied by the respective defendants. The vehicular defects are the subject of recall notices issued by the respective defendants. There is substantial overlap in the recall notices identified in the respective sets of proceedings. The recall notices the subject of the Johnston and Moroney proceedings form a large subset of those the subject of the Edwards and Sims proceedings, giving rise to a multiplicity of proceedings. Both groups of plaintiffs seek to resolve the multiplicity problem by intervening in the other proceedings and seeking orders staying the other proceedings, or in the case of Edwards and Sims, in the alternative, seeking an order for consolidation of their proceeding with the counterpart proceeding and for dual representation subject to a co-operation protocol with funding to be provided by International Litigation Partners No 22 Pte Ltd (202318293E) ('ILP').

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1 The overseas incorporated parent company.

4 The process to resolve carriage commenced on 29 June 2023 when Nichols J made orders by consent in the Johnston and Moroney proceedings for the management and determination of the issues arising from the existence of overlapping proceedings so as to facilitate the resolution of any carriage dispute. Relevantly identical orders were made by consent in the Federal Court.

5 Courts determining carriage recognise the essentiality of resolving such disputes in a 'commonsense and expeditious'[2] manner, mindful of the risk that a carriage dispute 'runs the risk of becoming exactly that which ought not occur, in effect mini trials in themselves, with a consequential deleterious effect on the prompt resolution of the substantive action'.[3]

6 As part of the resolution of the carriage question it is necessary to determine three matters which impact the terms on which Banton Group and Maurice Blackburn might conduct the proceeding. Edwards and Sims seek to amend the revised statement of position filed 25 July 2024 ('July 2024 RSOP') in the terms proposed in a revised statement of position dated April 2025 ('April 2025 RSOP')[4] which is asserted to provide a better return to group members. If they are not permitted to do so, then they rely on the July 2024 RSOP which Johnston and Moroney contend was filed contrary to the terms of earlier rulings made by the Court and as such should be struck out. In the event that Johnston and Moroney are granted carriage, Maurice Blackburn propose acting pursuant to a group costs order **('**GCO') and accordingly orders are sought for a GCO in the terms sought in the revised statement of position filed by Johnston and Moroney in July 2023 ('JM July 2023 RSOP').

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2 K*ajula Pty Ltd v Downer EDI Ltd* [2024] VSCA 236, [178].

3 *Maglio v Hino Motor Sales Australia Pty Ltd* [2023] VSC 757, [31] ('*Maglio*').

4 Prior to the hearing Johnston and Moroney filed a further RSOP on 13 June 2025 which made non material amendments to the April 2025 RSOP. The evidence referred to the April 2025 RSOP as did the parties' submissions. For convenience, these reasons refer to the April 2025 RSOP.

Chronology of relevant events

7 The 29 June 2023 orders directed that each group of plaintiffs provide the other with copies of their retainer and funding agreements and that by 21 July 2023 each party file a statement of position ('SOP') in these terms:

> 2. By **4:00pm on 21 July 2023**, each party file and serve a statement of position in the form of a document not exceeding 10 pages, which sets out in summary form the position and substance of the expected evidence in respect of each of the matters listed in the List of Issues at Appendix A (**Statement of Position**). The Statement of Position must meet the following requirements:
>
> …
>
> b. On the question of funding and legal costs, it should contain sufficient detail to allow the reader to meaningfully compare the plaintiffs' competing proposals. It should not set out arguments as to why a plaintiffs' proposal is to be preferred. It should only address the plaintiff's proposal (as opposed to the proposal of the plaintiff in the competing proceedings);
>
> …
>
> 3. By **4:00pm on 28 July 2023**, each plaintiff party may file and serve any Revised Statement of Position in response to the [original Statements of Position]. Any Revised Statements of Position must:
>
> a. conform with the requirements [applicable to the original Statements of Position];
>
> b. not exceed 5 pages; and
>
> c. must, in respect of substantive changes only, be marked up against the original Statements of Position, so that changes are readily apparent.

8 Appendix A to the order listed the issues generally considered to be relevant in resolving carriage disputes – practitioners' experience and resources, group membership, causes of action and scope of claims, funding and legal costs, proposals for security, the state of progress of the proceedings and any other factors said to be material. The parties were directed file and serve any interlocutory applications by 4 August 2023.

9 The parties filed their respective SOPs on 21 July 2023 and revised SOPs ('RSOPs') on 28 July 2023 in accordance with the orders of 29 June 2023 made in this Court and the

Federal Court. By filing their respective RSOPs the parties had the benefit of lodging a further 'bid' having seen the first bid lodged by each on 21 July 2023.

10 The JM July 2023 RSOP contemplated a GCO pursuant to s 33ZDA of the *Supreme Court Act 1986* ('Act') at 24.75% of the recovered amount and indicated that Maurice Blackburn had entered a cost sharing agreement with the funder CF FLA Australia Investments 3 Pty Ltd ('CF3', formerly Vannin).

11 The Edwards and Sims SOP disclosed that Bannister Law had agreed to act on a conditional or 'no win, no fee' ('NWNF') basis and that the litigation funder LLS Australia Funding Pty Ltd ('LLS') had agreed to fund 80% of Bannister Law's costs, subject to a cap. Bannister Law was entitled to a 25% uplift on certain fees accrued.[5] The funding agreement provided that LLS was to charge a commission on a sliding scale of rates and would seek payment of the commission from any resolution sum by way of common fund order ('CFO') which would be sought on a costs plus basis.

12 The Edwards and Sims SOP set out rudimentary modelling that compared the results for group members of the competing funding proposals, on stated assumptions. The modelling showed a modest difference in estimated returns to group members and the proposals for the competing proceedings against Hyundai and against Kia. For the Hyundai proceedings the modelling favoured Edwards (issued in the Federal Court) and for the Kia proceedings the modelling favoured Moroney (issued in the Supreme Court).[6]

13 The Edwards and Sims RSOP filed 28 July 2023 reflected revised cost agreements and cost estimates with funding on the same basis as in the original SOP. Comparative modelling of outcomes to group members were substantially the same as in the original SOP.[7]

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5 *Edwards v Hyundai Motor Company Australia Pty Ltd; Sims v Kia Australia Pty Ltd (Ruling)* [2024] VSC 301, [19] ('*Edwards v Hyundai; Sims v Kia Ruling*').

6 Ibid.

7 Ibid [20].

14 The JM July 2023 RSOP proposed a modified GCO calculated on a stepped basis as follows:

For each dollar of any award or settlement that is recovered in each of the proceedings:	The applicable percentage (including GST) is:
Between $0 - $120,000,000	24.75%
Between $120,000,001 - $150,000,000	20%
Over $150,000,000	15%

15 On 4 August 2023, Bannister Law served a third SOP for Edwards and Sims ('ES August 2023 RSOP') making relatively minor changes to the RSOP. Although this had not been contemplated by the 29 June 2023 orders, at a subsequent joint case management conference held 10 August 2023, Johnston and Moroney indicated that for the purposes of any prospective carriage contest they were content for Edwards and Sims to proceed on the basis of the ES August 2023 RSOP but that there should be no further opportunity for revision. Nichols J made an order regularising the service of the ES August 2023 RSOP and stated that she agreed with Johnston and Moroney that Edwards and Sims should not seek to further vary their position.[8]

16 On 4 August 2023, Edwards and Sims filed a summons in this Court by which they sought to transfer the Johnston and Moroney proceedings to the Federal Court pursuant to s 5(1)(b) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and interlocutory applications in the Federal Court seeking, in the event the Johnston and Moroney proceedings were transferred to the Federal Court, a permanent stay of those proceedings or, in the alternative, consolidation of those proceedings with the Edwards and Sims proceedings.[9]

17 On the same day Johnston and Moroney filed interlocutory applications in the Federal Court seeking leave to intervene in the proceedings in that Court and orders that those proceedings be permanently stayed. They also filed in this Court, summonses seeking the foreshadowed GCO.[10]

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8 Ibid [25].
9 Ibid [24].
10 Ibid.

18 At the case management conference on 10 August 2023, where concurrent hearings of this Court and the Federal Court were held, it was decided that the appropriate procedural course was to first determine the transfer applications filed by Edwards and Sims in this Court. In the result, the transfer application in respect of the transfer of the Johnston and Moroney proceedings to the Federal Court was not pursued and instead on 15 September 2023 the Federal Court made orders transferring the Edwards and Sims proceedings to this Court.

19 All proceedings were listed for a case management conference to be held on 20 September 2023 with the expected carriage contest listed for 24 November 2023.

20 On 19 September 2023, LLS terminated the litigation funding agreements for the Edwards and Sims proceedings. Bannister Law had advised LLS that they intended to seek a GCO. Given that development, LLS was no longer willing to provide litigation funding for the Edwards and Sims proceedings.[11]

21 On 19 September 2023, Bannister Law wrote to Maurice Blackburn advising that it was in discussions with the law firm Pogust Goodhead ('PG'), and that a merger was expected to occur within the next two weeks. Bannister Law indicated that following the merger it was expected that PG's new Australian entity, Pogust Goodhead (Australia) Pty Ltd ('PGA'), would be the solicitor on the record for Edwards and Sims in the newly transferred proceedings and would take over funding from LLS.[12]

22 At the case management conference on 20 September 2023, the Court was notified of the proposed change of lawyers for Edwards and Sims. Discussion ensued to the effect that in that event, the funding arrangements for the proceedings would be different from the arrangement described in the ES August 2023 RSOP and that Edwards and Sims now intended to seek a GCO. These developments impacted on the carriage contest. As a consequence, orders were made on 20 September 2023 that Edwards and Sims file and serve any summons seeking leave to amend the ES August

11 Ibid [30].
12 Ibid [31].

2023 RSOP and their summons filed on 4 August 2023. Related orders were made for the filing of material by 6 October 2023.

23 On 14 October 2023,[13] Edwards and Sims filed and served applications for leave to amend the ES August 2023 RSOP in the terms of a proposed fourth SOP.

24 The proposed fourth SOP for Edwards and Sims contemplated a GCO on a stepped-down basis calculated as follows:

> 18% (including GST) of any award or settlement up to and including $100,000,000;
>
> plus 14% (including GST) of any part of any award or settlement recovered above $100,000,000 but less than or equal to $150,000,000;
>
> plus 12% (including GST) of any part of any award or settlement recovered $150,000,000.

25 The proposed new solicitors PGA preferred to fund the proceeding on the basis of a GCO rather than the NWNF plus funding basis on which the Bannister Law had been proceeding. This further bid was not contemplated by the 29 June 2023 orders. In an affidavit made 1 November 2023, Rebecca Gilsenan of Maurice Blackburn, gave evidence that the mooted change of position threw up a range of issues which had to be investigated before the multiplicity issue could be fairly determined. This included the financial position of PGA and related entities as well as PGA's proposed staffing structure and resources. Ms Gilsenan's evidence was to the effect that her clients required time to investigate the matters and prepare their evidence on the substantive carriage dispute with the result that it was unlikely that the carriage dispute could be heard before the end of 2023.

26 By 7 November 2023, the proposed merger between Bannister Law and PG had been abandoned, and this was conveyed to Maurice Blackburn and Quinn Emanuel Urquhart & Sullivan, solicitors for the defendants in this proceeding. The Court was notified on 13 November 2023.

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13 Pursuant to the orders of 20 September 2023 as later extended.

27 On 16 November 2023, Bannister Law advised Maurice Blackburn and Quinn Emanuel Urquhart & Sullivan that it was anticipated that Edwards and Sims would now instruct Banton Group to act for them and that Ms Banton would file an appearance, a further summons and a proposed further amended SOP the next day.[14]

28 On 17 November 2023, Banton Group filed notices of change of solicitors for the Edwards and Sims proceedings and provided to the chambers of Nichols J proposed summonses seeking leave to amend the 14 October 2023 summons ('November 2023 amendment application') and two days later submitted a proposed further RSOP for Edwards and Sims, the proposed fifth SOP.

29 The proposed fifth SOP is the same in substance as the proposed fourth SOP, that is, a GCO on the same stepped-down basis at the same rates but with Banton Group acting as solicitors. It proposed that funding would be provided by Banton Group and by a cash flow finance facility between Banton Group and ILP which entitles Banton Group to draw funding up to a stated limit for the proceedings.[15]

30 In response to the November 2023 amendment application and the proposed fifth SOP, Ms Gilsenan gave further evidence to the effect that it would be necessary to investigate and make enquiries about a number of matters including the financial arrangements between Banton Group and ILP and that for a range of reasons it would be some time before the carriage contest could be heard.[16]

31 On 22 December 2023, Nichols J heard the November 2023 amendment application. The change of circumstances said to justify a departure from the procedural regime embodied in the 29 June 2023 orders was the change of solicitors. Heavy emphasis was placed by Edwards and Sims on the group members' interests.

32 Relevantly in regard to the latter, her Honour accepted that the proposed fifth SOP would 'deliver a return of somewhere between 5% and 9.1% more to group members

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14 *Edwards v Hyundai; Sims v Kia Ruling* (n 5) [49].
15 Ibid [51].
16 Ibid [82].

than that proposed by Maurice Blackburn'.[17] This factor notwithstanding, her Honour refused to allow Edwards and Sims to amend that part of the ES August 2023 RSOP relating to the funding terms,[18] noting that 'the opportunity for the Court to consider that proposal with the prospect that it might prevail in a carriage contest in order to potentially provide group members with such a benefit ought (not) determine the proper disposition of than application for leave to amend'.[19] Further the fact that a 'component of a new proposal is better in some ways than an existing one does not self-evidently require that it must be considered and a grant of leave be made'.[20]

33 In her reasons, her Honour noted the willingness of Edwards and Sims and the Banton Group to proceed if the application to amend was refused on the basis of the ES August 2023 RSOP, in which case 'the commercial terms on which the "carriage contest" occurs [would] not change'.[21]

34 On that basis, leave was granted to allow the filing of an amended RSOP in part. The effect of allowing leave 'only in part is to permit the Edwards and Sims proceedings to continue with legal representation, but to hold those plaintiffs to the commercial position from which they sought to move'.[22] Thus Edwards and Sims were permitted to file a RSOP 'with due allowance made for the change of solicitors and funders and their applicable hourly rates, funding commissions and budget estimates'.[23]

35 Her Honour's reasons show that her Honour was cognisant of the fact that the GCO contemplated in both the proposed fourth and fifth SOPs would deliver benefits to group members over and above those that would obtained under the Maurice Blackburn's proposal. Her Honour was also clearly influenced by the fact that Edwards and Sims and Banton Group were also prepared to proceed on a basis

17 Ibid [142].
18 Ibid [152].
19 Ibid [151].
20 Ibid.
21 Ibid [102].
22 Ibid [153].
23 Ibid [152].

equivalent to the ES August 2023 RSOP (which was in fact their third SOP) if leave to rely on the fifth SOP was not granted, although that was not their preference.[24]

36 That stated willingness was significant because Ms Banton had given evidence in an affidavit made 20 November 2023 that Banton Group was not prepared to undertake the proceedings on a NWNF basis[25] beyond the hearing of the application for the GCO and the determination of multiplicity issues[26] because 'the risk and cost to the firm is too great compared to the comparatively limited reward of proceeding pursuant to that approach'.

37 In rejecting the application to change the commercial terms and the funding arrangements from those set out in the ES August 2023 RSOP (ie, the third SOP), her Honour accepted that such a restriction 'limits to a significant extent the opportunity for them to benefit from their changes of position (by gaining a competitive advantage in the carriage contest). That that occurs is appropriate where those parties have failed to address in any meaningful way the consequences to the other parties of their conduct of the carriage dispute'.[27]

38 Accordingly, by orders made 18 June 2024, her Honour ordered, inter alia, that Edwards and Sims file and serve a RSOP and file an amended summons in the form approved by the Court. Orders were otherwise made for the carriage applications and any associated GCO applications to take place on 2 October 2024.

39 On 18 June 2024, in purported compliance with the orders made 18 June 2024, Edwards and Sims plaintiffs filed a new Statement of Position ('June 2024 RSOP'**)**.

40 The June 2024 RSOP provided relevantly:

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24 Ibid [102]; [136(k)].
25 Which was in fact the basis set out in the ES August 2023 RSOP.
26 The hearing was conducted on 22 December 2023 with further submissions filed 31 January 2024.
27 *Edwards v Hyundai; Sims v Kia Ruling* (n 5) [153].

(a) Edwards and Sims would enter into a funding agreement with ILP and pursuant to that arrangement the funder would fund 80% of the legal costs capped at a stated sum and disbursements up to a stated sum;

(b) amounts not paid or funded by the funder are recoverable by Banton Group if there is a successful outcome;

(c) Banton Group would make application for a CFO to be calculated as a percentage of any recovered funds;

(d) the funding agreement provides for funding commission calculated as a percentage of the recovered sum on a sliding scale. The commission rates are lower than those proposed in the ES August 2023 RSOP and take effect at different monetary thresholds by reference to the recovered amount;

(e) the CFO is to be sought on an 'all-inclusive basis'. At resolution of the proceeding there would be no separately sought order for the repayment of the expenditure for legal costs, insurance or security for costs. If a CFO is made ILP will repay Banton Group's costs and disbursements in excess of the agreed caps and the uplift fees; and

(f) the hourly and budget estimates in the June 2024 RSOP differ from the ES August 2023 RSOP and give rise to a budgetary estimate higher than that of Bannister Law in the ES August 2023 RSOP.

41 Johnston and Moroney contended that the June 2024 RSOP was not in accordance with the leave granted and sought that the matter be listed where they intended seeking an order that Edwards and Sims file a SOP which conforms with her Honour's ruling in *Edwards v Hyundai Motor Company Australia Pty Ltd; Sims v Kia Australia Pty Ltd (Ruling)* [2024] VSC 301 ('First Ruling').

42 Her Honour acceded to that application and made an order on 17 July 2024 directing Edwards and Sims to file and serve any RSOP conforming with the First Ruling by

25 July 2024. In *Edwards v Hyundai Motor Company Australia Pty Ltd Sims v Kia Australia Pty Ltd (Ruling No 2)*[28] ('Second Ruling') her Honour's reasons stated that:

(a) the First Ruling did not permit any change to substantially alter the commercial terms and context which had occurred 'at least'[29] because the June 2024 RSOP was on a costs inclusive basis;

(b) it also proposed different funding commissions and thresholds which were the result of commercial negotiations with a new funder, ILP, who was not a party to the ES August 2023 RSOP;

(c) inter alia, the evident purpose of the new SOP was to gain a competitive advantage for Banton Group which had submitted that the group members would be prejudiced if they were not permitted to amend the commercial terms;

(d) insofar as the changes related to commercial negotiations with a new litigation funder who is not a party to the arrangements at the time of the ES August 2023 RSOP, her Honour considered that this was not to the point and the First Ruling made clear that Edwards and Sims were to be held to the commercial position set out in the ES August 2023 RSOP; and

(e) it was not possible to determine on the basis of the present material whether the returns to group members would be broadly consistent with the returns contained in the ES August 2023 SOP but in any case the June 2024 RSOP represented a departure from the ES August 2023 RSOP.

43 Her Honour considered that the asserted fact that the ES August 2023 RSOP may be 'commercially unrealistic' did not justify a grant of leave to further amend the SOP and noted the First Ruling had been made on the basis of an acceptance by Edwards and Sims, albeit reluctantly, that the commercial terms on which Banton Group and the funder were prepared to act were those set out in the ES August 2023 RSOP. Her

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28 [2024] VSC 422 ('*Edwards v Hyundai; Sims v Kia Ruling No 2*').

29 Ibid [12].

Honour otherwise observed that any further disputation arising out of the filing of new SOP's should be taken up by Johnston and Moroney in the submissions concerning the multiplicity dispute proper and in the event of non-compliance could be relied upon in support of their stay application.[30]

44 On 18 July 2024, Edwards and Sims commenced an application for leave to appeal against that part of the First Ruling where her Honour refused leave to amend the funding terms. The primary relief sought on appeal was that the First Ruling be varied to grant the applicants leave to amend the funding terms and seek a GCO.

45 On 19 July 2024, Banton Group served copies of the originating documents for the appeal proceedings on Maurice Blackburn and Quinn Emanuel Urquhart & Sullivan.

46 Also on that date, Banton Group wrote to Quinn Emanuel Urquhart & Sullivan regarding safety recall reports which had been issued by the National Highway Traffic Safety Administration in the United States of America which affected vehicles manufactured by Hyundai and Kia. Banton Group inquired whether the defects identified in the safety recall reports affected vehicles in Australia and if recall notices have or will be issued in Australia.

47 On 25 July 2024, Edwards and Sims filed the July 2024 RSOP in response to the orders made 17 July 2024. Unlike the June 2024 RSOP which was structured on the basis of a costs inclusive CFO, the July 2024 RSOP was structured on the basis of a costs plus CFO. A new costs estimate is also referred to in the July 2024 RSOP which is in an amount substantially lower than that which accompanied the June 2024 RSOP. Johnston and Moroney contend that the July 2024 RSOP still fails to conform with the First Ruling because the funding rates are lower than those set out in the ES August 2023 RSOP.

48 On 1 August 2024, the Department of Infrastructure, Transport, Regional Development, Communications and the Arts ('DITRDCA') published recall REC-006041. The recall notice identifies an additional 113,525 Hyundai vehicles with model

30 Ibid [14], [17].

years between 2007 and 2014, which are not currently captured by the current group member definition in a statement of claim in either the Edwards proceeding or the Johnston proceeding.

49 On 9 August 2024, Quinn Emanuel Urquhart & Sullivan sent a letter in reply to Banton Group's letter of 19 July 2024, copied to Maurice Blackburn. Quinn Emanuel Urquhart & Sullivan noted a recall notice dated 1 August 2024 had been issued in relation to a potential issue related to the anti-lock brake system in certain Hyundai vehicles but otherwise provided no information. They enclosed a copy of the recall notice issued by DITRDCA on 1 August 2024.

50 On 9 October 2024, DITRDCA published a further 10 recall notices for defects relating to Kia vehicles. These recall notices represent 104,101 Kia vehicles with model years between 2009 and 2014 which are not currently captured by the current group member definition in either the Sims proceeding or the Moroney proceeding.

51 On 18 November 2024, Banton Group sent a letter to Maurice Blackburn offering to discontinue the appeal proceedings on the basis, inter alia, that the further recall notices issued by Kia and Hyundai in 2024 ('2024 Recall Notices') 'increases the estimate of the pool of damages in the event of a successful outcome, and therefore, plainly affects the commercial considerations relevant to the conduct of both the Hyundai Proceedings and the Kia Proceedings'. Accordingly, it proposed that the application for leave to appeal be discontinued, each of the plaintiff parties would amend their pleadings to take account of the 2024 Recall Notices and each would have the ability to amend their SOP should they wish given the changed commercial circumstances.

52 On 4 December 2024, Maurice Blackburn responded, in short rejecting that proposition and asserting, inter alia, that the approach was 'both opportunistic and disingenuous' including in circumstances where the group proceedings had been delayed by more than 12 months by Edwards' and Sims' disorderly conduct of the proceedings. In response to the contention that the 2024 Recall Notices affected the

proceedings, Maurice Blackburn noted, inter alia, that the assertion did not demonstrate the exercise of any independent skill and judgment[31] and that in any case, if Johston and Moroney considered it appropriate to make further amendments they would do so, if Maurice Blackburn were awarded carriage.

53 On 12 December 2024, Banton Group wrote to Maurice Blackburn advising that it wanted to relist this proceeding for case management and to discontinue the appeal proceedings on the basis that each party would bear their own costs. The letter annexed proposed timetabling orders which would 'effectively begin the multiplicity determination afresh by providing the parties file and serve amended statements of claim, revised funding agreements and [RSOPs], before setting out a framework timetable for the determination of multiplicity'.

54 On 18 December 2024, Banton Group notified Maurice Blackburn that it had filed notices of discontinuance in the appeal proceeding.

55 On the same day, Maurice Blackburn wrote to Banton Group regarding the discontinuance of the appeal and expressed concerns with the proposal to 'effectively begin the multiplicity proceeding afresh'.

56 On 6 January 2025, the Court of Appeal made orders for, inter alia, the filing of evidence and submissions regarding the question of costs of the discontinuance of the appeal proceedings with the issue to be determined on the papers.

57 On 14 January 2025, Banton Group wrote to Maurice Blackburn and Quinn Emanuel Urquhart & Sullivan regarding Edwards' and Sims' decision to discontinue their appeals and their proposal to effectively begin the multiplicity determination afresh.

58 On 20 January 2025, Maurice Blackburn wrote to Banton Group rejecting the proposal and describing it as 'unsustainable, vexatious and an abuse of process'.

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31 *Vingrys v International Capital Markets Pty Ltd* [2024] VSC 455, [82]-[83].

59 On 4 April 2025, summonses were filed in both the Edwards and Sims proceedings seeking leave for Edwards and Sims to file an amended summons and further RSOP ('April 2025 RSOP').

60 On 8 April 2025, the Court of Appeal handed down its ruling and made an order that Edwards and Sims pay the costs of the discontinuance of the proposed appeal.[32]

61 In the April 2025 RSOP, Banton Group and Edwards and Sims proposed that Banton Group would provide legal services on a conditional NWNF basis and that Edwards and Sims would enter into a funding agreement with ILP to assist in funding the solicitors' fees and disbursements. In accordance with the funding agreement, ILP would seek a CFO at the conclusion of the proceeding providing for the payment of commission at funding rates and at stepped rates. The funding commission and rates are lower than those set out in both the ES August 2023 RSOP and the July 2024 RSOP.

62 The CFO is sought on a 'all-inclusive basis', that is, at the point of resolution separate repayment would not be sought of expenditure for the plaintiffs' solicitors' fees and disbursements including any insurance and security costs in the proceeding. The fees and disbursements have been estimated and are consistent with the estimate which accompanied the July 2024 RSOP.

63 Edwards and Sims contend, and Johnston and Moroney do not dispute, that the funding arrangements embodied in the CFO produce a return to group members in a successful outcome that is more than 10% greater than the return to group members produced by the GCO sought by Johnston and Moroney across all outcome ranges.

Matters to be decided

64 Against that background, it is necessary to address the following:

(a) Does the July 2024 RSOP comply with the First Ruling?

(b) Should Edwards and Sims be permitted to rely upon the April 2025 RSOP?

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32 *Edwards v Hyundai Motor Co Australia Pty Ltd* [2025] VSCA 67.

(c) Should a GCO be made in the form sought by Johnston and Moroney?

(d) Who should be awarded carriage?

65 Johnston and Moroney relied upon the affidavits of Ronald Koo made 21 March 2025, Lee Scott Taylor made 12 May 2025, 26 May 2025 and 20 June 2025 and of Rebecca Gilsenan made 13 May 2025 ('Gilsenan 4').[33] Johnston and Moroney also relied upon the JS August 2023 RSOP which provides for a GCO funding model.

66 Edwards and Sims relied upon three affidavits of Amanda Kim Banton made 4 April 2025, 12 May 2025 and 27 May 2025 and an affidavit from Paul Lindholm made 24 June 2025. Mr Lindholm is a representative of the funder, ILP. Edwards and Sims relied upon the April 2025 RSOP or alternatively the July 2024 RSOP. Both RSOP's rely on CFO funding models although the April 2025 RSOP model is costs inclusive and the July 2024 RSOP model is costs exclusive.

67 Relevantly, Edwards and Sims no longer seek to be awarded carriage on the basis of the ES August 2023 RSOP, contrary to the position taken at the time of the First Ruling.[34] They also relied upon proposed amended statements of claim incorporating allegations based on the 2024 Recall Notices.

68 The defendants rely upon the affidavit of their solicitor Andrew Corkhill made 14 June 2025.

69 The parties each filed and relied upon outlines of submission in chief and in the case of the plaintiff parties only, outlines in reply.

Does the July 2024 RSOP comply with the First Ruling?

70 The application for leave to appeal with respect to the First Ruling was discontinued. As such the First Ruling remains in full force and effect. By its terms, as sensibly understood, the application to amend the funding terms was refused and Edwards and Sims could only advance a carriage proposal that was in substance equivalent to

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33 Gilsenan 4 is relied upon primarily with respect to the GCO application.

34 See above [43].

the commercial terms set out in the existing SOP, that is the ES August 2023 RSOP.[35] The grant of leave to amend in part was one which held Edwards and Sims 'to the commercial position from which they sought to move'.[36]

71 The ES August 2023 RSOP contemplated a costs plus model with stepped funding commission. One of the vices with the June 2024 RSOP, dealt with in the Second Ruling, was that the CFO was on a costs inclusive basis.

72 Whilst this costs inclusive vice is not present with the July 2024 RSOP, and in that respect the funding arrangement is the same as the ES August 2023 RSOP, the funding commission provided for in the contemplated CFO, the subject of the July 2024 RSOP, is at lower rates and has different stepped levels than that in the ES August 2023 RSOP. As a consequence, it provides for greater returns to group members than under the ES August 2023 RSOP. Accordingly, it fails to conform with the First Ruling, as it proposes a cheaper CFO across all resolution sums. As such, it is not substantively equivalent to that proposed in the ES August 2023 RSOP.

73 I do not accept that in any sensible reading of the First Ruling as a whole, the reference to due allowance being made 'for the change of solicitors and funders and their applicable hourly rates, funding commissions and budget estimates' permits the alteration proposed by the July 2024 RSOP. Any interpretation of that aspect of the First Ruling said to justify the proffering of a costs plus CFO but with different funding commissions, ignores the balance of the First Ruling and, in any event, was clarified by the Second Ruling. The Second Ruling makes it clear that the reference to due allowance 'should not be read as undermining the essential proposition that what Edwards and Sims were at liberty to advance was a carriage proposal in substance equivalent to their existing proposal'.[37] As the Second Ruling confirmed, the First Ruling (was) 'intended to limit to a significant extent the opportunity for them to benefit from their changes of position by gaining a competitive advantage in the

35 *Edwards v Hyundai; Sims v Kia Ruling* (n 5) [152].
36 Ibid [153].
37 *Edwards v Hyundai; Sims v Kia Ruling No* 2 (n 28) [11(a)].

carriage contest'.[38]

74 I do not accept that the July 2024 RSOP is consistent with the First Ruling. Edwards and Sims are not permitted to rely on it and it will not be considered in the resolution of the carriage dispute.

Should Edwards and Sims be permitted to rely upon the April 2025 RSOP?

75 The application for leave to rely upon the April 2025 RSOP is based on the premise that the 2024 Recall Notices gives rise to a material change in circumstances, such that it would be unjust to hold Edwards and Sims (and the class represented by Edwards and Sims which for this purpose should be taken to include the expanded class who acquired vehicles the subject of the 2024 Recall Notices) to the commercial terms the subject of the July 2024 RSOP.

76 According to Ms Banton, the 2024 Recall Notices produced 'fundamentally different commercial circumstances' and in turn prompted her to approach ILP to ascertain whether it would be willing to offer lower rates for Edwards and Sims for a CFO on an all-inclusive basis, than that previously offered, given the larger potential cohort of vehicles and group members. Following her conferral, ILP was willing to offer funding on the basis of an all-inclusive CFO at staggered cumulative rates for three tiers of resolution: (a) 16.35% of any resolution sum up to $100 million, plus (b) 13% of any resolution sum between $100 million and $150 million, plus (c) 5.5% of any resolution sum above $150 million.

77 As previously noted,[39] on Ms Banton's calculations, which are not in dispute, the result of this lowering of rates is that the likely return to group members in a successful outcome is more than 10% greater than the return to group members produced by the GCO sought by Johnston and Moroney.

78 As all parties accept, the Court holds a broad discretion with respect to the proposed amendment to the SOP under its supervisory jurisdiction in s 33ZF of the Act. The

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38 Ibid [11(b)(ii)].

39 See above [63].

discretion calls to be exercised against the background of the 29 June 2023 consent orders, which contemplated, among other things, a two bid process. That is, the filing of an initial SOP and then a RSOP (as later supplemented by the orders made as a consequence of the First Ruling). In the circumstances here, the question of whether to allow an amendment to the RSOP (*viz* the July 2024 RSOP or the ES August 2023 RSOP) is necessarily affected by the appropriateness of acceding to a further change to the regime embodied in the 29 June 2023 orders. It therefore imports questions of whether there has been 'a material change of circumstances since the original application was heard, or the discovery of new material which could not reasonably have been put before the Court on the hearing of the original application'.[40]

79 The Court's broad powers to permit amendment are also informed by case management principles, such as those discussed in *Aon Risk Services Australia Ltd v Australian National University*.[41] The relevant considerations include the proper use of the publicly funded resources of the Court, inefficiencies in the use of that resource and the need to maintain public confidence in the judicial system and relevant case management considerations.[42] The case management considerations include those set out in ss 7 to 9 of the *Civil Procedure Act 2010* ('CPA') by which the Court must seek to give effect to the overarching purpose in the exercise of its powers which relevantly comprise, inter alia, the just determination of the civil proceeding, the efficient conduct of the business of the Court, the efficient use of judicial administrative resources, and minimising delays.

80 The question of whether the application should be viewed solely through the prism of amendment of a document filed or whether the question needs to be considered by reference to questions of a material change of circumstances in light of existing orders, is a distinction without a difference. The relevant question in the end, is whether the interests of justice in the particular circumstances, requires the departure from the

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40 *Brimaud v Honeysett Instant Print Pty Ltd* (1988) 217 ALR 44, 46; *Lie v The Age Company Ltd* (2016) 92 NSWLR 679, 721-722 [199].

41 (2009) 239 CLR 175.

42 Ibid 182, 191.

existing procedural regime and hence the resultant amendment to the SOP.

81 Edwards and Sims submit that it does. They note that the 2024 Recall Notices were not known at the time of the 29 June 2023 orders, or the First Ruling and point to the fact that as a consequence, better commercial terms are on offer which are to the benefit of Edwards and Sims and the relevant group members. Refusal of the amendment would therefore deny group members the ability to have the carriage contest decided on the basis of a proposal which gives them the most favourable return. Whist they acknowledge the effect of the 29 June 2023 orders, they submit that those orders do not prevent a new bid in appropriate circumstances.[43] Relatedly, they submit that denial of the amendment would only operate to the benefit of Maurice Blackburn and its co-funder, CF3.

82 Johnston and Moroney see matters differently. They emphasise the importance of adherence to the orderly process for determining carriage embodied in the 29 June 2023 orders and the disruptions that have occurred subsequently all of which lays at the feet of Edwards and Sims or their lawyers. They emphasise that despite consenting to the two bid process, Edwards and Sims are now seeking to rely on their sixth SOP.

83 Otherwise, they take issue with the materiality of, and whether there has been a change of circumstances. Of course they must accept that the 2024 Recall Notices constitute a change of circumstances in the sense that they were not known as at 29 June 2023 or at the time of the First Ruling. However, they emphasise that in any case as at 29 June 2023 and at the time of the First Ruling, the Edwards proceeding included claims based on three recall notices that were not included in the corresponding Johnston proceeding. This translated to 106,471 affected units being the subject of Edwards but not Johnston. Similarly, the Sims proceeding relied upon three recall notices that were not included in the Moroney proceeding affecting 19,153 units.

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43 *Edwards v Hyundai; Sims v Kia Ruling* (n 5) [94].

84 They also note the application to amend the funding terms was refused at the time of the First Ruling, notwithstanding the change of circumstances arising from the appointment of new solicitors and funder, including where the change in funding terms was such as to give group members a more favourable return than the Johnston and Moroney model by 5-9.1%. They otherwise submit that there would be costs thrown away which would be wasted as there is doubt about the capacity of Edwards and Sims to meet them.

85 I do not consider that it is in the interests of justice in the circumstances to allow Edwards and Sims to rely on the April 2025 RSOP (the 6th SOP).

86 This is a dispute involving carriage. In resolving such disputes, courts are required to undertake a multi-factorial assessment. Return to group members is only one factor, albeit an important one. The prospect of new funding rates alone did not prompt her Honour to allow a new RSOP for the reasons set out in the First Ruling. Similar considerations remain pertinent now.

87 The extent of the increased return to group members is a relevant and important consideration and as noted earlier translates to an improvement in group returns at all resolution outcomes of around 10%. In dollar terms and at the overall group level the difference is significant. Whilst some of the information as to outcomes has been redacted from the defendants on the basis of an asserted confidentiality, the approach was applied somewhat inconsistently. The asserted and accepted 'around 10% differential' was not said to be confidential. The GCO rates in the JM July 2023 RSOP are not confidential. Edwards' and Sims' submissions referenced, on an open basis, a hypothetical resolution sum of $100 million which would net a 10% more favourable return to group members than under the GCO. In the case of the GCO, group members would net $75.25 million, because the GCO rate at that resolution level is 25.75%. If the April 2025 RSOP CFO produces a 10% better return it is possible, without reference to anything which might be said to be confidential, to point to a $7.525 million better outcome for the group as a whole at that resolution level. In fact, the modelling shows that it is slightly higher because the advantage is slightly over

10%. It also involves no disclosure of anything confidential to point out that the differential is even greater in dollar terms absolutely and differentially, at the higher resolution levels. $7.525 million is a significant amount; so too is say a $15- $16 million differential assuming a resolution level of $200 million.

88 However, whilst the figures relied upon by Edwards and Sims accurately point to the differential in the aggregate and at group level, the actual benefit to Edwards and to Sims and indeed to each group member appears less significant. The typical group member is most unlikely to take solace in and celebrate the overall return to the group in the aggregate. The typical group member is concerned with what he or she receives.

89 I raised with senior counsel for Edwards and Sims, the possible group size and the consequential average dollar improvement for each group member. After taking instructions, senior counsel advised that there was insufficient information in the court book to answer that question. It was submitted in any event, that there are real public policy reasons not to approach the issue in that manner, as it would incentivise law firms to increase costs in proceedings involving a large number of group members who would receive smaller sums as opposed to those proceedings where there is a smaller number of group members who might receive larger sums.

90 Whilst I accept that all things being equal, a larger group may entail an increase in legal costs, I do not agree that the significance of differential funding rates on each group member, as opposed to the group in the aggregate, is irrelevant or transgresses some public policy consideration. Edwards and Sims are seeking to rely on a further SOP outside the existing procedural regime, in circumstances where the resolution of carriage has been significantly delayed and no meaningful steps have been taken to advance the plaintiffs' claims or the interests of group members. A more nuanced assessment of the asserted benefit to each group member calls for examining the impact of the new bid at the granular group member level as opposed to the group as a whole. That said, it is not possible to determine it with any precision; not only is the size of the group unknown but so too is the opt outs and necessarily those registered when the class closes. Not every affected vehicle will be the subject of a claim. Whilst

it is not possible to reach any conclusion as to the size of the group and hence the increased dollar return to the individual group member resulting from the new RSOP, it is not likely to be a small group and this impacts on the uplift for each group member. According to Ms Banton, once the 2024 Recall Notices are taken into account, there are 356,389 vehicles affected by the defects in the recall notices in the Edwards proceeding and 192,885 in the Sims proceeding.[44] Even if say around 1 in 5 of the vehicles are the subject of a claim, the group size will be in the order of 100,000. On that assumption, the actual benefit on average to a group member resulting from an increased return to the group as a whole of between $7.75 million and $16 million is seen in a different context. This is relevant to the materiality of the new circumstances and the overall interests of justice in allowing the amendment.

91 The relevance of identifying the added benefit for each group member is also important because it serves to illuminate the extent to which the benefit of the amendment is enjoyed by other stakeholders such as the law firms who represent the plaintiffs and funders. Although they have a key stake, commercial and otherwise, in the resolution of the dispute, their interests are not relevant ones for the purpose of resolving carriage.[45] However, in resolving such disputes, the public resources of courts are directed towards addressing the problem of multiplicity, ultimately reaching an outcome that confers commercial benefit on the law firm and funder associated with the successful carriage bid. While the court's resources are taken up with the resolution of the carriage dispute, the substantive action remains in a suspended state. Meanwhile, other litigants with a direct stake in the outcome, not merely those investing human and other capital, suffer from delayed access to the courts with judicial time expended in the resolution of these ancillary disputes.

92 Against that background, the Court made orders on 29 June 2023 with the ready and understandable expectation that carriage would be resolved by the end of 2023 or early 2024 and the substantive actions could proceed apace. Whilst it is not Edwards'

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44 There are 136,393 affected units in the corresponding Johnston proceeding and 69,631 units in the corresponding Moroney proceeding.

45 *DA Lynch Pty Limited v Star Entertainment Group* [2023] VSC 561, [23].

and Sims' fault that Bannister Law ceased acting or the merger with PG fell over, from the time of the November 2023 amendment application their interests have been represented by Banton Group, whom it can be presumed have acted on their instructions.

93 Banton Group agreed to act fully aware of the process set out in the 29 June 2023 orders as did Edwards and Sims who consented to the orders. All knew that the ES August 2023 RSOP was said to be Edwards' and Sims' last bid.[46] Edwards and Sims sought to change the commercial terms following the change of solicitors to Banton Group and new funding arrangements with ILP. That attempt was unsuccessful as the First Ruling made clear, despite her Honour being conscious of the greater return to group members as a whole of between 5-9.1%. The carriage process continued because Edwards and Sims said on 22 December 2023 that Banton Group was willing to act on the basis of the ES August 2023 RSOP.[47] Despite this, the June 2024 RSOP was inconsistent with the First Ruling and the stated willingness of Banton Group to act in accordance with the retainer the subject of the ES August 2023 RSOP. So too was the July 2024 RSOP. Both were cast in terms which altered the funding terms from the ES August 2023 RSOP and in ways which constituted new bids which undercut the JM July 2023 RSOP.

94 Carriage remained unresolved because of the filing of the July 2024 RSOP, now held to be non-conforming, and because of the pendency of the now abandoned appeal. Serendipitously, the 2024 Recall Notices emerged which were then relied upon in an unsuccessful attempt to persuade Johnston, Moroney and Maurice Blackburn to start the carriage process afresh. The attempt was made in circumstances where it is tolerably clear that Banton Group was not willing to act on the basis of the retainer set out in the ES August 2023 RSOP, despite the statement made to the contrary on 22 December 2023.

95 When the attempt was rebuffed, Edwards and Sims sought to re-open the process by

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46 See above [15].
47 See above [33].

applying for leave to file a further RSOP, the April 2025 RSOP, which is the sixth SOP sought to be filed. The April 2025 RSOP undercuts the JM July 2023 RSOP.

96 The new funding rates alone would not result in the exercise of the discretion to allow the filing of the April 2025 RSOP. A further question which arises is whether the evidence relied upon is sufficiently cogent to conclude that it was the 2024 Recall Notices which caused the offer of new funding on more favourable terms. The alternative is that the 2024 Recall Notices occasioned but did not cause the new offer. Whether the evidence establishes causality or serendipitous opportunity to lodge a fresh bid requires examination.

97 Ms Banton's evidence provides some support for the proposition that the 2024 Recall Notices caused the improvement in funding terms. She gives evidence that she formed the view that the expanded cohort produced different commercial circumstances, that she approached the funder accordingly and that the funder then offered revised funding. But the evidence lacks specificity; she does not explain how the larger cohort translated into higher than expected resolution outcomes and if so how and to what extent, and it is not obvious why that would necessarily be so. Mr Lindholm does not address the matter at all. He does not reference the increased resolution outcomes or explain the basis on which those resolution outcomes in turn led to a revised funding offer.

98 In some cases, the linkage might be established by generalised evidence of the kind relied on here, namely, that an expansion in group size necessarily results in improved funding terms due to higher resolution outcomes. But this case calls for more scrutiny. Edwards and Sims are seeking to reconfigure the process nearly on two years after it commenced, in circumstances where they and their lawyers are fully aware of their competitor's position and, where Banton Group and ILP have a direct financial interest in the outcome. Given the plausible alternative of fortuitous co-incidence, the weight of the evidence must be assessed in light of Banton Group and ILP's unique capacity to lead such evidence. No one else could; it would have been easy to do so. In those circumstances, the quality of the evidence adduced calls for scrutiny, and it

does not withstand it.

99 No doubt, at least part of the improvement could be explained, though it is not, by the substantial reduction in Banton Group's estimate for the costs of running the two proceedings between June and July 2024. The evidence about this is also thin and unsatisfactory. Between 18 June 2024 to 25 July 2024, Ms Banton sharply revised downwards Banton Group's cost estimate from that set out in the June 2024 RSOP (which contemplated a costs inclusive CFO) to that in the July 2024 RSOP (which contemplated a costs plus CFO).

100 Ms Banton explains this by saying that since the commencement of the proceedings, the High Court handed down judgments in *Williams v Toyota Motor Corporation Australia Ltd*[48] and *Capic v Ford Motor Company of Australia Pty Ltd*,[49] which she considered narrowed the scope of work required and lead to the revised budget. This evidence is less than satisfactory in two respects; first, the High Court decisions were handed down on 6 November 2024, some months after the revised estimate; secondly, the evidence is very general and lacks any specificity as to how the budget was framed and how the relevant integers changed.

101 Further, whilst a link between a larger group size and higher expected resolution outcomes might seem logical, its premise is that the claims of the new group members are of the same quality as those of the existing group members. That might not be necessarily so because the claims of the new group members in large part relate to older vehicles where limitation questions among other issues might intrude. The other issues that might impact on the quality of the claims relating to older vehicles include the fact that the original acquisition price, against which any reduction in value damages might result, is likely to be less given that the vehicles were acquired years ago and that there may well have been changes of ownership over time. None of this detail is addressed in the evidence.

102 There is another premise which underlies the Edwards' and Sims' submission. It is

48 (2024) 419 ALR 373.
49 (2024) 419 ALR 437.

that group members will be denied the benefit of the more favourable resolution outcomes if leave to rely on the April 2025 RSOP is denied. It is submitted that this is because the April 2025 RSOP CFO costs inclusive rates are lower than those in the Johnston and Moroney GCO. That does not necessarily follow; the GCO rate may be reviewed by the Court at a later stage as per s 33ZDA(3) of the Act. Any expansion of the group size beyond that currently under consideration in the Johnston and Moroney proceedings may warrant such revision if it transpires that any expanded group membership due to the 2024 Recall Notices alters the resolution outcome.

103 In conclusion, the process set up by the 29 June 2023 orders is an important one. These disputes must be resolved expeditiously to allow the substantive action to progress. Judicial time is a scare resource. The orderly administration of justice, particularly in the context of these carriage disputes, requires that claims of changed circumstances relied upon to re-bid outside the agreed process must be carefully assessed, all the more so when it is the second such change being relied upon. Moreover, I do not accept that the circa 10% benefit to the expanded group assumes such significance that it outweighs the other concerns. The benefit to each group member is far less significant, while the Banton Group and ILP are real beneficiaries as they would remain participants in a potentially lucrative process in which they would not otherwise be involved. There is in any case room for the GCO rates, the subject of the JM July 2023 RSOP, to be revised by the Court in due course if the 2024 Recall Notices have any significant effect on the outcome.

104 As such, I do not consider that it is appropriate to grant Edwards and Sims leave to rely upon the April 2025 RSOP. Given the July 2024 RSOP does not conform to the First Ruling and Banton Group is no longer is willing to conduct the proceedings on the basis of the funding arrangement set out in the ES August 2023 RSOP, this means that there is no competing proposal. As such Johnston and Moroney will be awarded carriage.

105 Accordingly, it is appropriate to determine its application for a GCO.

Should a GCO be made in the form sought by Johnston and Moroney?

106 Johnston and Moroney seek a GCO under s 33ZDA of the Act to the effect that legal costs payable to Maurice Blackburn be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being 24.75% up to $120 million, 20% between $120 million and $150 million and 15% over $150 million.

107 The GCO is backed by a costs sharing agreement dated 9 December 2022 with CF3. If a GCO is made, CF3 pays 50% of the 'Project Costs' which include 65% of Maurice Blackburn's legal fees. Thus, CF3 pays 32.5% of Maurice Blackburn's legal fees. CF3 also pays 50% of any adverse costs and 50% of any security for costs that is ordered. Maurice Blackburn pays 50% of the GCO to CF3.

108 The costs sharing agreement provides that if a GCO is not made, the proceeding will be conducted in accordance with the 'Funding Arrangements' set out in Annexure B to the costs sharing agreement. Under those arrangements, CF FLA Australia Investments 2 Pty Ltd ('CF2') would pay a smaller amount of the fees and disbursements up front, Maurice Blackburn would claim an uplift on deferred fees subject to a cap and CF2 would seek a CFO at a headline rate of 30% through which fees and expenses would be paid.

109 The provisions in the costs sharing agreement relating to the consequences if a GCO is not made are consistent with and provide context to Maurice Blackburn's retainer and costs agreements with Johnston and the separate but relevantly identical agreement with Moroney. The retainer provides that Maurice Blackburn will act on a conditional basis and indemnify Johnston for adverse costs and security for costs until a reasonable time after the GCO application is determined. It provides that if a GCO is made, Maurice Blackburn will be paid in accordance with the order made by the Court. If the GCO is not made, then Maurice Blackburn may elect to conduct the proceeding in accordance with the funding arrangements (which are those set out in the costs sharing agreement) or cease to act or continue to act on a conditional NWNF basis. Ms Gilsenan gave evidence that if a GCO was not made, Maurice Blackburn will, subject to instructions, conduct the proceeding in accordance with the funding

arrangements set out in the costs sharing agreement. In substance, CF2 would seek a CFO at the end of the proceeding at the rate of 30%.

110 Section 33ZDA of the Act provides that on application by a plaintiff in a group proceeding, the Court may make a costs order 'if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding'. A GCO is in effect a statutory CFO for the benefit of the law practice.[50]

111 The relevant principles have been summarised in a number of cases including relevantly by Nichols J in *Gehrke v Noumi Ltd*,[51] endorsed by Delany J in *Mumford v EML Payments Ltd*[52] and applied in *Maglio v Hino Motor Sales Australia Pty Ltd; McCoy v Hino Motors Ltd.*[53] The relevant considerations are as follows:[54]

> (a) Considerations of reasonableness and proportionality in respect of legal costs can meaningfully inform the setting of an appropriate percentage under s 33ZDA. One of the questions (but not the only question) that s 33ZDA invites in this respect is whether the costs to be allowed are, among other things, proportional to the risk undertaken by the law firm in funding the proceedings. Proportionality and reasonableness of costs in this context might be evaluated against numerous measures.
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> (b) While that may be so, the statutory criterion for the exercise of the power is not whether the proposed percentage rate to be set by the GCO will produce a return to the plaintiff's solicitors that is proportionate to the risk undertaken by the assumption of the obligations imposed by s 33ZDA; it is broader than that. The statutory criterion — *that the court be satisfied that it is appropriate or necessary to make such an order to ensure that justice is done in the proceeding* — is open-textured and provides the Court with a large measure of significantly unguided discretion. For the reasons discussed in *Fox/Crawford*, a court should be satisfied, in order to make a Group Costs Order, that doing so would be a suitable, fitting or proper way to ensure that justice is done in the proceeding; and for that purpose, a broad, evaluative assessment is required, and the statutory criterion permits a range of meanings and is capable of satisfaction in myriad ways.
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> (c) Although the amount recovered will likely be a significant integer in any proportionality assessment, it must be recalled that the statutory funding scheme created by s 33ZDA is intended to be capable of taking effect early in the life of proceedings where the assessment of potential

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50 *Bogan v The Estate of Peter John Smedley (deceased)* [2022] VSC 201, [9].
51 [2022] VSC 672 ('*Gehrke*').
52 [2022] VSC 750, [14].
53 *Maglio* (n 3).
54 *Gehrke* (n 51) [53(a)-(f)] (citations omitted).

recovery sums is likely to be fraught with uncertainty. As was observed in *Fox/Crawford*, the question of whether the return to the law practice under a Group Costs Order is or is likely to be reasonable, and whether it bears a proportionate relationship to the assumption of risk or to any other relevant measure, may be considered prospectively, but there may be real limitations on the Court's ability to make an informed assessment of that question.

(d) Much of what needs to be known to make such an assessment will not be known at the outset of a proceeding when a GCO is first fixed. The making of a Group Costs Order under s 33ZDA(1) serves the purpose of permitting the proceeding to be funded in a particular way (the law firm funding the proceeding and assuming the burden of meeting any adverse costs and security for costs liability, and group members sharing liability for payment of legal costs).

(e) That is where s 33ZDA(3) assumes significance. Once information informing questions of proportionality becomes available, a review under sub-s (3) of a percentage fixed at an earlier time will allow the Court to ensure that the percentage to which the law practice is ultimately entitled remains appropriate. Subsections (1) and (3), then, operate in a complementary way. Section 33ZDA(3) complements s 33ZDA(1) by permitting a later adjustment to the percentage fixed at the outset. An adjustment may be made at any stage of a proceeding but will at least arise for consideration once a recovery amount has been achieved by settlement or judgment. In the ordinary course it can be expected that the appropriateness of a rate set on the making of the GCO would arise for consideration on the resolution of the proceeding, including on an application by a plaintiff for approval of a settlement under s 33V. That s 33ZDA makes provision for the amendment of a percentage in this way is consistent with its broader statutory context within which it sits, including the requirement in s 33V that no group proceeding may be settled without the Court's approval. The prospect that a percentage fixed upon the making of a GCO may be later amended *by the Court* does not detract from the relative certainty that is achieved by the making of a GCO.

(f) That is not to exclude the possibility that some conclusions might be drawn early in the life of a proceeding about the prospect of the proposed rate resulting in a reasonable and proportionate quantification of legal costs. Whether that can be sensibly achieved will depend in large measure on the quality of the evidence directed to that question. In *Bogan*, John Dixon J made some observations to the effect that principles employed in other contexts to analyse returns on investment might inform a principled approach to the fixing of a percentage rate for a Group Costs Order. Where evidence of that kind is available, provided it is formulated on sufficient relevant instructions and assumptions, it might indeed be significant, but the return on the Funder's investment is far from the only relevant consideration. In the few decided cases considering s 33ZDA, including *Bogan*, it has been emphasised that keeping costs proportional to the complexity of the issues and the amount in dispute will be an important consideration.

112 Gilsenan 4, which is the primary affidavit relied upon in support of the application for the GCO, contains parts which were subject to claims of confidentiality which have been addressed in orders. It is not necessary for the purpose of this application to refer to that confidential material which relates to matters such as a high level assessment of the prospects of success and matters relevant to Maurice Blackburn's cost of capital and internal rates of return across the portfolio of historical class actions.

113 Section 33ZDA links how legal costs may be calculated with who shares the liability for those costs where the proceeding succeeds and who bears the financial risks of the litigation. This allows the Court to take into account the value of legal services performed and the assumption of risk.[55]

114 Given that the plaintiff assumes the financial risk of the litigation under the GCO, the financial viability of both the existing funding arrangements and the proposed funding arrangement by a GCO are relevant considerations in the valuative assessment.[56] It is relevant in that context for the Court to consider whether the GCO, if made, would be financially viable and to compare this with the alternative funding model that would ensue absent the making of a GCO. Whilst it is relevant to consider whether group members would be better off under the proposed GCO than the alternative funding arrangement, this is not a proxy for the statutory test and the relevance of a comparative analysis will vary from case to case.[57] The relative comparative analysis is between the proposed GCO and 'a real, not hypothetical alternative funding model'.[58]

115 The GCO carries with it 'in-built structural benefits or certainty in relation to costs' in the sense that group members are guaranteed that they will be pay no more in legal costs than a specified percentage of the recovered amount. Provided the Court is satisfied that the percentage fixed is appropriate there are substantive benefits to a GCO.[59] Maurice Blackburn's retainer and cost agreement with Johnston was signed

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55 *Lay v Nuix Ltd; Batchelor v Nuix Ltd; Bahtiyar v Nuix Ltd* [2022] VSC 479, [72] ('*Nuix*').
56 Ibid [74].
57 Ibid [78].
58 Ibid.
59 Ibid [80].

on 24 February 2023 and is in substantially identical form to that signed with Moroney on 19 January 2023. Both provide that Maurice Blackburn will act on a conditional basis and indemnify the respective plaintiff for adverse costs and security for costs (if ordered) until a reasonable time after a GCO application is determined. It specifies that the intention is to make an application for a GCO and that if such an order is made, Maurice Blackburn will be paid in accordance with a court order. If a GCO is not made, Maurice Blackburn may elect to either conduct the proceeding in accordance with a third party funding arrangement, continue to act on a NWNF basis or terminate the agreement.

116 Given Ms Gilsenan's evidence I am satisfied that the real alternative funding model is that described in Annexure B to the cost sharing agreement dated 9 December 2022. That is to say, CF2 would pay a smaller part of Maurice Blackburn's fees and disbursements up front and that those fees would be subject to a claim by Maurice Blackburn for an uplift on deferred fees subject to a cap with CF2 seeking a CFO at a headline rate of 30% at the conclusion of the proceeding.[60]

117 The proposed GCO gives Johnston and Moroney and group members' certainty[61] as to the percentage of any resolution sum that they would receive. This is to be contrasted with the all-inclusive CFO under the alternative third party funding. The CFO percentage would not be known until it is approved by the court in the context of a settlement approval with the distribution scheme.

118 I am also satisfied that the value of the services provided by Maurice Blackburn in return for the tiered rates of 24.75%, 20% and 15% of any resolution sum are commensurate to the costs and risks it would bear in prosecuting and funding the Johnston and Moroney proceedings. This is evident from the risks and uncertainties associated with the litigation and Maurice Blackburn's estimates of costs of conducting the proceeding. Having regard to the cost sharing arrangement with CF3, Maurice Blackburn would need to fund 67.5% of its own legal costs, 50% of all

60 See above [108].

61 Subject to possible revision under s 33ZDA(3) of the Act.

disbursements and 50% of any security for costs that is ordered. There is a cost to Maurice Blackburn in financing such matters and Ms Gilsenan has in the confidential parts of her affidavit given evidence as to the firm's cost of capital and the hurdle requirements of undertaking investment in litigation only in circumstances where a projected internal rate of return is sufficient to accommodate for that cost of capital.

119 For present purposes the relevant enquiry is whether the proposed GCO funding model is one which is financially viable in the sense that Maurice Blackburn has the capacity to fund the proceeding which includes the provision of the security for costs. I am satisfied that the GCO constitutes a financially viable funding model. Maurice Blackburn has sufficient financial resources to fund the proceeding including any orders for security for costs and any adverse costs including having regard to CF3 support under the cost sharing agreement. The evidence relied upon by Maurice Blackburn includes its audited financial accounts for the year ending 30 June 2024 which records net assets of approximately $210 million which have increased during the current financial year and net quick assets of around $12 million.[62]

120 I am not persuaded by Ms Banton's evidence that a significant proportion of those assets, comprising work in progress, should be ignored due to uncertainty of resolution. The work in progress asset forms part of Maurice Blackburn's assets. Maurice Blackburn's financial statements, including work in progress amounts, have been independently audited by BDO and are recorded in conformity with the Australian Accounting Standards Board ('AASB'). Those standards relevantly include AASB 15 which requires work in progress to be recognised only if it is 'highly probable that a significant reversal in the amount of cumulative revenue will not occur'. In the context of the present enquiry, there is no basis on the evidence to go beyond the audited accounts.

121 I note further that in the current financial year Maurice Blackburn has successfully reached in-principle settlements in eight class actions totalling $694.25 million. In addition, Maurice Blackburn enjoys the financial support of CF3. Whilst there is no

62 Cash plus trade and current receivables less trade payables and current tax payable.

evidence of CF3's financial position, I note that its ultimate owner and controller is Fortress Investment Group LLC which is a diversified global investment management firm with approximately $49 billion of assets under management. CF3 has also obtained after the event insurance policies with a limit of $2.5 million in each proceeding in respect of adverse costs.

122 Whilst it is all true that the financial statements are not up to date, the settlements are in principle and require court approval and there is no visibility as to when the settlement moneys will be received, the submission that Maurice Blackburn does not have the ability to fund the proceeding has an air of unreality about it.

123 Relevantly, the proposed GCO rates are not lower than the rates the subject of the July 2024 RSOP proposed by Edwards and Sims or the proposed April 2025 RSOP.

124 Edwards and Sims oppose the making of a GCO order principally on the basis that the Court could not consider that the proposed GCO rate is either appropriate or necessary in light of the lower rates proposed by ILP in the costs plus CFO, the subject of the July 2024 RSOP or in the costs inclusive CFO the subject of the April 2025 RSOP. In relation to the rates which are the subject of the latter, ILP has confirmed its willingness to provide funding to any consolidated proceeding at those rates.

125 Turning first to the July 2024 RSOP, the headline rates only tell part of the story. The CFO operates on a costs plus basis, whereas in the case of the GCO, the funds paid out pursuant to any order necessarily include a costs component. The modelling of net group member returns does not suggest any material advantages in net returns either way. To the extent that differences exist, they depend on the level and timing of resolution.

126 The comparison is more apt in the case of the CFO the subject of the April 2025 RSOP, which is structured on a costs inclusive basis. However, again the comparison of headline rates only goes so far. The ILP rates are undoubtedly informed by the Banton Group costs budget, which are considerably lower than estimates advanced by Maurice Blackburn. A like for like comparison would be one where the solicitors'

budgets are the same. It must also be borne in mind that the April 2025 RSOP has been proffered in the artificial environment of a carriage contest, where the Edwards and Sims proposal is advanced with the benefit of having seen the competitive bid, falls outside the agreed regime and represents their sixth bid. Nor does the offer of ILP to fund consolidated proceedings on the same basis meaningfully inform the analysis. The only basis upon which the ILP rates will be made available to Johnston and Moroney and Maurice Blackburn is if the Court considered it appropriate to grant Edwards' and Sims' alternative application to consolidate the Johnston and Moroney proceedings with the Edwards and Sims proceedings, with the terms of allocation of work and other relevant matters to be agreed between Maurice Blackburn and Banton Group pursuant to a consolidation agreement.

127 Had I granted leave to Edwards and Sims to rely upon the April 2025 RSOP, which is the most favourable RSOP in terms of the Banton Group's competitive position vis a vis Maurice Blackburn, or even had I considered that the July 2024 RSOP was valid, I would not have ordered a consolidation on the basis that both Maurice Blackburn and Banton Group would act pursuant to an consolidation agreement that had yet to be agreed. Moreover, given Maurice Blackburn's unwillingness to adopt such an arrangement, I would be reluctant to impose it. I do not accept that it would be in the best interests of any party or the relevant representative group to make orders facilitating joint representation by two firms where one opposes that course. Such an approach carries obvious disadvantages. The carriage contest has already been hard fought with considerable delays in the prosecution of the underlying action. There is no history of these two firms acting together in such a manner and, to date, limited evidence of cooperation or agreement between them. In these circumstances, I would be most reluctant to endorse such an approach. Further, as noted above, the prosecution of the underlying actions has already been delayed for nearly two years whilst this carriage contest has played out. Any proposed consolidation agreement, yet to be agreed, will only complicate and prolong the disruption to the orderly prosecution of the substantive action.

128 Given that conclusion, I do not consider the terms of ILP's commission rates contemplated by the CFO sought by Edwards and Sims, or those same rates proposed to be offered in a CFO providing for a joint retainer, are a relevant alternative financial model for the purposes of evaluating the necessity or appropriateness of the making of a GCO with respect to the legal costs payable to Maurice Blackburn.

129 The proposed headline GCO rate of 24.75% up to $120 million is competitive with median GCO rates where a firm is supported by a funder, according to the record of audits since 2020 identified in Professor Vince Morabito's research.[63] It is also lower than the median CFO rates approved by courts, being 25% exclusive of legal costs. In addition, the proposed GCO percentage rates are also lower than the alternative costs inclusive CFO of 30%.

130 I am therefore satisfied that a GCO in the terms sought is a suitable, fitting or proper way to ensure that justice is done in the proceedings.

The carriage outcome

131 As Edwards and Sims and Banton Group no longer seek carriage on the basis of the ES August 2023 RSOP, there is no competing carriage proposal, given that the July 2024 RSOP does not comply with the First Ruling and leave to rely on the April 2025 RSOP has been refused. As carriage was argued fully on the premise that one or other of the July 2024 RSOP or the April 2025 RSOP applied, it is appropriate to set out the conclusion that I would have reached if either had applied. For the most part, it is unnecessary to distinguish between them.

132 There was no dispute between the parties as to the applicable principles. These are well established and were summarised by Nichols J in *Lay v Nuix Ltd*.[64] The Court's task is to 'ensure that justice is done in the proceedings, being astute to protect the interest of group members'.[65] The Court must determine which proceeding going

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63 See Vince Morabito, 'Group Costs Orders, Funding Commissions, Volume of Class Action Litigation, Reimbursement Payments and Biggest Settlements' (Research Report, Department of Business, Law and Taxation, Monash Business School, Monash University, 4 February 2025).

64 *Nuix* (n 55).

65 *Nuix* (n 55) [16].

ahead would be in the best interest of group members having regard to all relevant factors.[66] The exercise is necessary and an evaluative one with all relevant factors being considered although some will take on greater or lesser significance in different cases.[67] The Court must also seek to give effect to the overarching purpose set out in the CPA to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute and to further that purpose by having regard to the objectives of the CPA. There is no one size fits all approach. There is inherent flexibility as to how the issue of multiplicity should be resolved.[68] The relevant considerations are reflected in the list of issues in Annexure A to the orders made 11 April 2025 and each of the protagonists framed their submissions accordingly. Those factors are:

(a) Carriage (issue 1);

(b) Forum (issue 2);

(c) Practitioners (issue 3);

(d) Nature and scope of causes of action (issue 4);

(e) Group membership and extent of any book build (issue 5);

(f) Funding and legal costs (issue 6);

(g) Proposal for security (issue 7); and

(h) State of progress of the proceedings (including conduct) (issue 8).

133 Edwards and Sims place particular reliance on issues 4, 5 and 6, whilst Johnston and Moroney place principal reliance on issue 3 and issue 8 including the conduct of the practitioners representing Edwards and Sims.

134 The defendants submit that these interests are affected, and should be considered, in relation to the adequacy of costs arrangements and proposal for security for costs,

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66 Ibid; *Wigmans v AMP Ltd* (2021) 270 CLR 623, 649 [52], [109] ('*Wigmans*').
67 *Nuix* (n 55) [19].
68 *Wigmans* (n 66) 666 [106].

issue 7, and the group member definition which falls within the scope of issues 4 and 5. Appropriately, they did not take a position on which plaintiffs should be awarded carriage.

Issue 1 – Carriage

135 Edwards and Sims seek carriage and orders that the Johnston and Moroney proceedings be permanently stayed. Johnston and Moroney seek mirror orders staying the Edwards and Sims proceeding. Edwards and Sims however in the alternative seek an order that the Edwards and Sims proceedings be consolidated with the Johnston and Moroney proceedings with Banton Group and Maurice Blackburn acting jointly in accordance with a consolidation agreement to be funded by ILP. Johnston and Moroney and Maurice Blackburn do not entertain the consolidation proposal.

136 In those circumstances, I do not consider it is in the best interests of the parties or the group members to make any such order. Whilst Delany J made orders to that effect in *Lidgett v Downer EDI Ltd*,[69] upheld on appeal in *Kajula Pty Ltd v Downer EDI Ltd*,[70] and it may be appropriate in some cases, critical to his Honour's determination in that case was the willingness of the proponents of two proceedings to cooperate and consolidate.

137 Contrary to the submissions of Edwards and Sims, I do not regard the unwillingness to consider the alternative as evidencing unreasonable cooperation.

138 Overall this factor is neutral.

Issue 2 – Forum

139 This issue is neutral; both sets of proceedings are now being conducted in this Court.

Issue 3 – Practitioners

140 I accept the submissions of Johnston and Moroney that this factor weighs in their favour. Whilst I accept that members of the counsel team retained by Banton Group

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69 [2023] VSC 574.
70 (2024) 76 VR 75.

have demonstrated expertise in large-scale litigation and class actions generally, and that two junior members of the team have particular experience in class actions against motor vehicle manufacturers, the overall level of experience and depth of the broader legal team, including the solicitors responsible for the day-to-day conduct of the proceedings, falls well short of that available to Johnston and Moroney.

141 Ms Banton herself has extensive experience in large representative proceedings and consumer claims. However, her experience has largely been concentrated in financial product cases and does not extend to consumer class actions concerning defective products including claims against vehicle manufacturers.

142 To the extent that Banton Group seeks to bolster its position by reference to the proposed involvement of Mr Bannister, I do not regard this as an advantage because there is uncertainty as to the extent of the role that he will play. Moreover, it is relevant that Federal Court has previously criticised Bannister Law for the minimal contribution made in a comparable class action,[71] which detracts from the weight that might otherwise be given to his involvement.

143 In contrast, Maurice Blackburn's team is led by two highly experienced class action solicitors, Mr Taylor and Mr Koo, both of whom have specific experience in consumer class actions against motor vehicle manufacturers. Mr Taylor is currently the senior lawyer in several class actions against motor vehicle manufacturers and Mr Koo has substantial experience in class actions, including day-to-day carriage of the class actions against Jaguar Land Rover and Hino. I accept that class actions concerning misreporting of fuel efficiency and emission performance, such as the Hino class action, may involve some different factual and legal issues than claims based on alleged breaches of statutory guarantees of acceptable quality. Nevertheless, the nature of the litigation, the fact that the defendants are a car manufacturer, and the procedural complexities associated with prosecuting claims on behalf of a large group of consumers against global automotive companies render Maurice Blackburn's experience in the Holden, Jaguar Land Rover, Volkswagen, Audi and Skoda

71 *Cantor v Audi Australia Pty Limited (No 5)* [2020] FCA 637, [462]-[467].

proceeding directly relevant and material. This level of experience is not replicated at Banton Group.

144 More broadly, Maurice Blackburn's team has significant depth and capacity to resource the proceeding appropriately. Given the firm's national presence and scale, with a dedicated class actions practice across multiple offices, Maurice Blackburn is well positioned to increase resources as required. In addition, Maurice Blackburn's access to specialist support services, including a litigation technology team with IT and data specialists, and a dedicated settlement administration team, provides a material advantage. These capabilities are particularly important in proceedings of this kind and size, where discovery may involve large volumes of documentation and where, if the proceedings are settled, administration arrangements may be required to efficiently distribute compensation to a large class of group members. Ms Banton's evidence of the availability of additional employed solicitors, law graduates and paralegals who can be deployed as needed is generalised in nature and less persuasive than the detailed evidence relied upon by Johnston and Moroney.

145 Maurice Blackburn's team will also have the benefit of the expertise of Julian Schimmel, who successfully conducted the Volkswagen, Audi and Skoda class actions, which is of particular relevance given the overlap in subject matter and defendant profile. Mr Schimmel's continued involvement in these types of proceedings further underscores the depth of experience that Maurice Blackburn is able to bring to the proceedings.

146 Finally, while Banton Group is undoubtedly capable and has expertise in the conduct of class actions generally, Maurice Blackburn's track record demonstrates more experience. As evidenced by the research of Professor Morabito, Maurice Blackburn has acted in 23 of 59 settlements exceeding $50 million and in seven of the 10 largest settlements, reflecting a sustained record of achievement in securing significant outcomes for group members in large-scale litigation. By contrast, Banton Group's record of substantial recoveries, while notable, is more limited both in scale and recency.

147 In these circumstances, I consider that the comparative experience, expertise, resources, and institutional depth available to Maurice Blackburn materially increases the prospects of an efficient, well-resourced, and successful prosecution of the proceedings, and thereby enhances the likely outcome for group members. Accordingly, this factor weighs clearly in favour of Johnston and Moroney.

Issue 4 – Nature and Scope of Causes of Action Advanced

148 I consider this factor is neutral. The claims made in both groups of the proceedings are substantially similar. Both allege misleading and deceptive conduct and failure to comply with the guarantee of acceptable quality in s 54 of the *Australian Consumer Law* ('ACL') based on a defect in the ABS module of certain Hyundai and Kia vehicles.

149 I do not consider that the fact that Edwards and Sims additionally allege reliance on the guarantee as to express warranties in s 59 of the ACL constitutes a material difference given that this claim is based on the same representations that form the basis of the claim for misleading conduct and non-compliance with s 54 of the ACL. Nor do I consider that the fact that Edwards and Sims include claims against the parent companies makes any material difference. There is no basis to believe on the present evidence that the Australian entities lack sufficient resources to meet any damages award.

150 Contrary to the submissions of Johnston and Moroney, I do not accept that there is any problem with the pleading by Edwards and Sims said to amount to a concession that the recall 'fix' limits damages by stating that the reduction in value is for the period prior to its availability. There is debate about whether the framing of the pleading in this fashion amounts to a concession given that the analogous plea in Johnston and Moroney proceedings refers to the fix as a 'purported fix'. The difference in wording is not of great moment; the defendants intend to rely upon the fix as an answer to the claims and its significance will call to be assessed on the basis of evidence led as to its efficacy and the effect on any claim for loss regardless of any characterisation or framing of the Edwards and Sims pleading. Nor do I regard any alleged difference in the particulars of distress and disappointment loss as being

material. Both sets of proceedings claim damages for loss of amenity, vexation, distress and disappointment.

Issue 5 – Group Membership and the Extent of any Book Build

151 The Edwards group member definition includes claimants who acquired vehicles the subject of three recall notices affecting 106,471 Hyundai vehicles not in the Johnston proceedings, whilst the Sims group member definition has reference to three further recall notices affecting 19,153 Kia vehicles not in the Moroney proceeding (collectively, 'Additional Recall Notices'). Edwards and Sims, if awarded carriage, will also seek leave to amend their group member definitions to include the 2024 Recall Notices which affect 113,525 Hyundai vehicles and 104,101 Kia vehicles.

152 The Additional Recall Notices and the 2024 Recall Notices relate in significant part to vehicles manufactured from 2004 to 2010.[72] In contrast, the existing group in Johnston relates to Hyundai with model years 2014 to 2020 whilst the existing group in Moroney covers Kia vehicles with model years 2014 to 2019.

153 As such, the class in both the Edwards and Sims proceedings is wider than the comparable class in the Johnston and Moroney proceeding. It will be wider still in the event that Edwards and Sims are awarded carriage and amend their pleadings so as to rely upon the 2024 Recall Notices, as they propose to do but Johnston and Moroney choose not to. Edwards and Sims therefore argue that awarding carriage to Maurice Blackburn means that some group members will not be participants in the Johnston and Moroney proceedings in the event that those proceedings go ahead and the Edwards and Sims proceedings are stayed.

154 I do not accept that this is a factor of significance. First, if the Johnston and Moroney proceedings go ahead and Maurice Blackburn are awarded carriage, they may be

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[72] There are three Additional Recall Notices which relate to 106,471 Hyundai vehicles. The first relates to 9,557 Sonata (NF) and Grandeur (TG) vehicles manufactured from 2004 to 2013; the second and third relate to 87,497 i30 and Elantra vehicles manufactured from 2010 to2015 and 9,417 Santa Fe vehicles manufactured from 2006 to2009. The 2024 Recall Notice relates to 113,525 vehicles of a variety of models manufactured from 2007 to 2014. There are two Additional Recall Notices which relate to 19,153 Kia vehicles manufactured from 2005 to2010. There are 10 2024 Recall Notices which relate to Kia vehicles, the first 4 of which relate to vehicles manufactured from 2009 to2014, with the balance covering dates of manufacture from 2009 to2018.

expected to give appropriate consideration to amending the group member definition and their statement of claim to include those affected by the Additional Recall Notices and the 2024 Recall Notices. This would be a reasonable approach and consistent with the approach taken in other cases.[73]

155 Secondly, the submission by Edwards and Sims assumes that the members of the wider classes have valid claims and would be prejudiced if the proceedings proceed on the basis of a narrower class definition.

156 As noted, the vehicles affected by the Additional Recall Notices and the 2024 Recall Notices relate in significant part to vehicles manufactured from 2004 to 2010. As a result, there is a risk that any claims sought to be advanced on behalf of those consumers might be statute barred. If not statute barred, such claims may be affected by factors relevant to both quantum and liability, given the age of the vehicles. These factors may impact on the magnitude of any reduction in value by reference to any damages, whether assessed having regard to a reduction in acquisition price or by reason of the asserted significance of the defect, considering the time which has passed between acquisition and awareness of the defect. Additionally, the possibility that current owners of the vehicles acquired the vehicles on a second-hand basis might give rise to complications. All of these factors will need to be taken into account as they may mean that the claims based upon these Additional Recall Notices or the 2024 Recall Notices are of limited value. Conversely, the claims may be of value.

157 On the basis of the current material I am not in any position to draw any conclusion as to the strength or otherwise of those claims.

158 However, if the claims are perceived to be of value, there is every reason to believe, that Johnston and Moroney will seek to amend the group member definition and their statements of claim accordingly. Conversely, if they choose not to, or only seek to amend in a more limited fashion, and carriage is awarded to Johnston and Moroney, there will be a cohort of group members in Edwards and Sims, whose claims will not

73 *Klemweb Nominees Pty Ltd v BHP Group Ltd* (2029) 369 ALR 583, 601-602 [85].

be pursued by Johnston and Moroney. This concern was raised by the defendants who are understandably concerned about the prospect of facing two actions. The problem would not be one of multiplicity per se as there will be no overlap in group membership. The outcome that may theoretically result is that there is one group action involving recall notices that relate to vehicles manufactured from 2014 to 2021 and a separate group relating to older vehicles. The concern appears overstated; the non-inclusion will only arise because Johnston and Moroney and their legal team choose not to include them. This in turn will only occur if they consider that the claims offer insignificant value. In that case, there would seem to be real doubt as to whether a new action could be advanced for the older vehicles with a new representative plaintiff and new lawyers and funders.

159 As such, this is a neutral factor.

Issue 6 – Funding and Legal Costs

160 As noted earlier, the funding model proposed by Johnston and Moroney is a GCO model with tiered rates of 24.75% up to $120 million, 20% between $120 million and $150 million and 15% above $150 million.

161 The funding model proposed by Edwards and Sims depends on the applicable RSOP. Based on the April 2025 RSOP, the draft CFO model is based on three tiers of resolution; 16.35% of any resolution sum up to $100 million plus 13% of any resolution sum between $100 million to $150 million and 5.5% of any resolution sum above $150 million.

162 I accept that on the basis of the April 2025 RSOP, group members as a whole will derive a return which is about 10% greater than that to which they would derive under Maurice Blackburn's GCO model.

163 I accept therefore that this is a factor in favour of carriage being granted to Edwards and Sims.

164 However, the extent of the advantage is qualified in the manner considered above.[74] While an overall advantage of around 10% accrues to group members as a whole, when that improved return is disaggregated and translated to the particular dollar benefit for each group member, based on the estimated size of the group likely to participate in the outcome, the benefit is less than it appears, given the likely group size.

165 Secondly, the greater return to group members as a whole is predicated on the basis that the resources and expertise provided by the Banton Group to Edwards and Sims is sufficient to achieve such returns. In that respect, it is interesting to note that Banton Group's cost estimates are significantly less than those of Maurice Blackburn, which arguably suggests the deployment of lesser resources. Of course, a lesser estimated legal fees budget does not mean that the quality of the services that are to be provided by Banton Group are lesser or deficient. On the contrary, the efficient and cost effective provision of legal services is a good thing, and as Edwards and Sims submitted, some law firms may be structured in a more nimble and efficient way than others. However, it is difficult to accept that this constitutes the explanation here. In Banton Group's legal budget of 20 November 2023 and 22 December 2023, the estimate was at a level, slightly less than but near that of Maurice Blackburn, before being slightly revised downwards in the 18 June 2024 estimate which accompanied the June 2024 RSOP. However, by the time of the 25 July 2024 estimate, which accompanied the July 2024 RSOP, the estimate of legal fees had been revised downwards in a very substantial manner. That lower estimate is repeated in the April 2025 RSOP. As explained above, the explanation for the revision is less than optimal and as a consequence, unpersuasive.

166 There are three possibilities presented by the vastly lower Banton Group legal budget. The first is that the Banton Group's lower estimate of costs represents an informed, appropriate and accurate estimate of the legal spend required to achieve the optimal resolution outcomes. On that premise, this issue favours Banton Group. The second

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74 See above [87]-[91].

is that the estimate is set too low and that if the human resources deployed are limited accordingly, there is a risk that the legal resources deployed will not be sufficient. The third is that the estimate is set too low and that Banton Group will have to deploy additional resources beyond those budgeted if the desired outcomes are to be achieved. If the latter two possibilities eventuate this undermines the extent to which this factor favours Edwards and Sims (and Banton Group).

167 To the extent to which there is any need to make further comment with respect to the July 2024 RSOP, the same considerations apply save that the analysis is less clearcut in favour of Banton Group as it relates to the comparison in the funding rates. This is because the July 2024 RSOP proposes a CFO model which is plus costs, albeit capped, and, as such, the return to the group members will depend not only on the resolution sum but the amount of costs ultimately deducted. In turn, this is affected by matters such as when the matter resolves. In general terms, however, I accept that the July 2024 RSOP provides group members as a whole with slightly more favourable resolution outcomes above the lower resolution levels, but to a far lesser extent than the April 2025 RSOP.

168 Both sets of competing protagonists, cast doubt on the capacity of the other to fund the proceedings if awarded carriage. Assuming that both can provide adequate security, which for the reasons set out below I do, then the only issue is the capacity of each firm of solicitors to carry their own legal costs. In the case of the Banton Group, Johnston and Moroney criticised the opacity of the evidence as to the financial position of the firm. Evidence of the same quality was described in such terms in other carriage disputes where a GCO was sought. However, the quality of the evidence depends on the issue in contest. Here, the primary issue is Banton Group's capacity to carry 20% of the capped costs and 100% of any costs overrun. If there is no costs overrun, no issue arises given the 80% contribution from ILP and the small costs budgets. The risk is of course higher if there is a costs overrun, but in any case there is no real concern given the extent of ILP's contribution.

169 In the case of Maurice Blackburn, the funding requirement is greater as the

contribution by the funder is less and the costs budget is higher. However, given the evidence as to financial position adduced by Johnston and Moroney, and considered more fully above, I do not consider that there is any real concern about the capacity of Maurice Blackburn to fund the proceedings.

170 The capacity of each group to fund the actions is a neutral factor; the greater group returns to Edwards and Sims under the April 2025 RSOP constitutes a factor in favour of Edwards and Sims and therefore Banton Group but not to the extent submitted by them. In the case of the July 2024 RSOP, the advantage is lesser again.

Issue 7 – Proposal for Security

171 In Edwards and Sims, ILP intends to provide any security by way of cash, a letter of credit or suitable guarantee or after the event insurance. ILP has funded previous orders for security for cost in a like manner.

172 In Johnston and Moroney, Maurice Blackburn have entered into a costs sharing arrangement with CF3. CF3 has in turn obtained two after the event insurance policies with a limit of $2.5 million each with respect to its 50% share of the adverse costs in respect of the Johnston and Moroney proceedings. There is no issue with the provision of security by CF3 and nor for the reasons set out above, no real basis for concern that Maurice Blackburn will be unable to provide any such further security as they may be ordered to pay, assuming that such security is ordered. I accept that the $5 million in after the event insurance is certainly a good start. Maurice Blackburn's balance sheet and overall financial position provides further support.

173 Again both protagonists criticised the quality of the evidence adduced by the other and the defendants raised various concerns, particularly with the financial material adduced by Maurice Blackburn and the asserted lack of clarity with respect to the financial position of CF3. This is not a de facto security for costs contest. The relevance of the issue for present purposes is whether one proposal is sufficiently more robust that the other to constitute a factor in resolving carriage. Here it does not. The factor is neutral.

Issue 8 – State of Progress of the Proceedings (including conduct)

174 The Johnston and Moroney proceeding were commenced first in time in this Court on 22 December 2022 and 10 March 2023 respectively. The Edwards and Sims proceedings were commenced on 25 May 2023. Defences have been filed in the Johnston and Moroney proceedings but not in the Edwards and Sims proceedings, although the reason why that has not occurred has been because of the carriage application. In short, the proceedings are essentially at the same stage.

175 Johnston and Moroney argue that the conduct of Edwards and Sims has been inimical to the just, efficient, timely and cost-effective conduct of the proceedings by reason of the matters that have arisen during the course of the carriage dispute. However, I do not accept that any deficiencies as to how the carriage dispute has been conducted means that the proceeding would not be prosecuted consistently with s 7 of the CPA going forward if Edwards and Sims were granted carriage. The relevance of this issue goes to the exercise of the discretion to give leave to amend in the terms of the April 2025 RSOP which has been dealt with and refused above.

176 Nor do I accept that anything turns on the failure of Edwards and Sims to agree to consent orders to obviate the need for the 11 April 2025 directions hearing or seeking consolidation of the proceedings. These are discrete matters and do not give rise to any concerns with the capacity to properly conduct the proceedings going forward.

177 As such this issue is neutral.

Overall

178 Given the above, the considerations are largely neutral, save for an advantage in favour of Edwards and Sims in respect of funding and an advantage in favour of Johnston and Moroney with respect to the experience and expertise of practitioners.

179 The extent of the advantage in favour of Maurice Blackburn concerning their experience and expertise in matters of this nature is significant and outweighs the funding advantage in favour of Edwards and Sims.

180 Accordingly, even if I had allowed Edwards and Sims to rely upon the April 2025

RSOP, carriage would still have been granted in favour of Johnston and Moroney. The same conclusion would have arisen if Edwards and Sims were able to rely on the July 2024 ESOP.

Summary of conclusions

181 In summary:

(a) Edwards' and Sims' application for leave to rely upon the April 2025 RSOP is refused.

(b) The July 2024 RSOP does not comply with the First Ruling.

(c) Given that the Banton Group is not willing to act for Edwards and Sims on the basis of the ES August 2023 RSOP, there is only one proposal which is that proffered by Maurice Blackburn on behalf of Johnston and Moroney. That proposal seeks the proceedings be conducted on the basis of a GCO at the rate of 24.75% up to $120 million, 20% between $120 million and $150 million, and 15% over $150 million.

(d) I am satisfied that a GCO in the terms sought by Johnston and Moroney is appropriate to ensure that justice is done in the proceedings and accordingly an order in those terms shall be made.

(e) The Johnston and Moroney proceedings shall continue as open class proceedings and the Edwards and Sims proceedings shall be permanently stayed.

(f) Johnston and Moroney's costs of the directions hearing held 11 April 2025 will be paid by Edwards and Sims in an amount to be taxed absent agreement.

182 The parties are directed to confer and submit orders to the above effect within 7 days or in default of agreement, their proposed orders. The orders should also deal with any outstanding costs issues.

CERTIFICATE

I certify that this and the 50 preceding pages are a true copy of the reasons for ruling of Justice M Osborne of the Supreme Court of Victoria delivered on 18 July 2025.

DATED this eighteenth day of July 2025.

Katherine Clements

Associate