

IN THE SUPREME COURT OF VICTORIA
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2020 03402

5 BOROUGHES NY PTY LTD (ACN 632 508 304)

Plaintiff

v

STATE OF VICTORIA & ORS
(according to the attached Schedule)

Defendants

<u>JUDGE:</u>	Watson J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	29 September 2026
<u>DATE OF JUDGMENT:</u>	21 October 2026
<u>CASE MAY BE CITED AS:</u>	5 Boroughs NY Pty Ltd v State of Victoria & Ors (No 9)
<u>MEDIUM NEUTRAL CITATION:</u>	[2026] VSC 683

REPRESENTATIVE PROCEEDINGS – Part 4A group proceeding – Application for approval of settlement – Whether proposed settlement is fair and reasonable – Relevant considerations – Settlement approved – Settlement Distribution Scheme approved – Appointment of Scheme Administrator – Approval for payment of legal costs from settlement sum – Group Costs Order amended – Reimbursement payments – *Supreme Court Act 1986* (Vic) Part 4A, s 33V, s 33ZDA.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr A Hochroth SC with Mr H Whitwell, Ms A Ilic and Mr M Kingsland	Quinn Emanuel
For the Defendants	Ms R Doyle SC with Ms R Amamoo	HSF Kramer



HIS HONOUR:

- 1 This is an application for the approval of a proposed settlement in a class action. The class action was commenced by the plaintiff, 5 Boroughs NY Pty Ltd ('5 Boroughs') against the defendants ('the State parties'), being the State of Victoria ('the State'), two former Ministers of the Victorian government ('Ministers') and two former Victorian departmental Secretaries ('Secretaries').
- 2 5 Boroughs alleges that the negligent management of hotel quarantine during the COVID-19 pandemic caused it and the group members economic loss. The State parties deny those allegations.
- 3 A trial of the proceeding was listed to commence on 10 March 2026 and run for nearly three months but, two days before the commencement of the trial, the parties reached an agreement in principle to settle the matter and subsequently executed a Deed of Settlement ('the Deed') on 16 March 2026.
- 4 Under the Deed, the State will pay the sum of \$125 million ('the Settlement Sum') in settlement of the plaintiff's and group members' claims. That payment is to be made with a denial of liability. In return for the payment, the plaintiff and group members will have to give up their claims against the State parties.
- 5 The first key question for me is whether the payment of the Settlement Sum in return for the releases 'is fair and reasonable having regard to the claims of the group members who will be bound by it if approved'.¹ For reasons that follow, I am satisfied it is.
- 6 Under a group costs order made on 23 November 2023 ('the GCO') the solicitors for 5 Boroughs, Quinn Emanuel, will be entitled to receive 30% of that sum or \$37.5 million on account of their costs and disbursements in the proceeding. I need to consider whether the GCO should be amended so that Quinn Emanuel receive a different percentage. For reasons that follow, I have determined that the GCO should be amended so that the specified percentage is 29%. As a result Quinn Emanuel will

¹ *Iddles v Fonterra Aust Pty Ltd* [2023] VSC 566, [24] ('Iddles').



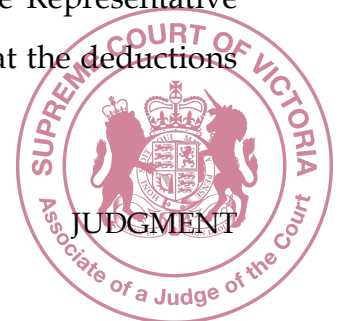
receive \$36.25 million as legal costs payable for representing 5 Boroughs and the group members.

7 5 Boroughs proposes a Settlement Distribution Scheme ('SDS') which provides for a mechanism to distribute the Settlement Sum. Under the SDS:

- (a) Certain amounts are deducted from the Settlement Sum and the interest earned on it, being the amount payable under the GCO, a payment to 5 Boroughs for repayment of a loan, \$5,000 each to 12 group members ('Representative Group Members') who provided assistance in the mediation of the proceeding and Administration Costs.
- (b) After those deductions, each participating group member is guaranteed a minimum payment of \$750.
- (c) After the payment of those minimum payments, the balance of the Settlement Sum together with any interest earned on it ('Net Settlement Sum') is distributed pro rata amongst participating group members whose assessed losses are more than \$750.

8 The primary question for me is whether the mechanism for assessing and paying amounts to group members is fair and reasonable. For reasons I explain below, I am satisfied that, subject to an amendment to the proposed loss assessment formula, it is.

9 I also have to consider whether the initial deductions from the Settlement Sum are appropriate. I have already indicated my view regarding the payment to Quinn Emanuel for its costs and disbursements. I am not satisfied the payment to 5 Boroughs for repayment of a loan should be made. Quinn Emanuel proposed to make a reimbursement payment of \$160,000 to 5 Boroughs from its GCO payment. As I discuss below, I do not regard it as appropriate for a payment to a plaintiff to be paid from a GCO amount. Such a payment should be deducted from the Settlement Sum as a separate payment and subject to the approval of the Court. I have not approved a payment to 5 Boroughs at the level proposed. The payment to the Representative Group Members is at a level which is appropriate. I am satisfied that the deductions



for Administration Costs are appropriate, though they should be subject to periodic approval by the Court during the course of the settlement administration.

- 10 I also have to decide who should administer the SDS. 5 Boroughs proposes that Mr Simon Weeks, a director of Sonority Pty Ltd, which trades as the Advisory Company ('the Advisory Company') should be appointed. I agree.
- 11 Finally, a range of ancillary orders are appropriate including regarding previously made costs orders and return of security for costs. I will make those orders. I propose to defer the making of final confidentiality orders until after the appeal period against the orders giving effect to these reasons has expired and assuming no appeal has been filed.

A brief factual background

- 12 The SARS-Cov-2 virus ('the virus') which causes the disease COVID-19 was first identified in late 2019. By 25 January 2020, the first Australian case of COVID-19 had been detected in Victoria. The World Health Organization declared the COVID-19 outbreak a public health emergency of international concern on 30 January 2020 and a pandemic on 11 March 2020.
- 13 In Victoria, the first case of community transmission was recorded on 12 March 2020, at which time there were a total of 26 active cases. From this point, the number of active COVID-19 cases in Victoria began to climb quite rapidly.
- 14 On 13 March 2020 a National Cabinet was established to address Australia's response to COVID-19. On 15 March the National Cabinet agreed that, upon arrival, persons coming to Australia from overseas would be required to self-quarantine for 14 days, a measure which was adopted in Victoria three days later. On 16 March 2020 the Minister for Health declared a state of emergency throughout Victoria pursuant to s 198(1) of the *Public Health and Wellbeing Act 2008* (Vic) ('*Public Health Act*').
- 15 Between 15 March 2020 and 30 March 2020 the National Cabinet adopted a range of measures aimed at restricting the spread of COVID-19. These included restrictions on gatherings, social distancing measures, restrictions on certain kinds of business, recreational and community activities and the suspension of all non-urgent elective



surgery. These measures were implemented in Victoria by a series of directions under ss 190 and 200 of the *Public Health Act*.

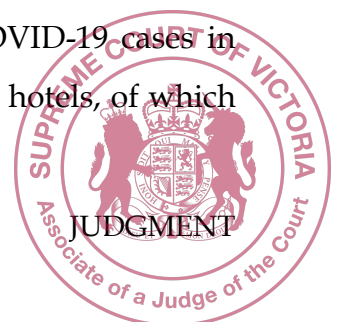
- 16 On 23 March 2020 ‘stage 1’ restrictions were put in place, which required the closure of pubs, bars, clubs, gyms, indoor sporting centres, casinos, cinemas, nightclubs, entertainment venues, restaurants and cafes (other than for takeaway meals or meal delivery), and places of worship (other than for weddings and funerals).
- 17 On 25 March 2020 ‘stage 2’ restrictions came into effect, which extended the range of business closures to include beauty and personal care facilities, auction houses, market stalls not supplying food or drink, accommodation facilities, swimming pools and zoos.
- 18 On 27 March 2020 the National Cabinet decided that, instead of self-quarantining, travellers returning to Australia would be required to undergo a 14-day quarantine at designated facilities. An announcement to the same effect was made by the Premier of Victoria on that day. By 27 March 2020, there were 465 active COVID-19 cases in Victoria.
- 19 On 28 March 2020 the Deputy Chief Health Officer for Victoria signed a detention notice under s 200 of the *Public Health Act* which required returning travellers to be quarantined in hotel quarantine for 14 days. Throughout the hotel quarantine program similar orders were issued from time to time.
- 20 In Victoria, the Department of Health and Human Services (‘DHHS’) and the Department of Jobs, Precincts and Regions (‘DJPR’) shared responsibility for implementing hotel quarantine. The DJPR procured the services of hotel operators and private security companies, whilst the DHHS placed its representatives at each hotel, arranged for nurses, mental health nurses and doctors, and supplied personal protective equipment for staff and travellers.
- 21 On 30 March 2020 Victoria entered what were described as ‘stage 3’ restrictions. Under these restrictions the range of business closures under stage 2 restrictions remained and, in addition, people were prohibited from leaving their homes except:

- (a) to obtain necessary goods or services;



- (b) for care or other compassionate reasons;
- (c) to attend work or education where it was not reasonably practicable to do those things from home;
- (d) for exercise; and
- (e) for a limited range of other reasons.

- 22 On 12 April 2020 the Rydges hotel in Carlton ('Rydges') commenced being used as a quarantine hotel under the hotel quarantine program. On 30 April 2020 the Stamford Plaza Melbourne hotel ('Stamford Plaza') became a quarantine hotel.
- 23 COVID-19 case numbers declined throughout April so that by the end of April the number of active cases had fallen from a peak of 543 on 28 March 2020 to 44 on 29 April 2020. From 30 April 2020 into early May they started trending upwards again for about two weeks, getting to 123 cases before trending downwards again from 15 May 2020. Commencing in about mid-May 2020, the Victorian government announced that restrictions would start easing from 1 June 2020. From 1 June 2020, the restrictions on leaving home only for specified reasons ceased, and restrictions on various business and community activities were eased.
- 24 There were two outbreaks of COVID-19 arising from hotel quarantine which are central to this proceeding.
- 25 The first outbreak was in May 2020 at Rydges, when the virus was transmitted from returned travellers to workers and, from there, into the community. A family of four returned travellers, some of whom had COVID-19, were moved to Rydges from another hotel on 15 May 2020. On 25 May 2020, a night manager employed by Rydges and two security guards employed by a security contractor experienced the onset of COVID-19 symptoms.
- 26 The second outbreak was at the Stamford Plaza in June 2020.
- 27 Genomic sequencing subsequently established that 98% of the COVID-19 cases in Victoria as at 18 August 2020 arose from the outbreaks at these two hotels, of which



approximately 96.6% arose from Rydges and approximately 1.4% from the Stamford Plaza.

- 28 From late June 2020, the number of daily active cases began to trend upwards and led to what is now known as the ‘second wave’ of COVID-19. In response, the State reimposed lockdown restrictions from 1 July 2020, initially ‘stage 3’ restrictions and then later ‘stage 4’ restrictions. Those restrictions prevented or limited businesses from operating and imposed limitations on individuals leaving their residential premises and lasted until 27 October 2020.

The class action

- 29 5 Boroughs commenced this proceeding against the State parties on 21 August 2020. 5 Boroughs brings the class action on behalf of group members who operated what might be broadly described as retail businesses which were affected by the restrictions between 1 July 2020 and 27 October 2020. It alleges that the hotel quarantine program was not conducted using adequate infection protection and control (‘IPC’) measures. It alleges that the Ministers and Secretaries were negligent, because they did not ask the right questions regarding whether IPC advice had been obtained and did not direct their Departments to implement the IPC measures which it pleads should have been implemented. Those allegations are denied by the State parties.

The plaintiff and group members

- 30 5 Boroughs operated a restaurant business known as ‘5 Districts NY’ between August 2019 and July 2023. Between 1 July 2020 and 27 October 2020, it was unable to provide in-house dining, and was only able to provide takeaway and delivery services.
- 31 The group on whose behalf 5 Boroughs brings the class action is all persons:
- (a) who, as at 1 July 2020, carried on a business (‘retail business’) the ordinary operations of which involved:
 - (i) the supply of goods or services at premises physically located within Victoria; and



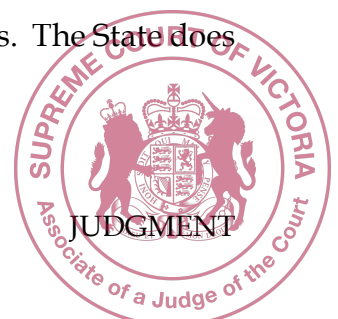
- (ii) the attendance by members of the general public at those premises for the acquisition of the goods or services supplied at those premises;
- (b) who were prohibited from supplying, or were restricted in their ability to supply, goods or services to members of the general public at such premises, or who operated such premises the attendance at which by members of the general public was prohibited or restricted, by one or more of:
 - (i) the 'stage 3' restrictions put in place in certain postcodes of Melbourne from 2 July 2020, and in Melbourne and the Mitchell Shire local government area from 9 July 2020;
 - (ii) the 'stage 4' restrictions put in place in Melbourne from 2 August 2020, including the workplace closures put in place from 6 August 2020; and
 - (iii) the regional 'stage 3' restrictions put in place in Victoria outside of Melbourne from 6 August 2020;
- (c) who have suffered economic loss by reason of one or more of the matters in subparagraph (b); and
- (d) who are not any of the persons mentioned in s 33E(2) of the *Supreme Court Act 1986* (Vic) ('the Act').

32 The group was originally described somewhat differently, but from 12 February 2021 the proceeding has been conducted on the basis that the group comprised the persons described above and on 3 August 2026 the definition of the group was formally amended to conform with the way in which the proceeding had been conducted. My reasons in *5 Boroughs NY Pty Ltd v State of Victoria & Ors (No 8)*² provide more detail about this.

The defendants

33 Section 23(1)(b) of the *Crown Proceedings Act 1958* (Vic) makes the State vicariously liable for the torts of its employees, agents or independent contractors. The State does

² [2026] VSC 496.



not have a direct liability for tortious acts.³ This is a matter of some significance in this proceeding because 5 Boroughs' claims therefore rely on establishing that at least one of the other four defendants is liable in tort — in this case, negligence.

34 During the period relevant to this proceeding:

- (a) the second defendant was the Minister for Health and the Minister for the Coordination of Health and Human Services with ministerial responsibility for the DHHS and its response to COVID-19;
- (b) the fourth defendant was the Secretary of the DHHS and its 'Department Head' within the meaning of the *Public Administration Act 2004* (Vic);
- (c) the third defendant was the Minister for Jobs, Innovation and Trade and the Minister for the Coordination of Jobs, Precincts and Regions: COVID-19 with ministerial responsibility for DJPR and its response to COVID-19; and
- (d) the fifth defendant was the Secretary of DJPR and its Departmental Head.

The cause of action

35 5 Boroughs pleads a claim in negligence to recover what is described as 'pure economic loss' — that is, loss which is not consequential on damage to person or property. To establish that claim it must succeed in establishing:

- (a) that at least one of the Ministers or Secretaries owed a duty of care to take reasonable care to avoid causing 5 Boroughs and the group members pure economic loss (**duty**);
- (b) that a person who owed a duty of care breached that duty by failing to take reasonable precautions against the risk of harm (**breach**); and
- (c) the breach of duty caused loss to the plaintiff and the group members (**causation of loss**).

³ *Salt v State of Victoria* [2017] VSC 6, [27], [32]; *Pateras v State of Victoria* [2017] VSCA 31, [58]–[59]; *Kaplan v State of Victoria* (No 8) [2023] FCA 1092, [122].



- 36 It is important in considering the fairness of the proposed settlement in this case to recognise that 5 Boroughs faced significant challenges in establishing each of duty, breach and causation of loss. I deal with some of those challenges in more detail below.
- 37 In its pleading 5 Boroughs alleged each of the Ministers and Secretaries owed a duty to exercise reasonable care in relation to the implementation of IPC measures at the quarantine hotels in order to avoid foreseeable economic loss to 5 Boroughs and the group members.
- 38 5 Boroughs alleges that DJPR and DHHS failed to:
- (a) adequately train staff;
 - (b) require appropriate usage of personal protective equipment ('PPE');
 - (c) establish necessary hand hygiene protocols;
 - (d) ensure physical distancing of 1.5 metres whenever possible;
 - (e) require testing of all workers exhibiting COVID-19 symptoms and require the isolation of those with symptoms and those who tested positive;
 - (f) ensure proper cleaning and disinfection at the hotels; and
 - (g) maintain proper supervision and audit of all of the above, with the rectification of any deficiencies identified in those matters.
- 39 It is important to note that the allegations of 5 Boroughs in this respect would have been the subject of considerable evidence and a real factual contest between the parties. In particular, the State parties say that they did all of those things outlined in the previous paragraph to an adequate standard in the circumstances. If the trial had proceeded there would have been considerable lay and expert evidence directed to the question of whether the particular training was adequate, whether the requirements regarding PPE use were sufficient and so on. I discuss this issue further below in my consideration of the risks which 5 Boroughs and the group members faced in proving their claims.



40 As I have noted above though, it is not enough for 5 Boroughs and the group members to succeed that DJPR and DHHS as entities failed to meet a proper standard of care. Nor is it enough that 5 Boroughs demonstrate that certain security guards employed in hotel quarantine did not take proper precautions. 5 Boroughs had to show that the Ministers and the Secretaries had themselves failed to exercise reasonable care.

41 The pleading alleges that those persons breached their duty of care because they did not:

- (a) ask their department whether it had obtained advice from a person with expertise in IPC on the risk of transmission of COVID-19 at quarantine hotels and what, if any, IPC measures should be implemented to minimise that risk ('IPC advice'); and
- (b) direct their department to obtain IPC advice and/or to implement it at the quarantine hotels.

42 This breach is said to have caused the outbreaks which caused the lockdowns which caused the economic losses which 5 Boroughs and the group members say they suffered. Issues relating to causation of loss would also have been hotly contested if the trial had proceeded.

Brief procedural history

43 This proceeding was hard fought. In his affidavit of 23 September 2026 filed in support of the approval application, Mr Damian Scattini, solicitor for 5 Boroughs, provides a comprehensive table of all of the procedural steps in the litigation. It runs to 133 pages. What follows is a very truncated summary of the procedural steps undertaken to the point of settlement.

44 In *5 Boroughs NY Pty Ltd v State of Victoria (No 5)*⁴ Keogh J summarised the procedural history of the proceeding up to the making of the GCO application in the following terms:

⁴ [2023] VSC 682 ('5 Boroughs (No 5)').



5 Boroughs served the writ in this proceeding in August 2020, and a statement of claim in February 2021.

In April 2021 the defendants applied for summary dismissal of the proceeding or to strikeout the statement of claim ('summary dismissal application'). After a contested hearing, John Dixon J delivered a ruling on 2 December 2021 refusing summary dismissal, striking out the statement of claim and giving 5 Boroughs leave to replead (*Summary Dismissal Ruling*).

5 Boroughs filed and served a second statement of claim ('2SOC') in March 2022 and an amended writ in April 2022. The defendants applied to strike out certain paragraphs of the 2SOC ('strike out application'). On 26 August 2022, John Dixon J ruled in favour of the defendants on one of three grounds, and otherwise dismissed their application. 5 Boroughs filed and served an amended statement of claim in September 2022, in accordance with the ruling and orders made by John Dixon J.

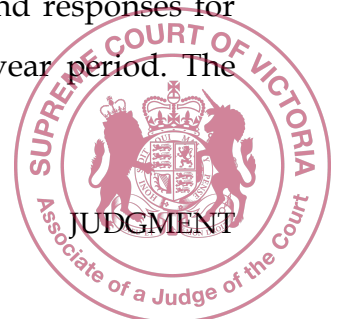
In September 2022, the first defendant applied to stay the proceeding until the criminal prosecution by the Victorian WorkCover Authority ('VWA prosecution'), concerning the same factual circumstances as this case, [was] finally determined, withdrawn or discontinued. On 3 February 2023, John Dixon J delivered reasons dismissing the first defendant's stay application. On 2 May 2023, leave to appeal that ruling was refused by the Court of Appeal.

...

5 Boroughs' application for a GCO was made on 23 June 2023. The procedural history explains why there was some delay in making the GCO application.⁵

- 45 On 23 November 2023, following a one-day hearing on 13 October 2023, Keogh J made the GCO.
- 46 On 21 February 2024 the Court made orders which required group members to opt out by 4:00pm on 8 July 2024 if they no longer wished to participate in the proceeding and required them to register by the same date if they wished to 'obtain any benefit arising from any settlement (subject to Court approval) of the proceeding reached at the mediation conducted' in November 2024. The notice was distributed to 121,900 businesses identified by the State, together with 902 deemed registrants. By the deadline, 6,004 group members had opted out, with a further 68 group members being permitted to opt out after the deadline pursuant to my orders of 2 February 2026. Approximately 16,000 group members had registered.
- 47 No discovery application was ever filed, but requests, demands and responses for production of relevant documents were exchanged over a three-year period. The

⁵ Ibid [7]-[12].



plaintiff produced 4,338 documents from a dataset exceeding 50,000 documents. For their part, the defendants produced 23,490 documents comprising more than 292,000 pages.

48 On 30 April 2024 the VWA prosecution was discontinued.

49 Throughout 2025 the parties filed witness outlines and expert evidence for trial. I describe that evidence below.

50 In the course of the proceeding an amount of \$3.6 million had been provided on 5 Boroughs' behalf as security for the State parties' costs. On 25 February 2026 I ordered the provision of a further \$3.6 million in security for the State parties' costs (although as it happens that amount was not paid before the settlement in principle was reached).

The evidence proposed for trial

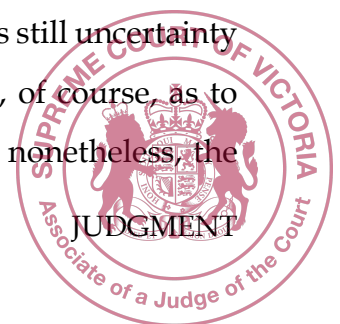
51 The trial of this proceeding was listed to commence on 10 March 2026 on an estimate of 10 to 12 weeks. The trial was to determine the common questions and the personal damages of 5 Boroughs. It is important to note that the trial would not have determined individual losses of group members. If 5 Boroughs had been successful on the common issues, those individual losses would only have been determined in further hearings after the initial trial.

52 The evidence to be presented at trial was complex and voluminous and fell broadly into three categories: documentary evidence, lay witness evidence and expert evidence.

53 5 Boroughs proposed to call 35 lay witnesses in total, comprising: its director, Mr Ferrara; 12 witnesses connected with the Rydges (five security guards contracted to work at the hotel; one hotel staff member; two returned travellers and four nurses); 16 witnesses connected with the Stamford Plaza (nine security guards, one risk management specialist, three hotel staff members, two returned travellers, and one IPC consultant); three medical professionals; and three 'authorised officers' working at the hotel quarantine sites.



- 54 The topics proposed to be addressed by the plaintiff's lay witnesses were varied, but included IPC measures such as training, PPE, hygiene, cleaning and disinfection, physical distancing, testing and isolation practices, and supervision and auditing of the hotel quarantine program, as well as alleged protocol breaches.
- 55 For their part, the defendants proposed to call 17 lay witnesses, including several ministers from the relevant period, senior government officials and public health officers.
- 56 The expert evidence proposed to be adduced at trial was extensive, comprising 12 experts in total. Four joint reports regarding epidemiology, IPC, ventilation and epidemiological modelling were produced. In those reports, the experts called by 5 Boroughs and the State parties provided answers to some specific questions, indicating where they agreed and disagreed. At trial, 11 of those experts were to give their evidence within concurrent expert panels organised by discipline. The concurrent evidence panels were to address the topics of epidemiological modelling, IPC, ventilation, economics, loss methodology and the quantum of alleged loss suffered by 5 Boroughs.
- 57 A further expert was retained by 5 Boroughs to address questions related to insurance, but was not allocated to any concurrent evidence panel.
- 58 The breadth of this expert evidence reflects the technical and multidisciplinary character of the common questions to be determined, spanning epidemiology and epidemiological modelling, infection control, ventilation science, and economic and forensic accounting evidence going to loss and causation.
- 59 The Court book contained approximately 5,000 documents going to various aspects of the hotel quarantine program.
- 60 Together, the lay, expert and documentary evidence outlined above were to address common questions concerning duty, breach and causation of loss.
- 61 At the stage the parties reached their in principle settlement there was still uncertainty as to how witness evidence might actually unfold during trial and, of course, as to how I would assess the evidence and the parties' submissions but, nonetheless, the



parties were in a very good position to assess the relative strengths and weaknesses of their case.

Risks if the proceeding went to judgment

- 62 All litigation has risks. This proceeding, in particular, carried a significant risk that the claims of the plaintiff and group members would not be successful.
- 63 In the course of the settlement approval, I have received affidavit evidence from Mr Damian Scattini, the solicitor for 5 Boroughs, in which he discusses his assessment of the prospects of success for 5 Boroughs and the group members. I also have a confidential opinion from counsel for 5 Boroughs, which also provides such an assessment. Those assessments have been provided to the Court on a confidential basis because they are subject to legal professional privilege, but I have taken them into account in assessing the fairness of the Settlement Sum.
- 64 Before the proceeding settled in principle, I had read the parties' written opening submissions, the witness statements, the expert reports and most of the underlying documents which would have been adduced in evidence. Plainly, I was still to hear the oral evidence and submissions in the proceeding but, as a result of that reading, I was in a position to form some preliminary views as to the likelihood of 5 Boroughs and the group members succeeding in their claims.
- 65 My preliminary assessment, at that stage, was that whilst 5 Boroughs and the group members had some real prospects of success in their claims, they were significantly more likely to lose than to win. That is, the preliminary view I held was that 5 Boroughs and the group members would not have established that the Ministers and the Secretaries were liable in the tort of negligence and that, as a result, the State would not be liable under s 23(1)(b) of the *Crown Proceedings Act 1958* (Vic). It is important to emphasise that hearing the evidence and the parties' oral submissions may well have rendered that preliminary assessment inaccurate. In other words, at the end of a trial I may have formed the view that 5 Boroughs and the group members should succeed, but at the time the case settled, I thought that was more unlikely than likely.



66 In order to explain why I held the view that I did, it is appropriate to provide a degree of broad elaboration on some of the areas where 5 Boroughs faced significant challenges in its claims on behalf of itself and group members.

Duty

67 The first element of the tort of negligence which 5 Boroughs must establish is that one of the Ministers or Secretaries owed it and the group members a legal duty to take reasonable care not to cause them loss or damage in the nature of pure economic loss. It is important to understand that what is involved is a consideration of whether there exists a *legal duty* to take reasonable care *to avoid a particular kind of loss*.

68 In the circumstances of this case three significant issues arise:

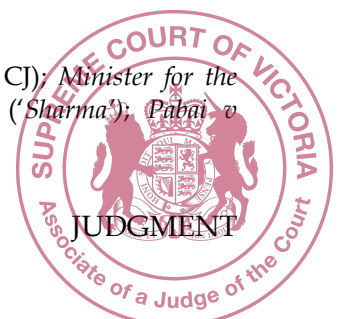
- (a) First, generally, the law does not impose a duty on a person to take reasonable care to avoid causing pure economic loss (loss not consequential upon injury to person or property) to another, even if that loss is reasonably foreseeable.⁶ Reasonable foreseeability of loss is a necessary but not sufficient condition.⁷
- (b) Secondly, the courts have a general reluctance to impose common law duties on governments or government officials which involve passing judgement on matters which are, in our system of representative democracy, appropriately left to the political process,⁸ and which ‘involve the judicial resolution of the reasonableness of government conduct involving matters of politics or high or core government policy’.⁹
- (c) Thirdly, particularly in cases involving governments or government officials, the courts will consider the degree to which the posited duty is coherent with other duties which might arise by statute or at common law.

⁶ *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2024) 283 CLR 507, 529 [30] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ) (*‘Mallonland’*).

⁷ *Mallonland* 530 [32].

⁸ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 553–4 [6] (Gleeson CJ); *Minister for the Environment v Sharma* (2022) 291 FCR 311, 389–91 [234]–[238] (Allsop CJ) (*‘Sharma’*); *Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796, [106]–[136] (*‘Pabai’*).

⁹ *Pabai* [107].



69 My preliminary view is that the activities undertaken in the hotel quarantine program were not the sort of activity where the Court would have been reluctant to impose a duty of care because they involved matters of politics or high or core government policy. However, there would definitely have been a live issue as to coherence with other statutory and common law duties, most particularly whether the imposition of a duty might have a ‘chilling effect’ on those who were required to determine what steps should be taken in response to an outbreak once it had occurred.

70 The greatest risk for 5 Boroughs and the group members, though, was whether the Court would have imposed a duty to take reasonable care to avoid pure economic loss.

71 The High Court has identified the primary policy reasons underpinning the general rule that there is no duty to take reasonable care to avoid pure economic loss:

The general rule is also said to reflect policy concerns about the potentially excessive scope of liability for financial loss, referred to by Cardozo CJ as liability “in an indeterminate amount for an indeterminate time to an indeterminate class”. Another policy reason said to justify the general rule is a concern to avoid infringing upon the legitimate pursuit of personal advantage.¹⁰

72 The approach that the courts have developed to determining whether there is a duty of care to avoid pure economic loss is to consider a range of ‘salient’ features of the relationship between the plaintiff and the defendant.

73 In *Caltex Refineries (Qld) Pty Ltd v Stavara*¹¹ Allsop P provided a non-exhaustive list of ‘salient’ factors:

- (a) the foreseeability of harm;
- (b) the nature of the harm alleged;
- (c) the degree and nature of control able to be exercised by the defendant to avoid harm;
- (d) the degree of vulnerability of the plaintiff to harm from the defendant’s conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;
- (e) the degree of reliance by the plaintiff upon the defendant;

¹⁰ *Mallonland* 529 [31] (citations omitted).

¹¹ (2009) 75 NSWLR 649.



- (f) any assumption of responsibility by the defendant;
- (g) the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant;
- (h) the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff;
- (i) the nature of the activity undertaken by the defendant;
- (j) the nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant;
- (k) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;
- (l) any potential indeterminacy of liability;
- (m) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff;
- (n) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests;
- (o) the existence of conflicting duties arising from other principles of law or statute;
- (p) consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and
- (q) the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law.¹²

74 The High Court has recently stated that an assumption of responsibility by the defendant to the plaintiff may well establish a duty to take reasonable care to avoid pure economic loss.¹³ 5 Boroughs did not contend that there had been a relevant assumption of responsibility by the Ministers and Secretaries in this case. Conversely, 'indeterminacy of liability, in the sense that the defendant's liability cannot be realistically calculated, will ordinarily deny the existence of such a duty of care'.¹⁴

75 5 Boroughs said that the kind of harm was reasonably foreseeable, and then alleged that the vulnerability of the group members, control by the Ministers and Secretaries of the hotel quarantine program, and the actual knowledge of the Ministers and Secretaries of the risk of harm to the group members, were salient factors in favour of the imposition of a duty of care to avoid pure economic loss. Some of those salient features might have favoured the imposition of a duty of care to avoid pure economic

¹² Ibid 676 [103].

¹³ *Mallonland* 530 [33].

¹⁴ Ibid 530 [32].



loss, such as, for example, the vulnerability of 5 Boroughs and the group members and their inability to take reasonable steps to protect themselves from harm. Even though this proposition was contested by the State parties, my impression was that their expert evidence on that issue seemed relatively unconvincing.

76 However, in my view, the issue of indeterminacy loomed large.

77 Indeterminacy does not arise simply because the number of persons affected might be large, or the quantum of their claims might be large, but it does arise where liability cannot realistically be calculated.¹⁵ Sometimes, a distinction is drawn between ‘first line victims’ and those who suffer loss as part of a ‘ripple effect’.¹⁶

78 In an earlier judgment in this case, John Dixon J rejected an argument by the State parties in the context of a summary judgment and strike out application that the posited duty could not exist because of indeterminacy.¹⁷ It is important to note that, in that context, his Honour was not determining whether in fact there was a duty, but rather the more limited question of whether the existence of such a duty was sufficiently arguable that 5 Boroughs could plead it. The argument before his Honour seems to have been primarily directed to the question of whether it was appropriate to categorise the group members as ‘first line victims’ and his Honour thought they were.¹⁸ Importantly, however, his Honour noted:

[I]f there is no principled basis for distinguishing the losses suffered by the plaintiff and group members from the losses falling into ... other unknown categories, then the duty ought not be recognised.¹⁹

79 John Dixon J thought that the argument before him from the State parties in that regard was ‘vague and undeveloped’ and that a ‘first line’ compared to ‘ripple effect’ analysis might provide a principled basis for avoiding the indeterminacy issue.

80 Having had the benefit of the parties’ opening submissions, I think there would have been, potentially, a real problem for 5 Boroughs and the group members in articulating a principled basis on which to delineate a duty in this matter on the basis

¹⁵ *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 221–2 [107]–[108] (McHugh J); 303 [336] (Hayne J).

¹⁶ *Ibid* 222–3 [112] (McHugh J).

¹⁷ *5 Boroughs NY Pty Ltd v State of Victoria* [2021] VSC 785, [151].

¹⁸ *Ibid* [144]–[146].

¹⁹ *Ibid* [149].



of identifying 'first line victims'. Certainly, delineating those affected by reference to the retail nature of their business, as broadly the group definition seeks to do, does not properly circumscribe those who might be described as directly affected. That much is evident from my consideration of issues relating to the amendment to the group definition.

81 I am inclined to the view that the imposition of a duty to avoid economic loss in these circumstances would have created exposure in an indeterminate amount to an indeterminate class. As a result, I am inclined to the view that, had the matter proceeded to trial, I would likely not have found that the Ministers and the Secretaries owed a duty to 5 Boroughs and the group members to take reasonable precautions to avoid pure economic loss. If I had ultimately made that finding, the claims of 5 Boroughs and the group members would have been unsuccessful, and they would have received nothing as a result of the proceeding.

Breach

82 Sections 48 and 49 of the *Wrongs Act 1958* (Vic) ('*Wrongs Act*') codify the requirements necessary to prove a breach of a duty of care. For present purposes, it is not necessary to conduct a detailed analysis of each of the elements of those sections and how they apply to this proceeding. Broadly though, those sections require someone who is under a duty to avoid the risk of harm to take reasonable precautions against that risk. In deciding what are reasonable precautions, the court is required to have regard to the likelihood of the risk and the seriousness of the potential harm, the burden of taking the precautions, and the social utility of the activity which creates the risk. That analysis is conducted at the time the activity is being undertaken, not with the benefit of hindsight.

83 In this proceeding, the relevant risk is not just that the virus would escape hotel quarantine, but that such an escape would lead to lockdowns which would, in turn, lead to economic loss. In this case, the risk of harm characterised in that way was reasonably foreseeable and plainly serious. The probability that the virus would be transmitted into the community if adequate IPC measures were not implemented was



also plainly reasonably high. The likelihood of consequent lockdowns and economic losses is somewhat more contestable.

84 A real issue in this case would have been whether the IPC measures which were adopted in the hotel quarantine program were appropriate and reasonable given the state of knowledge about the transmission of the virus at the time, in the circumstances of establishing a hotel quarantine program in a short space of time and in the context of other demands on the health system and government in the early stages of the response to the pandemic.

85 Another issue which would have been in contest was the extent to which it is appropriate to require the Ministers and the Secretaries to 'get into the weeds' regarding the particular IPC measures which should have been implemented at the quarantine hotels. 5 Boroughs says its pleaded precautions would not have required this, but I am not so sure.

86 I have discussed above how 5 Boroughs pleads a breach of duty by the Ministers and the Secretaries. It is alleged that a reasonable precaution those people could have taken to avoid the risk of harm was to ask whether the relevant Department had received IPC advice, which was defined to be advice on the risk of transmission of the virus at the quarantine hotels and on what IPC measures needed to be implemented to minimise that risk, and whether that advice had been implemented. Further, if no IPC advice had been obtained, the Ministers and Secretaries should have directed the Department to obtain it and, to the extent that IPC measures had not been implemented, they should have directed the Department to implement them.

87 Buried within that formulation were some significant issues which would have required consideration after hearing all the evidence. Below I give a few examples.

88 First, on the question of obtaining IPC advice, the evidence establishes that DHHS had obtained advice from an IPC consultant, Ms Michelle Bibby, on 17 April 2020, which was updated on 5 May 2020. However, 5 Boroughs argues that that advice was not IPC advice as pleaded because it was not at the request of the Ministers or the Secretaries, and because it was not advice on the risk of transmission of the virus.



There would have been a factual contest to resolve regarding the adequacy of Ms Bibby's advice but:

- (a) if the Ministers and the Secretaries had asked public servants running the hotel quarantine program, 'Do we have advice on infection protection and control measures?', it seems likely the answer would have been 'Yes'. It equally seems unlikely that a Minister or Secretary would have been required to ask whether the advice specifically dealt with the risk of transmission of the virus (as the pleaded precaution requires), or to assess in any detail the adequacy of the measures contained in that advice; and
- (b) if Ms Bibby's advice had been held to be reasonable in the circumstances, it is not immediately apparent to me that it would have mattered that that advice was not prepared at the specific request of one of the Ministers or Secretaries.

89 Secondly, there would have been real issues as to whether the specific IPC measures which 5 Boroughs says should have been implemented went beyond what was understood as reasonable practice at the time. On the issue of mask wearing, for example, 5 Boroughs pleaded that surgical masks should have been worn by workers at all times except when eating or drinking. However, the experts on this issue (including the expert called by 5 Boroughs) agreed in their joint report that during the relevant period workers would typically only be required to wear masks within 1.5 metres of a person who was infected.

90 Thirdly, there do seem to have been a number of instances of security guards at the quarantine hotels failing to follow IPC measures, like proper social distancing and hand hygiene. That might be consistent with inadequate training and/or inadequate supervision and auditing, two of the IPC measures which 5 Boroughs pleaded, although both social distancing and hand hygiene had been the subject of extensive public information campaigns. In any event, there would still have been a live question in this proceeding as to the reasonable precautions that the Ministers and Secretaries ought to have taken in respect of those issues.

91 As is evident from the above, difficult issues arose on the issue of breach and it is by no means certain 5 Boroughs and the group members would have succeeded on that



issue. Failure on this issue at trial would have meant that the claims of 5 Boroughs and the group members would not have succeeded.

Causation of loss

92 If 5 Boroughs had succeeded in establishing that the Ministers and Secretaries owed a duty of care to take reasonable precautions to avoid economic loss, and that there had been a breach of that duty, it would then have to have proved that the breach of duty caused the loss that it suffered.

93 Section 51 of the *Wrongs Act* sets out general principles for causation of loss in negligence claims. Section 51 relevantly provides:

- (1) A determination that negligence caused particular harm comprises the following elements –
 - (a) that the negligence was a necessary condition of the occurrence of the harm (**factual causation**); and
 - (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (**scope of liability**).
 - (2) In determining in an appropriate case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be taken to establish factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.
- ...
- (4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

94 5 Boroughs faced a number of challenges in proving factual causation.

95 First, it is not clear that the Stamford Plaza outbreak on its own would have led to lockdowns at all, given that it was responsible for only 1.4% of the COVID-19 cases as at 18 August 2020. There is, therefore, a real possibility that 5 Boroughs' case would only have succeeded if factual causation could be established in relation to the Rydges outbreak.



- 96 Secondly, as I have discussed above, it is not clear that if the Ministers or Secretaries had asked the pleaded questions regarding whether IPC advice had been obtained and whether measures had been implemented in accordance with that advice, the answer would not simply have been that IPC advice had been obtained from Ms Bibby and those measures had been implemented. In other words, it is simply not clear that, had the Ministers and Secretaries taken the precautions which 5 Boroughs says they should have, any different IPC measures would have been adopted.
- 97 Thirdly, based on the evidence which had been foreshadowed and filed, it was not possible to specify how the virus had transmitted from the returned travellers to hotel workers. In the case of Rydges, for example, none of the workers who first caught COVID-19 were working when the family of four arrived at Rydges, on the one occasion when that family was permitted a fresh air walk, or when the family left Rydges. Further, none of those workers were stationed on the same floor of the hotel where the family stayed at Rydges.
- 98 Fourthly, 5 Boroughs relied upon an alternative case that, had the pleaded IPC measures been implemented, there would not have been transmission between workers, even if there had been transmission of the virus from a traveller to a worker. Again, the evidence did not establish specific events of worker to worker transmission. Further, a number of the workers shared houses and/or drove together to work. It is not entirely clear that the pleaded IPC measures would have stopped transmission of the virus between those workers.
- 99 5 Boroughs sought to meet the absence of direct evidence regarding virus transmission events by relying on the evidence of Professor Pittet, an eminent epidemiologist and IPC specialist. Professor Pittet's evidence was that implementation of the pleaded IPC measures would more likely than not have prevented transmission from returned travellers to workers and between workers. That evidence rested on all of the pleaded IPC measures being implemented. I have noted above there was a real issue regarding whether, at the relevant time, it was reasonable to expect those responsible for hotel quarantine to require workers to wear surgical masks at all times except for eating and drinking, or whether, in light of the knowledge then available, it was reasonable to require workers to wear masks only when within 1.5 metres of an infected person.



Professor Pittet's views as to the effectiveness of the pleaded IPC measures seemed predicated on the former, but in a joint expert report he seemed to concede the latter.

- 100 Relatedly, a real issue arose on the evidence regarding the likelihood of long range transmission (that is more than 1.5 metres) of the virus. Professor Pittet's conclusions were premised on the unlikelihood of that mode of transmission. This issue would have been a matter of significant contest between Professor Pittet and Professor Baker, a professor of public health and an epidemiologist from the University of Otago in New Zealand, who were to give evidence in a concurrent session. My preliminary view, based on my reading of their evidence, was that there was not a widely accepted scientific understanding regarding the risk of long range transmission at the time of the two outbreaks, but that there was now an understanding that such long range transmission was possible and a greater risk than had been appreciated at the time of the outbreaks. Even though both experts agreed that short range transmission was more likely than long range transmission, it seemed plausible that the lack of direct evidence suggesting a short range transmission between those initially infected might have led to the conclusion that the likely mode of transmission in this case was long range transmission.
- 101 Fifthly, the evidence of the behaviour of some of the security guards suggests a lack of regard for the directions and training they had been given regarding infection protection and control. It may be that, having heard all the evidence, 5 Boroughs would not have proved that the IPC measures it says should have been implemented would have prevented the spread of the virus in the face of a similar lack of regard for those measures.
- 102 Sixthly, the losses to businesses were not caused by the COVID-19 outbreaks as such, but by the making of the relevant directions under the *Public Health Act* imposing the third and fourth stage restrictions. Those directions were not made by the Ministers or Secretaries, but by other government officers exercising independent statutory powers. The State parties say this means that the chain of factual causation was broken.



- 103 The upshot is that, notwithstanding Professor Pittet's evidence, proving factual causation in this case was going to be very challenging. Overall, based on things as they stood just prior to the commencement of the trial, my preliminary assessment was that 5 Boroughs was more likely than not to fail in proving factual causation.
- 104 Had the matter proceeded to trial, I would have had extensive submissions from 5 Boroughs and the State parties regarding scope of liability. In light of my views regarding factual causation, I do not intend to deal with those arguments at any length. One particular matter, though, is worth noting. Even if the fact that the directions under the *Public Health Act* were made by officers exercising independent statutory powers was not sufficient to break the chain of factual causation, the nature of those powers and the fact that they were to be exercised to protect the community may have raised questions about whether it was appropriate to impose liability on the Ministers and the Secretaries for economic consequences which flowed from the directions. The scope of liability remained very much in contest.
- 105 Section 51(2) of the *Wrongs Act* provides an alternative basis on which 5 Boroughs might have established causation. Its contention in this regard was that, if it failed to prove factual causation, it could succeed under s 51(2) of the *Wrongs Act* on the basis that the failure of the Ministers and Secretaries to take the pleaded reasonable precautions had materially increased the risk of the loss suffered. In a recent Federal Court case *Pabai v Commonwealth of Australia (No 2)*,²⁰ Wigney J said that that proposition did not form part of the common law of Australia, and that 'any conclusion that increasing risk is sufficient for a conclusion of causation ... is a matter for the High Court', and was not open to a single judge of that Court.²¹ I would have been bound to follow *Pabai* unless persuaded it was plainly wrong. As a result, 5 Boroughs' alternative case on causation under s 51(2) of the *Wrongs Act* was also more likely than not to fail.

Conclusion regarding prospects

- 106 As I indicated at the outset, my preliminary assessment at the stage the case settled

²⁰ *Pabai*.

²¹ *Ibid* [157].



was that, whilst 5 Boroughs and the group members had some real prospects of success in their claims, they were significantly more likely to lose than to win. That assessment is a factor of considerable importance in assessing the fairness of the proposed settlement.

Principles for approval

107 Section 33V of the Act provides as follows:

Settlement and discontinuance

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

108 The principles that apply with respect to an approval under s 33V are well established. The Court's discretion requires consideration of whether the overall settlement sum, and the distribution of that sum, 'is fair and reasonable having regard to the claims of the group members who will be bound by it if approved'.²²

109 The factors which may be taken into account in assessing that fairness and reasonableness have been extensively considered in other cases,²³ and a number are listed in clause 16.6 of the Court's *Practice Note SC GEN 10 Conduct of Group Proceedings (Class Actions) (second revision)*.

110 The assessment of reasonableness 'falls to be considered within a range, the question being whether the settlement is within that range and whether there are any features that are obviously unfair or unreasonable'.²⁴ Further, as stated by the Court of Appeal in *Botsman v Bolitho*:²⁵

It is an essential starting point to identify the settlement and its terms. It is commonplace that a deed of settlement may address more than the settlement of the claims against the defendant and will also deal with the distribution of settlement money, including to a litigation funder. The structure of subss

²² *Iddles* [24].

²³ *Ibid* [25]–[27]; *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459, 465 [19]; *Matthews v Ausnet Electricity Services Pty Ltd* [2014] VSC 663, [43].

²⁴ *Mumford v EML Payments Ltd* [2026] VSC 143, [23].

²⁵ (2018) 57 VR 68.



33V(1) and (2) suggests that such payments may be distributions of money that has been paid under a settlement to which the Court has given approval under s 33V(1). Those distributions are the subject of separate Court approval under s 33V(2).

The question of fairness interposes itself at various levels. Most obviously, there will need to be consideration of the fairness of a proposed settlement sum.

The Court is being asked to approve a compromise of litigation. Inevitably, that will require an assessment of whether the plaintiff is likely to succeed in the action, the measure of damages that a successful judgment would yield, the prospects of recovery, and the expenditure in costs, time and effort that would be required to bring the proceedings to a conclusion.

That assessment does not involve a simple calculus but calls for matters of judgment based on imperfect knowledge and is influenced by the appetite for risk. It will be informed by the complexity and duration of the litigation and the stage at which the settlement occurs. It is important to acknowledge that it is the state of imperfect knowledge and the existence of risks that will have likely induced the settlement. It follows that those matters should be accorded a degree of prominence in any assessment of the reasonableness of the settlement.

Those considerations mean that there will rarely, or ever, be a single correct settlement. Strategic decisions must be factored into account but it is not the role of the Court to second guess those decisions.²⁶

The Settlement Sum and the releases

111 The central feature of the proposed settlement is the payment by the State of the sum of \$125 million inclusive of costs to the plaintiff and group members in return for releases. In determining whether that is fair and reasonable, the matters I need to consider are:

- (a) whether it is appropriate to limit the group members who may receive compensation under the settlement in the way which is proposed;
- (b) whether there is anything about the scope of the releases which is problematic; and
- (c) whether, having regard to:

²⁶ Ibid 111-2 [203]-[207] (Tate, Whelan and Niall JJA) (citations omitted).
5 Boroughs NY Pty Ltd v
State of Victoria & Ors (No 9)



- (i) a reasonable estimate of the value of participating group members' claims;
- (ii) the risks associated with the claims; and
- (iii) the value of certainty and earlier payment;

the Settlement Sum falls within the range that is fair and reasonable.

Participating group members

- 112 Under the proposed settlement, the group members who will be eligible to receive a distribution under the SDS ('participating group members') will be limited to persons who registered by 4:00pm on 8 July 2024 ('registered group members'), together with any late registrants who the Court approves ('approved late registrants'). If the Court accedes to that proposal, a substantial number of group members will give the State parties and Associated State Entities a release but will not receive any monetary compensation in return.
- 113 As a practical matter, at some stage in a settled class action, group members have to come forward and indicate that they wish to participate in a settlement. Sometimes that occurs after the settlement has been approved under a settlement distribution scheme, and sometimes the court exercises its powers under s 33ZG of the Act to require group members to take that step before the matter has settled.
- 114 In this proceeding, the Court made orders on 21 February 2024 requiring group members to register by 4:00pm on 8 July 2024 if they wished to 'obtain any benefit arising from any settlement (subject to Court approval) of the proceeding reached at the mediation conducted' in November 2024. The registration process was very extensively publicised, and more than 16,000 group members registered by the deadline.
- 115 If the proceeding had settled at the mediation conducted in November 2024, things would be more straightforward. However, the proceeding did not settle (subject to Court approval) until two days before the trial was scheduled to commence. The notice which was published to group members regarding registration flagged that, if



the proceeding did not settle at the November 2024 mediation, 5 Boroughs and the State parties might still apply to the Court to have any settlement apply only to registered group members. In fact, that is what has happened.

- 116 In some cases, once a matter has settled, a very significant number of group members come forward seeking to participate even though they have not registered by a court-approved deadline. For example, in *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)*²⁷ 8,701 group members had registered by a court-approved deadline but once settlement was announced a further 6,476 group members sought to participate.
- 117 Here, things are very different. Whilst a few hundred people sought to register after the Court-imposed deadline, there are, in effect, 70 persons (including those who objected to the settlement on the basis that they ought to be permitted to participate) seeking to be included in the settlement who had not registered by the due date.²⁸ Given that the overall size of the class has been estimated as exceeding 89,000 group members, the number of group members who had not registered but who now seek approval to participate in the settlement can truly be described as a very small proportion of the group as a whole and a very small proportion of the number of registered group members. In those circumstances, the Court can have considerable confidence that the cohort of registered group members overwhelmingly captures those who wish to participate in the settlement.
- 118 Of the 70 persons who make applications for late registration, 5 Boroughs does not oppose 55 being admitted to participation in the settlement. Of the balance, seven do not meet the group member definition, three are on behalf of corporate entities which have been deregistered, and five do not provide any or any adequate explanation of their failure to register. I will approve as late registrants the 55 group members who are not opposed by 5 Boroughs. I accept 5 Boroughs' characterisation of the other late registrant applicants and will not approve their participation in the SDS, subject to my

²⁷ [2024] VSC 733.

²⁸ 14 group members who had in fact registered on time made applications to be accepted as late registrants and do not need any approval of the Court in order to participate in the settlement.



comments below regarding those applications on behalf of companies which have been deregistered. The settlement approval orders will reflect this outcome.

- 119 Overall, I am satisfied that it is fair and reasonable to limit participation in the settlement to registered group members and approved late registrants.
- 120 Ten persons objected to the settlement on the basis that they had been the person in effective control of a company which was operating during the lockdown period but which had been deregistered under the *Corporations Act 2001* (Cth). Three of these objectors made oral submissions, the effect of which was that it was unfair that they should be excluded from participation in the settlement and that they should be given an opportunity to re-register their companies.
- 121 None of these objectors are group members. The claim was not brought on their behalf. The group member was the company and that company no longer exists.²⁹ This is not just a technicality; it goes to the central feature of the proceeding, which is that the persons who benefit from the proceeding are those who are group members, not persons who might have an association with the group member. Further, to the extent that the company's right to participate in the settlement might be regarded as property, that right will have vested in either the Australian Securities and Investments Commission or the Commonwealth upon deregistration of the company.³⁰
- 122 In short, unless those companies are reinstated, no distribution can be made in relation to the claims those companies had in the proceeding. Reinstatement will likely involve a court order and will likely cost a relatively substantial sum, if legal representation is obtained. In some cases, that expense may not be worth it, given the amounts which would be recovered under the SDS if reinstatement is effected.
- 123 Nonetheless, I think it is appropriate that these ten objectors be given a reasonable opportunity to reinstate their companies. They should take advice and consider carefully whether this process will be worthwhile.

²⁹ *Corporations Act 2001* (Cth) s 601AD(1).

³⁰ *Ibid* ss 601AD(1A), (2).



124 I will make orders that will allow these objectors until 29 January 2027, or such further period as the Scheme Administrator shall allow, in which to reinstate their companies and notify the Scheme Administrator that this has occurred. In light of the likely time which will be taken in administering the settlement, I do not regard an approximately three month window for reinstatement as likely to impede the progress of distribution to other group members, but it is necessary to impose some form of deadline so the distribution is not unduly held up.

125 Three late registrant applications were made on behalf of companies which have been deregistered. In one instance, it seems plain that the company concerned would not, in any event, meet the group definition. The other two appear to meet the group definition and have provided some explanation for their failure to register by the registration deadline. The persons associated with those companies should have the same opportunity to reinstate those companies as the ten objectors.

The scope of the releases

126 Under the proposed settlement the plaintiff and all group members will provide the following releases:

- (a) the Proceeding as between the Plaintiff and Defendants including the Plaintiff's and Group Members' claims for damages, compensation, interest and legal and administrative costs and disbursements (present and future) is fully and finally resolved.
- (b) the Plaintiff, on its own behalf and on behalf of the Group Members (subject to the making of the Approval Orders), releases and discharges the Defendants and the Associated State Entities jointly and severally from, and covenants not to sue in respect of:
 - (1) the Claims made (either directly or indirectly) by the Plaintiff or any Group Member in the Proceeding;
 - (2) any Claim (either direct or indirect) by the Plaintiff or any Group Member which is in respect of, or arises out of, the same or related circumstances to those raised in the Proceeding; and
 - (3) any Claim that the Plaintiff or any Group Member has or may have, and which were raised or could have been raised in the Proceeding and is in respect of, or arising out of, the same or related circumstances to those raised in the Proceeding;

and for the avoidance of doubt:



- (4) this sub-clause (b) does not extend to a Claim that a Group Member has or may have against any of the Defendants or any Associated State Entities, and which:
- (A) is not made in the Proceeding and could not reasonably have been made in the Proceeding by the Plaintiff on its own behalf or on behalf of Group Members; and
- (B) is unique to that Group Member in the sense that it could not give rise to any common question of fact or law that was raised or could reasonably have been raised as between that Group Member and the Plaintiff.

127 'Claim' is defined as being:

All claims, actions, demands, debts, causes of action, liabilities, allegations or complaints, losses, suits or proceedings for damages, equitable relief, compensation, interest and legal and administrative costs, expenses and disbursements (present and future) of any description, debt, restitution, equitable compensation, account, interest, injunction, specific performance, judgments, decisions and orders or any other remedy, whether arising at common law, in equity or under statute or otherwise.

128 'Associated State Entities' is defined as:

All present and former:

- Ministers of the Crown in the right of the [State];
- statutory entities, Departments and agencies of the [State];
- Secretaries of Departments of the [State];
- Chief Health Officers of the [State];
- Deputy Chief Health Officers of the [State]; and
- servants, contractors and agents of the [State].

129 The definition of 'Claim' is quite broad, but not unusual in a settlement. The scope of the claims released, apart from the release of the Associated State Entities, is plainly tethered to claims which could have been advanced in the proceeding on behalf of the group, and specifically excludes those claims which are unique to group members. The scope of the releases is therefore within the scope of the plaintiff's representative authority under Part 4A of the Act.³¹ I am satisfied that the provision of releases to the Associated State Entities is permissible having regard to the Court of Appeal decision

³¹ *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647, [23].



in *Laszczuk v Bendigo & Adelaide Bank Ltd* ('*Laszczuk*')³² and in the particular circumstances of this case I am satisfied that that extension is fair and reasonable.

130 Two group members objected to the settlement partly on the basis that they had individual claims involving the particular circumstance that they were physically located in the Stamford Plaza and that the way in which 5 Boroughs had run the proceeding had not sufficiently taken into account those claims. The scope of the releases does not extend to claims that were not made in the proceeding and that are unique to the group member, in the sense that they could not give rise to any common question of fact or law that was raised in this proceeding. I am satisfied that the objection of those two group members, in this respect, therefore provides no basis to refuse the settlement.

131 Overall, I am satisfied that the scope of the releases is reasonable, including the requirement that group members who are not participating in the settlement will give those releases.

Is the Settlement Sum fair and reasonable?

132 After the deductions from the Settlement Sum, participating group members will share in a bit over \$87 million (together with any interest earned on the Settlement Sum). How does that compare to the value of their claims? The answer is somewhat unclear because the total value of participating group member claims is uncertain.

133 The average self-reported loss of registered group members is \$199,635. Applying that number across the nearly 16,000 registered group members would give a total claim value of more than \$3 billion. Experience suggests that self-reported losses tend to significantly over-estimate the losses which would ultimately be recoverable after a trial, including because they often include kinds of loss which are not legally recoverable, and because they often do not apply an appropriate methodology for calculation of those losses which are recoverable. I would not place any significant weight on those figures in this case.

³² (2020) 61 VR 1, 14–17 [51]–[62] (Whelan, Hargrave and Emerton JJA) ('*Laszczuk*').



- 134 In the GCO application, 5 Boroughs relied on an expert report from Mr Greg Houston a consultant economist. In his report, Mr Houston estimated there were approximately 89,000 group members, and conducted what might be described as a 'top-down' estimate of group member losses. That top-down exercise produced a range for losses for the entire group of between \$788 million and \$1.821 billion. As the range itself indicates, Mr Houston's figures were subject to significant limitations. The figures did not take account of any interest to which group members might be entitled. Adjusting Mr Houston's figures for the approximately 16,000 registered group members gives a range of approximately \$142 million to \$327 million, excluding interest.
- 135 At the mediation in November 2024, on the basis of further expert evidence obtained at that time, the total value of claims of the registered group members was estimated to be between \$980 million and \$1.13 billion plus interest. For present purposes, I propose to use this latter range as an estimate of losses for participating group members. The other possible estimates are likely to be less reliable. Self-reported losses in this instance seem likely to have significantly over-estimated losses. Mr Houston's figures were superseded by further expert analysis. I am somewhat concerned that an estimate for mediation purposes is likely to take what might be regarded as an optimistic view of potential recoveries, but 5 Boroughs did not provide any other estimate of losses to which I could compare the Settlement Sum (before and after deductions). So, for present purposes, the figures produced for the mediation are the best basis for a comparison.
- 136 The result is that the Settlement Sum represents approximately between 11.1% and 12.8% of the total estimated losses for participating group members, excluding interest. The Settlement Sum after deductions (approximately \$87 million) represents approximately between 7.7% and 8.9% of the total estimated losses, excluding interest for participating group members.
- 137 Those percentages are low, but in my view they reflect the reality, discussed at length above, that whilst this was a case that might have been successful, it was a case that was more likely than not to fail, leaving 5 Boroughs and the group members with nothing.



- 138 Equally, whilst \$125 million might seem like a very significant sum for the State to pay for a claim that, as I have said, seemed more likely to lose than succeed, that has to be set against the State parties' very significant potential exposure had the case against them succeeded. If 5 Boroughs had established its claims, the potential exposure for the State would have likely run into some billions of dollars, because the best estimate I have for the approximately 16,000 registered group members' loss is around \$1 billion and a judgment at trial would have allowed all of the estimated 89,000 group members to make a claim for their individual losses.
- 139 In addition to receiving something rather than a likely nothing, group members will also receive their distribution from the settlement years earlier than is likely if the matter had gone to trial. I would likely not have rendered judgment in the proceeding until the very end of this year, and more likely into next year. Given the factual and legal complexities raised by the claim, a decision in favour of 5 Boroughs and the group members would almost certainly have been appealed to the Court of Appeal, and potentially to the High Court. That process would likely have taken a further number of years. After that process, if the appeals were unsuccessful and the matter had not settled, group members would have been required to prove their individual losses. The number of claimants and the issues relating to proper proof of loss mean that process would also likely have taken years. In other words, even after the completion of a successful trial and even assuming a successful first instance decision was not reversed on appeal, the group members would still potentially have had to wait perhaps five years in order to receive an individual damages payment.
- 140 The SDS will take some time to administer, but it will be much quicker than the likely time it would take for individual group members to have their damages assessed.
- 141 Overall, despite the Settlement Sum and Net Settlement Sum reflecting a low percentage of the total estimated losses for participating group members, I am satisfied that, in the circumstances, it is within the range of reasonable outcomes, once account is taken of the very considerable risks which 5 Boroughs and the group members faced in establishing their claims, the value of certainty and earlier payment under the SDS, and the uncertainty and likely delay in payment had the matter gone to trial.



142 Eleven businesses (three of whom did not meet the group definition) objected to the settlement on the basis that the Settlement Sum will not fully compensate group members for their losses. All settlements tend to involve some element of compromise on the part of both parties. This settlement is no different. It is generally unrealistic to expect a settlement of a class action to provide full compensation for losses suffered and, in light of the matters I have discussed above, it is even more so here. Those objections provide no basis for refusing to approve the settlement.

Group Costs Order

143 On 23 November 2023 the Court made the GCO. Under that order:

- (a) the legal costs payable to Quinn Emanuel are to be calculated as 30% of any award or settlement recovered in the proceeding;
- (b) the liability for those costs is to be shared among the plaintiff and group members (other than those who opted out of the proceeding); and
- (c) Quinn Emanuel was liable to give any security for costs of the State parties and was liable to pay any costs which were awarded to the State parties in the proceeding.

144 Under s 33ZDA(3) of the Act, the Court has power to amend a GCO. I have to decide whether it is appropriate to exercise that power.

145 In *Maurice Blackburn Pty Ltd v McCoy* ('*McCoy*')³³ the Court said:

It is important to acknowledge and emphasise that the consideration of whether to exercise the power under s 33ZDA(3) is not an occasion for conducting a *de novo* hearing concerning the appropriateness of a GCO. Ensuring that justice is done in the proceeding requires that due regard be given to the fact that the Court has previously determined pursuant to s 33ZDA(1) that a GCO at a specified percentage is appropriate and necessary *and* that on that basis a law practice has incurred the costs and exposed itself to the risks of the proceeding. Informed by the need to ensure the just, efficient, timely and cost-effective resolution of the real issues in dispute, a judge undertaking the statutory task required by s 33ZDA(3) is called upon to identify and then evaluate any material changes in circumstance which clearly

³³ [2026] VSCA 236.



call into question the appropriateness and necessity of the percentage previously ordered.³⁴

146 When the GCO was made in this proceeding, 30% was the second highest percentage which had been specified to that date. In giving his reasons for the order, Keogh J said:

[A]s I have already said, this proceeding is novel, complex, difficult, and attended with significant risk. 5 Boroughs' claim has been vigorously defended to date. It survived the summary dismissal application, but the duty and causation issues on which that application was based remain to be finally determined at trial. In addition the question of breach looms as factually complex and challenging.

The claim made by 5 Boroughs raises for consideration important issues concerning the public health response by government to the COVID-19 pandemic, the duties and obligations that might arise in that context, and the corresponding rights of and protections provided to different sections of the community. The response by 5 Boroughs to the summary dismissal application and strike out application demonstrates a serious approach to those issues. I do not imply, by referring to the complexity and difficulty of 5 Borough's claim, that the Court will be facilitating the speculative or unmeritorious prosecution of a claim by granting the GCO application.

... I accept that both Quinn Emanuel and Regency will make a substantial investment in the proceeding, that will be at risk if a successful outcome cannot be achieved. The novelty and complexity of the proceeding has already led to a substantial increase in budgeted costs and in the expected time to completion of the proceeding, resulting in an increase in the degree and time on risk faced by Quinn Emanuel and Regency. Restrictions imposed by the concurrent VWA prosecution mean that 5 Boroughs has not had the opportunity as yet to gather and analyse much of the evidence that will be relevant to its claim. Because of the complexity of the claim there remains the risk of further significant cost blow-outs in future. Since Scattini prepared the most recent costs budget there has already been an increase in the estimated trial duration from 9 weeks to 12-15 weeks. There will, of course, be a commensurate increase in the defendants' costs. Quinn Emanuel and Regency carry the uncertain risk of the costs of both 5 Boroughs and the defendants.

The novelty, complexity and difficulty of the proceeding, and the resulting degree and magnitude of risks faced by Quinn Emanuel and Regency are important factors justifying the GCO percentage for costs that is being sought. The uncertainty faced by Quinn Emanuel and Regency may be contrasted with the considerable benefit of the certainty that will be achieved for group members by the proposed GCO. The risk/reward consideration is very relevant to the determination of this application.³⁵

147 Since the making of the GCO:

³⁴ Ibid [70].

³⁵ *5 Boroughs (No 5)* [90]–[93].



- (a) a number of GCOs have been made with specified percentages greater than or equal to 30%;
- (b) all of the evidence in the proceeding had been prepared for trial;
- (c) the budget Quinn Emanuel anticipated for the proceeding was substantially exceeded;
- (d) the time taken to resolve the proceeding has been about three years;
- (e) the proceeding has settled for a sum below the range anticipated by Quinn Emanuel at the time the GCO was made; and
- (f) on 19 June 2025, Regency V Pty Ltd ('Regency') terminated two agreements ('the litigation finance agreements') between itself and Quinn Emanuel and under which Regency provided certain financial support to Quinn Emanuel in relation to the proceeding.

148 I am not satisfied any of those matters constitutes a material change in circumstance which would warrant the amendment of the GCO percentage because:

- (a) whilst comparisons with GCO percentages in other cases are useful, they are plainly subject to limitations in their usefulness. In any event, the trend in GCO percentages would be a factor pointing to an increase in the 30% in this proceeding, something which 5 Boroughs and Quinn Emanuel do not seek;
- (b) the preparation of evidence did not provide a basis for any suggestion that there had been any reduction in the 'novelty, complexity and difficulty of the proceeding, and the resulting degree and magnitude of risks faced by Quinn Emanuel';
- (c) the fact that the costs and disbursements incurred by Quinn Emanuel exceeded those which were forecast at the time of the GCO provides no basis on which to reduce the GCO percentage. Indeed, one of the advantages of the GCO is that by fixing the solicitor's costs as a percentage of a settlement or judgment sum it shifts the risk of costs overruns to the solicitor for the plaintiff;



- (d) the time taken to resolve the proceeding is what Mr Scattini estimated at the time of the GCO; and
- (e) the Settlement Sum is somewhat below the range which Mr Scattini anticipated at the time the GCO was made but that fact does not warrant a reduction in the GCO percentage, leaving the percentage unamended will mean that less is paid to Quinn Emanuel under the GCO than was anticipated at the time the GCO was made. This does not provide a basis to further reduce that sum.

149 This leaves the issue of whether Regency's termination of the litigation finance agreements should be taken into account in considering an amendment to the GCO. I am not satisfied it should be taken into account. Under the GCO, it was Quinn Emanuel (not Regency) who became entitled to receive their costs, calculated as a percentage, in return for taking on the risks of the litigation including their own costs, disbursements, providing security for costs and paying any costs ordered to be paid to the State parties. At the time of the GCO the litigation finance agreements created an arrangement whereby Quinn Emanuel defrayed some of that risk to Regency in return for a share of any proceeds it received under the GCO. Whilst that arrangement was appropriately disclosed to the Court on the making of the GCO, it had no impact on the rights and obligations of Quinn Emanuel under the GCO. Similarly, once the litigation finance agreements were terminated nothing changed regarding Quinn Emanuel's rights and obligations under the GCO. As a result, I am not satisfied the question of Regency's termination of the litigation finance agreements is a matter to be taken into account in assessing whether the GCO should be amended.

150 If, contrary to my view, the termination of the litigation finance agreements were to be taken into account, I would not regard the consequences of that termination as providing any basis for amending the GCO. Following the termination of the litigation finance agreements, Quinn Emanuel took on risk and expense which it had anticipated would be defrayed to Regency, but the result of the termination is that it will (at least on its interpretation of the litigation finance agreements) not pay any portion of the GCO proceeds to Regency.



151 Further, none of the following matters suggest an amendment to the GCO is warranted:

- (a) Quinn Emanuel has devoted substantial resources to the prosecution of the proceeding. It has recorded approximately 27,000 hours of professional time in work performed on the proceeding and as I note above had thoroughly prepared the matter for trial, filing 40 witness outlines and 10 expert reports as well as producing, with the State parties, a Court book of approximately 5,000 documents. Quinn Emanuel's professional costs on a time costed basis (inclusive of GST) and disbursements (inclusive of GST) incurred to date in the proceeding would have been a little more than \$26.3 million.
- (b) Quinn Emanuel faced significant risks if the proceeding was unsuccessful. If 5 Boroughs had failed in its claims at trial Quinn Emanuel would not only have lost its outlays on the proceeding but would likely have been liable to pay the State parties' costs, which I found in *5 Boroughs NY Pty Ltd v State of Victoria & Ors (No 7)*³⁶ might reasonably be expected to be in the range of \$17.8 to \$21.2 million.
- (c) In effect, Quinn Emanuel has provided the services of a third party litigation funder for the proceeding for \$9.9 million (being the difference between what it will receive under the GCO and what it would have received for costs and disbursements under a traditional time costing method), which is approximately 8% of the Settlement Sum and a figure which is very much lower than average third party litigation funding rates.
- (d) Upon receipt of the GCO Quinn Emanuel will receive a return on investment (ROI) of between 1.9 and 2.1 depending on whether GST is taken into account. As I noted in *Allen v G8 Education Ltd (No 4)* ('*Allen v G8*'),³⁷ this is well within the range of ROIs sought and obtained by third party litigation funders. Quinn Emanuel's internal rate of return (IRR) will be between approximately 56% and 57%, again depending on whether GST is included or not. This level of IRR is

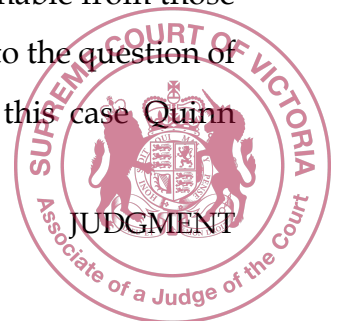
³⁶ [2026] VSC 54.

³⁷ [2024] VSC 487.



commensurate with the returns obtained in other cases where GCOs have been approved on settlement.

- 152 At the time of the making of the GCO, 5 Boroughs and Quinn Emanuel submitted to the Court that any reimbursement payment to 5 Boroughs and any Administration Costs under a settlement administration would be paid from the amount paid to Quinn Emanuel under the GCO. They now seek to move away from that position, in part for 5 Boroughs' reimbursement payment and in whole for the Administration Costs.
- 153 For the reasons I stated in *Allen v G8*, I do not regard administration costs incurred in a settlement administration and (applying the same reasoning) a plaintiff's reimbursement payment as falling within the ambit of the 'legal costs payable to the law practice representing the plaintiff' under s 33ZDA(1)(a) of the Act. I do not regard it as appropriate that these categories of payment should be paid out of any amount received under a GCO.
- 154 Quinn Emanuel seeks to depart from the position it advanced at the GCO approval because, at least insofar as Administration Costs are concerned, it says that at the time the GCO was made the arrangements between Quinn Emanuel and Regency were such that Regency would have paid those costs. I am not satisfied that provides a satisfactory explanation to allow departure from the assumption on which the GCO was made without a commensurate variation of the GCO percentage. In so holding, I am conscious of the submission made by 5 Boroughs that the interest earned on the Settlement Sum will be sufficient to cover the forecasted Administration Costs and so participating group members would still, under its proposal, receive 70% of the Settlement Sum. However, it seems to me that when the GCO was made, Quinn Emanuel assumed the Administration Costs would be paid from its GCO receipt, and the fact that this will no longer be the case constitutes a material change in circumstance warranting amendment of the GCO percentage.
- 155 In this regard, I consider the circumstances of this case as distinguishable from those in *Allen v G8*. In that case, it appeared no-one had turned their mind to the question of administration costs when the initial GCO was obtained, but in this case Quinn



Emanuel had expressly addressed the issue of administration costs, and a plaintiff's reimbursement payment, and had expressly stated they would be paid from the GCO amount which it received.

- 156 I have determined that both the 5 Boroughs reimbursement payment and the Administration Costs under the SDS should be paid as separate deductions from the Settlement Sum, or the interest accruing on it, and not from the amount payable to Quinn Emanuel under the GCO. The GCO percentage should be amended to take account of the fact that those amounts are being separately deducted. There is necessarily some uncertainty regarding the quantum of Administration Costs. 5 Boroughs seeks approval for a deduction of up to \$1.3 million (inclusive of GST), but the Scheme Administrator forecasts Administration Costs (inclusive of a 'buffer') of \$1,215,912 (inclusive of GST). For reasons I discuss below, the reimbursement payment to 5 Boroughs I would approve is \$60,000.
- 157 It seems to me the appropriate course is to vary the GCO percentage by 1% (being equivalent to \$1.25 million) to take account of the fact that Quinn Emanuel will not be paying Administration Costs or 5 Boroughs' reimbursement payment from the amount it receives under the GCO.
- 158 Four group members objected to the settlement on the basis of the payment to Quinn Emanuel under the GCO. Two of those group members, in effect, asked the Court to consider whether the amount payable under the GCO remained fair and reasonable having regard to the time and resources expended by Quinn Emanuel and the risks it had undertaken in the proceeding. As is evident from the above, I have had regard to those things and have determined they provide no reason to vary the GCO percentage beyond the amendment I have described. The other two objectors in this category said that the amount paid to Quinn Emanuel was disproportionate, given that group members were not being fully compensated for their losses. It is true that registered group members will receive a relatively small percentage of their estimated losses under the settlement, but had Quinn Emanuel not been prepared to undertake significant risk and expenditure, the likelihood is that group members would have received nothing. Certainly, no other law firm sought to run a similar proceeding on behalf of this category of group members.



159 In all of the circumstances, I am satisfied that the GCO percentage should be amended to 29% under s 33ZDA(3) of the Act.

SDS - distribution mechanism

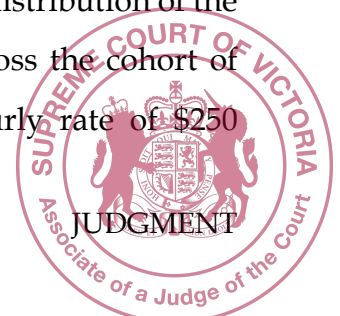
160 5 Boroughs proposes the SDS as a mechanism to distribute the Settlement Sum. Under the SDS:

- (a) Certain amounts are deducted from the Settlement Sum, being the amount payable under the GCO, a reimbursement payment to 5 Boroughs for repayment of a loan, payments to the Representative Group Members and Administration Costs.
- (b) After those deductions, each participating group member is guaranteed a minimum payment of \$750.
- (c) After the payment of those minimum payments, the balance of the Net Settlement Sum is distributed pro rata amongst participating group members whose assessed losses are more than \$750.

161 I am satisfied that providing for a minimum payment under the SDS is appropriate. Otherwise, there is a risk that some group members will receive very small amounts. Whilst providing a minimum payment represents a departure from calculating distribution amounts on a pro rata basis, I am satisfied that departure is warranted in the circumstances.

162 In order to determine the amount to which each participating group member is entitled, the SDS proposes calculating a figure for assessed loss pursuant to a loss assessment formula. The loss assessment formula does not give a precise individualised assessment of all losses which might be said to have arisen from the lockdowns.

163 In his evidence Mr Weeks says, and I agree, that a detailed individualised assessment would involve very significant extra cost and delay in effecting any distribution of the Net Settlement Sum. Each additional hour of assessment time across the cohort of participating group members at the Scheme Administrator's hourly rate of \$250



(exclusive of GST) adds approximately \$4 million to Administration Costs. A detailed and comprehensive individualised assessment process might cost tens of millions of dollars and might take some years to complete. In considering whether a proposed settlement distribution scheme ought to be approved, it is important not to let the perfect be the enemy of the good. If the proposed assessment formula provides a reasonable estimate of a group member's share of the settlement, and is significantly less costly and time consuming, that will weigh strongly in favour of approval. It needs to be borne in mind that, given the assessed loss figure is being used to determine a group member's proportionate share of the Net Settlement Sum, what is important is that the loss assessment formula provides a reasonable approximation of that proportionate share, rather than a precise estimate of individual loss.

- 164 Under the proposed loss assessment formula the starting point is a comparison of sales figures during a portion of the lockdown period (1 July 2020 to 30 September 2020) ('Assessed Period') with sales from the corresponding period in 2019 which were not affected by any lockdown ('Clean Period').
- 165 Once the differential in sales is calculated, the total wages, salary and other payments for the Assessed Period are added to the sales loss differential, and then the value of any assistance payments in that period is subtracted.
- 166 The proposed formula is therefore:

$$Li = \Delta S + W - A$$

(a) where: $\Delta S = S_{2019} - S_{2020}$

- o $S_{2019} = G1_{2019} - G2_{2019}$
- o $S_{2020} = G1_{2020} - G2_{2020}$
- o S is sales income calculated by subtracting export sales G2 from total sales G1, with "G1" and "G2" being the respective amounts provided by or on behalf of the Registered Group Member to the Australian Taxation Office evidenced by the corresponding Business Activity Statement(s) for the Comparison Periods. All figures exclude GST.
- o The subscripts "2019" and "2020" represent the Clean Period and Assessed Period, together forming the Comparison Periods.

(b) W is the amount of "total salary, wages and other payments" provided by or on behalf of the Registered Group Member to the Australian Taxation Office as amount "W1" in respect of the Assessed Period, as



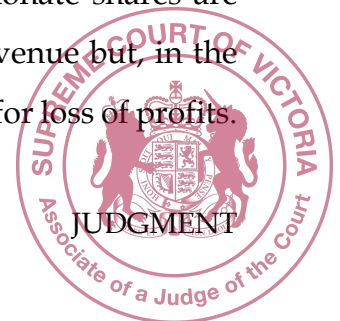
evidenced by the corresponding Business Activity Statement(s) for the Assessed Period.

- (c) A is the amount of Assistance received by the Registered Group Member in respect of the Assessed Period, evidenced by tax account statements, bank statements, formal communication (or similar, as determined by the absolute discretion of the Administrator) for the Assessed Period.

- 167 It is worth spending a little more time on the rationale for these calculations. Ordinarily, a calculation of loss for businesses such as those of the group members would involve an estimate of the loss of profits caused by the event for which compensation is payable.
- 168 Limiting the calculations primarily to a comparison between the Clean Period and the Assessed Period makes sense as a means of measuring the impact on sales revenue. On an individual basis, some businesses may have been able to establish an impact on sales revenue greater than just that comparison, and in some instances part of any decline in revenue might have been due to factors other than the lockdowns. Nonetheless, I am satisfied it is appropriate to use this measure to determine a group member's proportionate share of the Settlement Sum.
- 169 Under the SDS, the sales differential between the Assessed Period and the Clean Period is calculated from the Business Activity Statements ('BAS') lodged by group members with the Australian Taxation Office ('ATO'). Again, that is sensible. That data should be readily available and should significantly reduce the verification burden on the Scheme Administrator, given that it is provided to the ATO in circumstances where there are penalties for false or misleading information.
- 170 Even though the Assessed Period is not the whole of the lockdown period, utilising the whole of the period would require utilising twice as many BAS, and potentially involve having to calculate sales revenue for a portion of the BAS for the period 1 October to 31 December in the respective years, all of which would add considerably to the processing time under the SDS. Once again, it is worth emphasising that the purpose of the loss assessment formula is to provide a reasonable means of ascertaining a group member's proportionate share of the Net Settlement Sum.



- 171 Even with the limitation of a comparison between the Clean Period and the Assessed
Period, a calculation of loss of profits on an individual basis might involve some
complexity.
- 172 Profit is the difference between revenue and expenses.
- 173 Revenue might be different to the sales income in a particular period, because of other
sources of revenue and because of timing differences which might arise from the
recognition of revenue. In the circumstances of this case, the likely impact of the
lockdowns on revenue was an impact on sales income. Using the differential in sales
income and deducting any assistance received as a proxy for any decline in revenue
is justified.
- 174 Expenses will, in almost all cases, extend significantly beyond amounts paid to
employees. The proposed formula does not look at a differential in expenses between
the two periods, and it does not look at expenses beyond amounts payable to
employees, as shown in the 'W1' amount on the BAS for the Assessed Period. The
underlying logic for that step is unclear. I raised this with senior counsel for
5 Boroughs, who took instructions from the proposed Scheme Administrator. Based
on those instructions, senior counsel submitted that the formula could be left as is, that
it could be modified to use the difference between W1 amounts in the two periods or
that the W figure could simply be deleted and that there were arguments for and
against each of those approaches (though those arguments were not elaborated). It
was also submitted that there was no simple method to calculate the differential in
total business expenses.
- 175 Of the three options raised by counsel, using the differential in wages between the
Clean Period and the Assessed Period would at least provide a partial calculation of
the difference in expenses between the two periods. However, I am conscious of not
wanting to add to the administrative burden of loss assessment under the SDS.
Ultimately, my view is that it is better to simply drop the W figure from the proposed
loss assessment formula. This will mean group members' proportionate shares are
calculated by reference only to a proxy measure for any drop in revenue but, in the
circumstances, I am satisfied that this will provide a sufficient proxy for loss of profits.



The formula for individual losses in the SDS should therefore be amended so that it reads:

$$Li = \Delta S - A$$

where:

- (a) $\Delta S = S_{2019} - S_{2020}$
 - o $S_{2019} = G1_{2019} - G2_{2019}$
 - o $S_{2020} = G1_{2020} - G2_{2020}$
 - o S is sales income calculated by subtracting export sales G2 from total sales G1, with "G1" and "G2" being the respective amounts provided by or on behalf of the Registered Group Member to the Australian Taxation Office evidenced by the corresponding Business Activity Statement(s) for the Comparison Periods. All figures exclude GST.
 - o The subscripts "2019" and "2020" represent the Clean Period and Assessed Period, together forming the Comparison Periods.
- (b) A is the amount of Assistance received by the Registered Group Member in respect of the Assessed Period, evidenced by tax account statements, bank statements, formal communication (or similar, as determined by the absolute discretion of the Administrator) for the Assessed Period.

- 176 In the case of businesses which commenced operating after 1 July 2019, the Scheme Administrator may employ an alternative method for the assessment of loss which is consistent in principle and approach with the loss assessment formula described above. That is appropriate.
- 177 The SDS provides for a group member to seek a review by the Scheme Administrator of the amount in their Assessment Notice. The Scheme Administrator then conducts a review. If the group member is still dissatisfied, they can request a review by a barrister appointed under the SDS for this purpose. A review by the barrister under the SDS requires payment of a \$1,000 deposit, which is refunded if the review is successful and forfeited if it is not. I am satisfied that the review process is appropriate. I am also satisfied that, because the loss assessment formula contains no discretion for most businesses, there should be relatively limited scope for genuine reviews. In those circumstances, I regard the required deposit for reviews by the barrister as fair and reasonable.



- 178 Finally, I note Mr Weeks estimates the SDS might take between a year and two years to finalise. Given the large number of participating group members and the time taken on other large class action distributions, I do not regard that time frame as unreasonable, even with the streamlined loss assessment process which is proposed. In light of the duration of that process, I will require the Scheme Administrator to report to the Court quarterly on the progress of the Administration, and to seek approval for the payment of fees actually incurred in the administration of the scheme.
- 179 Overall, I am satisfied that the mechanism for distribution provided by the SDS is, subject to the amendment of the loss assessment formula I have discussed above, fair and reasonable.

SDS - Deductions

Overview

- 180 I have already dealt with the deduction from the Settlement Sum for the GCO amount. Three other categories of payment are proposed to be paid out of the Settlement Sum or the interest earned on it, being:
- (a) \$90,000 for a reimbursement payment to 5 Boroughs on top of a further \$160,000 which Quinn Emanuel proposes to pay 5 Boroughs from the GCO amount;
 - (b) \$60,000, comprising 12 payments of \$5,000 to each of twelve Representative Group Members who provided loss information for the purposes of the mediation of the proceeding; and
 - (c) an amount of up to \$1.3 million for Administration Costs to be paid from the interest earned on the Settlement Sum.
- 181 The second of these categories of payment can be dealt with shortly. The work of those group members was plainly for the benefit of the group, and the proposed payment is relatively modest. The total quantum of the payment is 0.048% of the Settlement Sum. Those payments should be approved.
- 182 The other two categories of payment require a little more consideration.



183 I have already indicated that I do not regard it as appropriate for those amounts to be paid out of any GCO amount payable to Quinn Emanuel. They are amounts payable as part of the distribution of the Settlement Sum. The Court has power under s 33V(2) of the Act to make such orders as it thinks fit with respect to the distribution of that sum. It is important as a matter of ensuring transparency and fairness that payments to a plaintiff by their solicitor of this kind should be disclosed to the Court and subject to its approval. It is important in the Court's ongoing supervision of the SDS that payments to the Scheme Administrator be subject to Court approval.

Payment to 5 Boroughs

184 The proposed payment to 5 Boroughs consists of two components:

- (a) repayment of a \$90,000 loan from Regency which was made to keep 5 Boroughs out of liquidation; and
- (b) \$160,000 for the time, cost and burden incurred by 5 Boroughs in its representative capacity.

185 No group member objected to the proposed payments to 5 Boroughs, but that does not relieve the Court of the burden of satisfying itself that the payment is appropriate. The combined amount of \$250,000 is very high but not unprecedented.³⁸ It stands in stark contrast to the average amounts which group members will receive under the SDS. The justification for a payment of this kind is not the damages to which the plaintiff would be entitled but fair recompense for the extra responsibilities of being the plaintiff in a class action. Nonetheless, it seems to me that it is appropriate to take into account the average payment to group members under a settlement as a factor which bears upon the fairness of the proposed reimbursement payment to a plaintiff.

186 The evidence establishes that in early 2024 5 Boroughs was no longer trading and had fallen into arrears with the ATO. If 5 Boroughs had been placed into liquidation at that

³⁸ Vince Morabito, 'Group Costs Orders, Funding Commissions, Volume of Class Action Litigation, Reimbursement Payments and Biggest Settlements' (Report, Department of Business Law and Taxation, Monash University, 4 February 2025), 52 discussing *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia* (No 6) [2011] FCA 277 (payment to representative applicant \$268,243.31); *Lifepan Australian Friendly Society Limited v S&P Global Inc (Formerly McGraw-Hill Financial, Inc)* (A Company Incorporated in New York) [2018] FCA 379 (payment to representative applicant \$250,000).

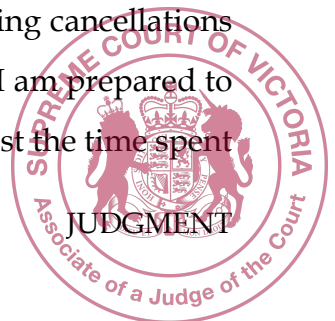


time there would have been extra time and cost expended on finding a replacement plaintiff, making application for substitution and then revising pleadings to take account of the substituted plaintiff. In order to avoid that outcome Regency evidently loaned 5 Boroughs \$90,000 interest free repayable on settlement. The affidavit material describes the loan, but does not provide a copy of the executed loan agreement. The funds advanced by Regency were applied to repay the ATO, and for a restructuring expert who facilitated that repayment.

187 In its submissions, 5 Boroughs characterises the repayment of the loan as an out-of-pocket expense incurred in the course of 5 Boroughs acting as representative. I am not persuaded that characterisation is accurate. Payment to 5 Boroughs so it can repay the loan to Regency would, in effect, be a payment by group members to 5 Boroughs in relation to tax debts incurred independently of its role as representative. I am simply not persuaded that this is an appropriate basis for payment from the Settlement Sum, even though I accept that group members may have received an incidental benefit, in terms of not having the delays associated with finding a new plaintiff, because Regency made the loan. I would not approve this aspect of the proposed payment to 5 Boroughs.

188 5 Boroughs seeks the \$160,000 payment as reimbursement for the time, cost and burden associated with being a representative plaintiff. In support of that payment, it provides a narrative description of activities Mr Ferrara, the director of 5 Boroughs, undertook to allow it to properly fulfil its role as plaintiff. I was not provided with any record or estimate of the hours which Mr Ferrara spent on those activities, as often happens in cases such as these. I accept that, given the nature and scope of this proceeding, its procedural history and the relatively late stage at which settlement in principle was reached, the time spent by 5 Boroughs would have been substantial and would likely have exceeded the time spent by representative plaintiffs or applicants in many class actions.

189 Mr Ferrara also deposes to 5 Boroughs having received a sudden flurry of adverse Google reviews, abusive emails and telephone calls, and some booking cancellations once its role as plaintiff in the class action received media attention. I am prepared to accept that 5 Boroughs should receive some compensation beyond just the time spent



as representative for this negative attention. Mr Ferrara also deposes to a drop in takings in the business following that media attention but, beyond that assertion, no attempt is made to prove or quantify that drop.

190 Finally, 5 Boroughs refers to the emotional and psychological impact of the proceeding on Mr Ferrara and his family. I am not persuaded I should take these matters into account. The basis of the payment is a payment to the plaintiff—in this case, 5 Boroughs—not to individuals who might be shareholders or directors of the plaintiff, or family members of those persons.

191 The median payment to a lead plaintiff or applicant in a class action is approximately \$26,000, although that figure is affected by its calculation over a 20 year period.³⁹ I accept that the matters I have referred to warrant a payment which exceeds that median, but the evidence before me does not provide a basis for an amount more than six times the median figure. In the circumstances, doing the best I can with the limited evidence I have, I will approve a payment of \$60,000 to 5 Boroughs as reimbursement for the time, costs and burden which it incurred as plaintiff in the proceeding.

Administration Costs

192 I have referred above to the estimate of costs associated with the administration of the SDS. That estimate assumes:

- (a) The Advisory Company's rate of \$275 per hour (inclusive of GST);
- (b) approximately 13,000 claims will be assessed in 5 minutes each;
- (c) approximately 1,500 claims will be assessed in 15 minutes each;
- (d) approximately 150 claims will require an hour of assessment time;
- (e) the balance of claims might require 1.5 hours of assessment time; and
- (f) a 'buffer' of an additional 5 minutes per claim in order to deal with engagement with participating group members.

³⁹ *Fuller & Anor v Allianz Australia Insurance Ltd & Anor (Settlement Approval)* [2025] VSC 160, [149].



193 The hourly rate of \$275 is reasonable. I accept that the loss assessment formula is a simplified and relatively mechanical calculation but, in my view, it is likely that all of the additional 'buffer' will be required. In the circumstances, I accept that Administration Costs up to the amount of \$1.3 million might properly be incurred in administering the SDS. I will approve an amount up to \$1.3 million in Administration Costs, but will require the Scheme Administrator to seek approval for payment of specific invoices at the same time as he provides his quarterly updates as to progress of the administration of the SDS.

Scheme Administrator

194 5 Boroughs proposes the appointment of Mr Simon Weeks, a director of the Advisory Company as Scheme Administrator. Mr Weeks has been a court appointed scheme administrator in one case and in two other cases – whilst not formally appointed – did most of the work on the administration. He has other relevant experience in issues relating to distribution of notices to group members and responding to group members' enquiries. He was responsible for the design of the SDS. I am satisfied Mr Weeks should be appointed Scheme Administrator.

Other matters

195 There are 13 other objections to the settlement which I have not dealt with above. Those objections do not articulate any reason why the settlement should not be approved. In all there were 38 objections to the settlement. In the scheme of things that is a very small number. Of course, quantity is not really the issue. If there is one objection and it is well-founded then the court should not approve a settlement. Indeed, even if there are no objections, the court is not relieved of its obligation to consider the fairness and reasonableness of the settlement. Nonetheless, for the reasons I have stated, none of the objections are well-founded, and the settlement should be approved in the terms I have indicated.

196 5 Boroughs seeks:

- (a) the vacation of all costs orders in the proceeding, other than those which have been paid and the GCO; and



(b) orders for return of the amounts paid as security for the State parties' costs.

197 Those orders should be made.

198 I will not make an order dismissing the proceeding at this stage. It is important that the Court supervise the SDS process. I will make an order dismissing the proceeding once the distribution of the Settlement Sum (and any interest) under the SDS is finalised.

199 Aspects of these reasons traverse material in respect of which 5 Boroughs claimed confidentiality. My view in light of *McCoy*⁴⁰, is that no part of the reasons should be confidential.

200 More broadly, I am not satisfied, in light of the Court of Appeal's reasoning in *McCoy*, that all of 5 Boroughs' claims of confidentiality over materials are appropriate. After the appeal period has expired for an appeal against the orders accompanying these reasons and, assuming there is no appeal, I will hear from the parties further on confidentiality.

201 Orders will be made to give effect to these reasons.

CERTIFICATE

I certify that this and the 52 preceding pages are a true copy of the reasons for Judgment of the Honourable Justice Watson of the Supreme Court of Victoria delivered on 21 October 2026.

DATED this twenty-first day of October 2026.



⁴⁰ [2026] VSCA 236, [90]–[94].

SCHEDULE OF PARTIES

S ECI 2020 03402

5 BOROUGHES NY PTY LTD (ACN 632 508 304)

Plaintiff

- and -

STATE OF VICTORIA

First Defendant

THE HONOURABLE JENNY MIKAKOS (IN HER
CAPACITY AS THE FORMER MINISTER FOR HEALTH
AND THE FORMER MINISTER FOR THE
COORDINATION OF HEALTH AND HUMAN SERVICES:
COVID-19)

Second Defendant

THE HONOURABLE MARTIN PAKULA (IN HIS
CAPACITY AS THE FORMER MINISTER FOR JOBS,
INNOVATION AND TRADE AND THE FORMER
MINISTER FOR THE COORDINATION OF JOBS,
PRECINCTS AND REGIONS: COVID-19)

Third Defendant

KYM LEE-ANNE PEAKE (IN HER CAPACITY AS THE
FORMER SECRETARY, DEPARTMENT OF HEALTH AND
HUMAN SERVICES)

Fourth Defendant

SIMON GRANT PHEMISTER (IN HIS CAPACITY AS THE
SECRETARY, DEPARTMENT OF JOBS, PRECINCTS AND
REGIONS)

Fifth Defendant

