

IN THE SUPREME COURT OF VICTORIA
COMMERCIAL COURT
GROUP PROCEEDINGS

Not Restricted

S ECI 2023 05208

BETWEEN:

ROSS ANDREW GAWLER

Plaintiff

v

FLEETPARTNERS GROUP LTD (ACN 131 557 901)

Defendant

<u>JUDGE:</u>	Craig J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	15 September 2026
<u>DATE OF JUDGMENT:</u>	15 September 2026 (Ex Tempore); Revised 27 October 2026
<u>CASE MAY BE CITED AS:</u>	Gawler v FleetPartners Group Ltd (No 2)
<u>MEDIUM NEUTRAL CITATION:</u>	[2026] VSC 698

REPRESENTATIVE PROCEEDINGS – Part 4A group proceeding – Application for approval of settlement – Whether settlement is fair and reasonable as between the parties and as between group members – Shareholder class action – Alleged breach of continuous disclosure obligations and misleading or deceptive conduct – Settlement approved – *Supreme Court Act 1986* (Vic) Part 4A, ss 33V, 33ZF – *Botsman v Bolitho (No 1)* (2018) 57 VR 68, *Mumford v EML Payments Ltd* [2026] VSC 143, *Fowkes v Boston Scientific Corporation* [2023] FCA 230, applied.

PRACTICE AND PROCEDURE – Part 4A group proceeding – Approval for payment of legal costs from settlement sum – No reason to vary group costs order – Requirement of law practice to provide internal rate of return and return on investment calculations – Appropriate cost base when performing calculations – *Supreme Court Act 1986* (Vic) Part 4A, s 33ZDA – *Fox v Westpac Banking Corporation* (2021) 69 VR 487, *Allen & Anor v G8 Education Ltd (No 4)* [2024] VSC 487, applied – *Fuller & Anor v Allianz Australia Insurance Ltd & Anor (Settlement Approval)* [2025] VSC 160, *McCoy v Hino Motors Ltd (No 2)* [2025] VSC 553, discussed.

PRACTICE AND PROCEDURE – Part 4A group proceeding – Application for approval of settlement – Soft class closure order – Proceeding settled at mediation – Applications for late registration to permit participation in the settlement – Some applications approved – *Andrianakis v Uber Technologies Inc* (2024) 108 MVR 55, discussed.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Ms M Szydzik SC
Mr B O'Connor

Phi Finney McDonald

For Phi Finney McDonald

Ms A Folie SC

Phi Finney McDonald

For the Defendant

Mr K Loxley KC

HSF Kramer

Contents

A	Introduction.....	1
B	An Overview of the Plaintiff's Claims.....	2
C	The Proposed Settlement and Settlement Distribution Scheme	9
D	Organising Principles.....	10
E	Consideration of the Proposed Settlement	14
F	Ancillary Orders	16
	F.1 Appointment of an Administrator	17
	F.2 Unregistered Group Members.....	17
	F.3 The Plaintiff's Reimbursement Payment.....	19
G	The Group Costs Order.....	20

HIS HONOUR:

A Introduction

- 1 This proceeding is a group proceeding brought under Part 4A of the *Supreme Court Act 1986* (Vic) (the **Act**). The proceeding was commenced on behalf of those persons or entities that acquired, or acquired an interest in, the fully paid ordinary shares of the defendant, FleetPartners Group Ltd (**ECX**),¹ at any time during the period from 8 November 2017 to 10:35am AEDT on 20 March 2019 (inclusive) (**Relevant Period**) and are alleged to have suffered loss or damage because of, by or resulting from, the contravening conduct of the defendant as alleged in the Third Further Amended Statement of Claim (**TFASOC**).
- 2 The plaintiff is Dr Ross Gawler. Dr Gawler acquired 4,950 shares in ECX on 20 August 2018 and a further 6,260 shares in ECX on 26 February 2019. Dr Gawler was represented at all times throughout the proceeding by Phi Finney McDonald Pty Ltd (**PFM**).
- 3 The plaintiff, the defendant and PFM have entered into an in-principle settlement. Pursuant to s 33V of the Act, Dr Gawler now seeks Court approval of:
- (a) settlement of the proceeding on the terms set out in the Deed of Settlement entered into between the plaintiff, the defendant and PFM executed on 2 June 2026 (**Settlement Deed**); and
 - (b) the scheme for distribution of the ‘Settlement Sum’² (**Settlement Distribution Scheme**) including the approval of distributions for a group costs order (**GCO**) and the ‘Plaintiff’s Reimbursement Payment’ as defined in the Settlement Distribution Scheme, in the amount of \$10,000.00.

¹ Formerly known as Eclix Group Ltd.

² As defined in the Settlement Deed: ‘the sum of **\$27,000,000** inclusive of Interest, Tax, professional fees and disbursements, expenses, charges and costs (including, without limitation, costs incurred by any Party or the Administrator in preparing the Settlement Distribution Scheme and distributing the Settlement Sum in accordance with the Settlement Distribution Scheme, the Plaintiff’s Reimbursement and the Group Costs Order).’ (Emphasis in original).

4 The plaintiff also seeks, amongst other things, orders that:

- (a) appoint Mr Jeremy Alexander Zimet of PFM as administrator of the Settlement Distribution Scheme (**Administrator**); and,
- (b) provide for a GCO in the amount of \$10,530,000.00 to be paid to PFM, calculated as 39% of the Settlement Sum (inclusive of GST) in accordance with the GCO ordered by Waller J on 26 June 2024.

B An Overview of the Plaintiff's Claims

5 During the Relevant Period, ECX operated a business providing fleet car, equipment finance and management services to customers in Australia and New Zealand, including consumer finance and fleet leasing.

6 The allegations in this proceeding are substantially concerned with two business units within ECX, being the 'Right2Drive' business and the 'Grays' business. ECX acquired these business units and sought to integrate them into the broader ECX group.

7 A further allegation in this proceeding relates to a third party, McMillan Shakespeare Limited (**MMS**). MMS announced that it was acquiring all of the share capital in ECX for a premium on the ECX share price, subject to Court approval and due diligence. Following that announcement (which allegedly increased the ECX share price), MMS then terminated the transaction on the basis of alleged failings in the Right2Drive and Grays business units.

8 The allegations are summarised below. I observe that they are, to a large extent, allegations only.

9 By the TFASOC, the plaintiff and group members allege that ECX made a number of announcements to the market of investors and potential investors in ECX shares (**Affected Market**) during the Relevant Period. It is alleged that those announcements were misleading and had a subsequent causative impact on the share price by 'inflating' it above its true value. These announcements and their alleged effect are described below in general terms. Relevantly:

- (a) Compliance Representations: on and from the date of ECX's half year financial reports and full year financial reports, ECX represented to the Affected Market that its financial reports were in accordance with the *Corporations Act 2001* (Cth) (***Corporations Act***) and the standards of the Australian Accounting Standards Board (**AASB**) and gave a true and fair view of the financial position and performance of ECX, and that it had reasonable grounds for the opinion.
- (b) Right2Drive Systems Representation: throughout the Relevant Period, ECX represented to the Affected Market that it had systems in place to manage, and accurately forecast, record and recognise, recoveries and revenue in the Right2Drive business.
- (c) The FY17 Results Announcement: on and from 8 November 2017, ECX represented to the Affected Market that its FY17 statutory NPAT and after tax adjusted NPAT (**NPATA**) were \$54.2m and \$68.3m respectively (including \$13.7m and \$15.9m from the 'Australian Consumer Segment'), and that it had reasonable grounds for the opinion. ECX also allegedly represented that Right2Drive had been successfully integrated into ECX and that it had reasonable grounds for that view.
- (d) The FY18 Guidance Representations: on and from 8 November 2017, ECX represented to the Affected Market that for FY18, Grays remained on track to deliver \$23m to \$25m EBITDA, that the Right2Drive business would deliver a contribution higher than the \$8m NPATA achieved by it in FY17, and that it expected ECX's NPATA to grow by 27-30%, 75% of which was to come from the Grays business.
- (e) The 1H18 Results Announcement: on and from 8 May 2018, ECX represented to the Affected Market that Grays was performing above expectations and was on track to earn \$23m to \$25m EBITDA and \$14.0m to \$15.4m NPATA for FY18, and that it was affirming the FY18 Guidance such that ECX was expected to grow NPATA by 27-30% in FY18 (consistent with subparagraph (d) above).

- (f) The FY18 Guidance Downgrade: on and from 6 August 2018, ECX represented to the Affected Market that it was revising the FY18 Guidance downward, and that it now expected to report FY18 NPATA in the range of \$77m to \$80m (+13% to +17% on FY17 NPATA), compared with the previous expectation of +27% to +30% growth. ECX further represented to the Affected Market that growth from Grays was likely to be a 30 to 40% NPATA increase in FY18, and that ECX expected to deliver mid-single digit NPATA growth from Right2Drive in FY18.
- (g) FY18 Expected Results Announcement: on and from 8 November 2018, ECX represented to the Affected Market that it expected FY18 NPATA to be within the figures given in the FY18 Guidance Downgrade (consistent with subparagraph (f) above).
- (h) MMS Merger Representation: on and from 8 November 2018, ECX represented to the Affected Market that it was likely, alternatively reasonably possible, that a merger with MMS would proceed on the terms announced, subject to Court approval. The merger involved a Scheme Implementation Agreement (SIA) whereby MMS would acquire all shares in ECX, implying a total value of \$2.85 per ECX share, which represented a 33.2% premium to ECX's closing price of \$2.14 on 17 August 2018.
- (i) FY19 Guidance Representation: on and from 14 November 2018, ECX represented to the Affected Market that it had achieved the figures referable to the FY18 Guidance Downgrade (subparagraph (f) above). Further, ECX represented to the Affected Market that it would achieve profitable growth across all businesses within the broader ECX group, and that FY19 NPATA would be more than \$78.1m (with the Grays business expected to contribute equal to or greater than \$10.4m in NPAT in FY19).
- (j) Revised FY19 Guidance Representations: on and from 29 January 2019, ECX represented to the Affected Market that it expected FY19 NPATA to grow by single digits when compared against FY18 NPATA.

- 10 The TFASOC pleads three ‘Corrective Disclosures’ which are alleged to have occurred during the Relevant Period. The plaintiff submits that they are not all styled in the pleading as ‘corrective disclosures’ but that they are factually equivalent to a form of corrective disclosure (where market participants learn ‘new’ information correcting a previous understanding). Immediately after the FY18 Guidance Downgrade (referred to at paragraph 9(f) above), the market price of ECX shares fell substantially. The trading price of ECX shares fell by \$1.14 from a closing price of \$3.04 on 6 August 2018, to a closing price of \$1.90 on 9 August 2018. This is described as the **First Corrective Disclosure**.
- 11 Next, on 29 January 2019, ECX published and lodged with the ASX an announcement entitled ‘ECX NPATA Performance and Expectations’ (described as the **Second Corrective Disclosure**). The plaintiff alleges that the Second Corrective Disclosure reduced expectations downwards by adjusting expected FY19 NPATA to be single digit growth over that previously announced, and that following the release of the Second Corrective Disclosure, the market price of ECX shares fell substantially. The trading price of the ECX shares fell by \$0.43 from a closing price of \$2.66 on 25 January 2019 to a closing price of \$2.23 on 31 January 2019.
- 12 On 20 March 2019, ECX published and lodged with the ASX an announcement entitled ‘Trading Update, Merger Update, Company Transformation and Cost Reduction Plan’ (described as the **Third Corrective Disclosure**). The plaintiff alleges that by the Third Corrective Disclosure, ECX announced that:
- (a) ECX’s financial performance had softened since the update provided by ECX on 29 January 2019 (i.e., the Second Corrective Disclosure);
 - (b) Right2Drive’s results had been impacted by factors including a ‘re-assessment of recovery rates on some debtor groups’ which resulted in the need for a higher level of provisioning. This included the ‘impact of process errors identified following queries arising from due diligence’;
 - (c) the broader ECX group NPATA was down 42.4% compared with the first five months of FY18;

- (d) ECX did not expect to achieve reported NPATA consistent with FY18 and would not be providing full year guidance for the broader ECX group at that time;
- (e) ECX had reviewed two business units which it identified to be 'non-core', being Right2Drive and Grays (and had commenced a review of its ownership of those business units); and
- (f) the merger with MMS was unlikely to proceed.

13 The plaintiff alleges that immediately after the Third Corrective Disclosure, the market price of ECX shares fell substantially. The trading price of ECX shares fell by \$1.14 from a closing price of \$1.885 on 15 March 2019 (before a trading halt was announced) to a closing price of \$0.745 at the close of trading on 22 March 2019.

14 As part of the proposed merger with MMS, ECX and MMS entered into the SIA on 8 November 2018. It was a term of the SIA that ECX would pay to MMS a 'Break Fee' in circumstances where the merger did not proceed. On 3 April 2019, ECX and MMS announced (via separate announcements) that:

- (a) an agreement had been reached to terminate the SIA with immediate effect;
- (b) ECX and MMS had agreed to release one another from any claims relating to the SIA and the proposed scheme; and
- (c) ECX and MMS had further agreed that ECX would reimburse MMS for costs that MMS had incurred to date in connection with the SIA and the proposed scheme.

15 On 13 May 2019, ECX announced that it expected to recognise non-cash impairment charges of between \$110m to \$130m in its 1H19 results, that the non-cash impairment charges related to the underperformance of Grays and Right2Drive, and that the Board of Directors of ECX had come to the view that Grays and Right2Drive had not been effectively integrated. ECX subsequently sold Grays (at a loss) and impaired the remaining goodwill in Right2Drive to nil.

- 16 On 13 November 2019, ECX announced that it was restating its historical accounts. By the announcement, ECX stated that:
- (a) ECX was required to restate its FY17 and FY18 accounts previously announced to the market on 8 November 2017 and 14 November 2018; and
 - (b) the restatement adjusted the 'trade receivables' across FY17 and FY18 downwards by \$20,690,000, of which \$9,513,000 was stated to be attributable to revenue recognition and 'processing errors'.
- 17 By paragraph 93A of the TFASOC and following, the plaintiff pleads the alleged 'true position'. The allegations relating to the 'true position' can be grouped together as follows:
- (a) First, the alleged 'Right2Drive True Position' comprising the following alleged facts and matters:
 - (A) During the Relevant Period, ECX was recognising excessive amounts of recovery revenue within the Right2Drive business that were not reasonably likely to be realised, and which it was inappropriate to recognise. ECX was also carrying debts which were likely to become 'bad debts'. This occurred because of a historical 'ballooning' receivables balance which was not showing material improvement.
 - (B) ECX had overstated its FY17 and FY18 financial performance by a material amount.
 - (C) By reason of the overstatement in subparagraph (B), the financial reports of ECX for FY17, 1H18 and FY18 did not give a true and fair view of the financial performance of ECX, did not comply with AASB standards, and did not comply with the *Corporations Act*.

- (D) The FY18 Guidance, Revised FY18 Guidance, FY19 Guidance Representations and Revised FY19 Guidance Representations were at least partly affected by the overstatement.
 - (E) During the Relevant Period, owing to a growing receivables balance, Right2Drive was reliant on ECX for cash drawdowns to fund its business, without which it could not support itself as a going concern.
- (b) Second, the alleged 'Grays True Position' comprising the following alleged facts and matters:
- (A) Throughout the Relevant Period, Grays was underperforming in its projected contribution to ECX EBITDA and/or NPATA.
 - (B) On and from the acquisition of Grays (and during the Relevant Period), ECX could not reliably forecast or measure Grays' financial performance due to deficiencies in Grays' financial reporting.
- (c) Third, the alleged 'MMS True Position' comprising the following alleged facts and matters:
- (A) On and from 8 November 2018 until 3 April 2019, there was a real and appreciable risk that ECX would have to pay MMS up to \$7,255,753 as a 'Break Fee' or as damages for losses and expenses suffered by MMS as a result of a material breach of the SIA by ECX.
 - (B) On and from 8 November 2018 until the end of the Relevant Period, there was an increasing risk that MMS would not proceed with the merger.

18 The plaintiff then alleges that the Right2Drive True Position, Grays True Position and MMS True Position gave rise to the existence of pleaded 'information' within the meaning of s 674(2) of the *Corporations Act*. The existence of items of pleaded information and the non-disclosure of that information was then alleged to give

rise to separate contraventions of ASX Listing Rule 3.1 and s 674(2) of the *Corporations Act*.

19 Separately, and in addition to the alleged breaches of continuous disclosure obligations, the plaintiff alleges that the existence of the various facts and matters constituting the ‘true position’ rendered the representations made by ECX misleading or deceptive or likely to mislead or deceive in contravention of s 1041H of the *Corporations Act* and/or s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) and/or s 18 of the Australian Consumer Law as set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

20 The alleged contraventions are said to have caused loss and damage because they caused the market price for ECX shares to be substantially greater than their ‘true value’, or the market price that would have prevailed but for the contraventions.

C **The Proposed Settlement and Settlement Distribution Scheme**

21 The proposed settlement is in orthodox terms. The Settlement Deed requires ECX to pay the Settlement Sum of \$27m into an interest bearing account and for the Settlement Sum to be distributed in accordance with the Settlement Distribution Scheme once approved by the Court.

22 The Settlement Deed also provides for an amount fixed by the making of a GCO to be deducted from the Settlement Sum. The Settlement Deed also provides that unless the Court otherwise orders, the only group members permitted to participate in the settlement will be the currently registered group members, being those individuals who had already registered to participate in the settlement prior to the deadline of 2 April 2025.

23 The Settlement Distribution Scheme provides a mechanism to assess and distribute the Settlement Sum. This involves using a loss assessment formula (LAF) to arrive at an amount to be distributed to the registered group members. This involves assessing a claimant’s ‘Trade Data’, applying a risk-weighted formula found in the LAF to the net Settlement Sum depending on the sub-period in which a group member’s claim arises, issuing a subsequent ‘Notice of Assessment’ and then transferring the funds to the group member.

D Organising Principles

24 The legal principles applicable to approval of a settlement under s 33V of the Act are well established. The Court's discretion in approving a proposed settlement is broad and 'its exercise is only limited by the necessity that it be exercised judicially having regard to the facts of the case'.³ Recognising that they are neither mandatory nor exhaustive, factors commonly taken into account when evaluating a settlement pursuant to s 33V of the Act are articulated in the Court's applicable practice note.⁴

25 In *Botsman v Bolitho (No 1)*,⁵ the Court of Appeal described the framework of s 33V and the principles to be applied as follows:

- [200] Sub-sections 33V(1) and (2) confer two distinct, but related, powers: first, to approve the settlement and, second, to approve the distribution of payments under it. It is important not to elide these two powers.
- [201] The general principles to be applied in considering an application for approval of a settlement under s 33V have been propounded in a number of cases and are well-established. Those principles guide, but do not control, the Court's exercise of the power in s 33V to approve, or not approve, a settlement.
- [202] The organising principle which underpins s 33V is whether the proposed settlement is fair and reasonable and in the interests of the group members bound by the settlement. Consideration of that question is informed by a number of matters.
- [203] 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 sub-ss 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).
- [204] 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.
- [205] 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

³ *Fowkes v Boston Scientific Corporation* [2023] FCA 230, [45].

⁴ *Practice Note SC Gen 10 Conduct of Group Proceedings (Class Actions) (Second Revision)*.

⁵ (2018) 57 VR 68.

in costs, time and effort that would be required to bring the proceedings to a conclusion.

- [206] 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.
- [207] 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.
- [208] The question of fairness will also be relevant to the distribution of the settlement sum, particularly where, as is usually the case, the group members will receive less than their claimed losses and the costs of bringing the proceeding (both in terms of legal costs and funding costs) will need to be accounted for. It follows that there will often be questions of fairness as between group members, particularly where some, but not all, of the group members have funded the litigation or where it may be necessary to apportion the settlement sum between group members based on differences in their respective claims.⁶

26 In *Fowkes v Boston Scientific*,⁷ Lee J identified ‘three central propositions or themes that run through’ applications for the approval of compromises under s 33V of the Act and the cognate provision in the *Federal Court of Australia Act 1976* (Cth):

- (1) *first*, the central question is whether the proposed settlement is fair and reasonable in the interests of group members considered as a whole;
- (2) *secondly*, there will rarely be one single or obvious way in which a settlement should be framed, either between the claimants and the respondents (*inter partes* aspects) or in relation to sharing the compensation among claimants (the *inter se* aspects); and
- (3) *thirdly*, reasonableness is a range. The question is whether the proposed settlement falls within that range; it is not the task of the Court to second-guess or go behind the tactical or other decisions made by the applicant’s legal representatives, but rather to satisfy itself that the decisions are within the reasonable range of decisions, having regard to the circumstances known or knowable; and a reasonable assessment of risks.⁸

⁶ *Botsman v Bolitho (No 1)* (2018) 57 VR 68, 111–112 [200]–[208] (Tate, Whelan and Niall JJA) (citations omitted).

⁷ [2023] FCA 230.

⁸ *Ibid* [41].

27 The principles guiding the Court's discretion in applications made pursuant to s 33V of the Act were more recently summarised by Nichols J (as Her Honour then was) in *Mumford v EML Payments Ltd*:⁹

[22] Section 33V confers two distinct but related powers upon the Court. The first, in s 33V(1), confers power to approve a settlement; the second, in s 33V(2) confers power to approve the distribution of payments.

[23] The principles that guide the Court's discretion on an application for approval under s 33V are well established. The task requires consideration of whether the settlement is in the interests of all group members and whether it is fair and reasonable having regard to the claims of all group members who will be bound by it if it is approved. That involves consideration of whether the overall settlement sum as well as the distribution of that sum between group members is fair and reasonable. What is 'reasonable' 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.

...

[25] It follows that in evaluating the proposed settlement, what is reasonable is to be judged by reference to 'the circumstances which could reasonably be expected to be knowable to the applicant and the applicant's lawyers'.

[26] The task of persuading the Court of the appropriateness of a settlement is one that is assumed primarily by the plaintiff and its advisers. The task will be discharged in part by the plaintiff's lawyers providing to the Court their candid opinions as to the value of the claims advanced in the proceeding and the discounts that they consider were rationally and reasonably applied to the claims, taking into account the risks of proceeding to trial. As I have said, the Court will be very much assisted by a carefully prepared opinion from the plaintiff's lawyers.

[27] While the question whether the compromise reached is fair and reasonable is to be made without applying hindsight bias, the evaluation of the compromise remains one for the Court; the Court does not just adopt the opinions of the parties' lawyers.

...

[29] The reasonableness of a settlement must necessarily involve consideration of the amount to be allowed for legal and related costs because such deductions will directly affect the return to group members from the settlement sum and are the price that group member pay for obtaining the settlement sum.

⁹ [2026] VSC 143.

- [30] The factors commonly taken into account when evaluating a proposed settlement are listed in the Court's *Practice Note SC GEN 10 Conduct of Group Proceedings (Class Actions)* (second revision).
- [31] It is important for the Court to consider whether group members received timely notice of the proposed settlement's critical elements, so they could take steps to protect their positions if desired.
- [32] An absence of objections from group members subsequent to the giving of notice can be a relevant consideration for the Court in favour of approval, but group members' silence does not equal assent.¹⁰

28 Assessment of whether a proposed settlement distribution scheme is fair and reasonable includes consideration of the following matters:¹¹

- (a) whether the distribution scheme subjects all claims to the same principles and procedures for assessing compensation;
- (b) whether the assessment methodology, to the extent that it reflects 'judgment calls', is consistent with the case that was to be advanced at trial and supportable as a matter of legal principle;
- (c) whether the assessment methodology is likely to deliver a broadly fair assessment;
- (d) whether the costs of a more perfect assessment procedure would erode the notional benefit of a more exact distribution;
- (e) to the extent that the scheme involves any special treatment of the applicant or some group members, for instance via 'reimbursement' payments – whether the special treatment is justifiable, and whether as a matter of fairness a group member ought to be entitled to complain;
- (f) whether appropriate individuals have been nominated to administer the scheme;
- (g) whether the procedures for lodging and assessing claims are appropriate and to be conducted in a timely manner; and

¹⁰ *Mumford v EML Payments Ltd* [2026] VSC 143, [22]-[23], [25]-[27] and [29]-[32] (citations omitted).

¹¹ *Camilleri v The Trust Company (nominees) Limited* [2015] FCA 1468, [43]-[44].

- (h) whether the scheme incorporates appropriate ‘checks and balances’, such as procedures for ensuring consistency between assessments and meaningful opportunities for review (and objection) by group members.

29 Fairness and reasonableness must be approached on a rational basis. As Lee J explained in *Lifeplan Australia Friendly Society Ltd v S&P Global Inc*:¹²

The way in which this fairness and reasonableness is identified, however, must be approached on some rational basis. This rational basis can only be reflected by the notion that, as a general proposition, the individual amounts paid to applicants and group members under a settlement distribution scheme should have some relationship to the individual compensation that reflects the merit of the individual claims, such that each of the applicants and group members receives compensation commensurate to the amount to which they otherwise would be entitled (assuming the settlement the subject of the application involves the payment of a compromised amount). Necessarily, of course, the assessment of the worth or merit of an individual claim requires application of the substantive law in identifying the remedies available to the applicants and the group members. It is in that way that the assessment of what is fair and reasonable does not become arbitrary or idiosyncratic, but has some principled basis.¹³

E **Consideration of the Proposed Settlement**

30 The proposed settlement ought to be approved pursuant to s 33V of the Act. That is so for the following reasons.

31 First, the proceeding involved complex questions of fact and law concerning the alleged failure to disclose a material deterioration from earning forecasts.

32 Second, the proposed settlement avoids delay and ensures a timely return of funds to registered group members, in a context where the trial of the proceeding is only due to commence more than a year from today.

33 Third, group members were invited to submit any objections by 17 July 2026, and no group member has objected to the settlement.

34 Fourth, the proceeding has settled at a stage at which the representatives for the plaintiff were in a position to meaningfully assess the prospects of succeeding at

¹² [2018] FCA 379.

¹³ Ibid [32].

trial. That is particularly so given the substantial volume of discovery that has been produced and examined, and the fact that the plaintiff had briefed and conferred with recognised experts in the fields of discipline required for this case. Those experts had conveyed preliminary views, which allowed the plaintiff, his solicitors and counsel to make an informed assessment as to the merits of the litigation.

35 Fifth, I have taken into account and recognise the risks faced by the plaintiff and group members, including in relation to quantum, loss, and causation. In particular, I have had regard to what was stated at paragraphs 54 to 164 of the confidential opinion of Ms Szydzik SC and Mr O'Connor,¹⁴ and the opinions advanced orally by Ms Szydzik SC and Mr O'Connor in closed court.

36 Sixth, I accept that the settlement achieved is within the range of reasonable settlements, having regards to the risks of the litigation, the quantum of loss, and issues of causation. Settlement has occurred at a stage which is apt to allow the plaintiff and his legal advisors to assess the merits of the litigation, and in circumstances where solicitors and counsel for the plaintiff have assessed the likelihood of establishing liability and causation comprehensively. I therefore consider that the settlement is one that is fair and reasonable on an *inter-partes* basis.

37 Seventh, the Settlement Distribution Scheme (through the LAF) seeks to apply a risk-weighted method of distribution primarily by having regard to the different sub-periods in which group members acquired their shares. I accept the plaintiff's submission that doing otherwise and treating each group member's claim as the same would not be fair and reasonable *inter se*.

38 I am satisfied that the LAF contained in the Settlement Distribution Scheme ensures that the settlement is fair and reasonable *inter se*, in particular by reference to the way in which the LAF treats different group members. In reaching my conclusion as to the fairness and reasonableness of the LAF, I am fortified by the fact that it was considered by solicitors and counsel together, was developed in consultation with counsel, and has been the subject of the confidential opinion.

¹⁴ Confidential opinion of Melanie Szydzik SC and Blake O'Connor of Counsel dated 7 August 2026 exhibited to the affidavit of Jeremy Zimet dated 7 August 2026.

39 I have had pause to consider whether or not clause 5.5 of the proposed Settlement Distribution Scheme is appropriate and necessary to ensure that justice is done in the proceeding. Clause 5.5 operates in the following context. A Registered Group Member is entitled to request a 'Review' (a form of merits review seeking to correct a Registered Group Member's Trade Data) pursuant to clause 5.1. The Administrator is required to make a 'Review Determination' within 14 days of receiving a request for a Review. Clause 5.5 then provides that any Review Determination is final and binding and no appeal can be made to any Court or tribunal. In my view, given the limited role of the review mechanism in this case (being the correction of trade data), there is limited scope for clause 5.5 to work any unfairness or injustice upon group members. In fact, clause 5.5 achieves an important purpose of ensuring that there is a finality in this proceeding and that the administration of the scheme is conducted economically and efficiently.

40 Eighth, as I have already observed, the Settlement Deed in the present case is in fairly orthodox form. The releases in the Settlement Deed do not extend beyond the authority of the plaintiff conferred under Part 4A of the Act. The plaintiff has no representative authority under the Act beyond the scope of the common claims that were or could have been the subject of the proceeding.¹⁵ The releases given by the plaintiff relate to his personal claims and the claims of group members 'which related to or arise from the common Claims'. Accordingly, I accept the submission of the plaintiff that the releases are fair and reasonable as the plaintiff is not releasing any individual claims of group members which do not relate to the common claims.

F Ancillary Orders

41 In giving effect to the settlement and before turning to the GCO, it is important to consider the necessity and terms of a number of ancillary orders.

¹⁵ *Timbercorp Finance Pty Ltd (in liq) v Collins* (2016) 259 CLR 212, 235-236 [53]–[54] (French CJ, Kiefel, Keane and Nettle JJ).

F.1 Appointment of an Administrator

42 It is first necessary to appoint an administrator of the Settlement Distribution Scheme. Having regard to the structure of the Settlement Distribution Scheme and the nature of the LAF, I consider that Mr Jeremy Zimet of PFM is an appropriate administrator. His experience in group proceedings (and more specifically securities class actions) means that he is an appropriate administrator of such a scheme.

43 The group members will benefit from having someone who is deeply familiar with the facts of this case and the LAF in administering the Settlement Sum. I also note that a benefit, albeit not a decisive benefit that arises from the appointment of Mr Zimet, is that the costs of the administration are not borne by the group members.

F.2 Unregistered Group Members

44 By orders made on 16 December 2024, Waller J made opt-out and registration orders. The opt-out and registration notice were in an approved form and included a stipulation that group members had to register by the class deadline in order to be eligible to receive any compensation if a settlement was reached between the date of the opt-out and registration orders and the first day of the initial trial.

45 There are a number of unregistered group members who now seek to participate in the settlement who did not register in accordance with that order. The plaintiff seeks an order pursuant s 33ZF of the Act that those unregistered group members be permitted to participate in the distribution of the Settlement Sum. Without such an order, the unregistered group members are not eligible to participate and their claims will be extinguished.

46 Ultimately, the question I must answer, by reference to the text of s 33ZF, is whether or not the admission of the unregistered group members is appropriate and necessary so as to ensure that justice is done in the proceeding. This is a high bar.

As Matthews J explained in *Andrianakis v Uber Technologies Inc (Settlement Approval)*:¹⁶

[61] The Class Closure Orders have effect unless the Court otherwise orders. I must determine whether I ought to permit a UGM to participate in the settlement pursuant to my discretion under s 33ZF of the Act. In exercising that power, I have a protective role in respect of group members as a whole, and primary consideration must be given to group members. Section 33ZF empowers the Court to make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding. Accordingly, in making my decision, I must be satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding to permit the UGM to participate, or I will decline to order their participation. In doing so, I must be astute to protect the best interests of all group members.

[62] It is self-evident that a group member will suffer prejudice if they are to be bound by the settlement but not able to partake because of the operation of the Class Closure Orders. However, mere prejudice is not enough. The potential for this prejudice was already considered by the Court in the making of the Class Closure Orders and balanced against the 'desirable ends of settlement' to be facilitated by the greater certainty about the size of the class and quantum obtained as a result of those orders.

[63] In order to be permitted to participate in the proposed settlement, the UGM must sufficiently demonstrate unfair prejudice to them in the operation of the Class Closure Orders, so that I am satisfied that it would be unjust to exclude the UGM from participating in the settlement. This is a high threshold for the UGM to reach.

...

[65] It may be unjust to exclude a UGM from participating in the settlement in circumstances where they have provided persuasive evidence that they did not receive notice of the class closure, or where there is persuasive evidence that the notice regime was defective, as occurred in *Wetdal Pty Ltd (as trustee for the Blueco Two Superannuation Fund) v Estia Health Ltd*.¹⁷

47 In my view, making an order under s 33ZF to allow an unregistered group member to participate in a settlement requires that that group member file and serve affidavit evidence which exposes in a formal way the cause of their inability to register in the Court stipulated registration window. In the usual course, the application of the statutory text of necessity and appropriateness will not avail the inadvertent or tardy applicant or those whose personal administration is otherwise

¹⁶ (2024) 108 MVR 55.

¹⁷ Ibid 71-72 [61]-[63]; [65] (citations omitted).

lacking. Those negotiating any settlement rely on the accuracy of registration data and the objective of ensuring that justice is done in a proceeding to all participants can be eroded if unregistered group members are admitted to participate without due regard to the criterion of appropriateness and necessity.

48 In the usual course it will be appropriate and necessary to admit an unregistered group member when that group member can demonstrate on evidence that their inability to register was caused by the act or omission of a third party (for example a registration notice was not sent at all), or by reference to a condition which has so disabled the group member for the majority of the registration period (for example, serious illness) so as to substantially limit their ability to exercise the right of registration conferred by the Court.

49 Having read the affidavit material filed by all unregistered group member applicants and applying the identified approach, only a small number of group members who filed affidavit evidence have satisfied me that it is appropriate and necessary to admit them to participate in the settlement so as to ensure that justice is done in the proceeding. Accordingly, I have determined that eleven unregistered group members ought to be admitted to participate in the settlement.¹⁸

F.3 The Plaintiff's Reimbursement Payment

50 The plaintiff seeks the sum of \$10,000 as a reimbursement payment in recognition of his assumption of responsibility for instructing PFM in the conduct of the proceeding. On the basis of available data, the median reimbursement to plaintiffs in group proceedings in this Court is \$30,000.¹⁹ That is of course a crude benchmark and can be no more than a rough cross-check for any evaluation. In the present case, Dr Gawler has discharged his responsibility carefully and kept timesheet records of his involvement. The evidence reveals that he has spent meaningful time reviewing mediation documents, preparing an affidavit and interacting regularly with PFM. Applying s 33ZF of the Act in the context of the time spent and activities undertaken by Dr Gawler, I consider that the sum of \$10,000 is appropriate and

¹⁸ Unregistered group members: 3, 5, 6, 7, 8, 17, 21, 23, 25, 27 and 28.

¹⁹ Professor Vince Morabito, *Group Costs Orders, Funding Commissions, Volume of Class Action Litigation, Reimbursement Payments and Biggest Settlements* (4 February 2025) at p.50.

necessary as a reimbursement payment. It is important that lead plaintiffs are renumeralated for the time and effort they expend in representing and advancing the interests of group members. Their role is particularly important and the Court must be cautious that it takes no step to disincentivise group members from fulfilling that important function.

G The Group Costs Order

51 On 26 June 2024, Waller J made a GCO under s 33ZDA of the Act in relation to the plaintiff's costs of the proceeding.²⁰ The GCO was set at 39% of any settlement sum, with liability for payment of those costs to be shared among the plaintiff and all group members.

52 Unless varied, the 39% rate applies in this case with a resultant costs award of \$10,530,000.

53 PFM submitted that the Court ought not vary the GCO under s 33ZDA(3) of the Act at this stage of the proceeding.

54 The principles to be applied on a settlement approval when evaluating an award of costs calculated under a GCO were articulated by Watson J in *Allen & Anor v G8 Education Ltd (No 4) (Allen (No 4))*²¹ and Nichols J (as Her Honour then was) in *Lieberman v Crown Resorts Ltd*.²² I have had regard to and applied those principles.²³

55 Section 33ZDA(3) permits the Court to assess and ensure that the percentage to which the law practice is ultimately entitled remains appropriate and necessary to ensure that justice is done in the proceeding. Considering whether an amendment is required at the finalisation of a proceeding is an important part of the Court's supervisory jurisdiction with respect to the interests of group members. Whether or not a GCO remains appropriate and necessary requires consideration of whether the GCO will deliver a reasonable and proportionate return to the law practice,

²⁰ *Ross Andrew Gawler v Fleetpartners Group Ltd* [2024] VSC 365.

²¹ [2024] VSC 487.

²² [2025] VSC 596.

²³ This decision was delivered *ex tempore* prior to the delivery of judgment by the Court of Appeal in *Maurice Blackburn Pty Ltd v McCoy* [2026] VSCA 236.

having regard to, amongst other things, whether the risk undertaken by the law practice proportionately reflects the reward that is proposed to be awarded to them.

56 An amendment to the percentage applicable to a GCO should only be made if the amendment is necessary and appropriate to ensure that justice is done in the proceeding. This requires an evaluation on Court's own motion as to whether or not the 39% rate remains appropriate and necessary to ensure justice is done in the proceeding, or whether an amendment is required and, if so, at what rate.

57 As a result of the ultimate actual costs incurred by a law practice (in the case of a return on investment and internal rate of return) and the time value of money (in the case of an internal rate of return), the headline percentage rate of a GCO may say very little in real terms about the ultimate or likely return on investment to a law practice or the internal rate of return of undertaking the investment risk that a law practice embarks upon when commencing a group proceeding.

58 In *Allen (No 4)*, Watson J identified the value to the Court exercising power under s 33ZDA(3) of information as to the return on investment, internal rate of return, and the estimate of professional fees based on hours worked by solicitors within the law practice.²⁴

59 Evidence of this type is very important to each and every application concerning a GCO. It is, in my view, a responsibility of the law practices applying for GCOs to routinely provide this information to the Court and to implement where necessary the infrastructure and capability so as to allow that information to be provided promptly. Importantly, care needs to be taken to select the appropriate cost base used for calculating a return on investment or internal rate of return. Rather than using the law practice's professional fees charged, the appropriate cost base is the actual labour and overhead costs incurred by the law practice together with any external disbursements such as counsel and expert fees. Those figures reflect the *actual* investment made by the law practice. The calculation of actual labour and overhead costs can be derived by adopting the approach explained by Watson J in *Allen (No 4)*:

²⁴ *Allen & Anor v G8 Education Ltd (No 4)* [2024] VSC 487 (*'Allen (No 4)'*), [77]–[84].

[A] less costly and time consuming method to arrive at a calculation of actual costs for labour and overheads will be to calculate the professional costs on an hourly rate basis and remove the practice's average profit margin.²⁵

60 I have been greatly assisted by the efforts made by PFM to undertake the required tasks over the past 72 hours to calculate the estimated actual cost base, return on investment and internal rate of return.

61 In the circumstances of this case, I am now satisfied that it is appropriate and necessary to maintain the GCO at 39% and make an award in respect of legal costs to PFM reflective of that amount.

62 I am so satisfied for the following reasons.

63 First, it is evident that PFM and counsel retained on behalf of Dr Gawler undertook a substantial and extensive amount of work between July 2024 and June 2026. That work has enabled a considered and careful assessment to be made as to the prospects of the plaintiff and group members succeeding in the proceeding, and that the solicitors acting for Dr Gawler and the group members have been assiduous in ensuring that all relevant documents have been produced and examined and that the views of experts (although expert evidence has not been filed) have been taken into account in reaching the decision to settle the case.

64 Armed with the discovery, the solicitors for the plaintiff undertook a process of preparing the TFASOC. Without descending into the confidential evidence, it is clear to me that this was a substantial and carefully undertaken exercise.

65 The costs evidence filed by PFM reflects the substantial amount of work undertaken by the law practice and illustrates the risk that they have undertaken in a financial sense to obtain this reward on behalf of group members. Having regard to the substantial amount of work undertaken in the proceeding and the complexity of the proceeding, I consider that the costs incurred by PFM are commensurate with that complexity and the duration of the proceeding. I accept that the effort and investment made by PFM in pursuing the interests of group members and in obtaining a positive outcome was significant.

²⁵ *Allen (No 4)*, [75(e)].

- 66 I accept, based on the material submitted to the Court, that the total costs incurred and estimated by PFM are reasonable in the circumstances. One cannot lose sight of the fact that the GCO enabled the proceeding to continue when it otherwise may not have continued, and, ultimately, produced a positive outcome for group members.
- 67 Second, I accept that the outcome of the settlement falls within the range of outcomes considered by the Court, the plaintiff and PFM at the time at which the GCO order was originally made. By using the phrase ‘considered by the Court’, I expressly note that I am having regard to the reasons as published by Waller J, together with the confidential annexure to those reasons.
- 68 Third, the amount that is proposed to be paid to PFM under the GCO is commensurate with the risk undertaken by PFM, including the adverse costs risk in the event that the plaintiff was unsuccessful at trial and on appeal. The financial outcome for PFM at this stage of the proceeding is commensurate with, and not vastly different to, that which had been estimated when the original application was made before Waller J.
- 69 Fourth, group members were provided with meaningful and timely notice of the 39% GCO rate in both the opt-out and registration notice and the notice of proposed settlement. There has been no objection by any group member to the GCO order being maintained or any application by a group member for it to be varied under s 33ZDA(3).
- 70 Fifth, counsel and solicitors have identified that they are not aware of any circumstance which would make it appropriate or necessary to reduce the GCO rate.
- 71 Sixth, and significantly, the evidence produced at my request, reveals and confirms that whilst 39% is on its face a high rate, once one considers the return on investment and the internal rate of return produced in this case, this case is not an outlier. The reward and return to PFM is clearly commensurate with the risk that was undertaken by the law firm in embarking on this litigation. The internal rate of return and the indicative return on actual investment are set out in the confidential

annexure to these reasons. Absent any appeal from my orders, confidentiality will lapse over those figures on 15 December 2026 and the figures will be published.

CONFIDENTIAL ANNEXURE

Pursuant to the orders of Justice Craig dated 27 October 2026, the following information is confidential and shall not be published or disclosed subject to further order without prior leave of the Court to any person or entity other than the Plaintiff, the Plaintiff's legal representatives, Phi Finney McDonald, Phi Finney McDonald's legal representatives, and the Court, until 15 December 2026.

1. The annualised internal rate of return is [redacted].
2. The return on investment is in the range of [redacted].

CERTIFICATE

I certify that this and the 25 preceding pages are a true copy of the reasons for judgment of Craig J of the Supreme Court of Victoria delivered on 27 October 2026.

DATED this twenty-seventh day of October 2026.


.....
Associate