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Details of Filing

Document Lodged:	Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	25/10/2024 3:35:10 PM AEDT
Date Accepted for Filing:	25/10/2024 3:35:17 PM AEDT
File Number:	VID312/2021
File Title:	MINNIE MCDONALD v COMMONWEALTH OF AUSTRALIA
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

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MCDONALD v COMMONWEALTH (VID312/2021)

APPLICANT'S SUBMISSIONS ON SETTLEMENT APPLICATION

A. INTRODUCTION

1. This proceeding is known as the "Northern Territory Stolen Wages Class Action". It is a significant matter concerning a dark period for the Aboriginal people of the Northern Territory at a time when the **Commonwealth** of Australia administered the Territory. The claims concern the non-payment, or under-payment, of Aboriginal persons who worked in the Northern Territory between 1 June 1933 and 12 November 1971.

2. The Applicant is Ms Minnie McDonald, who was born in about 1937 or 1938. She grew up at Lake Nash Station, where she lived with family including her mother and her two brothers who worked in the stock camp. Ms McDonald worked at Georgina Downs and Argadargada Stations as a domestic servant from about the age of 14. Ms McDonald brings the claim as a representative proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), on her own behalf and on behalf of the Group Members. The Group Members include, in summary, all Aboriginal persons who during all or part of the period between 1933 and 1971 worked in the Northern Territory under the operation of successive iterations of "protective" legislation – the *Aboriginals Ordinance 1918-1933* (NT), the *Welfare Ordinance 1953-1955* (NT), and the *Wards Employment Ordinance 1953-1959* (NT).

3. On 30 August 2024, the parties entered into a settlement of the proceeding conditional on the Court's approval for a sum of up to $202 million (including separate components of up to $15 million for party and party costs, up to $6 million for administration costs, and up to $1 million for costs assessor costs). Orders were made on 16 September 2024 providing for notice of the proposed settlement and other ancillary orders. These submissions address the Applicant's Interlocutory Application for approval of the proposed settlement and a proposed settlement distribution scheme (Scheme) as well as

arrangements for the reimbursement and payment of costs incurred and fees claimed by the litigation funder (**LLS**) relating to the proceeding.

4. The settlement of the Part IVA proceeding requires the Court's approval under s 33V of FCA Act. As the proceeding is also constituted as an old-style chancery representative proceeding within the meaning of Div 2 of the Federal Court Rules (but subject to orders under r 9.24(1)(c) that it may carry on behalf of deceased persons in the absence of a person representing deceased group members with no personal representative), it also requires approval under the old rules. However, the Applicant is proceeding on the basis no different test applies. That would be the position if the Applicant had been constituted as a representative under r 9.21 (see *Sister Marie Brigid Arthur (Litigation Representative) v Northern Territory of Australia (No 2)* [2020] FCA 215 at [71]-[79]), and the position ought be no different in the present case, notwithstanding that the representative order made was under r 9.24(1)(c).

5. The Applicant relies upon the affidavit of Vicky Antzoulatos sworn on 24 October 2024. While certain material exhibited to that affidavit is confidential (including an opinion prepared by counsel as to the fairness and reasonableness of the settlement), the Applicant and her representatives are mindful of the public interest associated with the settlement of this proceeding in particular, and accordingly seek to provide through these submissions as transparent a record as possible of why it is said that the settlement is fair and reasonable and in the interests of Group Members.

B. PRINCIPLES

6. The applicable principles in relation to settlement approval under s 33V of the FCA Act are well established. The Court's fundamental task is to determine whether the settlement is fair and reasonable and in the interests of Group Members who will be bound by it, including as between the Group Members *inter se*: *Webb v GetSwift Ltd (No 7)* [2023] FCA 90; 165 ACSR 560 at [15]-[17]. The Court's role in approving settlement was described in *GetSwift* at [16]. In summary, the Court assumes an onerous and protective role and must decide whether the proposed settlement is within the range of

reasonable outcomes, rather than whether it is the best outcome which might have been won by better bargaining.

7. The Class Actions Practice Note (GPN-CA) sets out at [15.5] a number of factors the Court may consider on an application to approve a settlement. Those factors are derived from *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925; 180 ALR 459 at [19] (Goldberg J) which relied on the factors identified by the United States Court of Appeals for the Third Circuit in *In re General Motors Corp Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3rd Cir. 1995). There is no requirement to deal with each of these factors; they are to be approached as a useful guide, subject to the circumstances of the particular case: *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 at [13].

8. The factors set out at GPN-CA [15.5] are these:

   8.1 the complexity and likely duration of the litigation;

   8.2 the reaction of the class to the settlement;

   8.3 the stage of the proceedings;

   8.4 the risks of establishing liability;

   8.5 the risks of establishing loss or damage;

   8.6 the risks of maintaining a class action;

   8.7 the ability of the respondent to withstand a greater judgment;

   8.8 the range of reasonableness of the settlement in light of the best recovery;

   8.9 the range of reasonableness of the settlement in light of all the attendant risks of litigation; and

   8.10 the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.

9. In practical terms, there are three primary aspects to any proposed settlement, which attract different considerations:

9.1 whether the settlement *inter partes* is fair and reasonable having regard to the interests of the group members, considered as a whole;

9.2 whether the proposed arrangements for distributing the Settlement Sum *inter se* among the group members are fair and reasonable, again taking the group members as a whole; and

9.3 whether the proposed deductions from the Settlement Sum, for past or future legal costs, for any insurance premiums, and for funder's remuneration are fair and reasonable in all the circumstances.

C. PRELIMINARY MATTERS

C.1. Outreach Program and notices

10. The Court's power to approve the settlement of representative proceedings is subject to a requirement to give notice to Group Members (s 33X(4)).

11. On 16 September 2024, her Honour Chief Justice Mortimer made orders approving the form and manner of distribution of a settlement notice to Group Members. The order also prescribed a physical 'pre-approval program' to be undertaken by Shine Lawyers.

12. The pre-approval program involved the publication of the settlement notices though broad channels –in newspapers, by radio, and online, including social media. Shine attending six major Aboriginal and Torres Strait Islander communities in the Northern Territory to run information sessions.

13. More detail about the pre-approval program is contained in Ms Antzoulatos' affidavit.

14. The evidence of Ms Antzoulatos is that the notice regime has been complied with. As at the date of these submissions, there have been no objections to the proposed settlement. There have been no opt-outs as a result of the notice.

15. On the evidence, the Court can be satisfied that notice has been provided of the proposed settlement to Group Members.

C.2. Counsels' opinion

16. In accordance with the established practice for class action settlement approval applications, counsel who have been briefed in the matter since its inception or very shortly thereafter have provided an opinion as to the fairness and reasonableness of the settlement, in its various aspects.

17. The purpose of the opinion is to enable the Court to discharge its protective jurisdiction on behalf of the Group Members and be satisfied that the settlement reflects a reasonable outcome both as between the Group Members and the Commonwealth and in terms of the arrangements for distribution of the settlement funds between the Group Members. The opinion contains counsels' candid assessments of the merits of the proceeding, among other things.

18. For those reasons, the opinions go, in considerable detail, into matters which would normally only be revealed to a client. They are at the centre of client legal privilege and are confidential. In accordance with the established practice, confidentiality orders are sought in respect of the opinions. However, as noted above, the Applicant is mindful of the public interest associated with the settlement of this proceeding and accordingly seeks to provide through these submissions as transparent a record as possible of why it is said that the settlement is fair and reasonable and in the interests of Group Members.

D. FAIRNESS AND REASONABLENESS OF THE PROPOSED SETTLEMENT

19. We here address the settlement as between the Applicant and Group Members on the one hand, and the Commonwealth on the other.

D.1. Relevant terms of proposed settlement

20. The proposed settlement comprises a Deed and annexed Settlement Distribution **Scheme**. The terms of the Deed dealing with the settlement sum provide for a maximum total settlement sum of **$202M**, made up of the following components:

    20.1 two amounts, together up to an amount of $180 million, being the **Settlement Sums**. The amounts are, in effect, calculated by multiplying $18,000 by the

number of "Eligible Claimants" up to 10,000 Eligible Claimants. The Settlement Sums comprise:

(i) a **Lump Sum** in an amount of $54 million, comprising an amount of $18,000 per person multiplied by an assumed 3,000 Eligible Claimants; and

(ii) a **Per Person Sum**, being an amount up to $126 million, which is additional to the Lump Sum, calculated by multiplying the number of Eligible Claimants above 3,000 Eligible Claimants up to a maximum of 10,000.

20.2 three amounts comprising the **Costs Sums** up to an amount of $22 million, being:

(i) the **Applicant's Agreed Costs**, being the Applicant's legal costs and disbursements as between party and party up to an amount of $15 million (inclusive of GST), including the costs of the proceeding up to settlement approval and including the registration process, but excluding any uplift;

(ii) the **Costs Assessor's Costs**, being the reasonable costs of the Costs Assessor up to a maximum of $1 million (inclusive of GST); and

(iii) the **Agreed Administration Costs Component**, being an amount up to a maximum of $6 million (inclusive of GST).

21. The terms of the Deed dealing with deductions from the $202M settlement sum provide for:

21.1 the deduction of the Applicant's legal costs from Group Member funds to the extent they exceed $15M, if approved by the Court (cl 2.16.1(d)(ii));

21.2 the deduction of a reimbursement payment for the Applicant, Sample Group Members, and any other Group Member who has provided assistance from Group Member funds, if approved by the Court (cl 2.16.1(c)); and

21.3 the deduction of 'excess' Costs Assessor's Costs and Administrator's Costs from Group Member Funds, if approved by the Court (cll 2.16.1(a) and (b)) (which event is on present information unlikely to occur).

22. While LLS is not a party to the Deed, the Deed recognises that the Court may approve deductions for commissions or other funding costs (cl 2.16.1(d)(i)).

23. Other Deed terms that are relevant to the current application are:

23.1 the Applicant is to file an "Approval Application" (this application) seeking approval of the settlement and related orders (cl 2.3.1); and

23.2 the releases given by the Applicant and group members to the Respondent on approval (cll 2.17 and 3).

24. The proposed Scheme forms part of the Deed (cl 2.4.1). A key aspect of the Scheme is that the persons eligible to participate in the distribution of the net settlement sum are "Eligible Claimants" (ie, a person who worked during the Claim Period and satisfies the criteria in the table to Scheme cl 43) and "Eligible Descendant Claimants" (ie, a person who is the most recent living spouse or the living children of a deceased Eligible Claimant and satisfies the criteria in the table to Scheme cl 44).

D.2. Calculation of the likely quantum of the gross Settlement Sum

25. The Settlement Deed calculates the Settlement Sum by reference to the number of Eligible Claimants – *not* Potential Eligible Claimants. The number of Eligible Claimants can only be determined *after* the Administrator has been appointed (and thus after the approval of the settlement). In order to estimate the gross Settlement Sum, it is therefore necessary to estimate the number of registrations that will 'convert' to Eligible Claimants. This is fundamentally a question for the Administrator.

26. Ms Antzoulatos' evidence is to the effect that a "base case range" of 8,000 Eligible Claimants (buffered to the downside to 6,000 for reasons of conservativism given the nascency of the Registration Process) is a reasonable estimate to be used for the purposes of considering the likely Settlement Sum. She provides the following reasons:

26.1 Shine has obtained an expert actuarial report from Mr Bruce Thomson, who has assessed the likely number of surviving group members (original group members who are either alive, or who have a descendant or children who remain alive), and therefore have the practical capacity to bring forward claims, was, at the upper end, around ~12,500;

26.2 This case is similar to, and brought on behalf of a similarly-sized class of claimants with the same demographic profile, to the "Western Australian Stolen Wages Class Action", *Street v State of Western Australia* (***Street v WA***), which was settled in late 2023 and in which there has now been an extensive registration process which has similar features to what is contemplated in the present settlement. Prior to the commencement of the post-settlement registration process in *Street v WA*, Shine had collected approximately 6,700 registrations from persons claiming either on their own behalf or on behalf of a relative. That figure is comparable to the approximately 6,000 registrations collected in this proceeding before settlement Shine's data analysis of the *Street v WA* registrations indicates it expects that following de-duplication (and combination of descendants), the 15,178 Registration Forms received to date would convert into 7,873 Original Eligible Claimant claims, which can be rounded up to 8,000 to account for additional registrants coming forward before the approval hearing. In short, it is reasonable to assume that a similar registration process in this case to the recently conducted process in the closest analogous case (*Street v WA*) will produce a similar outcome in a similar timeframe.

27. Accordingly, for present purposes, the Applicant's legal representatives assume the range 6,000 to 8,000 Eligible Claimants, leading to a Settlement Sum of **$108M to $144M** (plus up to $22M comprised of the three agreed separate costs components). These numbers are estimates, but they are based on a large volume of data and the demonstrated similarities in terms of total group size, participation rates and comparable cohorts between this proceeding and *Street v WA*. Hence, it is submitted that the estimate is sufficiently reliable for the Court to exercise its powers under s 33V

of the FCA Act, taking into account its expression as a range with a lower base case (of 6,000) than that actually experienced in *Street v WA*.

28. For the Distribution Model, the assumption that the number of Eligible Claimants ultimately assessed by the Administrator will be between 6,000 and 8,000 has been included as a key input to model distributions.

D.3. Whether the gross Settlement Sum fair and reasonable

29. The Settlement Sum must be evaluated against the risk-weighted value of the claims. proposed settlement involves the payment of modest but substantial compensation to persons who register to participate in the settlement.

30. No money payment can ever really provide adequate compensation for the lived experience of the Group Members, but the nature of civil litigation is that monetary compensation is the chief and often the only mechanism the law can offer. In the Applicant's submission the proposed Settlement Sum does reflect a reasonable compromise value, having regard to the various risks that the claim group faced if the litigation continued. It is fair to say, as the Court said when approving the settlement in *Pearson v State of Queensland* [2020] FCA 619 (the **Queensland Stolen Wages class action**) at [12], that the claims faced "*serious obstacles*". All of the claims made in this proceeding were very difficult, novel and risky ones. The claims faced risks in relation to liability, causation and quantum. Among other things, given most of the claims arose in respect of conduct between 1933 and 1971, they faced significant risk of being barred at law by the application of various limitation periods, or failing by reason of absence of proof of the factual matters on which they depended (all of which occurred more than 50 years ago).

31. *Secondly*, it is necessary also to address the reasonableness of the proposed "class closure" orders – that is, orders to the effect that any person who fits the definition of a Group Member, but who does not register to participate in the settlement, will:

    31.1 remain a Group Member and lose their rights to sue the Commonwealth for the claims that are covered by the class action; but

31.2 not be permitted to claim any compensation under the settlement.

32. Class closure orders are normal in class action settlements, and the power to make such an order at the settlement stage is uncontroversial: see eg *Ellis v Commonwealth of Australia* [2023] NSWSC 550; 411 ALR 578 at [34]-[36] (Beech-Jones J); *Webb v GetSwift Limited (No 7)* [2023] FCA 90 at [49] (Murphy J). They are necessary to achieve finality to the claims covered by the action. Provided that Group Members are given ample notice of the class closure orders, it is an appropriate corollary of settlement. Courts and class actions cannot compel people to make claims, but they can impose the consequence that a person who does not take reasonable steps to protect their own interest might lose their rights.

33. *Thirdly*, the final principal aspect of the fairness of the *inter partes* settlement is that even the participating group members will lose their rights to sue the Commonwealth. That is, the terms of Deed provide that each group member, in return for the settlement, gives a release to the Commonwealth. Again, this is a normal feature of settlements.

34. For these reasons the Applicant submits that the terms of settlement reflected in the Deed do reflect a fair and reasonable compromise of the group's claims.

E. FAIRNESS OF PROPOSED DISTRIBUTION

35. The next aspect relevant to an assessment of the fairness and reasonableness of the proposed settlement involves consideration of fairness between group members.

36. In this respect, Moshinsky J in *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468 explained at [43]-[44]

> The cases indicate a number of factors relevant to the assessment whether a proposed distribution scheme is fair and reasonable having regard to the interests of the group as a whole. Some of these factors are as follows:
>
> (a) whether the distribution scheme subjects all claims to the same principles and procedures for assessing compensation shares;
>
> (b) whether the assessment methodology, to the extent that it reflects 'judgment calls' of the kind described above, 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 (where the settlement is uncapped as to total payments) or relativities (where the task is allocating shares in a fixed sum);

(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 plaintiffs 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.

There are also procedural factors which relate to the fairness of a proposed distribution process, such as:

(a) whether appropriate individuals have been nominated to administer the scheme;

(b) whether the procedures for lodging and assessing claims are appropriate and to be conducted in a timely manner;

(c) 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.

37. There are four principal features to the proposed Scheme here:

37.1 the requirement for group members to register their claims in accordance with the proof and documentation requirements of the Registration Process;

37.2 the provisions it makes for payments to the spouse and children of persons who worked in the claim period, but not to more extended relations;

37.3 the criteria adopted for distribution between group members on the basis of date of birth; and

37.4 the provision for payment of deductions in the amounts, sequence, and timing approved by the Court.

E.1. Registration process and determinations as to eligibility

38. The Scheme provides a process for group members to register and provide the data by reference to which their entitlements are to be assessed, and for the Administrators to verify that data.

39. The Scheme involves, in essence, two steps in determining the eligibility of Group Members to participate in the Settlement. The *first* step involves Shine determining

whether a claimant is either an 'Potential Claimant' or a 'Potential Descendant Claimant', by reference to the eligibility criteria in cll 43 and 44: see cl 15.

40. The *second* step occurs after Shine has made determinations in respect of these 'potential' claimants. After Shine has made its determination, a further determination is to be made as to whether such claimants are eligible to receive a distribution. That is, a determination is to be made as to whether the claimant is an Eligible Claimant or an Eligible Descendant Claimant. That requires the Administrator to be reasonably and independently satisfied that the eligibility criteria in cll 43 or 44 are met.

41. The eligibility criteria include matters as to identification, Aboriginal or Torres Strait Islander identity, date of birth (ie, whether the claimant was born before 12 November 1961), the places the claimant worked and the kind of work they did and provide information allowing payment to be made. Appropriate steps have been taken in the Settlement Deed and Scheme to balance the need for proof of eligibility against the risk that these criteria impose undue and onerous registration requirements on the vulnerable cohort of Group Members concerned. These steps include substitute means of proof, and accommodations for those that are illiterate.

E.2. Eligible Descendant Claimants

42. A central concept in the settlement is the "Eligible Claimant". In essence, an Eligible Claimant is a group member whose working life was affected by the Control Legislation. The requirement in cl 43 that the Eligible Claimant be aged at least 10 years old during the Claim Period (ie, that they were born before 12 November 1961) is intended to filter for the fact that most if not all group members would not have commenced work before reaching 10 years of age.

43. The extension of eligibility to Eligible Descendant Claimants reflects, in a broad and simplified manner, the rules of intestacy in the Northern Territory, which are governed by the *Administration and Probate Act 1969* (NT):

    43.1 in accordance with s 66 and Schedule 6 of that Act, the persons entitled to take an interest in an intestate estate are, in the first place, the surviving spouse up to

the prescribed amount. The prescribed amount is 370,000 'monetary units', being $440,300 at the present date (*Administration and Probate Regulations 1983* (NT), r 3). Given the amounts to be distributed under the SDS, that monetary threshold would not be reached so each surviving spouse would take the whole intestate estate;

43.2 where there is no surviving spouse but there are issue of the deceased, the issue are entitled to the whole of the estate; and

43.3 in the event there is neither surviving spouse nor issue, s 69 and Schedule 6 make provision for the entitlements of parents and various next of kin.

44. We add that the Act makes specific provision for more complicated distributions in accordance with the customs and traditions of the community or group to which an intestate Aboriginal person belonged on an interested person making an application (Part II Division 4A).

45. In summary, the Scheme broadly approximates the intestacy rules in place in the Northern Territory, save that there is no provision for claims by relations more remote than spouses and children of the Eligible Claimant or for traditional distributions. Given the likely high rates of intestacy within the class, we did not think it desirable that the administration of the settlement be bogged down in potentially interminable disputation about where the entitlements of deceased estates ought to go. Any extension of the distribution process to relations other than spouses and children would have the real potential exponentially to increase the costs of administration and lead to a result where the settlement sum was substantially diminished by the excessive costs of the exercise. We add that a similar rule was adopted in the settlement approved in *Pearson v State of Queensland (No 2)* [2020] FCA 619.

E.3. Differentiation Order

46. The Administrator is to determine, pursuant to the "Differentiation Order" (which is addressed in detail below, and which forms the basis for determining the amount to be paid to an Eligible Claimant (the **Eligible Claimant Payment**)) the amount to be

distributed to each Eligible Claimant and each Eligible Descendant Claimant: cl 57. The following principle applies as to the determination of the distributions:

46.1 if the Eligible Claimant is alive, they are to receive the entirety of the Eligible Claimant Payment;

46.2 if the Eligible Claimant is deceased, a living spouse who is an Eligible Descendant Claimant is to receive the entire Eligible Claimant Payment. If there is no living spouse, the Eligible Claimant Payment is to be divided equally Eligible Descendant Claimants that are living children of the Eligible Claimant.

47. We turn now to the Differentiation Order which is proposed. The Applicant proposes a two-category distribution which is differentiated by the Eligible Claimant's date of birth. Persons born before a certain date will be in the first category, and after that date in the second. Both categories will receive a base amount (to reflect at least the minimum distribution referred to in the notice). The first category is proposed to receive a top-up payment above that amount, pro-rated to the balance of settlement available for distribution to group members.

48. The intention is as follows:

48.1 Eligible Claimants born on or before 1930 are placed in "Category 1" (being about 25% of Eligible Claimants);

48.2 Eligible Claimants born on or after 1930 are placed in "Category 2" (being about 75% of Eligible Claimants);

48.3 Eligible Claimants in both Category 1 and Category 2 receive a base payment of $10,000 (directly or to the relevant Eligible Descendant Claimant/s); and

48.4 Eligible Claimants in Category 1 receive a "top-up" payment, being a pro-rata distribution of the net surplus remaining in the settlement fund, after the making of base payments and payment of deductions by the Administrator.

49. This allocation method offers simplicity and a rough "rule of thumb" mechanism for sharing out the available funds, that broadly reflects the *relative* legal and factual risks

that each subgroup faced in trying to prove its claim in any trial. The question is not whether the resulting compensation payment reflects the damages award that might be achieved at trial. Rather, the present question is whether the relative shares of the compensation reflect the relative risks between different subgroups' claims. And there is a subsidiary question, namely whether the costs of a more precise assessment of each individual claimant's prospects would outweigh the overall benefits of that process.

50. It is submitted that both those questions compel a conclusion that the two-way split provides a rough "rule of thumb" result that is broadly fair and gives effect to the principle that 'people who worked longer should get more' and certainly minimises the costs of the distribution process. Those costs otherwise would quickly erode the compensation actually paid to the Group Members.

E.4. Proposed Distribution Model

51. The proposed Distribution Model is exhibited to Ms Antzoulatos' affidavit, and annexed to these submissions for convenience. As is apparent, it is far more complex than what would be required for a lump sum settlement. A conventional approach for a lump sum amount is simply to minus the approved deductions and distribute the net balance. That is not possible here, because the settlement sum accrues over time as eligibility determinations are made thereby increasing the common fund to which approved deductions can be charged.

52. It is of importance to the Applicant and Group Members to ensure that funds are accrued to their account to ensure that Minimum Payments can be made as soon as possible, especially to living Eligible Claimants. Paying the full value of the deductions sought as a first priority would leave nothing left over to pay claimants until approximately half-way through the Administration (assuming 8,000 Eligible Claimants). Such a result would not be fair and reasonable.

53. The Distribution Model addresses this dilemma by proposing staged payments in the following manner:

53.1 *First*, projecting out the incoming funds into the Settlement Fund Account for each tranche of 1,000 Eligible Claimants, and separately identifying the quantum of deductions in the amounts sought to be approved;

53.2 *Secondly*, creating a Minimum Payment Reserve which progressively accrues as money is paid into the Settlement Distribution Fund, and which allows for minimum payments to be made in respect of each assessed Eligible Claimant claim, of $10,000;

53.3 *Thirdly*, progressively reserving amounts in respect of the various categories of deduction, with (1) upfront reserves created in respect of administration costs (including costs assessor costs and reimbursement payments), and then (2) progressively accruing reserves for legal costs and funder charges as the Settlement Distribution Fund increases; and

53.4 *Fourthly*, creating a Top-up Payment Reserve which progressively accrues over time (albeit starting in negative territory) as deductions are applied into the other reserves.

54. It will be apparent that the Distribution Model in the form annexed to these submissions is neutral as to the *amount* of deductions which the Court approves (in the sense that the precise amount does not affect how it operates), but *conservative* (in the sense that it models the *maximum* amounts so as to illustrate the impact if claims are allowed in full. To explain further, for the purposes of illustrating the operation of the Distribution Model, it has been assumed, for example, that the Funder is allowed the commission asked for at the full 20% rate claimed, and is also allowed its ATE premium payment in full. Similarly, in respect of costs components which are forward looking, it is assumed they are allowed in the full amount estimated together with a buffer in case of inaccuracy (eg, while the excess legal costs over the $15 million separate component to be paid by the Commonwealth is $9.5 million plus a $500K buffer, the Distribution Model assumes an $11 million figure). It is only by making the assumptions least favourable to the

Applicant and Group Members in this way, that the true impact of the deductions can be assessed in terms of the fairness and reasonableness of the model. And, if the Distribution Model is fair on such assumptions, then it is also the case, a fortiori, that it would be fair if *lower than maximum* amounts were to be approved.

55. The Applicant is preparing a proposed short minute of order that will amend the orders sought in the Interlocutory Application to incorporate both the Distribution Model and a narrative explanation of how it is to be applied by the Administrator, together with a specification of the Differentiation Order.

F. THE PROPOSED DEDUCTIONS FROM THE SETTLEMENT SUM

56. Because this is a process settlement in which funds will be received into the Settlement Fund Account over time, it is necessary to consider the proposed deductions before turning in the next Section of these submissions to the question of when and how those deductions should be programmed to be paid out.

57. The authorities addressing settlement approval in the context of Part IVA proceedings reveal a number of principles relevant to our task of considering the fairness and reasonableness of the proposed settlement:

    57.1 the primary question in assessing proposed deductions either for legal costs or for funders' remuneration (aka commission) is that the lawyers and funder respectively ought receive a fair reward for work properly done and risks responsibly taken;

    57.2 it is relevant, but by no means determinative, to consider the proportionality between the claimed costs and commission, and the net returns that would be left for payment to group members;[1]

    57.3 the approval of commission rates should not become a race to the bottom.[2] Rates of commission should be set which properly reward for the risk undertaken. A lower rate may reflect lower risks in litigation. Risk must not be looked at only

[1] *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3)* [2018] FCA 1842 at [134]&ff; see also *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634 at [328]-[333].
[2] *Kuterba v Sirtex Medical Ltd (No 3)* [2019] FCA 1374 at [12]-[19].

in the context of the particular action – the Court may have regard to market rates, the risks faced by litigation funders in investing in litigation generally;

57.4 the chief influences on any assessment of proportionality of costs are:

(i) the quantum of the overall claim value, as reasonably judged at the time those costs were incurred;[3]

(ii) the quantum of the overall settlement actually achieved.

58. The Settlement Deed contemplates the payment of the following amounts from the Settlement Fund Amount:

58.1 the Administration Costs (to the extent they exceed the $6M separate allowance);

58.2 the Costs Assessor's Costs (to the extent they exceed the $1M separate allowance);

58.3 the Reimbursement Payments;

58.4 other amounts approved by the Court, including any amount ordered by the Court to be paid in respect of:

(i) commission or other funding costs;

(ii) the Applicant's Actual Costs (in excess of the $15M separate allowance),

59. It then contemplates the balance (the Net Settlement Fund Amount) being paid to Eligible Claimants or Eligible Descendant Claimants: Settlement Deed, cl 2.16.1. We have already addressed above, in the context of the Distribution Model how it is proposed that these net proceeds will be distributed.

F.1. Administration costs

60. Under the Settlement Deed and Scheme, the Administrator is responsible for two principal tasks being the making determinations regarding eligibility of potential claimants (where the Commonwealth has not accepted eligibility yet) and making

[3] *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634 at [328]-[333].

payments to eligible claimants. However, in order to perform those two main tasks, a substantial amount of work is involved, including reviewing applications, contacting Group Members, reconciling multiple claims on the same deceased group member, assessing eligibility, necessary conducting checks of details, in addition to the other tasks Administrators are conventionally called upon to perform.

61. The Scheme makes provision for the approval and payment of the **Administration Costs**, which include the costs of the Legal Advisor (who is appointed to advise the Administrator). The Commonwealth has made a separate allowance of up to $6 million for Administration Costs, and as is explained below, on the evidence available as to the quotes from those who have tendered for the administration that allowance will be sufficient to cover the costs of the administration. It is therefore not expected that any excess administration costs will be deducted from the settlement.

62. The Settlement Deed requires that the Administrator obtain Court approval of an estimated amount of the Administration Costs. The Administrator may apply to vary that amount. The Administration Costs, up to the approved amount, are to be paid following the process set out in cl 2.15. The Administrator's costs are to be assessed by the Costs Assessor. Where the costs are determined to be reasonable, they are to be paid by the Commonwealth up to the cap of $6M. This is a transparent, and fair and reasonable process.

63. Shine issued a request for tenders for suitable proposals for appointment as administrator. The four organisations selected were those that had provided a recent tender in the *Street v State of Western Australia* proceeding (**Street v WA**), which involves a similar kind and scale of Registration Process. Responses were received from Grant Thornton, Deloitte and McGrath Nicol. The costs of the responses are summarised below, along with an indication of when the first tranches of interim payments to Living Eligible Claimants might be made:

	Estimated Cost (incl GST)	**Key dates**
Grant Thornton	$1,944,525 to $2,399,512 (cost per registrant: $145 to $177)	Payments start to Living Eligible Claimants: 3 months

Deloitte	$1,519,522 to $1,791,149 (cost per registrant: $119 to $151)	Payments start to Living Eligible Claimants: March 2025
McGrath Nicol	$4,467,675 to $6,205,355 (cost per registrant: $414 to $447)	Commence assessments under SDS and consider interim payments: 1-2 months

64. The estimated per-person cost is significant but explained by the circumstance that the Administrators are not charged with simply applying a formula. Rather they are required to make an assessment of eligibility on the basis of documentation provided. While the scheme is not intended to create barriers to entry (ie, it is a low barrier to prove eligibility), it does involve documentation which makes the task of administration more than merely mechanical. The estimates are slightly (but not vastly) higher than in *Street v WA*, which is likely the result of the Commonwealth not having any role in "fast tracking" non-contentious registrations (the State did have such a role in *Street v WA*).

65. While it is a matter for the Court to appoint an Administrator, we note that two of the proposals (Grant Thornton and Deloitte) are substantially more competitive on price. While the lowest price might not always reflect the best fit, we note that one of these firms (Grant Thornton) has experience administering the scheme in *Pearson v State of Queensland*, and additional relevant experience explained by Ms Antzoulatos.

66. However, it is relevant that both Grant Thornton and Deloitte have also been proposed as the preferred tenders in *Street v WA*. While Deloitte's tender includes a 'merged project plan' between both this proceeding and Street v WA (if both its tenders are accepted), Ms Antzoulatos expresses a reasonable concern that conducting both administrations at the same time runs the risk of being too heavy a burden for a single firm.

67. On the basis that either Grant Thornton or Deloitte are selected as Administrator, the Court should approve $2.5M as the Authorised Amount (which can be increased upon application being made, supported by appropriate material, should that prove necessary). It appears unlikely, on the evidence and given the quotes that the costs would increase to such an extent as to result in the $6M separate payment by the Commonwealth on account of Administration Costs proving insufficient.

68. It is noted that the Distribution Model assumes that there will be no excess to the $6M allowed for separately by the Commonwealth in respect of Administration Costs, but also impounds the full amount of the $6M for the purpose of calculating the net percentage returns to Group Members

F.2. Costs Assessors Costs

69. On 24 September 2024, Ms Elizabeth Harris was appointed as the Referee to carry out the costs Reference set out at 35 to 41 of the orders of 16 September 2024. That Reference is concerned with the Applicant's legal costs and disbursements for work done up to the date of the Approval Hearing (including costs anticipated and yet to be incurred – including in relation to the Registration Process).

70. The intention of that appointment is that Ms Harris also be formally appointed as the Costs Assessor under the Scheme. The current Reference substantially overlaps with the assessment of party and party costs for the purposes of the Applicant's Agreed Costs, but the Costs Assessor under the Scheme also has an ongoing role in assessing:

70.1 the Applicant's Actual Costs now and in the future (cl 2.13.8); and

70.2 the Administration Costs (cl 2.15).

71. The estimated costs provided by the costs assessor for completing the costs assessment prior to the next approval hearing, and for conducting further costs assessments in relation to administration costs going forward is not likely to exceed $200,000 (i.e. very much below $1 million).

72. We consider that these costs are relatively modest in the scheme of the settlement overall and are fair and reasonable. The Settlement Deed includes a mechanism for the payment of the Costs Assessor's Costs. Again, this means that the Court will have a mechanism to ensure that the Costs Assessor's Costs are not unreasonably incurred.

F.3. Reimbursement payments

73. The approval application seeks the Court's approval contemplates three kinds of special "Reimbursement Payments" in the meaning of the Deed, being:

73.1 $45,000 to the Applicant, Ms McDonald; and

73.2 $5,000 each to those Sample Group Members and group members who are alive and who gave evidence at the preservation of evidence hearing,

which amounts total to $165,000.

74. The additional payments are designed to recognise the fact that Ms McDonald (in particular) and also the witnesses who appeared at the preservation hearing have been obliged to expend time and effort in bringing or personally supporting the action. Such payments are commonly made: *Camping Warehouse v Downer EDI (Approval of Settlement)* [2016] VSC 784 at [163]-[176]; *Petrusevski v Bulldogs Rugby League Club Ltd* [2004] FCA 1712 at [13]; *Lee v Bank of Queensland Ltd* (2014) 103 ACSR 436 at [55]-[56].

75. In *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626 at [62]-[73], Gordon J commented on the need to disclose the basis for claims for reimbursement payments of the present kind. However, as was recognised by Middleton J in *Andrews v Australia and New Zealand Banking Group Limited* [2019] FCA 2216 at [32], where the claim is for a small amount, and is supported by evidence in affidavit form verifying that the Applicant, Sample Group Members, and witness group members have spent time acting on behalf of group members, the Court should be prepared, in its discretion, to proceed without requiring detailed documentary proof of time expended.

76. The making of modest payments to witnesses, in addition to the Applicant and Sample Group Members is not typical, but it is not entirely without precedent either. In *Smith v Commonwealth (No 2)* [2020] FCA 837, Lee J approved payments of $20,000 to persons who were members of a "Steering Committee" in relation to the Williamtown PFAS class action. The evidence was that they gave their time in a way which went beyond advancing their own individual claims. In the present case, each of the elderly persons who gave evidence at the preservation of evidence hearing was giving evidence of the conditions that prevailed during the claim period which was likely to be of benefit to the class as a whole (and especially the deceased Group Members who could not give that evidence themselves). These people did give up their time in much the same way as a Sample Group Member would, even though they did not have that formal designation.

In truth, though not designated formally as such, there was little difference between these people and the Sample Group members who were formally designated. The modest payment proposed to them is not unreasonable.

F.4. Legal costs and disbursements

77. The Applicant seeks the Court's approval of the legal costs incurred and to be incurred in respect of the litigation. The costs claim is for ~$24.4M, which reflects past costs and estimated future costs. A substantial part of the total figure represents costs that have not yet been incurred but are estimated by Ms Antzoulatos to be incurred in conducting the outreach and Registration Process. To be clear – what is sought for approval now with respect to future amounts is a *cap* based on a highly detailed and well-considered estimate. Costs incurred to date will be assessed by Ms Harris in her report prepared as Referee, but which is not available at the date of these submissions. (As noted above, the Distribution Model incorporates the incurred and estimated future costs, with a further buffer, in the total amount of $26M.)

78. The Applicant's Agreed Costs provided for under the Settlement Deed reflects the Applicant's party and party costs, capped at a maximum amount of $15M. The Settlement Deed requires these costs to be assessed by the Costs Assessor and provides the Commonwealth with an opportunity to dispute the resulting report: Settlement Deed cl 2.13. However it is expressed or mechanically dealt with under the Settlement Deed, it is plain enough that the Applicant's Agreed Costs is part of the total settlement and subject to Court approval. The limitation is not on the power of the Court, but that to the extent not approved the Applicant's Agreed Costs do not become part of the net sum for distribution.

79. The 'Applicant's Actual Costs' are amount of costs over and above the $15M comprising the Applicant's Agreed Costs. The further deduction from Settlement Sum sought on account of the Applicant's Actual Costs is the amount of $10M. The Applicant's Actual Costs would have been higher were it not for Shine's agreement to voluntarily adopt discounts for the work it is required to do in the Registration Process.

80. We provide further detail below regarding the legal costs incurred to date and estimated future costs. In doing so, we note that these figures are prior to assessment. We provide this analysis to explain the make-up of the $10M deduction from the general settlement funds (ie, the Applicant's Actual Costs) that are sought. As Ms Antzoulatos' deposes, of the total costs to date with settlement (~$15M incl GST in total:

80.1 $9.9M are Shine's professional fees, of which $5.7M have been billed to LLS. This component also includes a 25% uplift on fees not billed to LLS; and

80.2 $5.1M relate to disbursements, of which LLS was billed $4.1M: see Antzoulatos Affidavit at [124].

81. Ms Antzoulatos gives evidence of Shine's future estimated outreach and registration process costs. The estimated total fees and disbursements is $9.45M (incl GST), comprising:

81.1 Shine's professional fees in the amount of $8.1M which includes uplift and also a $1.29M discount. The total amount of professional fees is split roughly evenly between the outreach and registration processes, with registration accounting for the better part of the amount; and

81.2 Disbursements in the amount of $1.4M : see Antzoulatos Affidavit at [124].

82. We observe that a considerable amount of work has been and will be performed on the matter, including extensive outreach efforts within remote communities. While the amount of legal costs are large, these proceedings were, in our experience, extraordinarily complex and resource intensive due to the facts that:

82.1 the proceeding was highly complex from a legal and evidentiary perspective;

82.2 the proceeding was compromised, subject to approval, having been on foot for three years and just prior to the commencement of pre-trial steps (i.e. after lay evidence, expert evidence, and the preservation hearing but shortly before opening written submissions);

82.3 the nature of the case was such that individual experiences varied significantly making it necessary to obtain comprehensive instructions from many Group Members, many of whom lived in remote areas without ready access to modern communication facilities;

82.4 the age of many of the Group Members was such that it became necessary to receive their evidence in advance of trial at the preservation of evidence hearing; and

82.5 the form of settlement requires Shine to carry out an extensive registration process over the Northern Territory and to maintain the personal and infrastructure necessary to take and process many thousands of registrations. That registration process (and its associated costs) will be of enormous benefit to Group Members, and will maximise participation in the settlement. In the *Street v WA* proceeding, which it is reasonable to assume is a reliable guide, the registration process resulted in an additional ~9,000 registrations and is expected to result in many thousands of people receiving compensation when they would not otherwise do so. As the registration process in this proceeding is an integral part of the fairness of the settlement, so too must be the costs of that process.

83. We observe that part of the legal costs have in fact been paid by the funder. The order sought, therefore, is partially in the nature of reimbursement to the funder.

F.5. Litigation funding charges

84. LLS seeks the Court's approval of the deduction from the settlement sum of:

84.1 20% of all monies paid by the Commonwealth forming part of the settlement as a funding commission; and

84.2 the additional amount of $1,045,000 referable to the costs of ATE insurance in providing security for costs.

85. The gross funding commission of 20% is sought to be calculated on the Settlement Sum (of $108M to $144M) plus the Applicant's Agreed Costs, Costs Referee Costs and Administrator's Costs (of $22M), being in total $130M to $166M.

86. It should be emphasised that the Settlement Sum figure is an estimate based on 6,000 to 8,000 Eligible Claimants, and the other sums are not part of the settlement unless they are, in fact, paid in accordance with the Deed. With that caveat, the commission derived from that sum is $21.6 to $33.2M, or $22.65M to $33.25M if considered together with the ATE insurance amount.

87. The Applicant is obliged by the funding agreement to make application for a common fund order in the amount sought by LLS. However, in accordance with usual practice, LLS has been granted leave to intervene in respect of these questions on the approval motion and it is appropriate that it carry the burden of persuading the Court of the fairness and reasonableness of the amounts it seeks the Court to approve. Accordingly, we do not propose to address the subject, save for the following observations.

88. *First*, this proceeding would not have been possible without the financial support of the funder and the concomitant risk it accepted.

89. *Secondly*, our view is that common fund orders at the approval stage of the kind sought in the present proposed settlement are within the Court's power: *Elliott-Carde v McDonald's Australia Limited* [2023] FCAFC 162; (2023) 301 FCA 1.

90. *Thirdly*, the funding rate of 20% is in the range of rates which, on the evidence, were available at the time this proceeding was funded.

F.6. Proportionality of costs and funding charges overall

91. It is important to consider the proportionality of legal costs and funding charges in a global sense as against group member recoveries.

92. In the present case, on the upper base case of 8,000 Eligible Claimants the Settlement Sum will be $166M (including the various costs components). If the proposed deductions are allowed in full, the resulting Net Settlement Fund Amount is illustrated in the following table:

Gross settlement	Per person	$ 144,000,000
	ACC	$ 15,000,000
	Admin Costs	$ 6,000,000
	CA Costs	$ 1,000,000
	Total settlement	$ 166,000,000
Deductions Sought	Reimbursement	$ 165,000
	Costs referee	$ 1,000,000
	Administration	$ 6,000,000
	Legal costs (A)	$ 26,000,000
	Commission	$ 33,200,000
	ATE premium	$ 1,045,000
	Total deductions	$ 67,410,000
Net settlement	Balance	$ 98,590,000

93. Assuming a total of 8,000 Original Claimants, the amount available for distribution "per claim" is $12,323.75 (which assumes a flat distribution so that averages can be calculated, notwithstanding that the Applicant proposes a Differentiation Order as explained above). That comparison of averages indicates that the deductions claimed out of Group Member funds total a ~32% reduction from the per person amount of $18,000.

94. On the more conservative base case of 6,000 Eligible Claimants the Settlement Sum will be $130M (again including the costs components). If the proposed deductions are allowed in full, the resulting Net Settlement Fund Amount is illustrated below:

Gross settlement	Per person	$ 108,000,000
	ACC	$ 15,000,000
	Admin Costs	$ 6,000,000
	CA Costs	$ 1,000,000
	Total settlement	$ 130,000,000
Deductions Sought	Reimbursement	$ 165,000
	Costs referee	$ 1,000,000
	Administration	$ 6,000,000
	Legal costs (A)	$ 26,000,000
	Commission	$ 26,000,000
	ATE premium	$ 1,045,000
	Total deductions	$ 60,210,000
Net settlement	Balance	$ 69,790,000

95. Assuming a total of 6,000 Original Claimants, the amount available for distribution "per claim" is $11,631.67 (which again assumes a flat distribution so that averages can be calculated, notwithstanding that the Applicant proposes a Differentiation Order as explained above). That comparison of averages indicates that the deductions claimed out of Group Member funds total a ~35% reduction from the per person amount of $18,000.

96. While each case must be considered on its own facts, these proportions are not unfairly unfavourable to group members, who are receiving the majority of the settlement funds.

97. While such calculations are rough and ready, the deductions do not in our view represent a disproportionate reduction for the expense of prosecuting the proceeding (including obtained registrations) or as a premium on the funder's investment in legal costs. These factors point to the conclusion that the legal costs and funding commission claimed have been incurred proportionately having regard to the benefit which was in fact realised.

G. OBJECTIONS AND OPT OUTS

98. There have been neither group member objections nor opt outs as at the date of these submissions. That may change by the time of the approval hearing and will be addressed in oral submissions, if that is the case.

H. CONFIDENTIALITY ORDERS

99. The applicant seeks pursuant to s 37AF(1)(a) of the FCA Act that, in order to prevent prejudice to the proper administration of justice, certain annexures and passages of evidence be the subject of a suppression order in terms that protects the confidentiality of that material as between the Applicant, the funder, their legal representatives, and the Court.

100. The fundamental rule is that the administration of justice must take place in open court (*John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344 at [18] per Spigelman CJ). Justice should manifestly and undoubtedly be *seen* to be done (*R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 259.4, 262.10–263.2; *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259A–B). Section 37AE of the FCA Act requires the Court to take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice. Section 37AF(1) sets out the only grounds upon which an order can be made and requires in respect of each ground that the order be "necessary".

101. The word "necessary" is a strong word and indicates a legislative intention that orders should only be made in exceptional circumstances. It will not suffice that the order is "*convenient, reasonable or sensible, or serves some general notion of public interest, still less that, as a result of some 'balancing exercise', the order appears to have one or more of those characteristics*": *Nationwide News Pty Ltd v Qaumi* (2016) 93 NSWLR 384 at [22] and [24]; *Rinehart v Welker* [2011] NSWCA 403; 93 NSWLR 311 at [27] and [31].

102. The evidence sought to be subject to a suppression order falls into two categories.

102.1 *First*, as noted above, the Court has also been provided with a confidential opinion prepared by the Applicant's counsel dealing with the potential risks

associated with the Applicant's case, and the fairness and reasonableness of the settlement more generally. A practice has developed (since at least *King v AG Australia Holdings Ltd* [2003] FCA 980) that the Court be provided such an opinion. What is required is counsels' candid opinion, and evaluation, of the matters which the Court needs to consider to evaluate the proposed settlement meaningfully: see *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)* [2012] VSC 625 at [3] to [5] and the referenced authorities.

102.2 *Secondly*, the Applicant also seeks orders over certain passages of Ms Antzoulatos' affidavit (at least pending approval of the settlement). Those passages will be identified to the Court at or before the hearing of the settlement approval application. That material is evidence of a kind that is likely to confer a forensic advantage and would not otherwise be disclosed – for instance: litigation budgets, privileged material, or other matters that are confidential. To the extent that orders are not sought to extend beyond the time of any approval if granted, the distinction will be made clear in an annexure to the orders provided to the Court at or prior to hearing.

103. The confidentiality orders are warranted in the present circumstances to prevent prejudice to the proper administration of justice and are sought in the ordinary way which this is done on applications under s 33V. It is important to encourage candour in the preparation of material on an application such as this. The material over which orders are sought is privileged and confidential and includes the candid assessment of legal practitioners acting for the Applicant in this proceeding of the risks associated with the claims in this case (both factually and legally).

104. If the settlement is not approved, the proceeding would continue, and the disclosure of the privileged and confidential information, including the Applicant's legal representatives' assessment of the claims would cause significant prejudice to the Applicant and Group Members and, conversely, confer a significant tactical and forensic advantage on the Commonwealth in continued litigation or the negotiation of a different form of resolution.

105. Even if the settlement is approved, however, there is a public interest in the administration of justice in ensuring that confidential material prepared on applications such as this remains confidential. In *Clime Capital Ltd v UGL Pty Ltd (No 2)* [2020] FCA 257, Anastassiou J recognised that confidential material which may confer a tactical advantage to future respondents in future litigation is properly the subject of a claim for confidence on an approval application. The specific views expressed in confidence as to the legal risks associated with particular factual and legal issues that arise in class actions of this kind, and the approach taken to settling this proceeding falls into that category.

106. In seeking such an order, the Applicant (and her counsel) recognise that in delivering judgment on this approval motion, it may be necessary for the Court to draw on the opinions, particularly in relation to the approach adopted by the Scheme between Group Members with different claims. That is unexceptional and there are many examples in the cases of courts, in applications such as this, recording careful consideration of the various factors without needing to disclose to what extent a view reached by the court is also a view reached by counsel, or disclose matters which are in fact the subject of privilege.

25 October 2024

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