FEDERAL COURT OF AUSTRALIA

Street v State of Western Australia [2024] FCA 1368

File number(s):	WAD 237 of 2020
Judgment of:	**MURPHY J**
Date of judgment:	29 October 2024
Catchwords:	**REPRESENTATIVE PROCEEDINGS** – application for court approval of settlement under s 33V of the *Federal Court of Australia Act 1976* (Cth) – claim by Aboriginal and Torres Strait Islander workers in respect of wages earned but not paid between 1936 and 1972 – relevant principles in relation to settlement approval – key terms of proposed settlement – whether the settlement amount is fair and reasonable – whether proposed deductions are fair and reasonable – consideration of objections to the settlement – deductions from legal costs and funding commission necessary – common fund order made – settlement approved
Legislation:	*Federal Court of Australia Act 1976* (Cth) ss 33V, 33ZB, 33ZF *Racial Discrimination Act 1975* (Cth) s 9 *Federal Court Rules 2011* (Cth) Div 9.2, r 26.12 *Legal Profession Uniform Law* (NSW) s 174 *Limitation Act 1935* (WA) ss 38, 47 *Native Administration Act 1905-1936* (WA) *Native Welfare Act 1905-1954* (WA) *Native Welfare Act 1963* (WA) *Slave Trade Act 1843* (Imp)
Cases cited:	*Allen & Anor v G8 Education Ltd (No 4)* [2024] VSC 487 *Augusta Pool 1 UK Ltd v Williamson* [2023] NSWCA 93; 111 NSWLR 378 *Baltic Shipping Co v Dillon* [1991] NSWCA 19; 22 NSWLR 1 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Recs & Mgrs Apptd) (In Liq) (No 3)* [2017] FCA 330; 343 ALR 476 *BMW Australia Ltd v Brewster* [2019] HCA 45; 269 CLR 574 *Bolitho v Banksia Securities Ltd (No 18) (remitter)* [2021]

VSC 666; 69 VR 28

Bradshaw v BSA Limited (No 2) [2022] FCA 1440

Caason Investments Pty Limited v Cao (No 2) [2018] FCA 527

Camilleri v The Trust Company (Nominees) Ltd [2015] FCA 1468

Carkeek v Aubrey F Crawley & Co [2024] NSWSC 86

Carnie v Esanda Finance Corporation Ltd [1995] HCA 9; 182 CLR 398

Chocolate Factory Apartments v Westpoint Finance [2005] NSWSC 784

Collard v State of Western Australia (No 4) [2013] WASC 455; 47 WAR 1

Court v Spotless Group Holdings Ltd [2020] FCA 1730

Darwalla Milling Co Ltd v F Hoffman-La Roche (No 2) [2006] FCA 1388; 236 ALR 322

Downie v Spiral Foods Pty Ltd [2015] VSC 190

Dyczynski v Gibson [2020] FCAFC 120; 280 FCR 583

Earglow Pty Ltd v Newcrest Mining Limited [2016] FCA 1433

Elliott-Carde v McDonald's Australia Ltd [2023] FCAFC 162; 301 FCR 1

Endeavour River Pty Ltd v MG Responsible Entity Ltd [2019] FCA 1719

Galactic Seven Eleven Litigation Holdings LLC v Davaria [2024] FCAFC 54; 302 FCR 493

Ghee v BT Funds Management Ltd [2023] FCA 1553

Greentree v Jaguar Land Rover Australia Pty Ltd [2023] FCA 1209

HFPS Pty Ltd (Trustee) v Tamaya Resources Ltd (In Liq) (No 3) [2017] FCA 650

In re General Motors Corp Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768 (3rd Cir. 1995)

Kuterba v Sirtex Medical Limited (No 3) [2019] FCA 1374

Mango Boulevard Pty Ltd v Whitton [2019] FCA 490

Mobil Oil Australia Pty Ltd v State of Victoria [2002] HCA 27; 211 CLR 1

Money Max Int Pty Ltd v QBE Insurance Group Ltd [2016] FCAFC 148; 245 FCR 191

O'Donnell v Commonwealth of Australia [2023] FCA 1227

Paroz v Clifford Gouldson Lawyers [2012] QDC 151

Pearson v State of Queensland (No 2) [2020] FCA 619

Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3) [2018] FCA 1842; 132 ACSR

	258 *Sister Marie Brigid Arthur (Litigation Representative) v Northern Territory of Australia (No 2)* [2020] FCA 215 *Timbercorp Finance Pty Ltd (in liquidation) v Collins; Timbercorp Finance Pty Ltd (in liquidation) v Tomes* [2016] HCA 44; 259 CLR 212 *Trevorrow v State of South Australia (No 5)* [2007] SASC 285; 98 SASR 136 *Webb v GetSwift Limited (No 7)* [2023] FCA 90; 414 ALR 500 *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925; 180 ALR 459
Division:	General Division
Registry:	Western Australia
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	410
Date of hearing:	28-29 October 2024
Counsel for the Applicant:	Mr WAD Edwards KC and Mr AH Edwards
Solicitor for the Applicant:	Shine Lawyers
Counsel for the Respondent:	Mr A Crowe KC and Mr M Walker
Solicitor for the Respondent:	State Solicitor's Office
Counsel for the First Intervener:	Mr AJL Bannon KC and Mr MW Guo
Solicitor for the First Intervener:	William Roberts Lawyers
Counsel for the Second Intervener:	Mr DR Sulan and Ms J Ibrahim
Solicitor for the Second Intervener:	Shine Lawyers

REASONS FOR JUDGMENT

WAD 237 of 2020

BETWEEN:	**MERVYN STREET** Applicant
AND:	**STATE OF WESTERN AUSTRALIA** Respondent
	LLS FUND SERVICES PTY LTD (ABN 51 627 975 213) First Intervener
	SHINE LAWYERS Second Intervener

MURPHY J:

1. INTRODUCTION

1 This representative proceeding, colloquially known as the as the "Western Australia Stolen Wages Class Action", is a significant matter in relation to a historic grievance between the First Nations peoples of Western Australia and the respondent, the **State** of Western Australia. The proceeding seeks damages for the widespread non-payment and underpayment of wages to Aboriginal and Torres Strait Islander people who worked in Western Australia between 11 December 1936 and 9 June 1972. There is no dispute that over that 36-year period thousands of Aboriginal men, women and children in Western Australia lived under strict legislative controls and many worked for little or no pay. For example, many Aboriginal men and boys worked on pastoral stations as ringers, or stockmen, sometimes from dawn till dusk seven days a week, and many Aboriginal women and girls worked as household domestics and nannies. They were fed or given rations, but provided little or no wages for the work they performed. During that period, many Aboriginal children who had been taken away from their parents and placed in institutions run by the State or by a church, were required to work before and after school and on weekends, and in some cases full-time, in laundries, farms and other places attached to the institutions. Those Aboriginal people were treated in a grossly discriminatory fashion compared to non-Indigenous people.

2 The applicant, Mr Mervyn Street, is a senior elder of the Gooniyandi People and an acclaimed artist, born circa 1940. The proceeding alleges that he worked on pastoral stations in the

Kimberley from when he was around 10 years old, starting on the Louisa Downs station which is his traditional country, and was not paid wages until he was in his 30s. Mr Street brings the case against the State, as a class action under Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and also an "old-style" representative proceeding under Division 9.2 of the *Federal Court Rules 2011* (Cth) (**Rules**), doing so on his own behalf and on behalf of all Aboriginal persons who during all or part of the period between 1936 and 1972 (**claim period**) worked in Western Australia under the operation of the *Native Administration Act 1905-1936* (WA), the *Native Welfare Act 1905-1954* (WA), or the *Native Welfare Act 1963* (WA) and Aboriginal persons who claim as their descendants (**class members**).

3 These reasons concern an application for Court approval of a proposed settlement of the class action, and are centrally addressed to explaining why the Court is satisfied that it is appropriate to approve the proposed settlement as fair and reasonable in the interests of the class members, and as between the class members. They concern a matter of public importance and are necessarily lengthy. For those who do not wish to wade through the reasons in their entirety, I provide the following summary.

1.1 Summary

4 On 17 October 2023, the parties entered into a settlement of the proceeding, subject to Court approval (**proposed settlement**). The proposed settlement is contained in a Deed of Settlement (**Settlement Deed**), with an annexed Settlement Distribution Scheme (**SDS or Scheme**), which Scheme has since been revised. Under the Settlement Deed the State promises to pay up to $180.4 million (**Settlement Sum**), comprised of:

(a) an amount of up to $165 million (**Settlement Fund Amount**) in compensation; and

(b) an amount of up to $15.4 million (**Agreed Costs Component**) in respect to the applicant's party/party costs of the proceeding up to the date of settlement approval.

5 The proposed settlement includes a public apology by the State. On 28 November 2023 the Legislative Assembly of the Parliament of Western Australian passed the following motion:

> That this house formally acknowledges and apologises to Aboriginal and Torres Strait Islander people who worked in Western Australia between 1936 to 1972 for little or no wages.

6 The Premier of Western Australia moved and spoke in support of the motion, and expressed the following apology:

> Today's apology follows the settlement of a class action led by Mr Mervyn Street on behalf of Aboriginal people across Western Australia. The class action started in 2020 and sought justice for people who, over a long period of time, were subject to discriminatory legislation. This legislation was supposed to protect Aboriginal people, but instead resulted in hardship and exploitation. The controls imposed on Aboriginal people impacted on where they were allowed to work, travel and live. It also impacted on how much money they were paid, how they were paid and how they received their wages and entitlements. Legislation of this kind, particularly in the early part of WA's colonial history, resulted in Aboriginal people working long hours without receiving any pay or an appropriate amount of pay. Instead, they were often paid through rations such as flour, sugar, tea, and tobacco. The "book down" system, in which people bought necessities on credit at the station store, also meant that some people never saw the money they were meant to be paid. Although the laws changed over the period, many controls remained in place until 1972.
>
> Aboriginal men, women and children worked hard and made enormous contributions to the economic development of this state. However, they received only a fraction of their worth. The fact that this mistreatment existed for Aboriginal workers for decades is a blight on the legacy of successive governments. The fact that our laws facilitated these outcomes brings great shame. For that, we are sorry. These workers - men, women and children - worked under oppressive conditions. In many cases, there was a threat of violence. The impacts of these laws were felt across the state in a range of different work settings. The issues in this matter were complex. I acknowledge that each individual Aboriginal person's work history will have been unique. However, as a community, many of these experiences were common. During the hearings in the class action proceedings, stories were told of Aboriginal people living and working in harsh conditions. We heard about men working 14-hour days as stockmen and musterers on pastoral stations; women working as domestics, cooking, cleaning and caring for children in homes all over Western Australia; and, on missions, young people working long hours before and after school, including in laundries or on farms attached to the institution.
>
> …
>
> In bringing a close to this shameful part of Western Australia's history, on behalf of the State of Western Australia, I apologise to the Aboriginal men, women and children who worked in Western Australia between 1936 and 1972, often for decades, for no pay or not enough pay. We acknowledge that many of these people have not lived to see this day. For their family members who remain, we are sorry for the hurt and loss that your loved ones suffered. Their strong shoulders carried the weight of their families and communities. Their strong hands build up this state's economy. Their strong minds and spirits pursued justice in the decades that followed, leading to this moment and the recognition they rightfully deserved.
>
> To you all, we say sorry.

7 The proposed settlement is structured such that the quantum of the Settlement Fund Amount depends upon the number of participating class members (defined as "Original Eligible Claimants"):

(a) an Original Eligible Claimant (**OEC**) is:

(i) a class member who registered during the Court-ordered class member registration process (**Registration Process**);

(ii) who is alive, or if deceased there exists at least one "Descendant Eligible Claimant" who is eligible for a payment under the SDS; and

(iii) who the Court-appointed Administrator of the SDS is independently reasonably satisfied meets the criteria for eligibility under the Scheme on the basis of credible and cogent evidence (with minimum evidence as specified), including as to identification as an Aboriginal or Torres Strait Islander, having a date of birth before 9 June 1962, provision of a statement that the person was employed by at least one nominated workplace in Western Australia which existed at the relevant time and were paid no or nominal wages during the claim period, and the provision of information allowing payment of an entitlement under the Scheme to be made;

(b) a Descendant Eligible Claimant (**DEC**) is:

(i) a class member who is the living spouse or child of a deceased OEC who registered during the Registration Process; and

(ii) who the Administrator is reasonably satisfied meets the criteria for eligibility under the SDS.

8 Orders were made on 14 and 20 November 2023 providing for class members to be given notice of the proposed settlement, and for the conduct of a substantial physical outreach program to Aboriginal communities throughout Western Australia, including in remote locations, so that class members were informed of the requirement to register if they wished to be eligible for a payment under the SDS, and to assist them to register.

9 The Registration Process was reasonably effective. Although the number of OECs is presently unknown, and the final decision as to eligibility rests with the Administrator under the SDS, the solicitors for the parties have engaged in a process to preliminarily assess the registrations received to date. The parties agree that there are likely to be circa 8,000 to 9,500 OECs once all eligible registrations have been determined by the Administrator (including all late registrations). In my view it is appropriate to assess the fairness of the proposed settlement by reference to the middle of that range, being 8,750 OECs.

10 On the assumption that there are 8,750 OECs, the Settlement Sum will be $159.775 million, comprising the following payments:

(a) the Settlement Fund Amount of $144.375 million (representing 8,750 OECs multiplied by $16,500 per OEC), to be paid by the State in tranches as the Administrator accepts the eligibility of OECs; and

(b) the Agreed Costs Component (**ACC**) of $15.4 million, to be paid by the State upon expiry of the time for appeal from the settlement approval orders.

11 It is important to understand that the proceeding does not relate to the discriminatory and cruel way Aboriginal people were often treated during this appalling period of our history; it is concerned with the fact that many were not paid either properly or at all for their work. In the course of the proceeding the Court heard evidence from many Aboriginal people who were taken away from their families at a young age, placed into an institution run by the State or a church, where they were then required to work for no pay. Many of the children suffered inestimable grief and trauma by being forcibly removed from their families, and many were cruelly treated within the institutions and discriminated against. Many suffered lifelong psychological scars as a result. As is often the case with people, some managed to rise through the discrimination and trauma they were forced to endure and went on to have reasonably happy and productive lives. Others, through no fault of their own, were brought down by the way they were treated and their lives were blighted by it. The stories that I heard will stay with me forever, and I am deeply sorry that First Nations people were so disgracefully treated. The proposed settlement does not attempt to compensate Aboriginal people for the shameful way they were treated.

12 It is also important to understand that the applicant does not suggest that the proposed settlement represents full compensation for the unpaid or poorly paid work Aboriginal people performed over the 36-year claim period. The Court has reviewed the confidential opinions of expert forensic accountants and economists which attempt to estimate the aggregate wage loss suffered by the great many Aboriginal people who were not properly paid during that period. They offer quite different estimates of the aggregate wage loss likely to have been suffered, which to an extent arises because of the counterfactual behind the opinion of the State's expert. Whatever expert estimate is used, it is plain that the proposed settlement represents a very substantial discount on full compensation plus interest.

13 Essentially, the applicant and his lawyers recommend the proposed settlement to the Court as the best result possible given the substantial legal hurdles facing the case, and the substantial risks that the claim brought by the applicant and class members will fail, or will succeed on

claims which do not relate to all class members or in relation to which the quantum is relatively low compared to the proposed settlement.

14 The following matters are salient to my conclusion that it is appropriate to grant approval of the proposed settlement as fair and reasonable in the interests of class members who will be bound by it, including as between class members.

15 *First*, the Court has the benefit of comprehensive confidential opinions from senior and junior counsel for the applicant, W.A.D. Edwards KC, J. Creamer, A.H. Edwards and J.A. Brezniak (**Counsels' Opinion**), which candidly considers the fairness and reasonableness of the proposed settlement in the interests of class members as a whole considered *inter partes*, and its fairness and reasonableness *inter se*, that is, as between class members. Counsel provided their opinions as officers of the Court rather than as advocates for the applicant and class members. Counsel assessed the principal risks and difficulties for the applicant and class members in the proceeding, including by making a risk-weighted assessment in light of the cumulative risks which the proceeding faces. Counsel also gave careful attention to the fairness and reasonableness of the proposed SDS as between class members. Counsel recommended that the Court approve the proposed settlement. It is appropriate to give significant weight to Counsels' opinion.

16 *Second*, many of the claims in the proceeding are novel and difficult, and they carry risks in relation to liability, causation and quantum. Amongst other things, given that most of the claims arise in respect of conduct between 1936 and 1972, they face a significant risk of being barred by the application of various limitation periods upon which the State relies. Further, the class member's claims are idiosyncratic being based in their individual employment circumstances, and there are likely to be substantial forensic difficulties for many class members in proving factual matters that are alleged to have occurred between 52 and 88 years ago, particularly where the OEC is deceased (as most are) and where most of the institutions and private employers for whom they worked are no longer operating. Many class members' claims face a significant risk of failing because they cannot prove the factual matters on which their claims depend. The risks and difficulties associated with the claims are cumulative in the sense that one risk follows after another, to the point that it is impossible for the applicant's lawyers to be confident of success in the proceeding. I am satisfied that there is a significant risk that if the case proceeds to trial the applicant's and class members' claims will fail, or they will succeed

on claims which relate to only a subset of the class members and for a quantum less than the proposed settlement.

17 In a case with the substantial risks and difficulties of this proceeding, notwithstanding that it is nowhere near full compensation, a settlement of up to $180.4 million combined with a public apology is comfortably within the range of reasonable outcomes.

18 *Third*, the complex and difficult legal issues involved in the proceeding means that if the applicant is successful on the common issues in the initial trial there is likely to be an appeal. Any appeal will inevitably lead to further significant delay. Assuming the appeal process results in findings favourable to the class members, there will be further delay while the parties either attempt to negotiate a groupwide settlement, or a series of individual settlements with the prospect of further mini-trials in relation to any claims that are not compromised. Given the idiosyncratic nature of the class members' claims, this not a case where it can be said that favourable liability findings will necessarily lead to substantial damages awards in favour of all class members.

19 The great majority of living class members are elderly, and many have passed away since the proceeding was commenced. It is likely that more class members will pass away during the pendency of any attempt to negotiate a groupwide settlement or a series of individual settlements. The advanced age of many class members, and the importance of them receiving compensation in their lifetime is material to my view that it is appropriate to approve the proposed settlement.

20 *Fourth*, the SDS provides for a fair division of the proceeds of the proposed settlement between eligible class members pursuant to uniform principles and procedures, the administration process does not involve "judgment calls" except perhaps in relation to the assessment of what constitutes "cogent and credible" evidence of eligibility, the Scheme provides a meaningful opportunity for review, and if it proceeds as planned the settlement administration process will not involve unreasonable costs or delay.

21 *Fifth*, there were 46 objections by class members to the approval of the proposed settlement, most of which were centrally directed to the inadequacy of the settlement amount compared to the aggregate wage loss that class members suffered, and to the contention that the settlement amount does not recognise the harsh or cruel treatment class members suffered. Many of the objections were powerfully made and I was touched by the anguish and hurt some objectors

expressed about the discriminatory and unjust way they and their parents were treated, and the lasting legacy of economic and social hardship which arose from that. Their objections reflect the historical wrongs to which the proposed settlement relates, and act as a reminder of the importance of acknowledging the occurrence of those wrongs. I gave careful attention to the objections but, in the circumstances of the case, they do not justify refusing to approve the proposed settlement.

22 *Sixth*, there is a question as to whether the legal costs (including disbursements) proposed to be charged by the applicant's lawyers, Shine Lawyers (**Shine**), are fair and reasonable and therefore appropriate to be deducted from the proposed settlement. Ultimately, Shine sought approval for legal costs in a total of $29,249,479, plus further monies for transition to the Scheme Administrator. This sum represented a discount, applied by Shine ahead of the settlement approval hearing, from the amount of $31,501,618 recommended as fair and reasonable by the independent Court-appointed Costs Referee, Ms Kerrie Rosati.

23 Even with Shine's proposed discount that is a huge amount, which I consider to be excessive. I am persuaded that it is appropriate to adopt most of the independent Costs Referee's reports, but I do not accept the conclusion that the fair and reasonable costs of the proceeding total $31.5 million, nor those parts of the reports which recommend approval of the amounts Shine charged for paralegals and law clerks. I consider it appropriate to approve Shine's fees with a reduction of $4 million from the amount approved by the Costs Referee, bringing total costs and disbursements down to approximately $27.5 million. That remains a huge sum, but a $4 million reduction in Shine's costs from those approved by the independent Costs Referee is substantial, even for a large publicly listed firm like Shine.

24 At least in part, the excessive costs are attributable to excessive legal fees incurred post-settlement. Before the Costs Referee's reports and before it proposed a discount to its fees, Shine had run up approximately $12 million in fees (not disbursements) including uplift charges for the work it undertook in the post-settlement Registration Process. After the Costs Referee's reduction those fees came to approximately $11 million and after the discount Shine belatedly proposed those fees came to approximately $8.8 million. The Court should be cautious before approving costs of that magnitude for a post settlement registration process. Because of the characteristics of the cohort of class members the Registration Process had particular difficulties, and Shine performed the work to a high standard, but before it ran up

such enormous costs post-settlement Shine should have come before the Court and given notice of that proposed expense.

25 Had the Court been approached I expect that a significantly less expensive solution could have been found. For example, it might have been appropriate to engage local Indigenous representatives on weekly or monthly contracts rather than hourly rates; or to engage a claims administration service. It might have been appropriate to take a less "Rolls Royce" approach. Shine needed to give greater attention to whether there were cheaper or more efficient ways of achieving a similar outcome, and to keep a much tighter grip than it did on the costs associated with the Registration Process.

26 *Seventh*, there is a question as to whether the funding commission sought by the litigation funder which funded the proceeding, LLS Fund Services Pty Ltd (the **Funder**), is fair and reasonable and therefore appropriate to be deducted from Settlement Sum. The Funder seeks reimbursement of the money it has paid out, being:

(a) $1,045,000 in premiums for after the event insurance (**ATE Costs**); and

(b) $13,358,868 it has paid to Shine for conducting the proceeding.

Then, for its return on investment in the case the Funder seeks a common fund order of 20% of the gross settlement.

27 Assuming that there are 8,750 OECs, the gross settlement will be $159.775 million (8,750 OECs x $16,500 plus $15.4 million for the ACC). A common fund order of 20% of the gross settlement would therefore mean a funding commission of approximately $31.955 million.

28 I am not persuaded that a funding commission of just under $32 million is fair and reasonable in the circumstances of the case. I consider that a funding commission of 16% of the Settlement Sum is "just" pursuant to s 33V(2) of the FCA Act. Assuming there are 8,750 OECs, the commission will total $25,564,000. That amount plus reimbursement of $14.403 million in Project Costs it has paid ($13.358 million in legal costs and $1.045 million for ATE Costs). It represents a commercially realistic return and properly reflects the costs and risks taken on by the Funder. It represents a return on investment (**ROI**) of 2.77 times the Funder's expenditure.

29 Intuitively, 16% seems too low, which gave me cause for some reflection. But it provides a reasonable ROI given the quantum of the settlement and the unusual operation of the funding arrangements which materially reduce the costs and risks the Funder took on. The Funder ceased to fund the case about a year before trial (upon reaching the funding cap); thus it did

not fund the case to the mediation at which the settlement was reached, and it did not fund the case for trial even though the proposed settlement was reached only five days before trial. By October 2023 when the proposed settlement was reached, the total legal costs of the proceeding were approximately $18.2 million, and the Funder had paid less than $10 million of that total. If its ATE Costs are included the Funder had paid approximately $11 million prior to the proposed settlement being reached. Overall Shine "funded" the case nearly 50-50 with the Funder, and yet the Funder seeks recovery of a funding commission as if it funded the whole case.

30 It is also necessary to understand that the requirement for Shine (rather than the Funder) to resource the case to the extent that it did imposed a significant further cost burden on class members through Shine's 25% uplift fees. By the end of the case (using the Costs Referee's assessment of reasonable costs of $31.5 million) Shine had charged approximately $2.69 million in uplift fees. Such fees would have been much less had the Funder fully funded the proceeding.

31 *Eighth*, the applicant submitted that Mr Street should be paid a $45,000 reimbursement payment to reflect the work he undertook as the representative applicant. I accept that Mr Street worked hard and effectively in his role as the representative applicant, but was troubled as to the amount of that payment given the modest size of the payments to be made per OEC. However, following receipt of further submissions I became persuaded that it is fair and reasonable to allow Mr Street a reimbursement payment of $45,000, and to allow a reimbursement payment of $5,000 for each of the seven sample group members.

32 The Court expresses its gratitude to the parties and their lawyers for the way in which they conducted the case. The parties' lawyers provided excellent representation throughout the case, and they maintained a professional approach to each other which made case management more straightforward, particularly during the logistical challenges and interruptions in the preservation of evidence hearings in relatively remote locations. More importantly, the Court thanks the parties and their lawyers for achieving a settlement including a public apology in relation to these historic and grievous wrongs. The Court hopes the settlement will assist Aboriginal and Torres Strait Islander communities to move forward from the trauma they suffered.

33 I now turn to consider the proposed settlement in detail. I thank the parties for their detailed submissions, upon which I have directly drawn at various points.

2. THE EVIDENCE

34 The applicant relied upon affidavits of:

(a) Ms Vicki Antzoulatos, a solicitor employed by Shine with the conduct of the proceeding for the applicant, filed 8 October 2024 (**First Antzoulatos Affidavit**), 22 October 2024 (**Second Antzoulatos Affidavit**), 25 October 2024 (**Third Antzoulatos Affidavit**), 28 October 2024 (**Fourth Antzoulatos Affidavit**), 29 October 2024 (**Fifth Antzoulatos Affidavit**) and 29 October 2024 (**Sixth Antzoulatos Affidavit**); and

(b) Ms Sarah Thomson, a solicitor employed by Shine, filed 13 November 2024.

The applicant filed written submissions dated 8 October 2024, supplementary submissions dated 25 October 2024, and further written submissions on 7 November 2024.

35 The State relied upon affidavits of Mr Daniel Gorman, a solicitor employed in the State Solicitor's Office with the conduct of the proceeding for the State, filed 14 June 2024 (**First Gorman Affidavit**), 22 October 2024 (**Second Gorman Affidavit**) and 25 October 2024 (**Third Gorman Affidavit**). The State filed written submissions dated 22 October 2024, and further written submissions dated 27 October 2024.

36 The Funder relied upon affidavits of Mr Stephen Conrad, an executive officer of the Funder, filed 10 October 2024 (**First Conrad Affidavit**) and 24 October 2024 (**Second Conrad Affidavit**), and the First Antzoulatos Affidavit. The Funder filed written submissions dated 10 October 2024, submissions in reply dated 24 October 2024, and further submissions on 1 November 2024.

37 Shine was given leave to intervene. It filed written submissions dated 22 October 2024.

3. THE CLASS

38 The class members to whom this proceeding relates are persons who:

(a) are Aboriginal or Torres Strait Islander persons who lived in Western Australia during all or part of the period from 11 December 1936 to 9 June 1972;

(b) during all or part of the claim period were a "native" as defined by:

(i) s 2 of the *Native Administration Act 1905-1936* (WA) (as amended from time to time in the claim period) (the **1936 Act**), including by the *Native Welfare Act 1905-1954* (WA) (the **1954 Act**); and/or

(ii) s 4 of the *Native Welfare Act 1963* (WA) (as amended) (the **1963 Act**); and

(c) during all or part of the claim period worked in Western Australia at a time when they were a "Controlled Native" or had their property controlled under the 1936 Act, the 1954 Act or the 1963 Act (collectively, the **Control Acts**),

all persons meeting sub-paragraphs (a) to (c) being a **Working Controlled Aboriginal**, and if a Working Controlled Aboriginal has died (**Deceased Working Controlled Aboriginal**), then any legal personal representative or beneficiary of the estate of the Deceased Working Controlled Aboriginal who has the capacity to claim on behalf of that estate. Any person who has a right (equitable or otherwise) in respect of the administration of, or property forming part of, the estate of the Deceased Working Controlled Aboriginal is also a class member.

3.1 The Class Member Registration Process

39 The proceeding was commenced as an "open class" class action in October 2020.

40 Prior to filing the proceeding Shine attempted to have class members register their interest in participating in the case, and it continued its efforts to have class members register throughout the course of the case.

41 Pursuant to orders made on 26 May 2021, the Court approved the form and content of an opt out notice, an information brochure, an advertisement and an announcement to be broadcast on radio. Shine engaged experts, including Aboriginal experts, to assist in drafting the information to be provided to class members so as to maximise the prospect that it would be understandable and effective for a cohort of Aboriginal class members which is highly vulnerable, with a high degree of socio-economic disadvantage, low levels of literacy and numeracy, in which many class members are of advancing years and living in remote locations.

42 Pursuant to those orders Shine conducted a physical outreach program by attending 62 communities in Western Australia to communicate with class members in relation to the proceeding and the opt out process. As part of that program, Shine also sought to identify sample group members to put forward their specific claims. A substantial number of class members registered to participate in the class action in the course of that outreach program.

43 On 17 October 2023, the parties reached the proposed settlement. On 2 November 2023, the applicant filed an interlocutory application seeking Court approval of the proposed settlement, and interlocutory orders including orders for:

(a) class member registration and class closure, to the effect that only class members who register and are found by the Administrator to be eligible will be entitled to share in the proposed settlement, and that class members who do not register will be bound by the settlement but will not be permitted to seek any benefit under the settlement, without leave of the Court; and

(b) a Notice of Proposed Settlement (**Settlement Notice**) and an information brochure to be provided to class members to inform them of the proposed settlement, of the requirement to register in order to participate in the proposed settlement, and of their right to object to the proposed settlement.

44 The Settlement Deed provided that a registration process was a requirement of the proposed settlement. Indeed, the Settlement Fund Amount is calculated by reference to the number of registered OECs multiplied by $16,500 per OEC, capped at $165 million. The Settlement Deed requires that a class member be registered and be found to be eligible by the Administrator (and thus an OEC) before the State is required to make a payment of $16,500 in respect of that OEC. Absent a registration process there would be no Settlement Fund Amount. Further:

(a) the registration form to be utilised would collect all the information the State requires before making a $16,500 payment relating to that OEC. That removed the need for two notice procedures, one to give notice of the proposed settlement and one for settlement distribution. Two separate notice procedures was likely to cause substantial delay and extra cost, in large part because of the necessity to use physical outreach programs to reach the class, and also had the potential to confuse class members; and

(b) the vast majority of living OECs are elderly, having worked between 1936 and 1972, and it was important to streamline processes to allow faster distribution of settlement amounts.

45 In the circumstances the Court concluded that a class member registration process was appropriate.

46 Shine again engaged experts, including Aboriginal experts, this time to assist in drafting the Settlement Notice and information brochure to be provided to class members so as to maximise the prospect that it would be understandable and effective for a cohort of class members with the particular characteristics of this class. The Court approved the Settlement Notice and information brochure in the terms proposed.

47 On 14 November 2023 the Court made orders requiring the publication of the Settlement Notice and information brochure:

(a) to the communities and towns listed in the orders;

(b) via a physical outreach program described in the orders;

(c) on a page of the Shine website titled "Western Australia Stolen Wages Class Action";

(d) on the Federal Court website;

(e) to the next of kin deceased persons on the customer list for the "2012 Reparations Scheme"; and

(f) in such other manner the applicant considered best calculated to bring them to the attention of class members.

The orders also required publication of advertisements regarding the proposed settlement in newspapers and by radio.

48 In compliance with the 14 November 2023 orders:

(a) advertisements of the proposed settlement were published in 18 newspapers in Western Australia;

(b) radio announcements in relation to the proposed settlement were broadcast on 31 radio stations operating in Western Australia;

(c) the Settlement Notice and information brochure were published on Shine's website, and also on the Federal Court website and made available for inspection at each Federal Court registry;

(d) the Settlement Notice and information brochure were sent by post to all persons not identified as deceased who were on the "customer list" for the State 2012 Reparations Scheme that was established in relation to stolen wages in Western Australia, and for whom the State held postal information;

(e) the Settlement Notice and information brochure were sent by email to all persons and Aboriginal organisations to whom an opt out notice was provided, and to those individuals and Aboriginal organisations who provided email addresses in connection with the State 2012 Reparations Scheme; and

(f) the Settlement Notice and information brochure were communicated along with updates via direct electronic and postal mailouts on 16 different occasions between 30 November 2023 and 19 September 2024.

49 Given the characteristics of the cohort of class members the physical outreach program to Aboriginal communities was central to informing class members of the proposed settlement, of the need to register to participate in the proposed settlement, and of their right to object to the proposed settlement if they wished. Between 19 November 2023 and 15 June 2024, the Shine team of lawyers, law clerks and paralegals visited 104 locations across Western Australia. At each town or community visited as part of the outreach program, Shine hosted an information session, generally lasting for 2-3 hours, and after each session, the Shine team would provide copies of the Settlement Notice and registration forms to key stakeholders in the community or town and to people who were not able to attend. Shine also:

(a) held 21 additional information and registration sessions upon invitation to provide information to class members who were unable to travel to an ordinary information session;

(b) distributed the settlement material to any community members who requested copies for family members and to key community facilities;

(c) attended residences or other community locations to take registrations from class members who did not or could not attend the larger sessions;

(d) conducted further registration and information sessions via video link; and

(e) where Shine was unable to visit a location in person due to the remoteness of that community, the applicant took steps to contact communities to arrange assistance to community members, for example, by providing a video link between the Community Office and Shine.

50 On 17 June 2024 the Court made orders to extend the registration date and to require the republication of the Settlement Notice and information brochure. I made these orders following a case management hearing where Shine put on evidence to the effect that many class members would miss out on the opportunity to register if the original registration deadline was maintained. The evidence was to the effect that the rate at which registration forms were being received indicated that class members were continuing to learn about the proceedings.

51 Pursuant to the orders made 17 June 2024 the Shine team travelled back to Western Australia in August and September 2024 and conducted further information sessions in a further seven locations upon invitation to AGMs of various Aboriginal land councils, and large communities where Shine was informed by stakeholders that there was still a number of class members who had not completed a registration form and required assistance.

52 140 of the locations listed in the orders made 14 November 2023 were not visited as part of the outreach program. In respect of 102 of those places, Shine considered the populations were so small and so remote that the cost and time of scheduling an in-person visit was disproportionate to the likely level of class member engagement. In respect of the remaining communities, populations often were able to attend information sessions held nearby. Flooding prevented an information session in one community, but Shine provided registration details to a key contact there.

53 Up to 30 September 2024, Shine received 15,178 registration forms on behalf of class members who had registered electronically, on the phone with Shine team members, in person at an outreach information session, or using a hardcopy registration form.

3.2 Class closure

54 On 20 November 2023 the Court made orders for class member registration and class closure. The orders provide:

> 1. Pursuant to s 33ZF of the Federal Court of Australia Act 1976 (Cth) (the Act), any Group Member who does not register under the Registration Process:
>
> (a) will remain a group member for all purposes of this proceeding; and
>
> (b) shall not without leave of the Court be permitted to seek any benefit under the proposed settlement, if the settlement is approved by the Court (otherwise than in accordance with clauses 23 to 26 of the proposed Settlement Distribution Scheme).
>
> 2. For the purposes of order 1, a group member will be taken to have registered under the Registration Process if they submit an Application for Registration Form or an amended or supplemented Application for Registration Form by the Registration Date that is in accordance with clauses 8 and 9 of the Settlement Distribution Scheme. A failure to provide the additional information sought in the Application for Registration Form that is not referred to in clause 9 of the Settlement Distribution Scheme does not mean the person so lodging an Application for Registration Form is not registered under the Registration Process.
>
> …

Clause 22 to 26 of the proposed SDS relates to late registrations. The balance of the relevant orders included a process for Shine to endeavour to rectify deficiencies in the registration forms provided to it, and to report to the Court in that regard.

55 The effect of the class closure orders, coupled with the release in the Settlement Deed, means that class members who neither opted out nor registered by the extended registration deadline continue to be class members; are therefore bound by the release in the Settlement Deed, but

precluded by the orders from sharing in the compensation achieved through the proposed settlement.

3.3 Deficient registrations

56 By the orders made 20 November 2023 Shine was directed to attempt to contact and rectify registration forms for people who lodged an incomplete form, and for Shine to report to the Court identifying applications that were received that did not meet the requirements of the Registration Process (**Deficient Registrations**), before the settlement approval hearing.

57 In the Third Antzoulatos Affidavit Ms Antzoulatos deposed as to the number of Deficient Registrations and Shine's rectification efforts. She said that, following amendments to the SDS agreed on 4 October 2024 which sought to reduce barriers to registration, many Deficient Registrations have been rectified and more will be rectified.

58 She deposed that, as at 30 September 2024, Shine had assessed 4,176 Registrations as Deficient Registrations for not meeting the minimum requirements prescribed by clause 8 and/or 9 of the SDS. Following amendments to the SDS and relaxation of the eligibility criteria the Shine team had reviewed 3,619 (87%) of these Deficient Registrations, and have rectified 1,009 (24%) of the total. She provided the following reasons for the Deficient Registrations:

(a) 366 required a signature;

(b) 1,743 did not provided current identification; and

(c) 1,030 failed to meet one or more (or a combination of) the other eligibility criteria.

59 In Ms Antzoulatos' view, where only the signature or identification requirements are not met, a large portion will ultimately be assessed as eligible registrations. This is because the 1,009 Deficient Registrations that have already been rectified were of that type, and the only reason that more were not rectified already is that Shine ran out of time to contact all the relevant class members prior to the settlement approval hearing. In her view, with more time, rectification numbers should increase.

60 This leaves a not-insignificant group of 1,030 where the rectification work will be more difficult, for example because there is a possibility that class members who did not record a date of birth or a name of an Original Potential Claimant did not do so because they are precluded from doing so by lack of records, or perhaps by cultural factors which prevent the sharing of certain information.

61 Shine has made commendable efforts, at huge expense, to have class members register, and the process cannot go on forever. Under the SDS the Administrator is required to make efforts to rectify Deficient Registrations, and the Court expects that the Administrator will take a practical approach to the requirement for credible and cogent evidence to satisfy the eligibility criteria, and take into account to the particular vulnerabilities and characteristics of the cohort of class members.

3.4 Late registrations

62 Because of the characteristics of the cohort of class members it is appropriate to take a flexible approach to compliance with the registration deadline. On the eve of the settlement approval hearing on 28 October 2024 Ms Antzoulatos deposed that 350 registrations had been received between the extended registration deadline of 30 September 2024 and the settlement approval hearing. The settlement approval orders provide for those late registrants who are found to be eligible to be included in the settlement distribution.

3.5 The number of registrants

63 In the First Antzoulatos Affidavit Ms Antzoulatos deposed that Shine received 15,178 registration forms from potential claimants between 14 November 2023 and 30 September 2024. She broke those registrations down into the following categories:

(a) 2,576 registration forms received on behalf of Original Potential Claimants;

(b) 11,241 registration forms received on behalf of Descendant Potential Claimants;

(c) 1,067 duplicate registration forms;

(d) 41 registration forms that have since been withdrawn;

(e) 22 registration forms that have not indicated whether they are lodging a living claim or descendant claim; and

(f) 231 registration forms that are incomplete or received from Papua New Guinea.

64 In the Third Antzoulatos Affidavit, Ms Antzoulatos states that after de-duplicating the dataset, there are approximately 14,000 registrants. After reviewing the registrations and accounting for late registrants, Shine's preliminary assessment is that there are approximately 9,500 Original Potential Claimants. Shine has undertaken an initial eligibility assessment and applied the State's estimated acceptance rate of between 85% and 90% to produce an estimate of 8,000 to 8,500 OECs. Taking the State's higher acceptance rate, the number comprises approximately 2,331 living OECs and 6,129 deceased OECs.

65 In the settlement approval hearing it was common ground that the range of likely outcomes in terms of the number of OECs is between 8,000 and 9,500.

4. OVERVIEW OF THE APPLICANT'S CASE

66 The proceeding is centrally based in the provisions of the Control Acts, the terms of which changed over the claim period.

67 So far as private employment is concerned:

(a) under the 1936 Act it was not permissible to employ Aboriginals without a permit granted by a State government Protector or Inspector (save for "half-blood" or less persons who did not live in the manner of "full blood" Aboriginal persons, to use the regrettable terms from that legislation). Under the 1954 Act the permit system ceased to exist, and it instead provided that all Aboriginals who were employed or engaged "shall be under the supervision" of the Commissioner of Native Welfare (**Commissioner**). Following passage of the 1963 Act it was no longer provided that Aboriginals be employed or engaged "under the supervision" of the Commissioner;

(b) under the 1936 and 1954 Acts, agreements with Aboriginals for service or employment had to be witnessed by an authorised person and provide for "substantial, good and sufficient rations, clothing and blankets"; and

(c) under each of the Control Acts, the Inspector or the Commissioner had a right of access to all premises where Aboriginals worked or lived.

68 So far as employment within State-run or church-run institutions is concerned:

(a) under each of the Control Acts, either Aboriginals could be removed and confined to reserves or institutions and the inmates of such reserves or institutions were obliged to follow all reasonable instructions and commands of the manager and could be disciplined, including by specified forms of corporal punishment, or it was permissible to make regulations to permit those things; and

(b) under the 1936 Act, Aboriginal inmates of reserves or institutions could be "called upon to work during such reasonable hours as the superintendent or manager may direct", but no person under the age of 14 (or the age of 16 following the 1954 Act) could be compelled to work or placed out at employment without the consent of the Commissioner. The power to call on an Aboriginal inmate to undertake work during

reasonable hours ceased following passage of the 1954 Act, but Aboriginal inmates could be required to undertake "industrial training" of 4-6 hours a day.

69 The proceeding makes the following broad claims.

70 *Fiduciary claims*: The essence of the fiduciary claims is that by the combination of the protective purpose of the powers available to the State under the 1936, 1954 and 1963 Acts (for the currency of each), the power of the State to affect the interests of working Aboriginals who were "controlled" under those Acts (Working Controlled Aboriginals), and the vulnerability and reliance of Working Controlled Aboriginals on the State's exercise of those powers, there existed a fiduciary relationship between the State and Working Controlled Aboriginals attached to the exercise or non-exercise of statutory powers. This relationship is alleged to give rise to several duties:

(a) the principal duties are the "Work Duties", alleged to be owed to Working Controlled Aboriginals in connection with specified statutory powers; and

(b) secondary limited duties (for persons who were "Native Wards" during the currency of the 1936 and 1954 Acts) are the "Ward Duties", alleged to arise by reason of the same specified statutory powers but with the addition of the statutory guardian/ward relationship expressed in those Acts.

71 In each case, Mr Street relies on the acts and omissions of the Commissioner, Protectors, Inspectors, Superintendents and Managers (**Relevant Officers**) as servants or agents of the State.

72 Under the umbrella of the fiduciary claims it is alleged that class members were entitled to fair compensation for the work they performed:

(a) in the case of work performed by Aboriginal people for private employers (e.g. pastoral stations), the claim against the State is based on the existence of the fiduciary relationship alleged to found the Work or Ward Duties which should have led the State to exercise its power to require the employment arrangements to be such that fair compensation was both payable and paid, supervise them, and pursue the workers' claims for payment on their behalf against the private employer;

(b) in the case of work performed by Aboriginal people within State-run institutions, the claim against the State is put in the same way, but more directly because the State was the employer;

(c) in the case of work performed by Aboriginal people within "non-State-run" institutions (e.g. religious missions), the claim is also direct, on the footing that the superintendents of those institutions were acting as servants or agents of the State, and therefore the State was the employer; and

(d) it is also put on the alternative footing that compulsory unpaid work of the kind alleged at those places was beyond the power conferred by the Acts, or otherwise repugnant to the imperial proscription on slavery.

73 *Direct quantum meruit Aboriginal Institution Claims*: An overlapping basis for the claims of some class members is the claim against the State in respect of work required to be done by Aboriginal people, typically children, at Aboriginal Institutions for no pay – either because the Aboriginal Institutions were State-run, or because the managers of "non-State run" Aboriginal Institutions (such as missions) were acting as servants or agents of the State, and therefore the State was the employer.

74 *Statutory duty claims*: An overlapping basis for the claims of some class members is the claim for breach of statutory duty alleging conduct amounting to dealing in persons in order to be dealt with as slaves contrary to ss 2 and 3 of the *Slave Trade Act 1843* (Imp) (**Slave Trade Act**). That claim asserts the existence of the statutory tort and its breach by (for example) the State knowingly causing or permitting an Aboriginal person to be admitted to an Aboriginal Institution to perform work under conditions of slavery. This claim is maintained for those who did work while in an Aboriginal Institution at any time in the claim period, and those who performed work under the permit system of employment for which the 1936 Act provided.

75 *Trust claims*: Additional claims are made concerning what are described as the Lost Wages, Management, Ward and Saved Wages Trusts. Each is alleged to be an express or implied statutory private trust arising from the operation of the relevant provisions of one of the Control Acts. For instance, under the 1936 Act the Commissioner was empowered to direct that a portion of wages be paid to him, and the State accepts that amounts were in fact paid and held (being the Saved Wages Trust).

76 *RDA claims*: The final claim arises under the *Racial Discrimination Act 1975* (Cth) (**RDA**). The applicant alleges that the class members generally have certain common characteristics – in particular, low education, literacy and numeracy, limited financial means and access to legal advice, and mistrust of government. The essence of the RDA claim is that the State 2012 Reparation Scheme in relation to the non-payment or underpayment of wages to Aboriginal

workers failed to have proper regard to those characteristics and had the effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of the class members' human rights. It is also alleged to have been administered in a way which increased the prospect that people would either not apply, or be unsuccessful if they did. The claim is brought on behalf of (at least) all class members who were alive at the time a complaint in this regard was filed with the Australian Human Rights Commission on 21 July 2020.

77 The relief sought for the fiduciary claims, the statutory duty claims and the trust claims is declaratory relief and general law relief by way of equitable compensation, account (and interest on such monetary relief as is awarded). The relief sought on account of the RDA claims is declaratory and statutory damages under s 46PO(4)(d) of the *Australian Human Rights Commission Act 1986* (Cth), aggravated and exemplary damages and an apology.

5. THE PRINCIPLES RELEVANT TO SETTLEMENT APPROVAL

5.1 Under Part IVA of the FCA

78 The applicable principles in relation to settlement approval of a class action brought under Part IVA of the FCA Act are well established. Section 33V(1) provides that a representative proceeding may not be settled or discontinued without the approval of the Court. Section 33V(2) provides that if the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

79 As I said in *Webb v GetSwift Limited (No 7)* [2023] FCA 90; 414 ALR 500 at [15]-[16]:

> The applicable principles in relation to settlement approval under s 33V of the FCA Act are now well-established. The Court's fundamental task is to determine whether the settlement is fair and reasonable and in the interests of the group members who will be bound by it, including as between the group members *inter se*: see for example, *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [7]-[8]; *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439; 112 ACSR 584; [2016] FCA 323 at [68]-[77]; *Camilleri v Trust Company (Nominees) Ltd* [2015] FCA 1468 at [5]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs. apptd) (in liq) (No 3)* (2017) 343 ALR 476; 118 ACSR 614; [2017] FCA 330 at [81]; *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 at [12]; *McKenzie v Cash Converters International Ltd (No 3)* [2019] FCA 10 at [23]-[24]; *Smith v Commonwealth (No 2)* [2020] FCA 837 at [6]-[12]; and *Prygodicz v Commonwealth (No 2)* (2021) 173 ALD 277; [2021] FCA 634 at [85]-[88].
>
> In undertaking that task, the Court:
>
> (a) assumes an onerous and protective role in relation to group members' interests, in some ways similar to Court approval of settlements on behalf of persons with a legal disability;
>
> (b) must be astute to recognise that the interests of the parties before it, and those

of the group as a whole (or as between some members of the group and other members), may not wholly coincide;

(c) relatedly to the second point, should be alive to the possibility that a settlement may reflect conflicts of interest or conflicts of duty and interest between participants in the common enterprise which has conducted the representative proceeding;

(d) should understand that at the point of settlement approval, the interests of the parties will ordinarily have merged in the settlement. It is likely that they both will have become 'friends of the deal'. As a result, both sides may not critique the settlement from the perspectives of any group members who may suffer a detriment or obtain lesser benefits through the settlement; and

(e) 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.

80 The *Class Actions Practice Note* (GPN-CA) at [15.5] sets out the following factors the Court may consider on an application to approve a settlement:

(a) the complexity and likely duration of the litigation;

(b) the reaction of the class to the settlement;

(c) the stage of the proceedings;

(d) the risks of establishing liability;

(e) the risks of establishing loss or damage;

(f) the risks of maintaining a class action;

(g) the ability of the respondent to withstand a greater judgment;

(h) the range of reasonableness of the settlement in light of the best recovery;

(i) the range of reasonableness of the settlement in light of all the attendant risks of litigation; and

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

81 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] (Murphy J).

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

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

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

(c) whether the proposed deductions from the Settlement Sum, for example, for past or future legal costs, for any insurance premiums, and for remuneration of any litigation funder, are fair and reasonable in all the circumstances.

5.2 Under Division 9.2 of the Rules

83 Rule 9.21 relevantly provides:

> **Representative party - general**
>
> (1) A proceeding may be started and continued by or against one or more persons who have the same interest in the proceeding, as representing all or some of the persons who have the same interest and could have been parties to the proceeding.
>
> (2) The applicant may apply to the Court for an order appointing one or more of the respondents or other persons to represent all or some of the persons against whom the proceeding is brought.
>
> …

Unlike Part IVA this rule contemplates representative proceedings by either an applicant or a respondent.

84 Rule 9.22 relevantly provides:

> (1) An order made in a proceeding for or against a representative party is binding on each person represented by the representative party.
>
> (2) However, the order can be enforced against a person who is not a party only if the Court gives leave.
>
> …

85 Nothing in Division 9.2 of the Rules requires leave or approval of the Court before a representative applicant (or representative respondent) can settle a representative proceeding brought under the Division. There is no provision akin to s 33V of the FCA Act. Rule 26.12(4),

however, provides that "a representative party must not discontinue a party's claim without first obtaining the leave of the Court."

86 As I explained in *Sister Marie Brigid **Arthur** (Litigation Representative) v Northern Territory of Australia (No 2)* [2020] FCA 215 at [74]-[79] and *O'Donnell v Commonwealth of Australia* [2023] FCA 1227 at [18], the authorities indicate that an applicant in a Division 9.2 representative proceeding should not be permitted to compromise a claim in a way which affects the rights of members of the represented class without leave of the Court. Division 9.2 is to be treated as "a flexible rule of convenience" with the Court retaining "the power to reshape proceedings at a later stage": see *Carnie v Esanda Finance Corporation Ltd* [1995] HCA 9; 182 CLR 398 at 422 (Toohey and Gaudron JJ).

87 In my view it is appropriate to approach settlement of an "old style" representative proceeding brought under Division 9.2 of the Rules on the same basis as settlement of a representative proceeding under Part IVA of the FCA Act. Before approving a settlement in a Division 9.2 proceeding which affects the rights of represented persons, the Court should be satisfied that the compromise is fair and reasonable in the interests of the represented persons and as between them: *Arthur* at [79].

6. THE KEY TERMS OF THE PROPOSED SETTLEMENT

88 Under the proposed settlement the State promises to pay the applicant and class members the Settlement Sum, being an amount of up to $180.4 million, comprising:

(a) the Settlement Fund Amount, being an amount of up to $165 million, calculated by multiplying $16,500 by the number of OECs, up to 10,000 OECs (on the basis of the eligibility criteria in the SDS, as previously described), to be paid by the State in tranches as the Administrator accepts the eligibility of OECs; and

(b) the Agreed Costs Component, being an amount of $15.4 million, being party/party costs assessed by the Costs Referee.

89 The Settlement Fund Amount is not to be understood as a series of individual settlements of a particular amount to be paid to each OEC, but rather it is a settlement on a common fund basis where the quantum of the fund is ascertained by accumulating amounts paid on account of (but not to) each OEC.

90 The Settlement Fund Amount is not a fixed sum, and the intersection between the Settlement Deed and the SDS means the latter has implications for ascertainment of what the Settlement

Fund Amount is; not just for how it is distributed. The State's covenant to pay the Settlement Fund Amount capped at $165 million is limited by the Administrator's determination of the number of OECs, according to the criteria in cl 50 of the SDS. It is common ground between the parties that the eligibility criteria under cl 50 are not intended to create difficult barriers, and over the course of the Registration Process the State progressively agreed to weaken those requirements as it became apparent that they caused difficulties for class members who wished to register.

91 The exact ascertainment of the Settlement Fund Amount will not occur until after the Administrator has made eligibility determinations (which can take into account information provided by Shine and be fast-tracked by State confirmation. This means that the parties and the Court do not yet have data which enables exact calculation of the Settlement Fund Amount. But as I have said, the solicitors for the parties have engaged in a process to preliminarily assess the OECs registered to date. The parties agree that there are likely to be circa 8,000 to 9,500 OECs at the conclusion of the Registration Process, and the Court will assess the proposed settlement by reference to the middle of that range.

92 The Agreed Costs Component of $15.4 million is a maximum sum for party/party costs, rather than a fixed sum. But it has become a fixed sum by the Costs Referee's assessment that the applicant's party/party costs exceed $15.4 million.

7. THE SALIENT CONSIDERATIONS FOR SETTLEMENT APPROVAL

7.1 The releases and bars against suit

93 Clause 9 of the Settlement Deed provides the following releases:

> On and from the Exhaustion of Appeal Date:
>
> 9.1 This Deed may be pleaded as a bar to any further proceedings by the Applicant and Group Members made in, arising out of or in connection with, whether directly or indirectly, the allegations in and the facts, matters and/or circumstances of the Proceeding, against the State Party (including the Respondent's present and former officers, servants, employees, agents, successors and assigns). Such a bar will not prevent the Scheme Administrator, the Applicant or any Group Members from making any application to the Court in connection with the administration of the Settlement Distribution Scheme.
>
> 9.2 The Applicant and Group Members release and forever discharge the State Party (including the Respondent's present and former officers, servants, employees, agents, successors and assigns), from all actions, proceedings, claims and demands whatsoever which the Applicant and Group Members or any person claiming by, through or under any of them may now or hereafter have against them or any of them for loss or damage sustained by any Applicant

or Group Member or any person claiming by, through or under them as a result of or arising out of or in connection with, whether directly or indirectly, the allegations in and the facts, matters and/or circumstances giving rise to the Proceeding.

9.3 The Applicant and the Group Members acknowledge that they, or any person acting on their behalf, have no further claims or demands against the State Party (including the Respondent's present and former officers, servants, employees, agents, successors and assigns), as a result of, or arising out of or in connection with, whether directly or indirectly, the allegations in, and the facts, matters and/or circumstances giving rise to the Proceeding.

94 The Settlement Deed does not contain a definition of the claims made in the proceeding. But, broadly put, the proceeding brings claims under various causes of action regarding the non-payment or underpayment of wages to Aboriginal men, women and children during the claim period, and a racial discrimination claim regarding the State Reparation Scheme in relation to non-payment or underpayment of wages to Aboriginal workers.

95 The extent of the proposed release of "all actions, proceedings, claims and demands whatsoever" which class members may have "as a result of or arising out of or in connection with, whether directly or indirectly, the allegations in and the facts, matters and/or circumstances giving rise to the Proceeding" was unclear in my view. The breadth of the release and bar against suit gave rise to a concern that the Settlement Deed might purport to effect a release of class members' claims not raised in the proceeding and non-common claims based in their individual circumstances. For example, it might be argued that the claims of an Aboriginal child who sought to bring a suit against the State for alleged unlawful removal from her family and placement in one of the institutions which are the subject of the unpaid wages claims in the proceeding, or against the State for physical or sexual abuse in one of those institutions, might be argued to arise indirectly from "the facts, matters and/or circumstances giving rise to the Proceeding". Yet the proceeding does not advance such claims.

96 I considered a release in those terms to be impermissible as this proceeding does not advance any such claims, and the applicant does not have representative authority under Part IVA of the FCA Act beyond the scope of the common claims under s 33C. The applicant represents group members "only with respect to the claim the subject of [the] proceeding, but not with respect to their individual claims.": *Timbercorp Finance Pty Ltd (in liquidation) v Collins; Timbercorp Finance Pty Ltd (in liquidation) v Tomes* [2016] HCA 44; 259 CLR 212 at [39], [49], [53]-[54] (French CJ, Kiefel, Keane and Nettle JJ), [122] and [141]-[142] (Gordon J); *Dyczynski v Gibson* [2020] FCAFC 120; 280 FCR 583 at [96], [106(a)], [201], [249]-[251] (Murphy and Colvin JJ), and [395]-[396] (Lee J). The applicant's representative authority is

not, however, strictly limited to the claims actually pleaded in the proceeding. In *Mobil Oil Australia Pty Ltd v State of Victoria* [2002] HCA 27; 211 CLR 1 at [34] Gaudron, Gummow and Hayne JJ explained that what is decided in a class action is "the claims that are made, *or could be made*, against the defendant by all those in the "class" or "group" that is identified in the proceeding" (emphasis added).

97 When the Court suggested that the proposed releases and bars against suit were arguably impermissible the parties conferred and agreed to the following order, which the Court has made.

> Any releases, or covenants not to sue given by Group Members are restricted to the claims the subject of this proceeding, and similar or related claims that could have been the subject of this proceeding, insofar as such releases and covenants not to sue are consistent with Part IVA of the *Federal Court of Australia Act*.

98 With that restriction to the operation of the releases and bars against suit the Court considers the releases to be within the scope of the applicant's authority.

7.2 The preclusion of unregistered class members sharing in the settlement

99 An important feature of the proposed settlement is that the releases together with the class member registration and class closure orders mean that class members that neither opted out nor eligibly registered pursuant to those orders continue to be class members and therefore bound by the releases. In effect their claims will be merged such that they lose their right to sue and they will not receive compensation under the settlement.

100 While that may seem harsh for such class members, I am nevertheless satisfied that the proposed settlement is fair and reasonable. Essentially that is because:

(a) the extensive registration and outreach program undertaken by Shine which was well-performed;

(b) the flexible approach taken in relation to Deficient Registrations given the particular characteristics of the cohort of class members;

(c) the number of registrants achieved through the Registration Process;

(d) the several extensions of the deadline for registration; and

(e) the fact that even after post-settlement approval the Administrator can admit further late registrants (and the State informed the Court that it would take a cooperative approach to that).

I am satisfied that class members were given ample notice that, should they neither eligibly register nor opt out before the deadline, they would be bound by the proposed settlement but be unable to share in the compensation under the settlement.

101 I considered it to be appropriate to make the class closure orders because:

(a) through the proposed settlement the State sought, as far as practicable, to achieve finality in relation to the claims which are the subject of the proceeding. It would only have practical finality if class closure orders were made so that class members who did not opt out, but who failed to register despite the comprehensive publication regime, and extensive outreach program are bound into the settlement but not entitled to recover under the settlement. I was satisfied that class closure was fair and reasonable given the comprehensive publication regime and outreach program;

(b) the proposed settlement will benefit the substantial body of class members who made the effort to register their claims, which would permit them to recover compensation without the uncertainty and risk of the case proceeding to trial. Through the publication regime and outreach program class members who had not opted out were informed that should they not register before the deadline (which was then extended) they would be bound by the proposed settlement and thus lose their right to claim damages but be precluded from sharing in the settlement monies;

(c) it was open to the Court to extend the period for registration, and it did so on several occasions. Even after settlement approval the SDS provides that the Administrator is able to accept late registrations. The State informed the Court that it would take a cooperative approach in that regard; and

(d) class closure orders would have to be made at some point, and the most efficient course was that they be made then.

102 Further, class members were given the opportunity to object to the settlement, and none objected to the preclusion of class members who neither opt out nor eligibly register. This preclusion is a necessary part of the settlement to afford the State finality in respect of the claims that were or could have been brought in the proceeding.

7.3 Counsels' Opinion

103 The Court has the benefit of two comprehensive confidential opinions from senior and junior counsel for the applicant which candidly consider the fairness and reasonableness of the

proposed settlement as between the parties, and its fairness as between class members. Counsel provided their opinions as officers of the Court rather than as advocates for the applicant and class members. Counsel considered the risks and difficulties facing class members in avoiding the operation of the time limitation defences raised by the State; in proving factual matters from more than 50 years ago including where the person alleged to have performed unpaid work is deceased and the employer or institution where they worked is no longer operating or in existence; in establishing the existence of the alleged Work Duties and Ward Duties and in establishing that the State was liable for any breaches of such duties if they were found to exist; in establishing the existence of the quantum meruit claims; in relation to questions of statutory interpretation including in relation to Imperial proscriptions on slavery; in establishing the existence of any of the trusts in individual cases as a factual matter; in establishing the existence of the alleged statutory duty; in establishing liability in respect of the RDA claims; and associated with achieving quantum in excess of the proposed settlement.

104 Counsel provided a risk-weighted assessment of the reasonableness of the proposed settlement having regard to the risks and difficulties the proceeding faces, and as against best recovery. Counsel recommended that the Court approve the proposed settlement as fair and reasonable *inter partes* in the interests of the class members to be bound to it. Counsel also gave careful attention to the fairness and reasonableness of the proposed SDS, and recommended that the Court approve the proposed settlement as fair and reasonable as between the class members.

105 The Court has given significant weight to Counsels' Opinion.

7.4 The stage of the proceedings at which settlement was reached

106 The parties reached the proposed settlement after eight days of testimony by the applicant and a number of class members in the preservation of evidence hearing, after all the evidence for the trial was filed, after the exchange of expert opinions in relation to quantum, following a series of mediations, and five days before the trial was listed to commence. By that point the applicant had filed detailed written opening submissions for the trial, and the State had prepared a detailed confidential written outline of their position for the mediation which the Court has reviewed.

107 The proposed settlement was reached at a point in the proceeding when the parties and their lawyers were in a position to make an informed assessment of the evidence to be adduced at trial, the strengths and weaknesses of their respective cases on liability and quantum, and the

costs likely to be incurred by proceeding to trial. This also favours approval of the proposed settlement.

7.5 The complexity and likely duration of the litigation

108 The litigation has been on foot since 2019, and it was for trial in October 2023 on an estimate of four weeks, eight days of testimony already having been heard in the preservation of evidence hearing. The initial trial involved 165 factual and legal issues for determination. The applicant's written opening submissions exceeded 230 pages in length, without dealing with the State's defences which were to be addressed in reply.

109 The claims advanced by the applicant are at the high-end of legal complexity and some are attended by considerable difficulty. Many of the legal issues are novel, particularly with respect to the establishment of the alleged fiduciary duties that comprise a central part of the applicant's case, and the factual issues are complicated by the need for individualised assessments in respect to each class member.

110 Whoever loses the initial trial is likely to appeal. The complexity and likely duration of the litigation weigh heavily in favour of approving the settlement.

7.6 The prospect of appeals and the age of the class members

111 The difficult legal issues involved in the proceeding means that if the applicant is successful on the common issues in the initial trial there is likely to be an appeal, which will take significant time. Then, if the appeal findings are favourable to the class members, more delay will occur while the parties attempt to negotiate either a groupwide settlement or a series of individual settlements, in each case with the prospect of further mini-trials over any claims that are not compromised. Given the highly individualised nature of the claims of class members this not a case where it could be said that favourable liability findings will necessarily lead to substantial damages awards in favour of all class members.

112 The great majority of OECs are already deceased and the living OECs are elderly. Many OECs have passed away since the proceeding was commenced. It is likely that more class members will pass away during the pendency of any attempt to negotiate a groupwide settlement or a series of individual settlements following the result of any appeal(s). The advanced age of many class members, and the importance of their receiving compensation in their lifetime is significant to my view that it is appropriate to approve the proposed settlement.

7.7 The risks of establishing liability and quantum

113 It is necessary to understand that in setting out the risks of establishing liability and quantum I do not purport to decide any question or issue regarding the respective strengths or deficiencies in the parties' cases in the proceeding. My remarks as to the risks and difficulties are merely in aid of explaining why I consider the proposed settlement to be fair and reasonable.

114 Issues of proof cut across each claim made in the proceeding. The proceeding has particular difficulties because of the historical nature of the claims and, consequently the availability of witnesses who worked during the claim period or the availability of employer witnesses who employed them. Documentary records are generally available to corroborate and supplement witness evidence with respect to the movements, locations and employment of Aboriginal workers during the claim period, but insufficiency of proof remains a serious problem for class members' claims.

7.7.1 Risks on liability

115 *The fiduciary claims*: The essence of the fiduciary claims is that there existed a fiduciary relationship between the State and Working Controlled Aboriginals which is alleged to give rise to Work Duties and Ward Duties. These duties are novel in many respects and present a number of factual and evidentiary challenges. First, the alleged duties do not arise by reference to an existing category of fiduciary relationship. Second, there are difficulties in establishing that the alleged fiduciary obligations are consistent with the Control Acts. Third, the Work Duties and Ward Duties are positive in nature and the position in the caselaw is not clear as to whether fiduciary obligations can be proscriptive only, or whether they may extend to prescriptive (i.e. positive) duties.

116 If the applicant is unsuccessful in proving the existence of the alleged fiduciary duties or unsuccessful in establishing that they imposed positive obligations, then a substantial part of the class members' claims falls away. For instance, the State's liability in respect of the *quantum meruit* claims made in relation to private employment is said to arise because of its breach of fiduciary duties in failing to take action to recover the wages due to those Aboriginal workers.

117 *State liability for alleged breach of the fiduciary duties*: If the Work Duties or Ward Duties are found to exist, there are risks and difficulties in establishing that the State was in breach of those duties (or the other alleged breaches including breach of trust and breach of statutory

duty). The applicant advances a direct and indirect theory of liability. For its theory of direct liability, the applicant relies on *Trevorrow v State of South Australia (No 5)* [2007] SASC 285; 98 SASR 136 to prove that the Relevant Officers were emanations of the State, but contrary conclusions were drawn in ***Collard*** *v State of Western Australia (No 4)* [2013] WASC 455; 47 WAR 1. The applicant bears the burden of distinguishing his case from *Collard* to succeed on this point. For its theory of indirect liability, the applicant relies upon vicarious liability. That carries a number of risks and difficulties for the applicant.

118 *Direct quantum meruit Aboriginal Institution claims*: To make out the *quantum meruit* claims, the applicant faces risks and difficulties in establishing that the directions for an Aboriginal inmate to perform work for no pay at an Aboriginal Institution were invalid or beyond power. It can be argued that the applicant's case seeks to condition the relevant powers by recourse to contemporary standards, rather than the standards applicable at the time. The applicant's "slavery claims" involve novel arguments regarding the application of Imperial statutes on issues that are strenuously contested by the State. The slavery claims also raise difficult issues of proof of factual matters from so long ago.

119 *Statutory duty claims*: The applicant bears the onus of establishing the existence of a statutory duty under the Imperial *Slave Trade Act*, which is strenuously contested. The fact that the Act imposed penalties for breach points away from the existence of a private right of action. And if the applicant can establish the existence of a statutory duty, the historical nature of the claim presents difficult issues of proof.

120 *Trust claims*: The applicant has reasonable prospects of proving that the requisite intention of the Control Acts was to establish trusts that were enforceable in equity, and at least in some instances the State admits the existence of the alleged trusts. However, there are risks and difficulties associated with establishing the existence of the trust in relation to individual class members, as well as establishing a breach of the trust, and the continued existence of the trusts. These difficulties stem in large part from the historical nature of the claims, the incomplete nature of available documentary evidence, and the potential absence of important witnesses by reason of being deceased or difficult to locate.

121 *RDA claims*: The applicant has reasonable prospects of proving that the establishment and operation of the State 2012 Reparation Scheme concerned "acts" involving a distinction based on race, as required by s 9(1) of the RDA. But there are risks and difficulties associated with establishing that the act of setting up the Reparation Scheme, which was implemented in an

attempt to redress the wrongs committed under the Control Acts, had either the purpose or the effect of nullifying or impairing a human right on an equal footing to other people. It can be argued that any impairment of human rights was by reason of the Reparations Scheme rather than it flowing from the Control Acts. Further, the degree to which compensable insult was experienced, or is provable, is likely to vary between class members and there can be little certainty that the $20,000 sum sought by the applicant would be appropriate for each class member.

122 *The State's positive defences*: The State raises a number of positive defences, which are potentially fatal to the applicant's case, including the following:

(a) *Laches:* A laches defence is alleged by the State on the basis that, as between the parties, it would be practically unjust to give relief which otherwise would be just. The State relies on matters including the substantial period of time that has passed since the claims arose, the unavailability of State witnesses who worked for or on behalf of the State during the claim period, and the deficiencies in the documentary record.

(b) *Limitation periods:* The State relies upon a number of limitation periods which it contends apply either directly or by analogy. Subject to the consideration of any grounds justifying the non-application of a limitation period by analogy, the contractual or tortious limitation periods of six years under s 38(1)(c) of the *Limitation Act 1935* (WA) and the effective six-year limitation period applicable under s 47 of the *Limitation Act 1935* (WA) or s 13 of the *Trustees Act 1900* (WA) present serious risks and difficulties for the applicant's and class members' claims.

7.7.2 Risks on quantum

123 If the applicant and class members are successful in establishing State liability for the alleged wrongs the class members' claims face risks and difficulties in relation to quantum.

124 It is exceedingly difficult to reach a well-founded estimate of the undiscounted aggregate value of class members' claims in the present case, and what constitutes the possible "best recovery" by class members depends upon a series of assumptions, the basis for which is uncertain. For the trial, the parties proposed to rely upon the following expert reports:

(a) the applicant:

(i) the report of Joseph Box, a forensic accountant with Grant Thornton, Accountants, dated 17 July 2023 which quantified the applicant's and sample class members' general law claims (**Box Report**); and

(ii) a reply report of Professor Jeff Borland, a professor of economics at the University of Melbourne who specialises in the operation of labour markets in Australia, dated 29 September 2023 (**Borland Report**).

(b) the State: the report of Hans Weemaes, a forensic economist with Vincents, Accountants, dated 25 August 2023 (**Weemaes Report**).

125 The Box Report quantifies the non-payment or underpayment of wages of the applicant and sample group members by calculating the difference between the amounts that were paid to them and the reasonable value of the work performed by them. As to what the applicant and sample group members had, in fact, received by way of wages during the claim period, the applicant relied upon the evidence given in the preservation of evidence hearing. The difficulty with most of the relevant evidence in the preservation of evidence hearing is that the testimony was far from clear or precise in relation to the wages that were paid or unpaid. That is understandable given the effluxion of time but it does not assist the applicant and class members in establishing the alleged non-payment or underpayment of wages.

126 In relation to the reasonable value of the work performed by the applicant and class members, Mr Box considered a series of historical awards, the Commonwealth Basic Wage system applicable from 1936 to 1967, and the Minimum Wages system applicable from 1962 to the end of the claim period, as they applied in Western Australian. Mr Box calculated interest on both a simple basis (i.e. Court rates) and a compound basis. Given the length of time involved, the loss calculated on a compound basis is an order of magnitude higher than the loss calculated on a simple basis.

127 The Weemaes Report does not engage directly with Mr Box's calculations. Instead, Mr Weemaes opined on Mr Box's "economic counterfactual" which he describes as "assum[ing] that if the counterfactual award wage rates were paid instead of the amount allegedly paid, the work performed by the individuals would be unchanged". In summary, Mr Weemaes expresses the view that such an economic counterfactual failed take into account the impact the significantly increased cost of labour would have had on the demand for labour (and to some extent the supply of labour), that Mr Box has not taken those matters into account, and that his analysis is accordingly unreliable. The thrust of Mr Weemaes' view as to the appropriate

counterfactual is that if Aboriginal workers were required to be paid the wage rates provided under the relevant Awards, the Commonwealth Basic Wage or the Minimum Wage, far fewer such workers would have been employed and for significantly less hours.

128 Professor Borland's report responded to the Weemaes Report. He opined that the approach taken by Mr Box was reasonable and plausible and that the impact on labour demand in Mr Box's counterfactual (i.e., that Aboriginal workers were paid the going rate for the general population) is ambiguous. In summary, he expressed the view that the relevant labour market bore the characteristics of a monopsony market in which workers had limited choices of employers, and in such a market, an increase in wages would have an ambiguous effect on labour demand and employment. Professor Borland considered that the impact on labour supply in the counterfactual was unlikely to have affected employment outcomes for the applicant and sample group members. In his view Mr Weemaes' approach was overstated.

129 Even on the applicant's method of loss assessment, the highly individual nature of class members' claims means that the applicant and class members will need to show the nature of the work that was done during the claim period and then value that work with regard to the relevant industry standards and other evidence of what constituted reasonable remuneration. There are likely to be serious difficulties in establishing the nature of the work done, and the hours worked, when the great majority of Aboriginal workers in the claim period are deceased, the employer is no longer operating, and the documentary records are far from complete. Even where an Aboriginal worker from the claim period is still alive, the preservation of evidence hearing illustrates the serious difficulties for witnesses in now giving cogent evidence of matters, at the time utterly mundane, as to the places worked, the periods at each such place, the hours worked, the nature of the work and the pay received, between 52 and 88 years ago.

130 As for the question as to which rate of interest is appropriate to be applied, the applicant needs to show that compound interest is available as a matter of law to justify the materially higher quantum on individual claims. That presents challenges for the applicant and class members because it departs from the orthodox position for breach of fiduciary duty claims. Compound interest may be more readily awarded for the trust claims, but those claims suffer from particular evidentiary difficulties.

7.7.3 Conclusion on the risks of establishing liability and quantum

131 In my view the claims made in the proceeding face serious risks and difficulties in relation to liability and quantum. And because most of the claims arise in respect of conduct between 1936

and 1972, they face a significant risk of being barred by the application of various limitation periods upon which the State relies. Further, the class member's claims are individual or idiosyncratic, and there are likely to be substantial evidentiary difficulties in proving class members' claims concerning matters that occurred between 52 and 88 years ago. Most of the Aboriginal people who worked during the claim period are deceased, most of the employers and institutions for whom they worked are no longer operating, many of the relevant witnesses are dead, and the documentary record is patchy. As a result, many class members' claims face a significant risk of failing by reason of insufficiency of proof of the factual matters on which their claims depend.

132 The risks and difficulties associated with the claims are cumulative in the sense that one risk follows after another, to the point that it is impossible for the applicant's lawyers to be confident of success in the proceeding. There is a significant risk that if the case proceeds to trial the applicant's and class members' claims will fail, or they will succeed on claims which relate to only a subset of the class members and for a quantum less than the proposed settlement.

133 This points strongly in favour of approving the proposed settlement.

7.8 Reasonableness of the settlement in light of the best recovery

134 Assessing the reasonableness of the settlement against "best recovery" is of limited assistance as it involves the unrealistic assumption that the applicant will succeed in full on both liability and quantum. It is more useful to assess the reasonableness of the proposed settlement in light of the attendant risks of litigation. It is therefore not useful to go further into the detail of the competing expert's reports on the aggregate loss suffered by class members. It suffices to note that the expert estimates of aggregate wage loss vary significantly, and (assuming success on liability) on whichever estimate was accepted by the Court, the proposed settlement represents a substantial discount on full compensation for the wage loss suffered plus interest.

7.9 The reaction of the class

135 46 written objections to the proposed settlement were filed with the Court. Seven class members made oral objections at the settlement approval hearing, including Ms Miller/Kickett and Ms Joanne Taylor who did not file written objections but were nevertheless heard by the Court.

136 The number of objections to the proposed settlement is comparatively small in relation to the number of claimants, but that says little about its fairness. It is the Court's task to assess the

fairness and reasonableness of the proposed settlement and the objections provide a convenient focus for the Court's consideration: *Darwalla Milling Co Ltd v F Hoffman-La Roche (No 2)* [2006] FCA 1388; 236 ALR 322 at [39] (Jessup J).

137 Many of the objections were powerfully made and I was touched by the anguish and hurt some objectors expressed about the discriminatory and unjust way they and their parents were treated during the claim period, and the lasting legacy of economic and social hardship which arose from that. The objections speak to the grief, torment and anger that some class members understandably feel. The trauma suffered through forcible removal from their families and their country, and of enduring psychological, social and economic harm, with intergenerational effects, cannot be underestimated. The emotion with which some of the views are expressed acts as a reminder of the importance of acknowledging the occurrence of those wrongs.

138 I have carefully considered each of the objections, which can be summarised as follows:

(a) Mr Christopher Coomer, a sample group member, filed a detailed and considered objection. He describes being taken from his family and placed in Roelands Native Mission, where he was made to complete farm work between 1960 and 1971. He says that he commenced his first job as a wood chopper at the age of six, filling house firewood storage boxes, and he went on to work in many jobs, including domestic rubbish collection, dairy work, managing the water irrigation systems, property fire break work, fruit picking, road and other infrastructure maintenance, caring for livestock, managing an animal slaughterhouse, maintaining farm paddocks, and helping with church services every Sunday. Mr Coomer describes the long days he was made to work as a child, the physical labour that was required, the poor and often unsafe working conditions, and the abuse that he and others on the mission endured. Mr Coomer alleges that he was not paid for that work and he describes the proposed settlement amount as "very unfair" in those circumstances.

(b) Ms Vivien Dimer filed an objection on behalf of herself, her grandmother and her father. She said that her grandmother, her father and his brothers were placed on Mount Margaret Mission and her father worked as a stock boy from age 10 or 11 years old without pay, and his parents only received rations. Ms Dimer objects to the proposed settlement on the basis that the proposed settlement is insufficient to compensate for her father's unpaid work. She also says that she wishes any distribution to which she is entitled to be paid into a trust created by her father.

(c) Ms Debbie Dalgety, Mr William Dalgety, Ms June Dalgety, Mr Ralpha Dalgety, Ms Ruby Dalgety, Ms Lynette Bellottie, Mr Gay Harris, Ms Leonie Jones, Ms Beverly Lynch, Ms Aubrey Lynch, Mr Lester McDonald and Ms Janette Wilton filed objections that are centrally concerned with the inadequacy of the proposed settlement sum. Ms Jones also objects to the legal costs coming out of the settlement, and says that the government should separately cover those costs. Ms A. Lynch, Ms B. Lynch, Mr Harris and Mr McDonald also complain that the proposed settlement does not account for other unpaid work entitlements such as superannuation and leave.

(d) Ms June Councillor filed an objection in which she complains that the proposed settlement insufficiently compensates Aboriginal workers for the unpaid work they undertook. She says that Aboriginal men only received rations for their work, and that the disadvantage from that operates as a cycle, and that more money should be paid to account for the "social, emotional and psychological abuse and trauma" that resulted from the unpaid wages.

(e) Ms Lisa Fay Westlake, Ms Dawn Lesley Little, Mr Desmond Freddie and Mr Richard Evans also filed objections on the basis that the proposed settlement is not sufficient to compensate for the unpaid work performed by their family members, and that it does not compensate for the poor treatment and slavery they suffered. They also object on the basis that the class members were not involved in the decision-making relating to the proceeding and that the decisions in the case were made by white people. They further say that the case should be pleaded to include the trauma suffered by Aboriginal people during that period and that the claim period should be extended.

(f) Ms Annie Dabb and Mr Henry Dabb object to the proposed settlement on the basis that it does not permit them to make a claim for payment on behalf of their grandfather who worked without pay during the claim period. They state that it is disrespectful not to acknowledge his work and the value of what he contributed and how he fought for Aboriginal people. They also say that no amount of money is going to be enough to right the wrongs that were committed. At the settlement approval hearing, Ms Dabb submitted that the amount of compensation was insufficient because it did not reflect the pay rates applicable in that period, and she says that she is fighting for her ancestors who were treated harshly.

(g) A number of objectors lodged a joint objection following a meeting of class members at South Headland, Western Australia, on 2 March 2024, being:

(i) Ms Sharon Todd;

(ii) Mr Peter Todd;

(iii) Mr John Patrick Todd;

(iv) Ms Tanya Nomak;

(v) Ms Taryn Laura Watkins;

(vi) Mr James Watkins;

(vii) Mr Steven Shepard;

(viii) Ms Jodie Greddon;

(ix) Ms Jacinta Rose Watkins;

(x) Mr Zarak William Bin Saad;

(xi) Ms Jane Bin Saad;

(xii) Ms Jan Cogan;

(xiii) Ms Jennifer Joan Baraga;

(xiv) Ms Patricia McDonald;

(xv) Mr George Dann;

(xvi) Ms Beverly Thompson;

(xvii) Ms Shirley Rose Edwards;

(xviii) Ms Sophie Edwards;

(xix) Ms Mareen Agnes Piper;

(xx) Ms Susan Joyce Lewis;

(xxi) Ms Alexis Vincent;

(xxii) Ms Lena Brown;

(xxiii) Ms Cynthia Ugle; and

(xxiv) Mr Wayne Smith.

They object to the proposed settlement on the basis that legal costs should not be deducted from the settlement funds, that tax should not be deducted from any compensation payments, and that claims in respect of more remote relatives should be available. At the settlement approval hearing Ms Todd and Ms Lewis made that submission by reference to the work undertaken by their grandmothers and Ms Todd's mother during the claim period.

(h) Ms Donelle Marie Narrier objects to the proposed settlement on the basis of the inadequacy of the settlement sum and she questions whether there should be a criminal penalty for the unpaid wages. She seeks a breakdown of the figures for the proposed settlement to understand how the amount was arrived at, complains about the failure to compensate by way of interest on the unpaid wages, and also in relation to legal costs. She set out some of the many ways in which she says people's lives continue to be affected by the manner of the treatment of Aboriginal people during the claim period, including mental health difficulties, loss of identity through removal from parents at a young age, poverty, lack of education, and other health issues.

139 Ms Miller/Kickett objects to the proposed settlement centrally on the basis that the settlement amount is inadequate to compensate for the work done by her parents who were not paid for their work. She says that her mother was forcibly removed from her family and put into Tardun Mission where she worked in a farmhouse and suffered abuse from age 12.

140 Ms Taylor objects to the proposed settlement on the basis that the claim period should date back to the applicable 1905 Act, and argues that the claim period could have been more appropriately set had the lawyers consulted with Aboriginal communities. Ultimately however, Ms Taylor does not oppose the proposed settlement, because she considered that without it "this case might go on for years."

141 I now turn to address the central issues raised by the objections.

7.9.1 Inadequate settlement amount

142 The objections to the adequacy of the proposed settlement amount are readily understandable. The proposed settlement does not come near to full compensation for the economic loss suffered by unpaid or underpaid Aboriginal workers during the claim period. But it does not necessarily follow from that that the objections justify refusing to approve the proposed settlement.

143 Here, the substantial and cumulative risks and difficulties of the case mean that it is impossible for the applicant's lawyers to be confident of success in the proceeding. There is a significant risk that if the case proceeds to trial the applicant's and class members' claims will fail, or class members will succeed on claims which relate to only a subset of the class members and for a quantum less than the proposed settlement. The risks on liability and quantum faced by the

proceeding are a powerful factor in favour of settlement approval because under the proposed settlement class members will get some compensation.

144 Further, some of the objections regarding the adequacy of the proposed settlement sum are based in complaints regarding the harsh and discriminatory treatment some First Nations people suffered during the claim period. But the proceeding only raises claims regarding the non-payment or underpayment of Aboriginal workers for the work they performed during the claim period; it does not seek compensation for the other mistreatment they suffered.

7.9.2 Excessive deductions from Settlement Sum

145 In relation to the objections directed to the proposed deductions for legal costs, and the contention that the State should have covered all of the legal costs, it is necessary to understand that the Court has no power to rewrite the parties' agreement. The State agreed to meet the applicant's party/party legal costs capped at $15.4 million, which is far from a niggardly offer in respect to party/party costs. The Court cannot require the State to offer a higher amount.

146 More fundamentally, as I later explain the Court has given careful attention to the reasonableness of the legal costs proposed to be charged to the class members; it has considered the reports of the independent Costs Referee and has approved costs in an amount substantially lower than the Costs Referee's recommendation. These objections do not justify refusing to approve the proposed settlement.

147 Other objections concern the operation of Commonwealth taxation laws on the compensation to be received by class members; they do not directly concern the proposed settlement. There is no basis for the Court to refuse to approve the proposed settlement because of the way Commonwealth taxation laws operate.

7.9.3 Inadequacies in the pleaded claims

148 In relation to the objections regarding the claim period in the proceeding and the decision to restrict the claims in the proceeding to complaints about non-payment or underpayment of wages, it is necessary to understand that the pleading of the claims in the proceeding was made by an experienced legal team, including experienced senior counsel, acting for the applicant.

149 Their recommendation to the applicant not to bring a claim for the abuse, ill treatment and discrimination that class members and their family member's suffered was a forensic decision available to them to make. That is not to deny or minimise the psychological scars and

intergenerational effects of the treatment that they endured; it is just that this proceeding is not aimed at achieving compensation for that type of non-economic harm. And their recommendation to the applicant to commence the claim period from the introduction of the 1936 Act was made because of the practical difficulties they foresaw with bringing a case on behalf of people who had worked even longer ago than 88 years. Again, that was a forensic decision available to them to make.

150 These objections do not justify declining to approve the settlement.

7.9.4 The limitation in the SDS to living spouses and children

151 In relation to the objections regarding the restriction in the SDS limiting eligible claimants to those who actually worked during the claim period, or their living spouses and children, the applicant submits that restriction is fair and reasonable because:

(a) extending the distributions beyond those who actually worked during the claim period, or their living spouses and children, would mean that the payments per claim would be significantly diluted being shared between a greater number of descendants; and

(b) doing so would introduce a number of complexities in the distribution scheme which would significantly increase settlement administration costs, such that it would outweigh any perceived benefit.

As I explain when dealing with the terms of the SDS, I am satisfied these restrictions are fair and reasonable, and they do not justify declining to approve the settlement.

7.9.5 The decision-making did not involve First Nations people

152 One can well understand why some objectors would complain that the decisions in the proceeding were made by white people, but the decisions in the case were made by both Indigenous and non-Indigenous people. The representative applicant in the case is Mr Street, a senior elder of the Gooniyandi People, and he gave specific instructions in relation to critical aspects of the proceeding, including in relation to the proposed settlement. The seven sample group members are First Nations people, and they also played an important role in the case. Further, Shine engaged in consultation with Aboriginal community leaders at various points, and two members of the applicant's counsel team, Mr Creamer and Ms Benn, are First Nations people. The Court understands the importance of Indigenous involvement in decision-making in a case where class members have historically been disenfranchised, and it has listened closely to their concerns.

8. THE TERMS OF THE SDS

153 The SDS forms part of the Settlement Deed, but it was amended so as to ease the eligibility requirements by a later Head of Agreement between the parties, and then further revised during the course of the settlement approval hearing. I will refer to the revised SDS as the SDS.

154 The four principal features of the SDS are:

(a) the requirement for class members to register their claims in accordance with the proof and documentation requirements of the Registration Process;

(b) it provides for payments to the spouse and children of persons who worked in the claim period, but not to more extended relations;

(c) the criteria adopted for distribution between class members is on the basis of date of birth; and

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

155 In the SDS, "Claimant" means a person in respect of whom the Administrator is determining should be accepted as an OEC or DEC. OEC and DEC mean persons who the Administrator is independently reasonably satisfied meets the respective eligibility criteria set out in clauses 50 and 51 of the SDS.

156 The SDS involves in essence two steps in determining the eligibility of class members to participate in the settlement.

157 First, the SDS provides for Shine to obtain registrations from Original Potential Claimants and Descendant Potential Claimants during the Registration Process. "Original Potential Claimants" are defined as people that worked during the claim period, and "Descendant Potential Claimants" are the spouses and children of Original Potential Claimants who are deceased.

158 The assessment is made by reference to the eligibility criteria, which includes matters as to identification, Aboriginal or Torres Strait Islander identity, whether they were born before 9 June 1962 (i.e. aged at least 10 years old during the claim period), that they were paid no or nominal wages during the claim period, that it relates to at least one nominated workplace in Western Australia which existed at the relevant time, and the provision of information allowing payment to be made.

159 Second, after Shine has made its determinations in respect of these "potential" claimants, a further determination is to be made as to whether such claimants are eligible to receive a distribution. That is a determination as to whether the claimant is an OEC or a DEC. That may occur in one of two ways:

(a) the State may confirm that the eligibility criteria are satisfied during the Registration Process; or

(b) the Administrator may determine that the eligibility criteria are satisfied.

160 The Administrator must be satisfied as to eligibility on the basis of "credible and cogent evidence" and has absolute discretion as to what is credible and cogent evidence, taking into account the characteristics of class members.

161 The State has agreed to pay one amount of $16,500 in respect of each OEC claim up to a cap of 10,000 claimants, thereby determining the Settlement Fund Amount.

162 The Administrator will then pay out from that Settlement Fund Amount, after Court-approved deductions, an amount in accordance with the Distribution Criteria (as defined) approved by the Court to eligible claimants. The following principle applies as to the determination of the distributions:

(a) if the OEC is alive, they are to receive the entirety of the due payment; and

(b) if the OEC is deceased, a living spouse who is a DEC is to receive the entire payment or, if there is no living spouse, the payment is to be divided equally amongst any living children that are DECs.

163 The Distribution Criteria is provided in Annexure A to the SDS. It proposes a two-category distribution which is differentiated by the OEC's date of birth. It operates in the following manner:

(a) OECs born on or before 1930, who it may be assumed spent the majority of their working life under conditions which prevailed in the claim period (or worked either through the entire claim period, or almost all of it) are placed in "Category 1";

(b) OECs born on or after 1930 are placed in "Category 2";

(c) OECs in both Category 1 and Category 2 receive a base payment of $10,000 (directly or to the relevant DEC/s); and

(d) OECs in Category 1 receive a "top-up" payment, being a pro-rata distribution of the net surplus remaining in the Settlement Sum, after the making of base payments and the payment of Court-approved deductions by the Administrator.

164 Other key terms of the SDS provide:

(a) a claimant may seek review of the Administrator's decision, with Independent Counsel to be appointed for the purpose of making binding determinations;

(b) the payment of Court-approved deductions including:

(i) the Court-approved litigation funding charges;

(ii) the Court-approved legal costs incurred by the applicant;

(iii) reimbursement payments to the applicant and sample group members; and

(iv) the Court-approved administration costs for the conduct of the administration, including the costs of any legal advisor who is appointed to advise the Administrator;

(c) the provision of distribution statements to each eligible claimant by the Administrator, or a rejection notice to unsuccessful claimants;

(d) the provision for what is to be done with uncollected and residue monies; and

(e) other general matters, including Court referral of issues arising in relation to the administration of the SDS.

8.1 Whether the SDS is fair and reasonable

165 In *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468 at [43]-[44] Moshinsky J usefully summarised the authorities in relation to the fairness of a settlement distribution scheme, as follows:

> 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 applicants 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.

166 I am satisfied having regard to those matters that the SDS is fair and reasonable as between class members. In particular, it provides for a fair division of the proceeds of the proposed settlement between eligible class members pursuant to the same principles and procedures, the administration process does not involve "judgment calls" except perhaps in relation to the assessment of what constitutes "cogent and credible" evidence of eligibility, the scheme provides a meaningful opportunity for review, and if it proceeds as planned the settlement administration process will not involve unreasonable costs or delay.

167 The design of the Distribution Criteria in the SDS involved a number of structural decisions; given the number of claims, the complexity of some claims, the length of the claim period, and the size and characteristics of the class members, there are many ways in which distribution could be fashioned. The applicant's representatives designed an SDS which provides for two categories of class member:

(a) Original Eligible Claimants (OECs); and

(b) Descendant Eligible Claimants (DECs),

and which applies differential treatment to those two categories.

168 The SDS provides two methods for determining whether potential claimants are eligible to receive a distribution under the SDS, both of which are fair and timely.

169 Under the first method, the proposed SDS facilitates a fast-track determination of eligibility for claims that have received confirmation by the State. Typically, the State's confirmation follows

Shine assisting class members with the registration forms, and endeavouring to validate and pre-qualify class members for registration. Where the State accepts the eligibility of class members put forward through that process, there is no need for the Administrator to repeat the process which will reduce administration costs.

170 Under the second method, where the State does not confirm eligibility, the Administrator is required to make an independent assessment based on clear and cogent evidence. The Administrator has absolute discretion to determine what is clear and cogent evidence for eligibility, and to take into account the characteristics of the class members in doing so.

171 In relation to OECs, the SDS provides that the OEC is to receive the entirety of the due payment if they are alive. If the OEC is deceased, the SDS provides that the OEC's living spouse, or if there is no living spouse, the OEC's living children are to receive that OEC's share. In this regard the SDS approximates the rules of intestacy in Western Australia, but entitlement to a share of the amount attributable to the deceased OEC is limited to that person's living spouse or children.

172 Given the likely high rates of intestacy within the class, I am persuaded that that approach is appropriate to avoid the wastage and inefficiency of potentially lengthy and expensive disputation about entitlements to deceased estates. It is also appropriate because if eligibility is allowed for descendants further than the living spouse or children of an OEC then the amounts per person are likely to be very small, and the costs of registration and payment to such descendants will substantially consume their share of the Settlement Sum.

173 As earlier explained, the two-category Distribution Criteria provides that all OECs will receive a base payment of $10,000 and provided there are sufficient funds, OECs born on or after 1930 will receive an additional modest "top up" payment. The applicant submits that the Distribution Criteria is fair because it ensures a base payment to all OECs and that a top up payment is available to those class members with the highest claim values on account of that OEC having worked for a longer time during the claim period. The applicant was keen to ensure that those OECs who worked the longest periods without pay should receive more than those who worked shorter periods. While it is open to describe the compensation payable as constituting a limited redress scheme rather than compensation for lost wages, I consider it to be roughly fair to provide slightly more to those who suffered more. The base payment recognises the litigation risk shared by all class members, and the minimum payment quoted to class members in the Settlement Notice.

174 The SDS contains a mechanism for class members to formally request a review of their entitlement or distribution under the Scheme. The Administrator can correct a notice advising of entitlement or distribution if satisfied that the review request discloses an error, slip or omission. In all other cases, the review request is referred to two junior counsel, as approved by the Court, to make a final and binding determination. I am satisfied that this incorporates appropriate checks and balances in the determination of eligibility and distribution.

175 The SDS does not provide for differing methods of payment to class members. Each distribution will be made by Electronic Funds Transfer. Whilst this may raise issues for some class members having regard to their particular circumstances, it must be balanced against the costs associated with providing other modes of payment to the claimant group, some of whom are located remotely. I am satisfied the proposed approach is reasonable.

176 The proposed SDS provides, at the Administrator's absolute discretion, for the provision of residue monies to an independent charity associated with Aboriginal people as approved by the Court. I am satisfied that it is appropriate.

177 Each of the allowable deductions from the Settlement Sum are for Court-approved amounts, and in a Court-approved priority. I will separately explain the reasons for each of the deductions allowed.

8.2 Appointment of the Administrator

178 Ms Antzoulatos' evidence shows that Shine sought tenders for appointment as the Scheme Administrator, and received tenders from Grant Thornton, Deloitte, FTI Consulting and McGrathNicol.

179 Shine proposed Grant Thornton as the most suitable firm on the basis of their experience administering a similar scheme in the Queensland Stolen Wages Class Action, *Pearson v State of Queensland* (QUD 714 of 2016), which concerned similar claims on behalf of Aboriginal and Torres Strait Islander people who worked in Queensland from the 1930s to the 1970s, and also because its tender estimate was competitively priced (although not the least expensive).

180 I accept the applicant's submission that Grant Thornton's work in providing expert loss opinions in the proceeding does not disqualify them from being appointed as Administrator. Indeed, the firm's familiarity with the proceeding may also assist in keeping administration costs down. Grant Thornton is appropriately qualified to be appointed as Administrator. It is an established accountancy firm, with specific experience in conducting a similar settlement

administration, with a cohort of class members with similar characteristics, in which it performed its role well.

181 I am satisfied that it is appropriate to appoint Grant Thornton as the Administrator.

8.3 The reasonableness of the settlement administration costs

182 Grant Thornton estimated the costs of the administration at approximately $2.675 million which I consider to be reasonable. Having regard to the range in the tenders I am satisfied that is within the range of what is fair and reasonable. The settlement approval orders however set aside $3 million to ensure there are enough funds to complete the administration, and I approve the deduction of that amount from the Settlement Sum. The settlement administration costs are to be the subject of assessment by the Costs Referee to ensure that they are fair and reasonable.

9. THE LEGAL COSTS PROPOSED TO BE CHARGED

183 By orders made 20 November 2023 the Court appointed Ms Kerrie Rosati as the Costs Referee under s 54A of the FCA Act to inquire into and report to the Court as to the fairness and reasonableness of the applicant's legal costs and as to what proportion of those costs would be recoverable as party/party costs. By orders made on 12 August 2024 the Costs Referee was also directed to provide an opinion on the fairness and reasonableness of costs associated with the post-settlement Registration Process, including the physical outreach program.

184 Initially, Shine proposed legal costs to the Costs Referee totalling $33,252,230 (representing $24,511,099 in fees and $8,741,131 in disbursements). The applicant's document "**MFI-1**" shows the costs of the proceeding which the firm put forward to the Costs Referee, for the period up and including the settlement approval hearing on 28-29 October 2024. Up to 1 October 2024 it states the costs which were the subject of assessment by the Costs Referee, and after 1 October 2024 it includes estimates. It provides:

Work Period	**Fees**	**Uplift**	**Total fees**	**Disbursements**	**Total**
Up to 14/11/23 (**pre-settlement work**)	$10,297,857	$1,106,269	$11,404,126	$6,804,998	$18,209,125

15/11/23 to 30/6/24 **(outreach work)**	$6,581,177	$727,179	$7,308,356	$1,308,452	$8,616,808
15/11/23 to 30/9/24 (**non-outreach**)	$3,467,480	$866,870	$4,334,350	$264,705	*$4,361,858*
1/10/24 to settlement approval (est)	$1,171,412	$292,853	$1,464,265	$270,000	$1,734,265
Subtotal for post-settlement work	**$11,220,069**	**$1,886,902**	**$13,106,971**	**$1,843,157**	**$14,950,128**
Total pre and post settlement work	**$21,517,927**	**$2,993,172**	**$24,511,097**	***$8,741,131***	***$33,252,230***

185 There appear to be some arithmetical errors in MFI-1, which I have italicised. The correct total of the row labelled "15/11/23 to 30/9/24 (non-outreach)" appears to be to be $4,599,056, and the total in the disbursements column should be $8,648,156. Allowing for these changes the total of the figures in the right-hand column comes to $33,159,255, rather than the total specified. But that difference is not material.

186 The amount of $14.95 million for post-settlement work gave me serious concern.

187 The Costs Referee produced three reports from which I have drawn the following (along with some reduction calculations from MFI-1):

(a) by a report dated 2 May 2024 (**First Costs Report**) (dealing with the applicant's legal costs and disbursements for work undertaken from the commencement of the proceeding to 14 November 2023, being a date just after the in-principle settlement was reached) the Costs Referee recommended approval of the applicant's solicitor-client costs for this period in a total of $17,172,772 (representing $9,371,049 in fees, $1,006,705 in uplift charges and $6,795,016 in disbursements). That involved a global reduction of 9% of Shine's claimed professional fees for work done up to 14 November 2023, being a reduction of $1,107,192;

(b) by a report dated 18 September 2024 (**Second Costs Report**) (dealing with the applicant's costs and disbursements for work undertaken in relation to the outreach program from 15 November 2023 to 30 June 2024, which I infer takes in the Registration Process) the Costs Referee recommended approval of the applicant's legal costs for this period in a total of $8,340,174 (representing $6,408,719 in fees, $727,179 in uplift charges and $1,204,274 in disbursements). That involved a 12.5% reduction in Shine's claimed professional fees for travel between 15 November 2023 to 30 June 2024, being a reduction of $309,965;

(c) by a report dated 25 October 2024 (**Third Costs Report**) (dealing with the Applicant's remaining legal costs and disbursements for costs not covered in the First or Second Costs Report) for work done from 15 November 2023 up to the date of the settlement approval hearing on 28 and 29 October 2024, including costs associated with the Registration Process and the outreach program between 1 July 2024 and 30 September 2024, not caught in the prior report, the Costs Referee recommended approval of the applicant's legal costs for this period in a total of $5,988,722 (representing $4,517,531 in fees, $953,670 in uplift and $517,520 in disbursements). That involved a global reduction of 3.5% of Shine's claimed professional fees for that period, being a reduction of $191,382.

The Costs Referee recommended approval of a total of $31,501,618.

188 Overall, the Costs Referee recommended fee reductions of $1,608,540, which Shine accepted. MFI-1 states that Shine's total costs and disbursements after those reductions total $31,643,691, whereas, as I have said, the Costs Referee calculated total costs as $31,501,618. Again, the difference is not material.

189 Then, during the settlement approval application, Shine offered two further reductions in its professional fees:

(a) first, a discount of $1,262,069 on fees by reducing the hourly rate charged for law clerks engaged in the Registration Process and outreach program from $341 per hour (excl. GST) to $260 per hour (excl. GST); and

(b) second, a discount of $1,132,141 on fees by reducing the percentage uplift charge under its Conditional Costs Agreement (**CCA**) for that item of work from 25% to 10%.

After those further reductions Shine sought approval for its costs in a total of $29,249,479, plus an allowance of up to $600,000 for work in finalizing the Registration Process and transitioning the database to the Scheme Administrator.

190 To those not versed in the costs commonly incurred in complex class action litigation, such costs may appear completely excessive, but it is necessary to consider the reasonableness of the costs having regard to the huge costs commonly associated with large, strenuously defended class action litigation. Costs of between $12 and $20 million are regularly reasonably incurred in such litigation. I say *reasonably incurred* because costs in such amounts are regularly certified as reasonable by independent Court-appointed costs referees and approved as reasonable by the Court. In relation to the huge post-settlement costs it is also necessary to keep in mind the particular difficulties and expense associated with the Registration Process given the particular characteristics of the cohort of class members.

191 Here, the costs are substantially higher than usual, which gave me cause for concern. But the independent Court-appointed Costs Referee recommends approval of Shine's costs in an amount of $31.5 million, which is $2.25 million more than the $29.25 million the firm now seeks.

192 The State opposes adoption of the Costs Referee's reports on two grounds. The State contends that:

(a) the hourly rates at which Shine charges out the law clerks it employs are excessive; and

(b) that Shine should be paid for only 50% of the work it performed in investigating the case prior to the applicant entering into a retainer with Shine in October 2019.

9.1 The cost of class member registration and related work

193 By an email to my chambers dated 11 November 2024, Shine informed the Court of the cost of the Registration Process and outreach program before the Costs Referee's reductions and before uplift charges:

Phase Code	Phase Code description	Units	Amount (GST inc)
SW021	Field work/Registration outreach program	166,474	$3,303,695
SW022	In-office time/Group member communication and registration	3,182	$7,171,739
Fees sub-total		169,656	**$10,475,435**
Disbursements incurred during period 15 Nov 23 to 30 Sept 24			$1,573,158
Total (GST incl.)			**$12,048,593**

194 The email states that the Costs Referee allowed $10,987,015 in professional fees for the Registration Process and outreach program (comprising $9,489,612 in hourly charges and $1,497,403 in 25% uplift charges). After the Costs Referee's reduction the quantum of the costs in the case, particularly those associated with the post-settlement Registration Process, continued to be of concern to the Court.

195 MFI-1 shows the fees associated with Shine's earlier class member communication and management and the opt out process, most of which work I infer was undertaken by paralegals and law clerks:

Phase Code	Phase Code description	Units	Amount (GST inc)
SW0003	Group member communication and	16,360	$576,671

	management		
SW006	Opt Out	16,614	$849,861
Total		33,001	**$1,426,532**

9.2 The nature of the work undertaken in the Registration Process

196 The cohort of class members in this case includes relatively high proportions of individuals:

(a) living in geographically remote locations;

(b) with low English or legal literacy;

(c) with limited access to technology, or with limited technological literacy, especially the older people; and

(d) for whom English was not their first language.

197 Shine primarily seeks to justify its fees for the Registration Process and outreach program on the basis that in order to achieve the appropriate level of class member registration it was necessary to perform that work to a high standard, and that the characteristics of the cohort of class members meant that that was necessarily very expensive. The firm relies on the fact that its registration work was effective in achieving a high level of registration, notwithstanding the characteristics of the cohort of class members and the remote locations in which many of them lived.

198 I accept that the characteristics of the cohort of class members meant that the Registration Process and the outreach program inevitably involved higher costs than in many other types of class action, and that absent Shine's good work the number of OECs would be significantly lower.

199 Ms Antzoulatos deposes that the Registration Process involved a core team of her, Ms Thomson (a practice leader), one senior associate, one associate, one senior solicitor and two solicitors and a large team of approximately 20 to 30 law clerks and paralegals. She says, and I accept, that the characteristics of the class member cohort meant that a physical outreach program was necessary as part of the Registration Process. I earlier described the intensity of the outreach program, which involved Shine visiting 111 locations and communities. Ms Antzoulatos said that involved a large team of solicitors, law clerks and administration assistants/paralegals were

involved in both the planning and physical conduct of the outreach program. That program involved direct interface with class members and back-office support in tracking registrations, data matching, de-duplication and other similar tasks.

200 I accept Ms Antzoulatos' evidence that while registration forms could be completed online or via post, as well as in person or over the phone, the information required by the State before a person could register produced difficulty for many class members. The difficulties included that:

(a) some class members found questions about work history, payment for work and, in the case of a Descendant Potential Claimant questions requesting particulars of the deceased OEC, difficult to understand and provide responses to;

(b) identification documentation had to be provided as part of the Registration Process but many class members did not have sufficient photo identification or birth certificates;

(c) most class members had no records in relation to their work or their deceased family members' work;

(d) many class members struggled to provide specific details about the farm work allegedly undertaken, including the names of employers or the farm itself, or the exact location beyond the name of the town around which the farm was based;

(e) many class members were unable to give complete particulars about family members, especially their grandparents or their spouse's family, as required under the SDS;

(f) many class members have had their name recorded differently across documents;

(g) many class members were confused about the need to re-register in the Registration Process if they had registered with Shine prior to 14 November 2023; and

(h) many class members, especially those in rural or remote areas or the elderly, were unable to provide direct contact details.

201 The difficulty experienced by class members was sometimes reflected in an emotional escalation, which required sensitive management by Shine. For example, Ms Antzoulatos deposes that a number of class members became visibly emotional or verbalised distress over the difficulty in completing a registration form for their deceased father in circumstances where their birth certificate did not contain his details. Other times, procuring the necessary registration information would necessitate the involvement of other family members or community offices.

202 I accept that the relative complexity of the registration requirements meant that many class members were unable to, or resisted, providing the information to complete their registration forms unless the forms were explained to them by Shine. The work undertaken by Shine also included rectification work, conducted by large teams of law clerks, in which Shine was required to remedy deficiencies with forms that did not meet the requirements of the SDS. As of 8 October 2024, over 4,000 registration forms either required rectification or were assessed as inconclusive because of the missing information.

203 On any assessment the Registration Process was a large job, which required repeated contact with class members and guidance to them, travel to remote locations, and an organisational infrastructure that few Australian plaintiff law firms could provide. The State estimates that 90% of those registered as potential claimants by Shine will ultimately prove eligible to share in the settlement. I commend Shine for the registration numbers its work achieved, which will reduce the time and cost necessary for the Administrator to confirm class members' eligibility.

204 The particular circumstances of the Registration Process mean that there is a basis for allowing a higher level of registration costs in this case compared to most other types of class actions.

9.3 The rate charged by Shine for paralegals and law clerks

205 Nevertheless, there remains a question as to whether the hourly rate Shine charged for its law clerks was excessive and as to whether some other less expensive approaches to class member registration could or should have been found. It is also necessary to remember that the work undertaken by law clerks was not restricted to the Registration Process and their work included earlier group member communications and work involved in the opt out process.

206 Until Shine offered to reduce the hourly rates charged for law clerks, Shine charged them at the rate of $325 per hour (excl. GST) from 2016 to mid-2022, and thereafter at $341 per hour (excl. GST).

207 The State provided the following chart derived from the Costs Reports as to the hourly rates Shine charged for law clerks:

Report	Rate (excl. GST)	Rate (incl. GST)	Units (6-minute increments)	Amount incl. GST
First	$325 (2016 to	$357.50	101,560 including	**$3,622,895**

Report	mid 2022) $341 (mid 2022 to date)	$375.10	5,215 for travel	(including $186,329 for travel)
Second Report	$341	$375.10	91,360 including 17,296 for travel	**$3,426,913** (including $648,772.96 for travel)
Third Report (pre 30 /09/24)	$341.00	$375.10	56,443	**$2,117,176**
Third Report (estimated post 30/09/24)	$260.00	$286	1,800 + 16	$468,000 + $4,160 = $472,160 excl. GST = $519,376

208 The period post-30 September 2024 described in the fourth row reflects the discounted hourly rate Shine offered to apply to the post-settlement work from 14 November 2023. The total professional fees for law clerk's work comes to approximately $9.639 million (incl. GST). It should be understood that the first three rows of the chart predate Shine's belated offer to reduce the hourly rate for post-settlement registration work to $260 per hour.

209 Shine confirmed that it employed a mix of undergraduate law students and law graduates (but pre-admission) as law clerks. The exact mixture was not quantified in relation to the First Costs Report, but Annexure B to the Second Costs Report lists the relevant fee earners. Shine informed the State that 15 of the law clerks had completed their Bachelor of Laws. The State counts 64 employees at the $375.10 hourly rate in the Second Costs Report of which the State says that 52 were unqualified law clerks, one was an Administrative Assistant who is named "NCT CA Clerk", and there were nine paralegals and two people with the title "paralegal law clerk". Shine does not contend otherwise.

210 I proceed on the basis that about 25% of law clerks Shine employed on the proceeding were legally qualified (but not admitted). The rest of the law clerks were unqualified.

9.4 The asserted error by the Costs Referee

211 In the First Costs Report (at [59]) the Costs Referee referred to the hourly rates for law clerks provided for in the New South Wales Costs Assessment Rules Committee Guidelines (**Guidelines**). The Guidelines provide the following ranges of hourly rates on a party/party basis:

(a) for "paralegals", a range of $120 – $250 (excl. GST) from 2016, and $135 – $300 (excl. GST) from May 2023; and

(b) for "clerks/secretaries", a range of $75 – $150 (excl. GST) from 2016, and $90 – $180 (excl. GST) from May 2023.

212 The Guidelines define a "Paralegal" and a "Clerk", as follows:

(a) the "Paralegals" category is intended to cover employees not admitted but holding a law degree or diploma or equivalent experience; and

(b) the "Clerks/Secretaries" category is intended to cover unqualified employees.

213 The Federal Court Scale (**Scale**) draws a similar distinction using different language. The Scale differentiates between "a law graduate or articled clerk" and a "clerk/paralegal", as follows:

(a) attendances capable of performance by a law graduate or articled clerk for each unit of 6 minutes: $27 i.e. $270 per hour (excl. GST); and

(b) attendances capable of performance by a clerk or paralegal – for each unit of 6 minutes: $13 i.e. $130 per hour (excl. GST).

214 In relation to unqualified Clerks, the hourly rates provided for by the Guidelines and by the Scale are substantially lower than the rates Shine charged for its law clerks. As I have said, Shine charged out paralegals and clerks at the rate of $325 per hour (excl. GST) from 2016 to mid-2022, and thereafter at $341 per hour (excl. GST).

215 On 20 October 2024 the State wrote to the Costs Referee about the rates being charged for law clerks and the Costs Referee responded on 24 October (before the Third Costs Report was complete) merely by referring to the reasons set out in the First and Second Costs Reports. In the First Costs Report the Costs Referee said that $341 per hour (excl. GST) ($375.10 incl.

GST) is a reasonable hourly rate for law clerks on the basis that they are "*within the range of rates routinely charged by lawyers in complex commercial and representative proceedings…and are at the upper end of or above the rates set out in the Guideline*." The Costs Referee identified the reasonable range of hourly rates for paralegals and law clerks charged in the market by firms engaged in complex commercial and representative proceedings, as being between $150 and $350 (excl. GST).

216 Shine responded to the contention that it was seeking to charge excessive hourly rates for law clerks by:

(a) noting that the rates in the Guidelines and the Scale relate to party/party costs, and it is billing on a solicitor/client basis; and

(b) pointing to the discount it is now proposing be applied to its fees, which reduces the rates for law clerks to $260 per hour (excl. GST) for the period of time in which they were engaged in the Registration Process and outreach program.

217 Shine also argues, while maintaining that the Guidelines and the Scale should not be the primary reference for determining the reasonableness of legal fees charged to class members, since they concern party/party rates, that the discounted $260 (excl. GST) hourly rate it proposes is within the range proposed in the Guidelines for paralegal rates of $135 – $300 (excl. GST) from May 2023.

218 The State submits the Costs Referee erred in assessing an appropriate hourly rate for law clerks, by failing to take into account that paralegals hold a legal qualification while law clerks are unqualified and by treating them as carrying the same rate. It says that approximately 75% of the law clerks employed by Shine did not have law degrees or equivalent, so their hourly rates should have been assessed at a lower rate than the rates actually charged. The State further says that the rate Shine charged is too far above the party/party rates in the Guidelines and the Scale and barely within the upper end of the range of market rates provided by the Costs Referee.

219 The State also submits that the nature of the in-office work (as distinct from physical outreach work) undertaken in the Registration Process was essentially call centre and data entry work, which should be charged at a lower rate than the rates allowed by the Costs Referee, being the top-end of the market range. Against that the applicant says that the work undertaken by the law clerks required skilful listening and understanding, as well as ensuring data entered met

the requirements of the SDS, which justifies a higher rate than the market rates for less skilled work.

220 I do not accept the applicant's contention that the nature of the law clerk's work in the Registration Process and outreach program and the earlier group member communications and opt out work justifies a rate of $341 per hour (excl. GST) that Shine sought to charge, nor the reduced rate of $260 per hour (excl. GST) it now proposes (which is only referable to post-settlement registration work):

(a) first, it is far from unusual for call centre staff to be required deal with difficult content, to address difficult technical problems, to deal with upset or angry clients or customers, or to be required to display sensitivity. In my view, much of the work in the proceeding regarding class member communications, opt out process and the post-settlement Registration Process could have been performed by call centre staff rather than law clerks. Indeed, it was necessary for such work to be performed by other types of employees or contractors if Shine proposed to charge such high hourly rates for its law clerks;

(b) second, Ms Antzoulatos' first affidavit refers to significant support from "a large back-office team assisting in tracking registrations, data matching, de-duplication and other similar tasks", and she distinguishes that work from the IT and systems specialists dealing with the collation and analysis of data. That work by the "large back-office team" is a paradigm case of data-entry work. At least that part of the work associated with the Registration Process was insufficiently different to data entry work to justify $341 per hour (excl. GST) or $260 per hour (excl. GST);

(c) third, Shine handed up examples of the billing entries of law clerks working on the Registration Process, one with a law degree and one in the second year of law school. The majority of the entries appear to pertain to attendances upon class members to "rectify outstanding issues including obtaining current identification documents and obtaining outstanding information". Contrary to the thrust of Shine's contentions, that is work of a type that one could see competent and well-trained call centre staff undertaking. None of it involved taking a "work history" from a person as was suggested in the hearing. Other entries recorded work such as "conducting file review" and "conducting eligibility check". There is little in the evidence to support the applicant's contention that the nature of that work meant that it was appropriate to use

law clerks at the rate of $341 per hour (excl. GST), or even at the reduced rate of $260 per hour (excl. GST); and

(d) fourth, to the extent that work was undertaken by legally qualified law clerks (thus "paralegals" under the Guidelines), it is not clear to me why that was appropriate. I do not accept that it was necessary for a person to hold a law degree in order to competently undertake the work associated with the Registration Process.

221 Until its belated offer to reduce the hourly rate for law clerks engaged in post-settlement registration work, Shine charged out law clerks at the rate of $341 (excl. GST) per hour from mid-2022. It effectively conceded that rate was too high by dropping the rate for post settlement registration work to $260 per hour when its rates were challenged. Whether or not that was a concession, I am satisfied that hourly rates of $341 per hour (excl. GST) for the pre-settlement work and $260 per hour (excl. GST) for the post-settlement work undertaken by unqualified law clerks is not fair and reasonable.

222 From May 2023 for pre-settlement work, and from October 2023 for post-settlement registration work (until its belated offer to reduce the rate), Shine was charging:

(a) unqualified law clerks at a rate:

(i) $251 per hour above the bottom of the party/party range, and $161 per hour above the top of the party/party range, for a Clerk under the Guidelines. It was charging approaching double the rate at the top of the party/party range; and

(ii) $211 more per hour than the Federal Court Scale (more than double the Scale rate of $130 per hour); and

(b) legally qualified (but not admitted) law clerks (termed Paralegals in the Guidelines) at a rate:

(i) $206 per hour above the bottom of the party/party range, and $41 per hour above the top of the party/party range, for a Paralegal under the Guidelines; and

(ii) $71 per hour more per hour than the Federal Court Scale.

223 For the period up to May 2023, before the rates under the Guidelines went up, the disparity between Shine's rates and the party/party rates under the Guidelines were even more pronounced.

9.5 Relevant principles regarding rejection or non-adoption of a referee's report

224 In *Chocolate Factory Apartments v Westpoint Finance* [2005] NSWSC 784 at [7] McDougall J laid out the principles for exercising the Court's discretion to reject or not adopt part of a referee's report. They relevantly include:

(a) the discretion to not adopt a report should be exercised consistently with the purpose of the reference;

(b) in so far as the subject matter of dissatisfaction with a report is a question of law, or the application of legal standards to established facts, a proper exercise of discretion requires the judge to consider and determine that matter afresh;

(c) where the report shows a thorough, analytical and scientific approach to the assessment of the subject matter of the reference, the Court would have a disposition to accept the report;

(d) where the report reveals some error of principle, patent misapprehension of the evidence or manifest unreasonableness in fact finding, then there would arise reasons for rejecting it; and

(e) the referee should give sufficient reasons to enable the parties and the Court to know the that the conclusion is not arbitrary or influenced by improper considerations, and is not affected by the flaws described above.

225 I am satisfied that that it is appropriate to not adopt the Costs Referee's reports in relation to those parts which recommend approval of Shine's fees for the work performed by law clerks, and in relation to the overall total of reasonable costs. It is appropriate to adopt the balance of the Costs Reports.

226 Pursuant to s 33V(2) of the FCA Act the Court has an obligation ensure that any legal costs proposed to be deducted from the settlement so are "just"; i.e. fair and reasonable. The question as to the reasonableness of legal fees includes an assessment of "whether the charge out rate was appropriate having regard to the level of seniority of that practitioner and the nature of the work undertaken": ***Downie*** *v Spiral Foods Pty Ltd* [2015] VSC 190 at [181] (J Forrest J).

227 The Costs Referee concluded that Shine's hourly rates for law clerks were fair and reasonable because they fell within "the range of rates routinely charged by lawyers in complex commercial and representative proceedings"; i.e. within market rates. In my view the Costs Referee erred in so determining when:

(a) in relation to paralegals and clerks, both the Guidelines and the Scale differentiate between the rates for employees with a law degree (but not admitted) and those without a law degree. The Costs Referee's assessment of "the range of rates routinely charged by lawyers in complex commercial and representative proceedings" does not differentiate between legally qualified paralegals and unqualified law clerks and it should have, particularly when 75% of the law clerks engaged in the relevant work did not have legal qualifications;

(b) the Costs Referee's assessment of "the range of rates routinely charged" was made expressly by reference to lawyers engaged in "complex commercial litigation and representative proceedings". In my view that broad brush approach fails to sufficiently take into account "the nature of the work done" by the law clerks: *Downie* at [181]. Some aspects of commercial litigation and representative proceedings are complex and may justify paying law clerks at high hourly rates, whereas other parts are not. Generally speaking, class member registration work and class member communication is not complex and should not command such top of the market hourly rates; and

(c) even allowing for the increased difficulty arising from the characteristics of the cohort of class members in this case, the registration work in this case should not command such top of the market hourly rates.

228 I consider that the Costs Referee fell into error by:

(a) failing to sufficiently take into account the different hourly rates under the Guidelines and the Scale that apply to qualified Paralegals and unqualified Clerks;

(b) failing to identify that approximately 75% of the employees Shine identified as paralegals and law clerks were not legally qualified (and thus not Paralegals under the Guidelines), and therefore attracted lower hourly rates under the Guidelines and the Scale;

(c) failing to appreciate that much of the class member registration work, opt out work and class member communication could reasonably have been undertaken by call centre and data entry workers, at substantially lower hourly rates;

(d) approving as fair and reasonable an hourly rate for law clerks of $341 per hour excl. GST, without giving adequate consideration to the type of work the law clerks were engaged in and when that was so substantially above the Guidelines and the Scale;

(e) failing to take a global view as the fairness and reasonableness of the costs associated with law clerk's work in the case; and

(f) failing to step back and consider whether, globally, it was fair and reasonable to run up approximately $11 million in fees and uplift for the post-settlement Registration Process.

229 Shine sought to rely on *HFPS Pty Ltd (Trustee) v Tamaya Resources Ltd (In Liq) (No 3)* [2017] FCA 650 at [111], where Wigney J observed that "[t]he Court's role in approving a settlement does not include performing an assessment or taxation of legal costs". His Honour found that there was no "basis to substitute the Court's own subjective assessment of a reasonable amount for legal costs", because there was no error shown in the costs report. Here, the position is different. I am persuaded that the Costs Referee fell into error in relation to the reasonableness of the costs incurred through law clerk's work, particularly in the post-settlement period, and I have not adopted that part of the Costs Referee's reports. The Court's task is to decide what deductions from the Settlement Fund Amount should be approved and I consider it appropriate to approve costs with a substantial reduction.

9.6 What quantum of legal cost is fair and reasonable

230 The State seeks a reduction in Shine's professional fees for work undertaken by unqualified law clerks throughout the proceeding in a total of $4.129 million. It reaches that figure by reducing by half the applicable hourly rate for those Clerks without a law degree (being 75% of the law clerks), thereby reducing their hourly rate from $375.10 to $187.55/hr. That rate is just above the maximum party/party rate allowed for clerks under the Guidelines, and at the lower end of the Costs Referee's view as to "the range of rates routinely charged…in complex commercial and representative proceedings. This change, applied to the clerk rates reported in each Costs Referee's Report, reduces the overall amount charged for clerks by $3.34 million.

231 On the State's argument, it follows that the uplift fees charged by Shine must also be reduced in line with the reduced hourly rates. It calculates that by reducing the amount on which uplift was permitted to be charged by $3.34 million, from $20.297 million to $16.959 million. This reflects the difference between the fees actually charged and the rates as adjusted by the State. Then, the State subtracts the amount of fees paid by the Funder (as no uplift was charged on that amount), and calculates the uplift on the remainder. It treats that result as the correct adjusted uplift. The adjusted uplift is $790,998 less than the uplift allowed by the Costs Referee.

232 Adding the effect of the State's proposed reduction in law clerk rates ($3,338,289) and its proposed reduction in uplift ($790,998) results in a proposed overall reduction of $4.129 million.

233 In response to the challenge to the fairness of its fees Shine proposed to reduce its total legal costs to $29,249,479, being a reduction of approximately $2.25 million from the costs as allowed by the Costs Referee. It achieves that reduction by reducing the hourly rate for law clerks engaged in the Registration Process and outreach program from $341 per hour (excl. GST) to $260 per hour (excl. GST) and reducing the percentage uplift from 25% to 10% for the period of the Registration Process.

234 I am persuaded that Shine's costs should be approved with a reduction roughly in line with the State's submissions.

235 I do not, however, purport to decide what hourly rate is fair and reasonable for law clerks generally, nor do I do so in this specific case. That is particularly so when the Court has no evidence as to what Shine paid the law clerks per hour, what law firm "on costs" are generally or what Shine's "on costs" were at different points of time, or what reasonable profit ratio is appropriate for work performed as part of a post-settlement registration process, or in other types of class member communication. And there is unlikely to be one fixed reasonable rate. It is likely to depend upon the type of work undertaken by the law clerks and, outside of the Registration Process and outreach program, the evidence did not provide any insight into the work undertaken by law clerks.

236 Before the Costs Referee's reports and before it proposed a discount to its fees, Shine had run up approximately $12 million in fees (not disbursements) including uplift charges for the work it undertook in the post-settlement Registration Process most of which work was undertaken by law clerks. After the Costs Referee's reductions those fees came to approximately $11 million and after the discount Shine belatedly proposed, those fees came to approximately $8.8 million. And it ran up another $1.43 million in fees for opt out and earlier class member communications, most of which work I infer was undertaken by law clerks.

237 Standing back and taking an overall view, even having regard to the difficulties associated with the characteristics of the cohort of class members in this case, such fees are seriously overblown. It may not be the whole cause but it seems likely the costs blowout can be largely put down to excessive hourly rates charged by Shine for its unqualified law clerks. Even after

the Costs Referee's reductions, and the discounts which Shine proposes, I consider the overall costs to be too high.

238 My concerns are not limited to the post-settlement Registration Process, but in relation to that Shine should have come to the Court before it ran up those enormous costs so as to give notice of that proposed expenditure. Had it done so the Court would have been concerned to ensure that a significantly less expensive solution was found, or at least attempted. It was necessary for Shine to keep a much tighter grip than it did on the expenditure of monies which would ultimately come out of the class members' recoveries, and greater attention needed to be given to whether there were cheaper or more efficient ways of achieving similar outcomes. Had Shine kept the Court informed, the situation where the Court is forced to disallow a substantial amount of fees after they have been incurred, could have been avoided.

239 I approve Shine's professional fees as fair and reasonable with a reduction of $4 million from the amount approved by the Costs Referee, which reduces the applicant's total legal costs to $27,501,618. That reduction is approximately $1.7 million more than the reduction in total costs after Shine's belated offer to reduce its charges. It does not, however, take into account Shine's claimed winding down costs and transitional costs which I deal with below.

240 The "Applicant's Actual Costs" are defined in clause 2.1.5 of the Settlement Deed as follows:

> Applicant's Actual Costs means the Applicant's legal costs of the Proceeding that the Applicant seeks to be deducted from the Settlement Fund Amount, and which are not part of the Agreed Costs Component.

241 I note however that the ACC is primarily being distributed to the Funder, and partially used to reimburse ATE Costs. It should suffice to note that:

(a) the Court approves Shine's costs of the proceeding (except for any transitional allowance) in the amount of $27,501,618;

(b) Shine has been paid $13,358,868 of its costs;

(c) Shine is therefore due to receive $14,142,750, (of which it will receive $996,132 pursuant to order 5(b)(ii)); and

(d) therefore, it is appropriate to approve the deduction of $13,146,618 from the Settlement Fund Amount to meet the Applicant's Actual Costs.

9.7 Winding down costs and transitional allowance

242 Shine seeks an additional allowance of "up to $600,000" for work in finalising the Registration Process and transitioning the database to the Administrator (**Transitional Allowance**).

243 Ms Antzoulatos deposes in her First Affidavit that this amount is necessary because there would likely be transitional costs of the Registration Process dealing with inquiries from class members during a wind-down period during which the database is migrated to the Administrator, and to meet to any costs associated with a short extension to the Registration Process. Ms Antzoulatos estimates that if there is no extension to the Registration Process, the total cost for the transition is likely to be $350,000.

244 As it eventuated the applicant did not seek an extension to the Registration Process, so Shine's relevant estimate is $350,000. There are several problems with this request:

(a) that seems too high an amount for fielding class member inquiries during a wind-down period and migrating the claimant database to the Administrator;

(b) it appears that the Costs Referee took such costs into account in the Third Costs Report (at [129], [135]); and

(c) I do not understand what is meant by "winding down" costs and I do not allow anything for such costs or expenses. I expect that there will be costs for Shine associated with, for example, packing up files, archiving materials, and closing down the worksite used by law clerks and paralegals engaged in the Registration Process. But those costs cannot be charged to class members. They are administrative costs not legal costs appropriate to charge to a client.

245 The Court will consider whether to allow an amount for any Transitional Allowance upon Shine filing evidence to show that the Costs Referee did not take such transitional costs into account in the Third Costs Report and to show what costs were actually incurred in the transitional phase which are chargeable to clients.

9.8 Pre-retainer costs

246 The State contends that the Costs Referee also fell into error in approving Shine's costs incurred before it entered into the CCA with the applicant.

247 Shine first performed investigative work related to this proceeding in June 2016, and the firm did not enter into the CCA with the applicant until 31 October 2019. By that point Shine had

incurred costs of $1,564,404 (comprising $1,111,882.03 in professional fees and $452,522.21 in disbursements), some of which were paid by the Funder.

248 Shine seeks Court approval of the pre-retainer costs incurred and payment of the portion of those costs not paid by the Funder including an uplift on the fee component. There is no evidence as to the amount of uplift charges Shine seeks on its pre-retainer professional fees, but in the First Costs Report the Costs Referee determined that Shine charged an uplift on about 40% of the fees reported on. On the assumption that the same proportion applied to the pre-retainer fees incurred, Shine carried 40% of $1,111,882.03, which equals $444,728.81. Applying a 25% uplift fee to that amount, Shine's uplift charges can be estimated at $111,182.

249 The State contends, first, that the Court should not approve the pre-retainer costs incurred as Shine has no legal entitlement to legal costs incurred before it entered into the CCA with the applicant. It argues that a costs agreement cannot be entered to cover fees incurred before the client interacted with the law practice because legislative requirements which require prospective estimations of fees and provision of information cannot be satisfied retrospectively. It relies on s 174(1)(a) of the *Legal Profession Uniform Law* (NSW) (**LPUL**) which requires disclosure of the basis upon which legal costs will be calculated, an estimate of the total legal costs, and information about the client's rights to negotiate a costs agreement with the law practice when instructions are initially given in a matter. It cites ***Mango Boulevard*** *Pty Ltd v Whitton* [2019] FCA 490 and ***Carkeek*** *v Aubrey F Crawley & Co* [2024] NSWSC 86 in support of this argument.

250 *Mango Boulevard* concerned an attempt by a barrister to retrospectively replace an existing costs agreement with a new agreement governed by the law of a jurisdiction that would have enabled him to charge an uplift fee. Rangiah J held this attempt to retrospectively manipulate the governing law was ineffective, emphasizing that the legal effect of a statute attaches to the actual situation that existed between the parties at the relevant times, not just the terms of agreements between them: *Mango Boulevard* at [119]-[122]. That principle can be readily accepted, but the case does not support the State's submission that a costs agreement with respect to costs already incurred is necessarily ineffective. In the present case, there was no attempt to create an "historical fiction" that a costs agreement existed when the pre-retainer costs were incurred (cf *Mango Boulevard* at [119] quoting *Paroz v Clifford Gouldson Lawyers* [2012] QDC 151 at [33]). Rather, the CCA simply created an entitlement for Shine to be paid, (and the Funder to be reimbursed) for costs already incurred in investigating the claim as part

of the consideration for their acting in the proceeding on behalf of the applicant. *Mango Boulevard* says nothing about this situation.

251 In *Carkeek*, Fagan J held in the context of a dual-purpose costs agreement/retainer, which the relevant law firm sought to backdate by more than two years upon execution, that "it is not possible for a person to retain a solicitor retrospectively for work that he has already performed". Again, that is not this case.

252 I am not inclined to accept that the LPUL renders it impossible for a firm to enter into a binding costs agreement with a client in respect of costs incurred prior to execution of the costs agreement. This case can be distinguished from *Carkeek* (see [38]) as there is no suggestion Shine failed to provide the mandatory disclosures to the applicant as soon as practicable after receiving instructions from him, and no attempt to backdate the CCA. Thus it appears that Shine satisfied the requirements of s 174(1)(a) of the LPUL.

253 Here, the applicant agreed to retain Shine on terms that included, if the litigation was ultimately successful, his taking on liability for costs incurred before the retainer commenced plus an uplift. I am not persuaded that is "meaningless" as an "offer to do work that had already been performed" as Fagan J characterised the costs agreement in *Carkeek* at [45]. The offer by Shine was to undertake further legal work, which the applicant would be liable to pay for on the terms of the CCA, *on the condition that* the pre-retainer work is also paid for.

254 It is, however, strictly unnecessary to decide the proper construction of the LPUL when the Court's power under s 33V(2) of the FCA Act to approve the deduction of legal costs from a settlement is predicated on being satisfied that the costs are "just". Section 178(1) of the LPUL deals with the consequences for a firm seeking to recover costs where it has contravened the disclosure obligations. In *Carkeek* at [44] Fagan J summarised the purpose of those provisions as follows:

> The statutory purpose of the avoidance provision is to eliminate the prima facie reasonableness of agreed rates or quantum and to require that costs be assessed, to the standard of what is fair and reasonable: s 178(1)(b). The relevant sections do not disclose an intention that the avoidance of a "costs agreement" should eliminate liability for costs altogether…

255 Under the LPUL, and under s 33V(2), the central enquiry is whether the costs sought to be recovered are fair and reasonable.

256 Second, in answer to Shine's argument that class members benefited from the firm's pre-retainer work and it is therefore "just" under s 33V(2) that the firm be paid for it, the State submits that the Court should follow the approach taken in ***Bradshaw*** *v BSA Limited (No 2)* [2022] FCA 1440 at [191]-[228] (Bromberg J).

257 In *Bradshaw*, the applicant's solicitors, again Shine, commenced investigating a class action in January 2019; contacted a litigation funder in February 2019, and the funder decided to fund the case in May 2019. The applicant did not enter into a CCA and funding agreement until September 2019. Bromberg J held at [198]:

> I respectfully agree with the proposition at the heart of the approach taken by Gordon J in *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd (No 2)* [2013] FCA 1163, that it would be unreasonable for group members to bear the costs of legal work primarily directed to identifying whether funding a class action was commercially viable for the funder and/or the lawyers promoting the class action. However, where there is a derivative benefit to group members which is substantial rather than peripheral, I think the better view is that the benefit provided to group members should be reflected in the way the proceeds of a settlement are shared as between group members and those who facilitated that settlement by contributing to the funding of the class action.

His Honour concluded that it was appropriate to allow only 50% of the pre-retainer costs incurred by Shine to be deducted from class members' recoveries: *Bradshaw* at [202], [227].

258 Essentially, the State submits that Shine's pre-retainer work in this case was investigative work to decide whether to go ahead with the proceeding, which was to the joint benefit of Shine and the Funder, and the applicant and class members, and Shine (and the Funder) should only be permitted to recover 50% of the pre-retainer costs.

259 I do not accept the State's submissions.

260 *First*, contrary to the analysis in *Bradshaw* (at [219]-[223]) of what appears to be a similar CCA, I do not accept that the construction of the CCA and the funding agreement means that it is somehow unfair or not "just" pursuant to s 33V(2) of the FCA Act for Shine to be paid for the pre-retainer costs the firm incurred.

261 Clause 5.4 of the CCA imposes an obligation upon the applicant to pay to Shine the "Remaining Legal Costs" should there be a "Successful Outcome" meaning, relevantly, a resolution of the proceeding by a settlement where compensation or damages are payable to the applicant. The term "Legal Costs" is defined to mean "Professional fees and disbursements taken together and

incurred in performing the Legal Work and *the Preliminary Work*" (emphasis added). The two defined terms used in the definition of "Legal Costs" are defined as follows:

> "**Legal Work**" means any advice and any other legal services which Shine consider reasonably necessary to progress the Preliminary Work and to prosecute the Proceedings.
>
> "**Preliminary Work**" means Legal Work undertaken by Shine in investigating and developing the Claims that is of common benefit to You, and Group Members prior to execution of this Costs Agreement, the Funding Agreement or the Terms of Engagement.

262 The CCA expressly acknowledges that Shine had undertaken some pre-retainer "Preliminary Work" in investigating and developing the claims that are of common benefit to the applicant and class members, and the applicant agreed to be liable for such costs upon a "Successful Outcome", with a 25% uplift on any reasonable fees that were not met by the Funder. By entering into the CCA the applicant retrospectively authorised the pre-retainer Preliminary Work. And there has been a "Successful Outcome". For its part, the Funder expressly agreed to fund pre-retainer work by Shine and it paid for a proportion of it. I can see no difficulty with treating the "Remaining Costs" under the CCA as including the unpaid portion of Shine's pre-retainer costs.

263 Again, however, it is strictly unnecessary to decide the proper construction of the CCA when the Court's power under s 33V(2) of the FCA Act to approve the deduction of legal costs from a class action settlement is predicated on being satisfied that the costs are "just". In circumstances where the applicant expressly (albeit retrospectively) authorised the pre-retainer work and the applicant expressly agreed to be liable for the costs incurred in such work, provided there was a successful outcome, I consider it to be "just" pursuant to s 33V(2) that Shine be paid for that work.

264 *Second*, the approach in *Bradshaw* is different to the approach I took in ***Endeavour River*** *Pty Ltd v MG Responsible Entity Ltd* [2019] FCA 1719 at [16]-[17]. In that case the Costs Referee had disallowed work undertaken by the applicant's solicitors in relation to a "funding proposal", being work undertaken by the applicant's lawyers before the applicant signed a retainer, but which the retainer expressly noted was relied on in producing the pleadings. I held that it was appropriate to allow the applicant's solicitors to recover their fees for the funding proposal because that work was also used in producing the pleading. I then went further and said the following:

> Even if the funding proposal had only been used so as to engage a litigation funder to

> fund the class action, in my view it would remain appropriate to treat such costs as recoverable. I doubt that the proceeding could have been started without litigation funding and preparing a funding proposal to secure such funding was in the applicant's and class members' interests.

265 That remains my view. As the Funder submits, it could not seriously be said that the work associated with the pre-retainer costs, which were part of due diligence in assessing the merits of the claims and identifying who would be viable lead applicants, were not brought to bear in how the litigation was ultimately conducted. The examination of the merits were plainly not for some idle purpose, and it is axiomatic that work done in assessing merits feeds into how the claims are prosecuted.

266 Finally, having regard to the substantial reductions I have already made in Shine's fees I am not persuaded that it would be "just" to require further reductions. Shine's pre-retainer costs are captured within the Applicant's Actual Costs specified above.

10. THE PROPOSED LITIGATION FUNDING CHARGES

10.1 The Funder's position

267 The Funder submits, and I accept, that it invested the following amounts in the proceeding:

Legal costs	$13,358,868
Plus the cost of ATE Insurance premiums (**ATE Costs**)	$1,045,000
TOTAL	**$14,403,868**

It seeks reimbursement of those amounts, and for a return on its investment in the case, it seeks a common fund order of 20% of the gross settlement.

268 On the assumption that there are 8,750 OECs, the Funder seeks the following amounts:

Reimbursement of legal costs it has paid	$13,358,868
Reimbursement of ATE Costs	$1,045,000
Plus 20% commission on the gross settlement of $159.775 million (8,750 OECs x $16,500 + Agreed Costs Component (**ACC**) of $15.4 million)	$31,955,000

TOTAL	**$46,358,868**

269 A payment of $46,358,868 for an investment of $14,403,868 would provide an ROI of 3.22 times (although that does not include adverse costs risk). By ROI (return on investment) I mean the profit or return for the Funder from the investment divided by the cost of the investment.

270 I do not mean the internal rate of return (**IRR**) which is the annual rate of return for the Funder expressed as a percentage that an investment generates. The Funder did not put on evidence as to its IRR under its proposed 20% funding rate, or as to its expected IRR at the time it funded the proceeding, and the evidence does not allow calculation of the IRR.

271 On the assumption that there are 8,000 OECs, the Funder seeks the following amounts:

Reimbursement of legal costs it has paid	$13,358,868
Reimbursement of ATE cost	$1,045,000
Plus 20% commission on the gross settlement of $147.4 million (8,000 OECs x $16,500 plus ACC)	$29,480,000
TOTAL	**$43,883,868**

272 A payment of $43,883,868 for an investment of $14,403,868 would provide an ROI of 3.05 times (although that does not include adverse costs risk).

10.2 The State's position

273 The State accepts that the Funder advanced $14,403,868 in funding the proceeding but it contends that:

(a) the final $3.5 million tranche of legal costs the Funder paid were paid after the case settled, and there was no risk for the Funder that it would not be reimbursed those monies which reduces the return the Funder should receive;

(b) the Funder should not recover the ATE Costs as that was a cost of the Funder doing business, taken out because of the Funder's internal policy requirements. It argues that taking out ATE insurance cover advantaged the Funder by reducing its risk in relation

to any adverse costs order by $5 million and it did not operate to benefit the class members; and

(c) due to "the unique funding arrangements" in this matter and the relatively low risks faced by the Funder the funding commission should be calculated as 15% of the *net* settlement amount; i.e., after all of the proposed deductions from the Settlement Fund Amount are made.

274 The State enumerated those deductions as follows:

Administration costs	$3 million
Costs Referee's charges	$150,000
Reimbursement payments to the applicant and seven sample group members	$80,000
Total legal costs	Approximately $30 million
TOTAL	**$33.23 million**

275 On the assumption that there are 8,750 OECs, the State submits that the Funder should receive the following amounts:

Reimbursement of legal costs it has paid	$13,358,868
Plus 15% commission on the *net* settlement amount of $126.545 million, (being 8,750 OECs x $16,500 = $144.375 million plus ACC = gross settlement of $159.775 million, minus deductions of $33.23 million.)	$18,981,750,
TOTAL	**$32,340,618**

276 A payment of $32,340,618 for an investment of $13,358,868 (as the State puts to one side the Funder's expenditure of $1,045 million in ATE Costs) would provide an ROI of 2.42 times (without including adverse costs risk).

277 On the assumption that there are 8,000 OECs, the State submits that the Funder should receive the following amounts:

Reimbursement of legal costs it has paid	$13,358,868
Plus 15% commission on the *net* settlement amount of $114.17 million, (being the $162.8 million gross settlement 8,000 OECs x $16,500 = $132 million, plus ACC = gross settlement of $147.4 million, minus deductions of $33.23 million.)	$17,125,500,
TOTAL	**$30,484,368**

278 A payment of $30,484,368 for an investment of $13,358,868 (putting to one side the Funder's expenditure of $1,045 million in ATE Costs) would provide an ROI of 2.28 times (without including adverse costs risk).

10.3 Relevant principles

279 The Court has power under s 33V(2) of the FCA Act to allow the deduction of litigation funding charges from the common fund of the class members' recoveries in an amount the Court considers to be "just", so as to fairly and reasonably compensate the funder for providing the funding which contributed to the creation of the common fund: *Elliott-Carde v McDonald's Australia Ltd* [2023] FCAFC 162; 301 FCR 1 per Beach J at [170], per Lee J at [423] and per Colvin J at [504]).

280 The State accepts, except in relation to ATE Costs, that it is appropriate that the Funder be reimbursed the amounts that it has paid ($13.358 million), but it argues for a percentage funding commission which is substantially lower than that sought by the Funder.

281 In ***Money Max*** *Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148; 245 FCR 191 at [80] (Murphy, Beach and Gleeson JJ) the Full Court set out a non-exhaustive list of considerations relevant to deciding what constitutes a fair and reasonable funding commission in the circumstances of a case, which considerations have been applied or approved in numerous decisions by single judges and intermediate courts of appeal. Relevantly to this proceeding, these include:

(a) the information provided to class members as to the funding commission;

(b) a comparison of the funding commission with funding commissions in other Pt IVA proceedings and/or what is available or common in the market;

(c) the litigation risks of providing funding in the proceeding, assessed without hindsight bias, and recognising that the Funder took on those risks at the commencement of the proceeding;

(d) the quantum of adverse costs exposure that the Funder assumed, again recognising that assumption of risk was done at the commencement of the proceeding;

(e) the legal costs expended and to be expended by the Funder;

(f) the amount of the settlement, and the proportionality of the commission bearing in mind the risks assumed by the Funder;

(g) class members' likely recovery "in hand" under any pre-existing funding arrangements; and

(h) any substantial objections made by class members in relation to any litigation funding charges.

282 The Full Court held that the Court should allow a funding commission which is commercially realistic and properly reflects the costs and risks the Funder took on by funding the proceeding: *Money Max* at [82].

283 When determining the reasonableness of litigation funding charges the Court does not engage in a "race to the bottom" and funding rates should be set that provide an appropriate reward for the risk undertaken by the funder: ***Kuterba*** *v Sirtex Medical Limited (No 3)* [2019] FCA 1374 at [12] (Beach J); *Endeavour River* at [29].

284 The proper analysis of the reasonableness of a proposed litigation funding charge is multifactorial and the relevant considerations and the weight to be given to them in any particular case will depend upon all of the circumstances, rather than just by reference to the amount of the settlement or judgment or by comparison to funding rates available in the market. In ***Bolitho*** *v Banksia Securities Ltd (No 18) (remitter)* [2021] VSC 666; 69 VR 28 at [1966], John Dixon J said, and I agree:

> It is fundamental that the assessment by a court of a fair and reasonable return for a litigation funder more naturally emerges from the inputs specific to the litigation funder - primarily the level of funding, and promise of funding, that it provides and the period of exposure to risk - than a denominator applied to the settlement or judgment sum.

285 In ***Augusta*** *Pool 1 UK Ltd v Williamson* [2023] NSWCA 93; 111 NSWLR 378 at [102] per Ward P (with Bell CJ and Adamson JA agreeing at [1] and [169] respectively) the NSW Court of Appeal held that one matter properly to be taken into account in assessing whether a

proposed settlement is fair and reasonable is whether the funder is receiving a reasonable rate of return.

10.4 The funding arrangements

286 The Funder and the applicant entered into a Litigation Funding Agreement (**LFA**) on 31 October 2019. The terms of the LFA are not unusual, but in the circumstances of the case they led to an unusual result.

287 Under the LFA the Funder is obliged to pay 75% of the legal fees incurred by Shine, and 100% of the disbursements. The remaining 25% of Shine's fees are treated as "Remaining Costs" which are only payable to Shine upon (and from) a Successful Outcome (as defined). Pursuant to the CCA (colloquially, a No Win-No Fee costs agreement) between Shine and the applicant, Shine is entitled to charge a 25% uplift on those conditional fees upon (and from) a Successful Outcome. That is not unusual. Such arrangements are commonly employed by litigation funders to ensure that the applicant's solicitors remain motivated to win the case; that is, so they have "skin in the game".

288 The LFA also includes a "funding cap" of legal costs of $10.006 million, and the Funder is not obliged to continue to fund the case once that cap is reached. Any legal fees and disbursements incurred by Shine above that funding cap are treated as "Remaining Costs" which are only payable to Shine upon (and from) a Successful Outcome. Again, pursuant to the CCA, Shine is entitled to charge a 25% uplift on those conditional fees upon (and from) a Successful Outcome. The existence of a funding cap in the LFA is not unusual. Such caps are commonly employed by litigation funders to cap their exposure to legal costs at a known amount.

289 The Funder and Shine also entered into a collateral agreement, the Standard Lawyer Terms (**SLT**), which describes the terms and conditions of Shine's engagement. Relevantly, under the SLT, the Funder is obliged to pay Shine's invoices within 30 days from the end of the month in which the invoice is received, subject to an entitlement to a credit note or repayment if a costs consultant engaged by the Funder subsequently determines any of those legal costs to be unreasonable.

10.5 The unusual operation of the funding arrangements

290 By orders made on 27 April 2022 the proceeding was listed for an eight-week trial commencing 2 October 2023, although that trial estimate was subsequently reduced.

291 By 24 October 2022, approximately 12 months before trial, it appears that Shine had invoiced $9,406,133 to the Funder. Thus there was only approximately $600,000 remaining before the funding cap was reached.

292 It is plain from the correspondence between Shine and the Funder that they were both well aware of that. During 2023 there were only two payment events – in May 2023, Shine reimbursed the Funder $192,571.85, and in August 2023 the Funder paid Shine $7,964.00. Over the 12 months prior to the trial date, Shine incurred substantial legal costs but because those costs would be above the funding cap Shine did not send any further substantial invoices.

293 The Funder was aware of that. On 24 February 2023 Ms Colantonio, an Investment Manager with the Funder, sent an email to Ms Antzoulatos of Shine, which relevantly said:

> Further to our conversation about the WA funding budget, are you able to please let me know how you wanted to proceed considering we only have approx. $226K remaining in the funding budget and much more than that amount outstanding in disbursements. I understand you wanted time to review the outstanding disbursements.
>
> Just confirming that at this stage, I won't be able to get any funding budget increase approved ahead of mediation. If the matter doesn't settle, then the case will need to be reviewed by our investment committee and a way forward determined.

294 On 20 March 2023 Ms Colantonio sent an email to Ms Antzoulatos which relevantly said:

> It would be good to know a breakdown of the outstanding disbursements figure - i.e. the amount owed to counsel vs third parties such as travel etc because much of these will now form part of Remaining Costs pursuant to clause 5.4 of the LFA.
>
> I think the budget discussion on WA needs to be prioritised for this week before we go to WA unless you are content for everything above the funding cap to form part of the Remaining Costs.

295 Ms Antzoulatos rejected Ms Colantonio's suggestion that all of the substantial fees and disbursements it had incurred in the run-up to trial, and the substantial costs it would incur in any trial, should be treated as Remaining Costs. By return email the same day she said:

> No we are obviously not content for everything above the funding cap to form part of Remaining Costs. There will need to be a renegotiation of the budget in particular if the matter goes to trial. As business partners, I am sure we can achieve that.

296 Contrary to Ms Antzoulatos's expectation that this issue could be resolved between "business partners" it was not resolved. On 23 June 2023, less than four months before the trial, Shine notified the applicant, as follows:

> The litigation funder, LLS Fund Services Pty Ltd ABN 51 627 975 213 as trustee for the LLS Fund 1 (LLS), has paid close to all of the professional fees and disbursements it agreed to pay in the Litigation Funding Agreement which you signed on 31 October

> 2019. It is not clear at present whether LLS will fund any further professional fees and disbursements. In the event that LLS does not agree to pay any further professional fees and disbursements, our professional fees will form part of the Remaining Costs and will be deferred and only payable in the event of a Successful Outcome as defined in the Costs Agreement (defined as the Remaining Costs). In the event of a Successful Outcome, a 25% uplift will also be payable on the Remaining Costs as described in the table above.

297 That position was in accordance with the LFA but plainly contrary to Shine's interests as it would be required to carry all of the substantial pre-trial and trial costs. It was also contrary to the interests of the applicant and class members as, pursuant to the CCA, the applicant was obliged to pay a 25% uplift on the Remaining Costs. If the applicant was liable for a 25% uplift on the substantial pre-trial and trial costs, the burden on class members of meeting their share of those costs from any Successful Outcome would be substantially increased.

298 The Funder argues that Mr Conrad's affidavits show that the Funder was contemplating providing additional funding for the trial, and that those deliberations did not complete only because they were overtaken by a mediation, and then the proposed settlement. I do not accept that contention. Apart from some dribs and drabs the Funder provided no funding for the proceeding from October 2022, and Shine carried the substantial costs and disbursements associated with the preparation of evidence for the trial, a number of mediation events, pre-trial preparations, including briefing counsel for a four-week trial and putting on voluminous written opening submissions.

299 The parties did not reach agreement on the proposed settlement until five days before trial. It may be that the Funder was still contemplating providing additional funding for the trial but the fact is that it did not do so. All of those substantial costs were met by Shine.

300 The evidence shows that, by October 2023 when the proposed settlement was reached, the total legal costs of the proceeding were approximately $18.2 million. The Funder had paid just short of $10 million of that total.

301 Then, on 26 February 2024 (five months after the proposed settlement was reached), the Funder agreed to contribute a further $3.5 million towards costs but not towards disbursements. That limited additional funding was provided to be used in seeking more registrants. Every further registrant up to a cap of 10,000 OECs would attract an additional $16,500 from which the Funder intended to seek a 20% commission. The $3.5 million in additional funding was spent by June 2024. The amount paid by the Funder for post-settlement work represented only about

25% of the legal costs incurred by Shine from the date of settlement to the settlement approval hearing, with the balance being carried by Shine.

302 Overall, on the basis of the $31.5 million approved as reasonable by the Costs Referee, Shine carried approximately $18 million in legal costs, being approximately 57% of overall costs.

303 Thus, although the funding arrangements were not unusual they had an unusual effect in the circumstances of the case. From approximately one year before trial, the burden of the fees and disbursements incurred in bringing the case to trial had shifted entirely to Shine. This would have significant adverse repercussions for the applicant and class members if the case was successful.

304 Another unusual aspect of the operation of the funding arrangements was that Ms Antzoulatos' evidence establishes that the Funder did not comply with the terms of the LFA by meeting Shine's invoices within 30 days. The evidence establishes that the time period for the assessment of Shine's draft invoices for the first three tranches of Shine's costs under the Funding Agreement ranged from 0 to 110 days, and that the time period between the issuance of a final invoice, and payment of that invoice, was significant, ranging from 9 days to 520 days, with an average of 196 days between the issuance of Shine's invoice to the Funder and the payment of such invoices. As a result Shine was forced to shoulder significant expense by drawing on its own funds to ensure it met liabilities incurred in the proceedings, including carrying its fees for longer than agreed and paying disbursements and counsel's fees when they were due.

305 The Funder argues, and I accept, that the case budget and the funding cap was formulated at the start of the litigation, when the funding was offered - which included funding a trial. It says that the fact that the budget turned out to be an underestimate was only apparent by hindsight, and also overlooks that any budget "overrun" will be driven at least in part by the litigation tactics of the respondent, which also involves hindsight. I take a different view. Except on the rosy idea that the State was prepared to make a reasonable offer at an early stage, which is the exception rather than the rule, a funding cap of $10 million was never going to be enough. For example, in the analogous case of *Pearson* (which the Funder funded) which settled about six months before trial, legal costs totalled approximately $13.88 million: ***Pearson*** *v State of Queensland (No 2)* [2020] FCA 619 at [111], [260]. It is likely that the Funder was the primary driver for the unrealistic $10 million funding cap.

10.6 Analysis regarding a fair and reasonable funding commission

306 I now turn to deal with the relevant considerations regarding a fair and reasonable funding commission in the circumstances of the case, including the non-exhaustive considerations set out in *Money Max*.

10.6.1 The information provided to class members as to the funding commission

307 The Funder contends that the Settlement Notice foreshadowed to class members that the Funder would seek a common fund order of "20% of the amount the State pays under the settlement", and described the effect of a common fund order as being "so that everyone who benefits from the class action contributes to these costs". It argues that class members were informed of the proposed funding commission and that they had a chance to object to that commission, or to opt out of the proceeding, and they neither objected nor opted out. The Funder contends that the Settlement Notification having precipitated 39 objections (this number was in fact 46), it should be inferred that the notice process was effective in informing class members that the Funder would seek its 20% commission, and that class members do not oppose that.

308 I accept that class members were informed, both in the opt out notice and in the Settlement Notice, that the Funder intended to seek a funding commission of up to 20% of the gross settlement. I also accept that none of the objections to settlement approval specifically relate to the Funder's claim for a 20% funding commission. But the balance of the Funder's submissions on this point misstate the position:

(a) the Settlement Notice *did* inform class members that the Funder would seek a common fund order of 20% of the gross settlement plus ATE costs, but the next sentence of that notice told them that the State would oppose that. The Settlement Notice stated:

> The Court will be asked to make an order approving the commission payment to the funder of 20% of the amount the State pays under the settlement, as well as the payment of $1,045,000 for the cost of insurance. **The Western Australian Government will oppose this. …**
>
> (Emphasis added.)

In those circumstances it was unnecessary for any class members who opposed a 20% funding commission to lodge an objection to it. It is reasonable to expect that they would understand that the State would oppose any such order, effectively on their behalf; and

(b) the proposed settlement did not provide class members with a second opportunity to opt out and the Settlement Notice did not notify class members that they could opt out if they did not wish to pay the Funder's commission. It was incorrect to state otherwise.

309 Further, and more fundamentally, the Funder's contention that the Court should infer from the absence of objections that class members do not oppose the Funder's proposed commission is contrary to authority. It is established that the practical realities of class actions and the likely low level of engagement of many class members means that an absence of objection or a low level of objection to a particular proposition is often weak evidence of class members' assent and carries little weight. The Court should be careful before approaching an application on the basis that class members' silence is equivalent to their assent. It is the Court's responsibility to protect class members' interests and the absence of objections or a low level of objections does not relieve it of that task: see *Money Max* at [50] and the cases there cited.

10.6.2 A comparison of the funding commission with funding commissions in other Pt IVA proceedings and/or what is available or common in the market

310 The Funder submits that the market rates for class action litigation funding typically vary from 20% to 35% of the gross settlement. It provided a schedule of the funding commission rates in 25 cases (**Funder's Case Schedule**), which is attached as Schedule 1 to these reasons. The Funder argues that the 20% funding rate which it seeks is at the bottom of that range, and it relies upon Ms Antzoulatos' evidence that she "doubt[ed] that a better funding rate could have been achieved in the commercial funding market" than the Funder's 20%.

311 I accept that a 20% funding rate was at the low end of the range of funding rates available in the litigation funding market when funding for this proceeding was approved in 2019, and that it is doubtful that a better funding rate was available in the commercial funding market at that time. But whether a 20% funding commission is fair and reasonable depends upon the particular circumstances of the case, including the considerations set out in *Money Max* at [80]. In particular, the fairness of a particular percentage funding commission commonly depends upon settlement quantum. For example, had this settlement been for $300 million, a 20% funding rate would mean the Funder would receive a funding commission of $60 million, which would equal a ROI on its investment of approximately 5.2 times. That could readily be argued to be excessive. On the other hand, had this settlement been for $50 million, a 20% funding rate would mean that the Funder would receive a funding commission of $10 million,

it having spent $13.358 million in legal costs and $1.045 million in ATE Costs. That could readily be said to be a very poor return for the costs and risks it took on.

312 It also commonly depends upon the costs and risks assumed by the funder through the operation of the particular funding terms. In *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433 at [179] I explained as follows:

> It should be kept in mind that it is not enough to consider the funding commission rate on a stand-alone basis. The funding arrangements reached may be structured in a variety of ways which can affect the costs and risk taken on by the funder and therefore affect the reasonableness of the funding commission rate. For example, a funder might agree:
>
> (a) to provide funding to cover adverse costs but not to meet the applicant's legal costs and disbursements, with the case being conducted by the applicant's solicitors on a conditional fee basis to be paid by class members from any settlement conditional on success;
>
> (b) to pay disbursements only, with the case being conducted by the applicant's solicitors on a conditional fee basis;
>
> (c) to only pay costs and disbursements up to a fixed cap or to pay a fixed percentage of the costs and disbursements, with the remainder left to the applicant's solicitors to be paid by class members conditional on success; or
>
> (d) to cover the risk of adverse costs liability through After the Event Insurance with the premium to be paid by class members from the settlement sum upon success.

313 Thus, it is simplistic to assert that a particular percentage funding rate is fair and reasonable because it falls within the range, or as in this case at the bottom of the range, of the funding rates commonly available in the litigation funding market. It is necessary to be cautious when comparing headline funding rates, as one is not always comparing apples with apples: *Galactic Seven Eleven Litigation Holdings LLC v Davaria* [2024] FCAFC 54; 302 FCR 493 at [89] (Murphy J, with whom Lee and Colvin JJ agreed).

314 Further, as observed in *Bolitho* (at [1966]), the assessment of a funder's fair and reasonable return more naturally emerges from the level of funding that was provided and promised by the funder, rather than from a percentage denominator applied to a settlement or judgment. One matter properly to be taken into account in assessing whether a proposed funding commission is fair and reasonable is whether the funder is receiving a reasonable rate of return: *Augusta* at [102]. A headline funding rate may appear to be reasonable, but when the particular funding terms are considered it may provide the funder with a ROI which is not fair and reasonable.

10.6.3 The operation of the funding terms in the circumstances of the case

315 Four matters about the operation of the funding terms are material to my assessment of a fair and reasonable funding commission.

316 *First*, the central component of the Funder's bargain (and thus its entitlement to a funding commission) was its agreement to pay the applicant's legal costs incurred in the proceeding.

317 Here, the Funder did not pay all of the applicant's legal costs. By October 2023 when the proposed settlement was reached, the total legal costs of the proceeding were approximately $18.2 million. The Funder had paid just short of $10 million of that total. From approximately one year before trial the burden of the fees and disbursements incurred in bringing the case to trial had shifted entirely to Shine. Over the course of the case the expense of the case was shared approximately 50-50 between the Funder and Shine.

318 Under the LFA, the Funder was contractually entitled to cease funding once the funding cap was reached, but it cannot have it both ways. That is, it cannot both cap its expenditure at around half of the legal costs necessary for the case to be brought to trial, and at the same time argue that it "saw the matter through to trial" in an attempt to justify a 20% funding rate. By taking the approach that it did the Funder capped its expenditure in the case at a sum which was insufficient for the case to be brought to trial, or even to be brought to mediation. In my view the Funder and Shine shared the case resourcing on an approximately 50-50 basis.

319 That did not only have adverse repercussions for Shine. Because so much of the case was undertaken by Shine on a conditional fee basis, before Costs Referee reductions Shine sought approximately $2.99 million in uplift charges in relation to its unpaid professional fees which were to be paid by class members from their recoveries.

320 That illustrates the problem with relying on the case examples set out in the Funder's Case Schedule. The Court has been told nothing about the particular funding arrangements in those cases or their operation in the circumstances of the case. But I doubt that the funding terms in those cases operated similarly to the way that they operated in this case. Here, the Funder took on only about 50% of the costs and risk of the case and yet it seeks a 20% funding rate in part by reference to a comparison to cases in which it is likely that the funder took on more of the costs and risks. That is unlikely to be an "apples with apples" comparison.

321 *Second*, the other main component of the Funder's bargain was its agreement to indemnify the applicant against the risk of an adverse costs order should the proceeding be unsuccessful. In

some cases the quantum of an adverse costs order, and the risks faced by a funder, can be substantial.

322 Here, however, the Funder did not carry much risk in relation to adverse costs. The Funder took out ATE insurance which covered it for an adverse costs order up to $5 million, and it seeks reimbursement of the ATE Costs directly from the class members, by deduction from the Settlement Fund Amount. Mr Gorman's evidence shows that, had the applicant been unsuccessful in the initial trial, the State's party/party costs would have been approximately $8.6 million. Thus, the Funder's risk of an adverse costs order can be quantified at $3.6 million (if that risk came home to roost) which is relatively modest compared to the funding commission.

323 Further, the Funder in this case was not required to provide security for costs, whereas I expect that in many of the cases in the Funder's Case Schedule the funder was required to put on substantial security for costs.

324 Again, that illustrates the problem with relying on the case examples set out in the Funder's Case Schedule. The Court has been told nothing about the quantum of the risk of adverse costs in those cases, nor the extent to which any such risk was defrayed by ATE insurance, nor whether the funder in those cases sought to recover its ATE Costs directly from the class members, or treated that as one of its business costs. But I doubt that the funders in those cases faced as little as $3.6 million in adverse costs risk. Again, that is unlikely to be an "apples with apples" comparison.

325 Further, as I later explain, it is likely that the Funder's "bet" in this case was centrally based in the likelihood of a reasonable settlement offer being made, rather than the Funder having an intention to fund a trial of the proceeding. In such circumstances there was little risk of any adverse costs order.

326 *Third*, the payment of the applicant's solicitor's invoices within normal trading terms is significant to a funder's entitlement to its funding commission. Here, the evidence shows that the Funder substantially delayed paying Shine's invoices and ultimately entered into a payment plan which required it to pay $500,000 per month until the Funder was up-to-date with its payments. Then the Funder did not comply with the payment plan. This reduced the costs and risk the Funder took on and increased Shine's burden in resourcing the case.

327 *Fourth*, the Funder seeks to justify its proposed 20% funding rate partly on the basis that it expended $13.358 million in funding the proceeding. But as I have said, the Funder ceased providing funding once the $10 million funding cap was reached, and it did not advance the further funding tranche of $3.5 million until five months after the proposed settlement was reached.

328 There was no real risk that the Funder would not recover that tranche of funding, and in assessing a fair and reasonable funding commission I do not treat that tranche as being "at risk". Again, that illustrates the problem with comparing the proposed 20% funding rate in this case, with the headline funding rates in the cases in the Funder's Case Schedule, which does not explain how much of the funding expenditure in those cases was genuinely "at risk".

10.6.4 The proceeding would not have occurred without funding

329 I accept the Funder's contention that the proceeding would not have occurred without litigation funding. Ms Antzoulatos deposes that the case "required litigation funding in order to be brought" and that it was "unlikely that it would have been commenced without the support of a third party litigation funder". I therefore accept that the applicant and class members are unlikely to have recovered compensation without the funding support the Funder provided. Even so, as I have explained, Shine was ultimately responsible for approximately 50% of the case resourcing and equally responsible for the class members' recoveries.

330 The Funder submits that it upheld its end of the funding bargain, because it paid the costs of the proceeding as they were incurred and indemnified the applicant against adverse costs, and it argues that it "saw the matter through to trial." I accept that the Funder upheld the contractual bargain in the LFA, which provided for a funding cap of $10.006 million. But it is quite wrong for the Funder to submit that it "saw the matter through to trial." It did not. The funding cap was reached approximately 12 months before the case was listed for trial and the only reason that the case was prepared for trial and prepared for the mediation was because Shine continued to resource the case.

10.6.5 The litigation risks of providing funding in the proceeding, assessed without hindsight bias, and recognising that the Funder took on those risks at the commencement of the proceeding

331 Mr Conrad deposes that the due diligence conducted by the Funder before it made an offer to fund the proceeding was atypical and reflected the heightened risks of the case compared to the "average" investment that the Funder makes. The Funder submits that it has assumed

disproportionate risk. It contends that the proceeding is a novel one which involves a high level of risk and substantial expenditure, such that a funding rate of higher than 20% of the gross settlement would be justified, and that it voluntarily reduced its funding rate to 20% in recognition of the "social justice" nature of the proceeding.

332 I accept that the proceeding raises novel causes of action and that it has substantial and cumulative risks on liability, causation and quantum such that the proceeding faced a real risk that it would not succeed at trial.

333 The Funder also submits that, in addition to the case specific risks facing the proceeding, it also faced risks of "an environment of heightened regulatory risk associated with the former Federal government's introduction of MIS compliance requirements, what was then a significant post-*Brewster* risk associated with the question about whether [common fund orders] could be made at all, and calls for a minimum rate of return to class members to be legislated." I do not accept those contentions, when:

(a) the proceeding was commenced before the Federal government introduced MIS compliance requirements. The case was not caught by those requirements;

(b) the High Court decision in *BMW Australia Ltd v* ***Brewster*** [2019] HCA 45; 269 CLR 574 was handed down on 4 December 2019, which post-dated the Funder's October 2019 decision to fund this proceeding. It was not a risk in play at the time the funding decision was made. Further, and importantly, I do not accept that there was a significant post-*Brewster* risk associated with the question about whether a common fund order could be made at all. *Brewster* concerned the power to make a common fund order at an early stage of a class action under s 33ZF of the FCA Act. Shortly following the decision in *Brewster* the Chief Justice amended the *Class Actions Practice Note (GPN-CA)* to state that at the settlement approval stage under s 33V of the FCA Act, the parties, class members and litigation funders may expect the Court to make a common fund order in relation to reasonable litigation funding charges or commission; and

(c) the calls for a minimum rate of return to class members to be legislated arose in the course of the Parliamentary Joint Committee Enquiry into Litigation Funding and the Regulation of the Class Action Industry, the referral for which was made on 13 May 2020. Those calls arose after the decision to fund this proceeding, and no such requirements were ever legislated.

334 Although I accept that the proceeding relies on some novel causes of action and that it has substantial and cumulative risks on liability, causation and quantum such that it was impossible for the applicant's lawyers (or the Funder) to be confident of success at trial, that does not reflect the true risk position in the case.

335 The Funder entered into LFA to fund this proceeding on 31 October 2019, following the settlement of the Queensland Stolen Wages Class Action, *Pearson.* That case, which was funded by the Funder under a common fund order providing a 20% funding rate, was brought on behalf of Aboriginal and Torres Strait Islander people who worked in Queensland between 1939 and 1972 who alleged that they were paid little or no wages. The case settled for $190 million, and the Funder received a funding commission of $38 million, plus reimbursement of the monies it expended. I accept Mr Conrad's evidence that the 20% funding rate in this proceeding was based on the funding rate in *Pearson*.

336 Both the Funder and the State made submissions which seek to compare the risks facing this proceeding with the risks that faced the *Pearson* proceeding, which was funded pursuant to a 20% common fund order. The State submits that this proceeding has a substantially lower risk profile than that which faced the Funder in *Pearson* which justifies a substantially lower funding commission than allowed in that case. The Funder contends that there are risks affecting the present matter which were not at play in *Pearson*, and notes that the legal basis of the claims in *Pearson* are different to the legal basis of the claims in the present case.

337 In my view, while the cases are different, they have more similarities than differences. Not much turns on this, because the reasonableness of the proposed funding commission in this case is not to be assessed by comparison with *Pearson*; it must be assessed based on the particular circumstances of the case. Even so, when the two cases are compared, I consider *Pearson* had a substantially higher risk profile for the Funder than this case.

338 I have drawn the following largely from the settlement approval judgment in *Pearson*, but in part derived from my knowledge as the docket judge in that case:

(a) *Pearson* was the first Indigenous stolen wages class action in Australia and it showed that an Australian state government was prepared to offer a substantial settlement to redress the well-recognised historic wrongs of non-payment and underpayment of Aboriginal workers from the 1930s to the 1970s, notwithstanding that the class action brought on behalf of those workers faced substantial risks and difficulties, including

serious limitations problems. It is likely that following its success in *Pearson* the Funder thought there was a reasonable prospect that other Australian governments would be prepared to settle similar proceedings in relation to Aboriginal workers living in other states and territories.

(b) many of the members of the counsel team in *Pearson* were members of the counsel team in this case and they brought an understanding of the litigation approaches most likely to generate pressure for a settlement;

(c) in *Pearson* the Funder had paid $12.65 million in legal costs at the point settlement was reached (*Pearson* at [22(b)(i)]), whereas in this case the Funder imposed a funding cap of $10 million. Mr Conrad deposes that there was a $12.4 million funding cap in *Pearson* but there is no evidence that the Funder ever ceased funding in that case;

(d) in *Pearson* the Funder faced $4.35 million in further costs to the completion of the trial (*Pearson* at [22(b)(i)]), whereas in this case the Funder had ceased to fund the case approximately a year before trial, and five days before trial when the case settled the Funder had not agreed to pay for the trial. Thus, in *Pearson* the Funder faced substantial trial costs, whereas in this case it did not; and

(e) in *Pearson* the Funder faced the risk of an adverse costs order of $15 million (*Pearson* at [22(b)(i)]), whereas in this case the risk of adverse costs above the ATE insurance was just $3.6 million.

339 I accept that there was no guarantee that the State would make a substantial offer in this proceeding, and that there was a risk that there would be a trial in the case. And I accept that if the case went to trial there was a real risk that the applicant's and class members' claims would fail, or would succeed on claims which do not relate to all class members or in relation to which the quantum is relatively low compared to the proposed settlement. Even so, it is likely that the Funder's "bet" in this case was centrally, perhaps entirely, based in the likelihood of a reasonable settlement offer being made, rather than it having an intention to fund a trial of the proceeding.

340 My view that that the Funder was centrally, perhaps entirely, focussed on settlement (and did not intend to fund a trial) finds support in:

(a) aspects of the confidential material in Mr Conrad's first affidavit, which I cannot set out;

(b) the fact that the Funder set a funding cap well below the costs that would have been incurred in *Pearson* had that matter proceeded to trial, and well below the costs likely to be incurred in bringing this proceeding to judgment; and

(c) the fact that the proposed settlement was reached five days before trial and the Funder had not agreed to revisit the funding cap.

That is not to criticise the Funder's focus on settlement; instead it is to recognise that the Funder's risk was not as high as it is now seeks to portray.

341 I appreciate that this is hindsight, and thus not relevant to assessing the Funder's risk at the commencement of the case, but it is perhaps worth noting that that is what eventuated. The Funder funded this "stolen wages" class action in relation to Aboriginal workers in Western Australia which has settled subject to Court approval for up to $180.4 million, and another "stolen wages" class action in relation to Aboriginal workers in Northern Territory, *Minnie **McDonald** v Commonwealth of Australia* VID 312/2021, which has settled for up to $202 million.

10.6.6 The quantum of adverse costs exposure that the Funder assumed, again recognising that assumption of risk was done at the commencement of the proceeding

342 As I have said, the Funder took on an adverse costs risk in a modest quantum having regard to the funding commission it seeks. The Funder took out ATE insurance which covered it for an adverse costs order up to $5 million (and it seeks reimbursement of that cost from the class members' recoveries), and the Funder's risk of an adverse costs order beyond the insured amount can be quantified at $3.6 million. Further, the Funder was centrally, perhaps entirely, focused on settlement rather than trial, and thus there was little risk of an adverse costs order.

10.6.7 The legal costs expended and to be expended by the Funder

343 Under the LFA the Funder's liability to pay the applicant's legal costs was capped at $10 million, and it paid close to that amount. I accept that amount was "at risk" and should be taken into account in deciding what is a fair and reasonable funding commission.

344 It was open to the Funder to continue to fund the proceeding after the funding cap was reached, but it chose not to do so. And it was open to the Funder to reinstate funding when the case was approaching trial, but it again chose not to do so.

345 The Funder paid a further $3.5 million in legal costs, after the proposed settlement was reached. It argues that while that further tranche of funding was provided post-settlement, it was not "de-risked" as it could not assume that the settlement would be approved on the terms sought, nor did it have any assurance on whether the projections as to the number of OECs who would register would be reached.

346 I do not accept those contentions. In my view there was no real risk that the Funder would not recover that tranche of funding upon approval of the proposed settlement, and given the risks and difficulties the proceeding faces there was little or no risk that the proposed settlement would not be approved in some form or another.

347 Mr Conrad acknowledges that the Funder was incentivised to fund the outreach program to drive up registration rates (and therefore the amount available for its percentage-based commission), but the Funder argues that the same investment expanded the reach of the settlement to more class members than would have otherwise been the case. I accept that, but that does not change the fact that the $3.5 million it provided was not genuinely "at risk" and therefore carries less weight in the assessment of a fair and reasonable funding commission.

348 The Funder also notes that because the settlement amount will be paid in tranches as OECs register, the Funder will be paid in tranches. It argues that that exposes it to loss associated with the time value of money up until the last tranche is paid. I accept that but the time cost of money for the Funder is unlikely to be substantial given: (a) the approval orders provide for it to be reimbursed all of its Project Costs from the $15.4 million Agreed Cost Component which is paid up-front; and (b) the Court has been informed that the distribution of the Settlement Fund Amount is expected to be complete within approximately 12 months. Having regard to the distribution schedule, it seems likely that the Funder will have been substantially paid within approximately 6 months.

10.6.8 The amount of the settlement, and the proportionality of the commission bearing in mind the risks assumed by the Funder

349 After deduction of a 20% funding commission and the reimbursement to the Funder of the amounts that it paid (which total $46.398 million) 70% of the proposed settlement would remain for distribution. After deduction of all litigation funding charges and legal costs class members would receive in the order of 60% of the settlement.

350 The proportion of the Settlement Sum remaining for class members is roughly in line with the median proportions received by class members in funded class actions, which has been assessed as between 51% to 58%: *Court v **Spotless** Group Holdings Ltd* [2020] FCA 1730 at [106] (Murphy J) and the references cited therein; Slade B, "Outcome of Settlements of Australian Class Actions" (Paper presented to the Law Council of Australia Class Actions: Commonwealth Law Conference, Melbourne, 24 February 2023).

351 I consider the Funder's proposed commission to be proportionate having regard to the size of the settlement.

10.6.9 The ATE Costs

352 I accept that class members were informed in the Settlement Notice that the Funder intended to seek reimbursement of its ATE Costs of $1.045 million, and that none of the objections to settlement approval specifically relate to the Funder's claim in that regard. But for the same reasons as in respect to the funding commission I do not accept that the Court should infer from the absence of specific objections to the Funder's separate recovery of ATE Costs that class members do not oppose such recovery.

353 First, that is because the Settlement Notice specifically told class members that the State would oppose reimbursement of ATE Costs. In those circumstances it was unnecessary for any class members who objected to the Funder being reimbursed the ATE insurance costs to lodge an objection. Second, the practical realities of class actions and the likely low level of engagement of many class members means that an absence of objection or a low level of objection to a particular proposition is often weak evidence of class members' assent and carries little weight: see *Money Max* at [50] and the cases there cited.

354 The State submits that the Funder should not recover its ATE Costs from the class members' recoveries as that was a cost of the Funder doing business, taken out because of the Funder's internal policy requirements. It argues that taking out ATE cover advantaged the Funder by reducing its risk in relation to any adverse costs order by $5 million and it did not operate to benefit the class members.

355 In *Spotless* at [96] I explained that if a funder has the protection of ATE insurance cover (the cost of which it seeks to recover from class members) the funder might receive a lower funding rate as its risks are lower. In *Ghee v BT Funds Management Ltd* [2023] FCA 1553 at [147]-[152] I summarised the authorities and said (at [150]) that "[t]he question can be boiled down

to whether the combined amount of the proposed funding commission and ATE costs is reasonable and proportionate."

356 Here, the class members obtained a benefit from the ATE cover the Funder took out, as it operated to reduce the Funder's exposure to adverse costs, which operated to reduce the amount the Funder had at risk, and thus the quantum of the funding commission to which the Funder is entitled. It is appropriate for the class members to separately meet the ATE Costs.

10.6.10 The State's approach

357 I do not accept the State's contention that it is appropriate to approve a funding commission of 15% of the settlement *net* of all deductions (including legal costs, settlement administration costs and the reimbursement payment to the applicants and class members). As the Funder submits:

(a) the 15% net funding rate is arbitrary. There is nothing in the State's submissions explaining how the figure has been arrived at. The Court has warned against a "race to the bottom" in approving funding commission rates, and setting a rate on such an arbitrary basis would have that tendency: *Kuterba* at [12]; *Endeavour River* at [29];

(b) the task of setting a commission rate is a "forensic question … not to be determined by some value laden proposition": *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Recs & Mgrs Apptd) (In Liq) (No 3)* [2017] FCA 330; 343 ALR 476 at [120] (Beach J). The best the State offers for its 15% net figure is the broad assertion that a 20% commission "is unreasonable and unjust" which involves value judgments;

(c) the State did not provide a cogent basis as to why its proposed 15% funding rate should be taken off a 'net' base. Percentage funding rates are sometimes arrived at net of legal costs, but here the State takes the unusual approach that it also be net of settlement administration costs and reimbursement payments; and

(d) the Funder did not agree to fund the proceeding on the basis of a calculation *net* of all deductions, nor is it a basis upon which, at least to my knowledge, a funder has ever offered to fund an Australian class action. To approve a funding commission on a basis not available in the funding market has a tendency to discourage funding and reduce access to justice.

10.6.11 Conclusion regarding proposed litigation funding charges

358 Assuming there are 8,750 OECs the gross settlement amount is $159,775,000 million (8,750 OECs x $16,500 plus the ACC), and the Funder seeks a 20% funding commission being $31,955,000.

359 That funding commission, combined with reimbursement of the legal costs and ATE Costs the Funder paid ($14,403,868), would mean that the Funder would receive $46,358,868 million from the proposed settlement, based on an investment of $14.403 million (treating all of that as "at risk"). That would give the Funder an ROI of approximately 3.22 times (not taking adverse costs risk into account).

360 In fact the Funder's ROI could be said to be better that that because the final $3.5 million tranche of the funding was made after the proposed settlement was reached when, in my view, there was no real risk that the Funder would not recover those monies. I consider the Funder's "at risk" investment in the case was approximately $11 million (being approximately $10 million in legal costs plus ATE Costs).

361 In the circumstances of the case, particularly the quantum of the settlement and the way the funding terms operated in practice, I do not consider a funding rate of 20% representing a commission of almost $32 million and at a 3.22 times ROI to be fair and reasonable. I consider a funding rate of 16%, which (on the assumption of 8,750 OECs) represents a commission of $25,564,000 to be commercially realistic and to properly reflect the costs and risks taken on by the Funder: *Money Max* at [82].

362 I accept that a 20% headline funding rate is toward the bottom of the range of the rates available on the market and, intuitively, a funding rate of 16% seems too low. However, having regard to the quantum of the settlement, the costs and risks the Funder took on, and the operation of the funding terms in the circumstances of the case I consider that funding rate of 16% to be "just". In particular:

(a) the risks of the case were not as great as the Funder now seeks to portray. The Funder was centrally, perhaps entirely, focused on settlement rather than trial, and did not intend there to be a trial;

(b) the rate is just 4 percentage points lower than the Funder seeks, in circumstances where by October 2023 when the proposed settlement was reached, the total legal costs of the proceeding were approximately $18.2 million, and the Funder had paid just short of

$10 million of that total. If its ATE Costs are included the Funder advanced approximately $11 million prior to the proposed settlement being reached, and for the case overall it provided only approximately 50% of the case resourcing. It would not be "just" for the Funder to be paid the 20% funding commission provided for under the LFA, when it provided only approximately half of the funding necessary for the case to reach fruition;

(c) the last $3.5 million tranche of the Funder's investment in the case was not "at risk" as there was no real chance that the Funder would not recover those monies. Thus the Funder's rate of return is better than it appears;

(d) Shine met all of the costs and disbursements incurred in the 12 month run up to trial, and it rather than the Funder was on the hook for the trial costs had the case run. Shine was approximately 50% responsible for the case resourcing, and that came at a cost to class members through increased uplift fees;

(e) the Funder's adverse costs risk can be quantified at just $3.6 million, and given the Funder's focus on settlement there was only a very low chance of an adverse costs order;

(f) the Funder did not comply with its obligations under the LFA. It was substantially late in paying Shine's invoices, and then did not comply with the payment plan it entered into to get up-to-date with its obligations. It should not be permitted to have it both ways. That is, be granted the 20% funding commission provided for under the LFA but not meet its side of the bargain; and

(g) that funding rate provides the Funder an ROI of 2.77. That is not a niggardly return. Recently, in *Allen & Anor v G8 Education Ltd (No 4)* [2024] VSC 487 at [110] Watson J noted the following:

> Omni Bridgeway, an ASX listed litigation funder, publishes data regarding its MOIC which is the total amount it receives (including any return of its investment amount) divided by the amount invested (but not including finance costs). In other words, the MOIC is the ROI plus one if finance costs are excluded. The evidence shows that Omni Bridgeway's ROI on all completed cases (including those on which it loses some or all of its capital) is 1.2 and approximately 1.9 on those cases which did not produce a negative return. Approximately 15% of its cases have an ROI exceeding 4.0, with some cases having an ROI exceeding 9.0.

363 A 16% funding rate means (on the assumption of 8,750 OECs) that the Funder will receive a total of $39,967,868 (representing a funding commission of $25,564,000 and the reimbursement of its investment of $14,403,868).

11. THE REIMBURSEMENT PAYMENTS

364 The applicant submitted that Mr Street should be paid a $45,000 reimbursement payment to reflect the work he undertook as the representative applicant, and that each of the seven sample group members should be paid a $5,000 reimbursement payment. There was no opposition to that course.

365 I was initially troubled as to the amount of the proposed reimbursement payment to Mr Street given the modest size of the payments to be made per OEC. However, upon receiving further submissions I came to accept that it is fair and reasonable to allow Mr Street a reimbursement payment of $45,000, because of the extent of the work he undertook in support of the proceeding amounting upwards of 193 hours, the particular work he undertook around Fitzroy Crossing in attending community meetings and explaining the Registration Process, and that the payment has a negligible effect on the payments per eligible class member. I will also approve a reimbursement payment of $5,000 for each of the seven sample group members.

12. COSTS REFEREE'S COSTS

366 The applicant seeks up to $250,000 for "Costs Assessor's Costs", referring to the costs associated with the Costs Referee's reports. $150,000 relates to work already completed by the Costs Referee and invoiced, and the applicant seeks up to a further $100,000 for costs likely to be incurred in respect of assessments of the Administrator's costs.

367 The fees for past work reflect the work involved in scrutinising costs in litigation of this size, and the necessary expertise of somebody undertaking that work. The assessment process provides transparency and downwards pressure on costs in class actions. While I have found it necessary to depart from the Costs Referee reports in important respects, I have adopted the majority of her reports, which provided for reasoned discounts to Shine's charges on a range of different grounds. It is appropriate that the Costs Referee is remunerated $150,000 for that work, which is a relatively modest amount in the context of the settlement.

368 The Settlement Deed contemplates that further Court approval for the payment of the Costs Assessor's Costs will be required from time to time. The Costs Referee is directed to confer with the Administrator and propose a regime for checking and assessing the Administrator's costs in an attempt to ensure that settlement administration costs are fair and reasonable. I approve up to $100,000 for this item.

13. PRIORITY OF PAYMENTS

369 The proposed settlement structure has two temporal features which require consideration of the priority of payments. The first feature is that the State will pay the ACC of up to $15.4 million as a separate contribution towards legal costs, calculated on a party/party basis, by way of a single upfront payment. The Costs Referee's reports show that the applicant's legal costs on a party/party basis exceed the $15.4 million cap and thus the ACC amount is $15.4 million. The second feature is that the SDS contemplates that the payment of amounts per OEC into the Settlement Fund Amount are to be made by the State in tranches, rather than as one upfront payment.

370 Several clauses of the LFA indicate that the Funder has first claim on any settlement monies and costs, but the Funder does not seek to assert priority in relation to the $10,000 base payment in respect of OECs under the SDS. The Administrator is to set aside that amount to the Minimum Payment Reserve Account in respect to each OEC.

371 By an interlocutory application filed 22 October 2024 Shine sought leave to intervene to seek orders that:

(a) the $15.4 million ACC be paid 46% to the Funder and 54% to Shine; and

(b) the same percentage split be applied in respect of payment by the Administrator of the remainder of Shine's legal costs (either those to be reimbursed to the Funder or to be paid to Shine) to be paid in the tranches contemplated under section 7 of the Settlement Deed.

372 Like the Funder, Shine does not seek to be paid its costs in priority to the $10,000 base payment in respect of OECs under the SDS. Shine's contentions are concerned with priority of payment in relation to the ACC and the Applicant's Actual Costs. Its contentions are based in the argument that total legal costs are approximately $29.4 million, of which Shine incurred and carried $16.041 million (being 54%), whereas LLS paid $13.358 million (being 46%).

373 Leave to intervene was granted, unopposed.

13.1 The relevant contractual terms

374 As I have said, the LFA indicates that the Funder has first claim on any settlement monies and costs.

375 The definitions clause of the LFA, clause 1, relevantly provides:

Claim means the legal claim or claims the Claimant has or may have against some or all of the Respondents arising out of, or connected with, the facts, matters, circumstances and/or allegations set out in **Item (b) of Schedule 2.**

Claim Proceeds means any amount of money, or the value of any goods, services or benefits, any interest (including interest earned on trust money), any monies recovered by virtue of a Costs Order or any agreement in respect of costs, any money received as part of a claims resolution process or remediation scheme by a government body to compensate group members… The Claim Proceeds refers to the gross value of these sums prior to any set-off or counterclaim exercised or exercisable by the Respondent, prior to any deduction for tax payable and is not net of any costs or expenses of conducting the Claim…

Claimant means the person or entity listed as the "Claimant" on Cover Page A to this Agreement. [The cover page lists Mr Street as the "Claimant".]

Claimant's Share means the share borne by the Claimant calculated by reference to the proportion that the amount of the Claims bears to the total amount of the Relevant Claims.

LLS Commission means the amount provided for and calculated in accordance with **Item (e) of Schedule 2. [**Item (e) of Schedule 2 states "LLS Commission means 20% of the Claim Proceeds"]

LLS Entitlements means an amount equal to:

(a) the Claimant's Share of the Project Costs (with any adjustments necessary relating to GST);

(b) an additional amount, on account of GST…; and

(c) the LLS Commission…

to be paid, assigned and attributed (as the case may be) in the order of priority as listed above.

Project Costs means the external costs incurred at any time up to the conclusion of this Agreement in respect of or associated with investigating, prosecuting and/or resolving the Claims and/or the Relevant Claims, comprising:

(a) the costs involved in a provision of any security for costs;

(b) any Adverse Costs Insurance Premium;

(c) any Adverse Costs Order;

(d) the Legal Costs and Disbursements associated with the Project Investigation;

(e) the Legal Costs and Disbursements associated with the Proceeding;

…

For clarity, Project Costs does not include Remaining Costs or Remaining Costs for Project Investigation.

376 "Remaining Costs" are defined in the definitions clause to be:

(a) the unpaid 25% of Shine's reasonable professional fees for pre-retainer and post retainer work plus uplift; and

(b) any professional fees or disbursements incurred by Shine which are not met by the Funder, plus an uplift in respect of the professional fees.

Remaining Costs do not form part of the Project Costs.

377 Clause 6.1 of the LFA provides:

> In consideration for LLS agreeing to provide the services and funding set out in this Agreement, upon Resolution, the Claimant, as assignor, assigns and pays to LLS, as assignee, the LLS Entitlements from any Claim Proceeds.

378 Clause 6.2 provides for the Funder to have first priority in clear terms. It states:

> Mechanism for payment of the LLS Entitlements and Remaining Costs from the Claim Proceeds
>
> (a) The Claimant agrees to and will take all reasonable steps, and give all necessary instructions where required, to ensure that upon Resolution:
>
> (i) any Claim Proceeds are paid into the Trust Account in the first instance;
>
> (ii) the Lawyers promptly and otherwise within 1 business day, inform LLS of the event in clause 6.2(a); and
>
> (iii) the Lawyers pay the LLS Entitlements directly to LLS from the Trust Account in accordance with subclause 6.2(b) below.
>
> (b) From the Claim Proceeds, the Claimant and the Lawyers will cause:
>
> (i) as first priority, the LLS Entitlements to be paid to LLS within 7 days of receipt of the Claim Proceeds into the Trust Account and before any other payment from the Trust Account;
>
> (ii) as second priority, any Remaining Costs and Remaining Costs for Project Investigation to be paid to the Lawyers pursuant to their entitlements under this Agreement and the Standard Lawyer Terms; and
>
> (iii) as third priority, all remaining amounts belonging to the Claimant to be paid to the Claimant.

379 The SLT between the Funder and Shine is Schedule 5 to the LFA, and is collateral to the LFA. The copy of the SLT in the materials is not signed, but I proceed on the assumption that it was executed.

380 Clause 2.1 of the SLT provides:

> 2.1 The Lawyers will:
>
> 2.1.1 act consistently with the terms of the LLS Funding Agreement;
>
> 2.1.2 comply with all instruction set out in, or provided pursuant to, the LLS Funding Agreement; and

2.1.3 do all things which the LLS Funding Agreement contemplates the Lawyers will do.

381 Clause 7 provides in clear terms that Shine will not seek to recover any Remaining Costs other than in accordance with the terms of the SLT and the LFA. It states:

> **Payment of Remaining Costs**
>
> 7.1 For the avoidance of doubt, the Lawyers will not seek to recover any Remaining Costs or any Remaining Costs for Project Investigation other than in accordance with these Terms and the LLS Funding Agreement.
>
> 7.2 On Resolution and in accordance with the LLS Funding Agreement, the Lawyers shall be entitled to payment or distribution out of any Claim Proceeds, an amount comprising the Remaining Costs uplifted by the amount of 25% and the Remaining Costs for Project Investigation uplifted by the amount of 25%.

13.2 Shine's contentions

382 Shine submits that, consistently with the Court's power under ss 33V and 33ZF of the FCA Act, the manner in which any legal costs are to be apportioned, including the way in which the Applicant's Actual Costs are to apportioned, is subject to the Court's discretion to decide what is "just". It says that is also recognised clause 8.7 of the Settlement Deed which provides that the ACC will be paid to the applicant or at his direction "or as the Court orders".

383 It contends that its proposed apportionment of the ACC and the Applicant's Actual Costs is fair and reasonable in all the circumstances because:

(a) Shine bore the risk and burden of the majority of costs in this proceeding – being approximately $16 million of the total $29.4 million in legal costs and disbursements (i.e., approximately 54% of all legal costs and disbursements incurred). It says that although the litigation would not have commenced but for the Funder's funding it is equally true that the litigation would not have continued (and, ultimately, successfully settled) without Shine's significant contribution to the legal costs of the case. It contends that it is therefore fair and reasonable for Shine to be proportionately awarded 54% of the Agreed Costs Component and the equivalent percentage split in the subsequent deductions from the Settlement Fund Amount for the payment of the balance of the Applicant's Actual Costs;

(b) Shine was also forced to bear additional cost and risk because there were lengthy periods of time between Shine incurring legal costs and the ultimate payment of invoices by the Funder;

(c) while the Funder partially funded the Outreach Program which resulted in a higher number of registrations of affected class members, Shine funded an equivalent amount in respect of the costs of that program;

(d) Shine claims costs of the proceeding have been assessed by the Costs Referee as fair and reasonable; and

(e) while Shine's costs and disbursements totalled $33.2 million, Shine accepted the proposed reductions by the Costs Referee to $31.5 million and voluntarily resolved to apply a significant further discount of $2.25 million to its charges which brought the total cost and disbursements down to $29.25 million.

384 Shine notes that the SDS contemplates the payment of funds in tranches progressively over time depending upon the number of registrations that are accepted as being eligible for payment. It says that there is therefore uncertainty as to the time by which the administration of the SDS will be completed. It argues that, having regard to the circumstances outlined above, it is fair and reasonable for Shine to be reimbursed promptly and separately for its fees from the ACC, with any remaining costs of the SDS to apply the same percentage split until such time as the Funder is fully reimbursed for its funding contribution.

385 Shine further argues that, while not much turns on the contractual entitlements conferred on the Funder under the LFA and the SLT (because of the discretion to decide what is "just" under s 33V(2) of the FCA Act), the apportionment it proposes is nonetheless consistent with the terms of the Settlement Deed and the LFA. In particular, it says that under the LFA, the Funder's entitlement to payment as a first priority is limited to the applicant's share of the costs, as opposed to costs generally incurred in connection with the proceedings.

386 It submits that under clause 6.1 of the LFA, the Funder is entitled to "LLS Entitlements" from any "Claim Proceeds", and that:

(a) "Claim Proceeds" relevantly includes "any agreement in respect of costs, any money received as part of a claims resolution process… settlement [or] judgment...";

(b) "LLS Entitlements" relevantly means "an amount equal to the Claimant's Share of the Project Costs," including the legal costs and disbursements associated with the proceeding and any alternative dispute resolution process;

(c) "Claimant's Share" is defined to mean "the share borne by the Claimant calculated by reference to the proportion that the amount of the Claims bears to the total amount of the Relevant Claims";

(d) "Claimant" means Mr Street; and

(e) "Relevant Claims" means "claims of persons who have, or may have, claims which are the same or similar to the Claims, against some or all of the Respondents. Unless otherwise stated, Relevant Claims include the Claim [being the legal claim or claims of the applicant against any respondent]."

387 On Shine's argument:

(a) under clause 6.1(a) of the LFA, upon receipt of the Claim Proceeds, the applicant agrees to instruct Shine to pay the LLS Entitlements (i.e., including the applicant's share of the costs) to the Funder in accordance with cl 6.2(b) of the LFA;

(b) under clause 6.2(b)(i) of the LFA, from the Claim Proceeds, the Claimant and Shine will, as a first priority, pay the LLS Entitlements (i.e., including the applicant's share of the costs) to the Funder within 7 days of receipt of the Claim Proceeds.

388 Shine contends that the Funder has no entitlement to the entirety of the ACC (or the Applicant's Actual Costs) as a matter of first priority. It argues that the Funder is only entitled to priority payment of the "LLS Entitlement" (being the applicant's share of the claim and costs, relative to all other class members).

13.3 The Funder's submissions.

389 The Funder submits that the terms of the LFA between it and the applicant, and the terms of the SLT between it and Shine, provide that the Funder is to be paid first from all "Claim Proceeds" (as defined). It says that under the LFA, the Funder has priority in relation to the $15.4 million ACC from the State, so as to reimburse it for the $13.358 million it has paid to Shine, plus reimbursement of its ATE Costs, plus part payment of its funding commission.

390 However, the Funder proposes a concession, which involves the $15.4 million ACC being distributed as follows:

(a) first, $80,000 in reimbursement to the applicant and sample group members;

(b) second, $150,000 as payment to the Costs Referee for past invoices;

(c) third, reimbursement to the Funder of approximately $13.358 million it paid to Shine for legal costs;

(d) fourth, reimbursement to the Funder of approximately $1.045 million it paid in ATE Costs; and

(e) fifth, the remaining $766,132, going towards the Funder's commission.

391 The Funder calculates its commission under subparagraph (e) above on the basis of 20% of the $15.4 million ACC, which equals $3.08 million. The Funder then seeks the balance of its 20% commission attributable to the ACC ($2,313,869) to be paid from the first tranche of the Settlement Fund Amount.

392 The Funder submits that the balance of the first tranche of the Settlement Fund Amount, and each subsequent tranche, should be distributed as follows:

(a) first, to each OEC in respect of which the tranche is paid, the proposed minimum payment of $10,000;

(b) second, 20% of the gross Settlement Fund Amount of each tranche to the Funder on account of commission (noting for the first tranche, the Funder would receive the part commission of $2,313,869 referred to above plus 20% of the gross Settlement Fund Amount. Then, for the second tranche payment onwards, the Funder would receive 20% of the gross Settlement Fund Amount tranche paid);

(c) third, for accrual of reserves for administration costs and the "Top-up Payment Reserve" contemplated (from which top-up payments to OECs are paid), and payment of Shine's unpaid costs and disbursements.

393 Thus the Funder submits that it should be paid all of the $15.4 million ACCC amount in reimbursement of costs paid to Shine, ATE Costs and part payment of commission, and the balance of its funding commission should be paid to it from the Settlement Fund Amount in priority to any payment of Remaining Costs to Shine, but not in priority to base payments due to OECs under the SDS.

13.4 Analysis

394 I do not accept Shine's contentions as to the proper construction of the LFA and the SLT.

395 The LFA provides that:

(a) Claim Proceeds includes any monies recovered by virtue of any costs order or an agreement in respect of costs. It therefore includes the ACC;

(b) Project Costs relevantly includes all legal costs paid by the Funder to Shine and its ATE Costs;

(c) the costs to which Shine's interlocutory application relates fall within the definition of Remaining Costs under the LFA, and also the definition of Remaining Costs under the CCA between Shine and the applicant; and

(d) the "LLS Entitlements" comprising "the Claimant's Share of the Project Costs" and the Funder's commission is to be paid to the Funder as first priority, and the Remaining Costs are to be paid to Shine as second priority (cl 6.2(b)(i) and (ii)).

396 Under the LFA the Claimant's share of the Claim Proceeds is the third priority, but it is common ground that the $10,000 base payment in respect of each OEC is to be set aside by the Administrator to the Minimum Payment Reserve Account before reimbursement or payment of legal costs and funding commission.

397 The SLT expressly provides that Shine must act consistently with the LFA, and not seek to recover any Remaining Costs other than in accordance with the SLT and the LFA.

398 In my view the LFA and SLT provide that the Funder has priority over Shine in relation to all Claim Proceeds, including the ACC. The SLT requires Shine to act consistently with the LFA.

399 With respect to the priority between Shine and the Funder in relation to the $15.4 million ACC, Shine's reliance on the limitation in the definition of "Claimant's Share" to "the share borne by [Mr Street of the ACC] calculated by reference to the proportion that the amount of the Claim bears to the total amount of the Relevant Claims" is misconceived. At present there is only one Claimant, the applicant. No other class member has as yet been admitted as an eligible claimant under the SDS. The legal costs incurred in the proceeding are the applicant's costs, and the class members had (and have) no liability to Shine for legal costs. I consider the ACC is paid by the State to defray the party/party costs the applicant incurred. That is recognised in clause 8.7 of the Settlement Deed which states "[t]he Agreed Costs Component or any tranche thereof *will be paid to the Applicant, or at his direction*, or as the Court orders…" (emphasis added).

400 If the case had not settled there would likely have been some legal costs attributable to individual eligible class members, but here all of the legal costs incurred are the applicant's

costs. Thus, the applicant's share of the ACC is the entirety of the ACC, and under the LFA and the SLT the Funder is entitled to first priority in obtaining reimbursement of the legal costs it has paid.

401 Further, even if the definition of "Claimant's Share" reflects the parties' intention in relation to one Claimant only and (contrary to my view) there is presently more than one Claimant, the priority terms replicate the Funder's first priority in relation to any other Claimant who is admitted as eligible to receive a payment under the SDS. Thus, the Funder has first priority in relation to other Claimants' shares of the Agreed Costs Component, if that was the case.

402 However the LFA is with the applicant, and whether those terms should apply across to all class members is a matter for the Court. Both Shine and the Funder accepted, the Court's task under s 33V(2) of the FCA Act is to approve the deduction and payment of reasonable and proportionate costs from the settlement, and to approve the deduction and payment of reasonable and proportionate litigation funding charges, on the basis of what the Court considers to be "just". They accepted that the exercise of the power to approve the quantum of costs and/or funding charges to be deducted, and the priority of such payments, pursuant to s 33V of the Act requires consideration against all the relevant circumstances, including but not limited to the applicable costs agreement and LFA. In that sense, not much may turn on the particular terms of any applicable costs agreement or LFA: *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842; 132 ACSR 258 at [112], [117] (Murphy J).

403 Even so, to my mind the starting point is that Shine and the Funder, unlike class members for example, are sophisticated repeat players in class actions and litigation funding. The contractual bargain they struck should not lightly be departed from, and there is a public interest in keeping people to their freely entered bargains: *Baltic Shipping Co v Dillon* [1991] NSWCA 19; 22 NSWLR 1 at 9 (Gleeson CJ).

404 In relation to the ACC, I consider it would not be "just" pursuant to s 33V to order that the Funder lose its priority in relation to the Project Costs it invested in the case. It should be reimbursed its legal costs of $13.358 million and its ATE Costs of $1.045 million as first priority from the ACC. In that way the Funder will no longer be "out of pocket" and the only remaining amount to be paid to it is its return of investment, the funding commission.

405 I take a different view however in relation to the fairness of Shine being required to wait until after the Funder has been paid the entirety of its funding commission before Shine commences to recover any of the very substantial costs it has incurred and carried. That is what the contractual arrangements between the applicant and the Funder in the LFA, and between Shine and the Funder in the SLT require, but I am satisfied that it would not be "just" in all the circumstances to so order.

406 Shine submits that the costs sharing across the whole proceeding was 54% Shine / 46% Funder. The Funder says the relevant consideration is not costs incurred but rather risk taken on. It contends (and I accept) that Shine knew that 75% of their fees would be paid as incurred, regardless of the outcome of the proceeding, while the Funder's expenditure was entirely at risk. I accept too that unpaid work in progress is of a different character to advancing cash, as the Funder did.

407 I accept that the Funder was at risk for the nearly $10 million it advanced in legal costs up to the point of settlement, and the $1.045 million in ATE Costs it paid. But the Funder's share of the risk in the case is not as it suggests. And, while there is a public interest in holding Shine to the bargain it entered into with the Funder, the following matters are material to my view:

(a) the Funder's entitlement to first priority reflects the view that it was to fund the proceeding. As it eventuated, it funded only half of the proceeding, and the balance was "funded" by Shine;

(b) up to the point of settlement Shine incurred and carried more than $8.2 million in legal costs above the $10 million funding cap. That amount included disbursements, and therefore involved advancing cash. At that point Shine had resourced nearly 50% of the case, which it would lose if the case was unsuccessful, and it would receive no risk commission if the case was successful. It is unlikely that that was Shine's intention when the case was commenced. The 25% uplift cannot be seen as a risk commission. It usually barely covers borrowing costs and wage expenditure given the time value of money;

(c) it was open to the Funder to continue to fund the proceeding after the funding cap was reached but it chose not to do so. Alternatively, it was open to the Funder to reinstate funding when the case was approaching trial, but it chose not to do so;

(d) it was directly in the Funder's interests for the Registration Process to be extensive and well performed so that as many class members as possible registered. Because the

Funder seeks a 20% funding commission, the greater the number of registered OECs the greater its total funding commission would be. Even then the Funder did not fully fund the case. By the settlement approval hearing, after the Costs Referee's reductions, Shine claimed legal costs of $31.5 million which (less the $13.358 million which the Funder had paid) meant Shine had carried approximately $18 million in costs to that point. There was no real risk that it would not recover the reasonable post-settlement component of those costs, but that expenditure increased the case resourcing shouldered by Shine;

(e) there was no guarantee of settlement occurring when it did, five days before trial. If the case had continued, as it might have, Shine would have been on the hook for further substantial costs and disbursements which it would lose if the case was unsuccessful. The Funder had not agreed to reinstate funding even at that point; and

(f) the Funder did not meet its end of the bargain. The evidence shows that the Funder was contractually obligated to pay Shine's invoices within 30 days, subject to an ability to obtain a refund or credit note if the Costs Referee engaged by the Funder later found the costs to be unreasonable. The Funder did not comply with those terms and the time period between the issuance of a final invoice and payment of that invoice was significant, with an average of 196 days delay which forced Shine to carry more of the costs and risk of the case that it had bargained for.

408 The amount of the reasonable legal costs Shine carried is reduced by my disallowance of $4 million of its fees from the amount approved by the Costs Referee, but it is nevertheless appropriate to treat it as having carried approximately 50% of the costs and risk of the case.

409 Taking all of this into account, in my view it is "just" that the priority of payment as between the Funder and Shine be such that after the Funder has been reimbursed its Project Costs, Shine receive what is left of the ACC in part payment of the Applicant's Actual Costs, and thereafter as provided in the SDS, from each tranche, Shine be paid the Applicant's Actual Costs and any Transitional Allowance in an equal amount to that which the Funder is paid its funding commission, and at the same times, until the Applicant's Actual Costs are paid in full. The amount due to Shine for the Applicant's Actual Costs is substantially less than the amount due to the Funder for its commission, so Shine will be paid out before the Funder is paid out.

CONCLUSION

410 The Court has provided the parties with draft orders to reflect these reasons. The parties should confer and provide any suggested changes, but reflecting these reasons, within 7 days.

I certify that the preceding four hundred and ten (410) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Murphy.

Associate:

Dated: 27 November 2024

SCHEDULE 1 – FUNDER'S CASE SCHEDULE

	Name of case and description	Type of claim	Citation	Percentage of gross
(a)	In *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Recs and Mgrs apt)* (Federal Court of Australia, NSD1609/2013), a common fund order was made at resolution with a commission rate of 30% of the *net* resolution sum (22.1% of the gross resolution sum).	Shareholder	(2017) 343 ALR 476, 515–516 at [143]–[160].	22.1%
(b)	In *Caason Investments Pty Limited v Cao (No 2)* (Federal Court of Australia, NSD1558/2012), a common fund order was made at resolution approving a rate of 30% of the *gross* resolution sum.	Shareholder	[2018] FCA 527 at [165].	30%
(c)	In *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3)* (Federal Court of Australia, NSD362/2016), Murphy J declined to award the commission rate of 25% sought as it would leave only approximately $250,000, or 2% of the resolution sum, to be distributed amongst group members and instead, made a common fund order at resolution that resulted in a commission payment to the funder of 8.3% of the *gross* resolution sum.	Investor (against bank which operated accounts of Ponzi scheme architect)	(2018) 132 ACSR 258, 260 at [5] and 262 at [14].	8.3%

	Name of case and description	Type of claim	Citation	Percentage of gross
(d)	In *Hopkins v Macmahon Holdings Limited* (Federal Court of Australia, NSD1346/2015), a common fund order was made at resolution that resulted in a commission payment to the funder of an amount representing 19% of the *gross* resolution sum, or 35% of the *net* resolution sum.	Shareholder	[2018] FCA 2061 at [10].	19%
(e)	In *Money Max Int Pty Limited v QBE Insurance Group Limited* (Federal Court of Australia, VID513/2015), a common fund order was made at resolution that resulted in a commission payment to the funder of an amount representing 23.2% of the *gross* resolution sum, or 27.5% of the *net* resolution sum.	Shareholder	(2018) 358 ALR 382, 384-5 at [8].	23.2%
(f)	In *Kuterba v Sirtex Medical Limited* (Federal Court of Australia, VID1375/2017), a common fund order was made at resolution that resulted in a commission payment to the funder of an amount representing 25% of the *gross* settlement sum.	Shareholder	[2019] FCA 1374 at [7].	25%
(g)	In *Hall v Slater & Gordon Limited* (Federal Court of Australia, VID1213/2018), a common fund order was made at resolution that resulted in a commission payment to the funder of an amount representing 21.92% of the *gross* resolution sum, or 28.07% of the *net* resolution sum.	Shareholder	[2018] FCA 2071 at [84]–[97].	21.92%

	Name of case and description	Type of claim	Citation	Percentage of gross
(h)	In *Pearson v State of Queensland* (Federal Court of Australia, QUD714/2016), a common fund order of 20% of the gross settlement sum was left in place by Murphy J on settlement approval, but the evidence on the hearing where the early common fund order was set was that the funder (LLS) had committed to a low rate mindful of the social justice aspect of that case (which was on behalf of very disadvantaged Aboriginal persons).	Human Rights	[2020] FCA 619 (and see [2017] FCA 1096).	20%
(i)	In *Uren v RMBL Investments & Anor* (Federal Court of Australia, VID1093/2018), a common fund order was made at resolution which resulted in a return to funders of 25% of the *gross* resolution sum	Shareholder	[2020] FCA 647 at [48].	25%
(j)	in *Webster atf the Clar Pty Ltd Superfund Trust v Murray Goulburn Co-Operative Co Limited & Ors* (Federal Court of Australia, VID508/2017), a common fund order was made which resulted in a return to the funders of 23% of the *gross* settlement sum.	Shareholder	[2020] FCA 1053 at [125]; [2020] FCA 1405.	23%
(k)	In *Court v Spotless Group Holdings Limited* (Federal Court of Australia, VID561/2017), a common fund order was made which resulted in a return to the funders of 22.5% of the settlement sum, *net* of costs (20.5% of the *gross* settlement sum).	Shareholder	[2020] FCA 1730 [101].	20.5%

	Name of case and description	Type of claim	Citation	Percentage of gross
(l)	In *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd & Anor* (NSD544/2019), a common fund order was made which resulted in a return to the funder of 25% of the *gross* settlement sum.	Consumer (junk insurance)	(2020) 385 ALR 625, 633 at [28].	25%
(m)	In *Evans v Davantage Group Pty Ltd (No 3)* (Federal Court of Australia, VID982/2018), a common fund-type order was made which resulted in a return to the funder of 28.77% of the *gross* settlement sum. A further 43.5% of the residual resolution sum of $680,000 was returned to the funder (representing a return to the funder of an additional 3.11% of the original resolution sum), not included in the right-hand column.	Consumer (motor vehicle warranties)	(2021) 398 ALR 490, 507 at [113]. [2021] FCA 70 at [39(b)], [53], and [59].	28.77%
(n)	In *Hall v Arnold Bloch Leibler (No 2)* (Federal Court of Australia, VID1010/2019), a common fund-type order was made which resulted in a return to the funder of 28% of the *gross* settlement sum.	Shareholder (against legal advisor)	[2022] FCA 163.	28%
(o)	In *Quirk v Suncorp Portfolio Services Pty Ltd in its capacity as trustee for the Suncorp Master Trust (No 2)* (New South Wales Supreme Court, 2019/193556), a common fund order was made which resulted in a return to the funder of 37% of the *net* settlement sum.	Superannuation	[2022] NSWSC 1457 [45]-[51].	25%

	Name of case and description	Type of claim	Citation	Percentage of gross
(p)	In *Bradshaw v BSA Ltd (No 2)* (Federal Court of Australia, VID 488/2020), a common fund order was made which resulted in a return to the funder (LLS) of 18.66% of the *gross* settlement sum. Bromberg J based the rate, *inter alia*, on the fact that there are lower financial risks associated with an employment class action, which attracted the no costs jurisdiction of s 570 of the *Fair Work Act 2009* (Cth). LLS had sought a higher rate be approved than the Court ultimately allowed.	Employment	[2022] FCA 1440 at [168] to [170].	18.66%
(q)	In *Hall v Pitcher Partners* (Federal Court of Australia, VID918/2018), a common fund order was made which resulted in a return to the funder of 28% of the *gross* settlement sum.	Shareholder (against auditor)	[2022] FCA 1524 at [2] and [51].	28%
(r)	In *Lay v PTTEP Australasia (Ashmore Cartier) Pty Ltd* (Federal Court of Australia, NSD1245/2016), a common fund like order was made which resulted in a return to the funder of 30% of the settlement sum	Environmental	[2023] FCA 242	30%
(s)	In *Haswell v Commonwealth* (Federal Court of Australia, NSD431/2020) a common fund order was made which results in a return to the funder of 25% of the gross settlement sum	Environmental	[2023] FCA 1093	25%

	Name of case and description	Type of claim	Citation	Percentage of gross
(t)	In *Ingram & Anor v Ardent Leisure Ltd* (Federal Court of Australia, QUD182/2020), a common fund order was made which resulted in a return to the funder of 30% of the gross settlement	Shareholder	Orders of Justice Derrington dated 30 November 2023; Judgment reserved	30%
(u)	In *Ghee v BT Funds Management Limited* (Federal Court of Australia VID962/2019), a common fund order was made which resulted in a return to the funder of 21.8% of the gross settlement sum	Consumer (junk insurance)	[2023] FCA 1553	21.8%
(v)	In *Galactic Seven Eleven Litigation Holdings LLS v Pareshkumar Davaria* (Federal Court of Australia, VID180/2018, VID182/2018), the Full Court made a common fund order which resulted in a return to the funder of 25% of the gross settlement sum	Franchisee	[2024] FCAFC 54	25%
(w)	*Marcel Eugene Krieger & Anor v Colonial First State Investments Limited & Anor* (Federal Court of Australia, VID1141/2019), the Federal Court made a common fund order which resulted in a return to the funder of 18% of the gross settlement sum.	Consumer (superannuation)	[reasons not yet published]	18%

	Name of case and description	Type of claim	Citation	Percentage of gross
(x)	In *Compumod Investments Pty Limited as Trustee for the Compumod Pty Limited Staff Superannuation Fund & Anor v Universal Equivalent Technology Limited (formerly ACN 603 323 182 Limited and formerly Axsesstoday Limited & Ors* (Federal Court of Australia, NSD917/2020) a common fund order was made which resulted in a return to the funder of 21.7% of the gross settlement sum.	Bondholders	[2024] FCA 917	21.7%
(y)	In *Ewok Pty Ltd as Trustee for the E & E Magee Superannuation Fund v Wellard Limited* (Federal Court of Australia, VID175/2020) a common fund order was made which resulted in a return to the funder of 21.15% of the gross settlement sum.	Shareholder	[2024] FCA 296	21.15%