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

Not Restricted

S ECI 2020 04505

NICHOLAS JOHN GEHRKE	First Plaintiff
and	
LESTER BUCH	Second Plaintiff
v	
NOUMI LIMITED (ACN 002 814 235)	First Defendant
and	
DELOITTE TOUCHE TOHMATSU (A FIRM) (ABN 74 490 121 060)	Second Defendant

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JUDGE:	DELANY J
WHERE HELD:	Melbourne
DATE OF HEARING:	17 April 2025, further material 9 May 2025
DATE OF RULING:	25 June 2025 (First Revision 27 June 2025)
CASE MAY BE CITED AS:	Gehrke & Anor v Noumi Ltd & Anor
MEDIUM NEUTRAL CITATION:	[2025] VSC 373 (First Revision (27 June 2025): [159])

REPRESENTATIVE PROCEEDINGS — Part 4A Group proceeding — Application for approval of settlement — Whether settlement fair and reasonable as between the parties and as between group members — Shareholder class action — Alleged breach of continuous disclosure obligations over a 5.5 year period — Two defendants — The company and its auditors — Defences raised proportionate liability issues — Cross claims and third party claims between defendants — Financial circumstances of the company — Settlement involves all parties — Settlement approved — *Supreme Court Act 1986* (Vic) Part 4A, ss 33V, 33ZF — *Botsman v Bolitho* [2018] VSCA 278, applied.

PRACTICE AND PROCEDURE — Part 4A Group proceeding — Application for approval of settlement —Soft class closure order — Proceeding settled at mediation —Applications for late registration to permit participation in the settlement — *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)* [2024] VSC 733, applied.

PRACTICE AND PROCEDURE — Part 4A Group proceeding — Appointment of Scheme Administrator — Approval for payment of costs of administering settlement distribution scheme.

PRACTICE AND PROCEDURE — Part 4A Group proceeding — Approval for payment of

legal costs from settlement sum — No reason to vary group costs order — *Supreme Court Act 1986* (Vic) Part 4A, 33ZDA — *Allen v G8 Education Ltd (No 4)* [2024] VSC 487, applied.

CORPORATIONS — Earlier declarations and orders for the payment of a pecuniary penalty in Federal Court proceedings between ASIC and the first defendant — Contravening conduct occurred during part of the claim period in this proceeding and in respect of the same subject matter — Plaintiffs in this proceeding intervened in their representative capacity in the Federal Court proceeding — Pecuniary penalty ordered to be paid into the Federal Court subject to further order — Statement of agreed facts in this proceeding as between the plaintiffs and first defendant mirrors facts agreed in the Federal Court proceeding between ASIC and the first defendant — Declarations and orders made in this proceeding on the basis of the agreed facts to facilitate the potential payment of compensation by the Federal Court to group members whose claims relate to the same period as the contravening conduct — *Corporations Act 2001* (Cth) ss 674, 1317HA, 1317QF — *ASIC v Noumi Limited (No 3)* [2024] FCA 862 referred to.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	E Levine	Slater and Gordon Phi Finney McDonald
For the First Defendant	R G Craig KC A McRobert	Arnold Bloch Leibler
For the Second Defendant	S Gerber	Corrs Chambers Westgarth

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HIS HONOUR:

A. Introduction

1 These reasons concern an application to approve a proposed settlement of a group proceeding under s 33V and s 33ZF of the *Supreme Court Act 1986* (Vic) (**'**Act') against Freedom Foods Group Limited ('FFA' now called 'Noumi') and Deloitte Touche Tohmatsu ('Deloitte'), together with a Settlement Distribution Scheme. The proposed settlement provides for the payment of costs pursuant to a Group Costs Order ('GCO') and for the distribution of the remainder of the $43 million settlement sum between group members ('Settlement Sum').

2 These reasons follow the hearing on 17 April 2025 and the later provision of further materials up to and including 9 May 2025 concerning applications by certain unregistered group members to participate in the settlement.

3 The proceeding is brought on behalf of all persons who, during the period between 7 December 2014 to 24 June 2020 ('Claim Period') acquired an interest in fully paid ordinary shares in Noumi, an interest in American Depository Receipts ('ADRs') that represent Noumi shares, and/or long exposure to Noumi's shares by entering into equity swap confirmations in respect of ordinary shares ('Equity Swaps').

4 Noumi is and at all relevant times was a public company incorporated pursuant to the *Corporations Act 2001* (Cth) ('*Corporations Act*'), listed on the Australian Securities Exchange ('ASX'), carrying on business as a manufacturer and distributor of food and beverages, in particular, cereals, snacks, long-life beverages (both dairy and non-dairy) and canned seafood. As a listed company Noumi was subject to and bound by the ASX Listing Rules.[1] It was obliged to immediately inform the ASX of any information that a reasonable person would expect to have a material effect on the price or value of its shares, upon becoming aware of that information.

5 Deloitte is and at all relevant times was a partnership carrying on business as

[1] Which are and at all material times were 'listing rules' within the meaning of s 674 of the C*orporations Act 2001* (Cth).

accountants, auditors and advisors. Deloitte was Noumi's auditor during the Claim Period. It was required to conduct its audits of Noumi's full-year financial reports in accordance with its statutory audit obligations under the *Corporations Act*.

6 The claims advanced by the plaintiffs and group members concern Noumi's failure to disclose material misstatements in its financial accounts in the Claim Period and alleged misrepresentations by Deloitte in the yearly audits and half-yearly reviews of Noumi's accounts which Deloitte prepared. The alleged misstatements and misrepresentations are alleged to have affected the value of Noumi's shares, and to have caused loss to the plaintiffs and group members.

7 Noumi and Deloitte deny liability for the claims made by the plaintiffs and group members. They also dispute the basis of calculation of loss for which the plaintiffs contend. As between themselves, by their defences, notices of contribution and third party notices filed in the proceeding, Noumi and Deloitte seek to sheet home any liability that may arise to one other.

8 Following a protracted process of mediation conducted by Associate Justice Gobbo, the judicial mediator, the parties reached an in-principle settlement of the proceeding subject to Court approval pursuant to s 33V of the Act.

9 The in-principle settlement is recorded in the Deed of Settlement executed by the parties on 16 October 2024 ('Settlement Deed').

10 There are three issues arising from the Settlement Deed and the settlement of the proceeding to which specific reference should be made.

11 The first issue concerns late registrations and whether unregistered group members should be permitted to participate in the settlement. Orders were made on 28 September 2023 for claim registration, opt out and 'soft class closure'. The order for soft class closure has the effect that only group members who registered by 15 November 2023 are entitled to participate in any settlement reached at the Court-ordered mediation.

12 118 group members who did not register their claims prior to 15 November 2023 wish to participate in the settlement. The plaintiffs submit those persons should be permitted to participate in the settlement. Their participation is not opposed by the defendants. For the reasons discussed below, I have determined to allow most, but not all, of the group members who did not register their claims prior to 15 November 2023 but who have applied to participate in the settlement to do so.

13 The second issue concerns orders to facilitate access by group members who acquired shares in Noumi or ADRs or entered into Equity Swaps during the period 29 August 2019 to 25 May 2020 ('Eligible Group Members') to $5 million ordered to be paid by Noumi as a pecuniary penalty to the Commonwealth of Australia pursuant to an Order made in the Federal Court of Australia on 5 August 2024 ('ASIC penalty sum'). That Order was made in Federal Court proceeding NSD 163 of 2023 in which ASIC was the applicant and Noumi was the respondent ('ASIC proceeding'). It is in the interests of Eligible Group Members that I make such declarations and orders as are within my power to facilitate access by them to the ASIC penalty sum ordered to be paid by Noumi in that proceeding and I will do so.

14 The third issue concerns whether the GCO made on 8 November 2022, which set the percentage for legal costs at 22% of any settlement sum, should be varied pursuant to s 33ZDA(3) of the Act. Neither the plaintiffs nor the law practices acting on their behalf seek to vary the rate of the GCO. I am satisfied this is not an appropriate case to vary that percentage.

15 For the reasons that follow, I accept the submission on behalf of the plaintiffs and group members that the proposed settlement is fair and reasonable and in the interests of group members as a whole, and as between the group members. I am satisfied that the proposed Settlement Distribution Scheme and the costs involved in the administration of that scheme are reasonable and appropriate. I am satisfied that it is appropriate to approve the settlement pursuant to s 33V of the Act.

B. The Proceeding

16 On 7 December 2020 and 19 February 2021, respectively, Nicholas John Gehrke and Lester Buch commenced separate but overlapping group proceedings both in the Supreme Court of Victoria against Noumi and Deloitte.

17 On 18 November 2021, Nichols J made orders consolidating the separate proceedings with Mr Gehrke and Mr Buch as joint plaintiffs ('the consolidated proceeding'). The consolidation orders included that the solicitors in the separate proceedings initiated by Mr Gehrke and Mr Buch (Slater and Gordon Lawyers ('Slater and Gordon') and Phi Finney McDonald ('PFM') were granted leave to be jointly named as solicitors on the record in the consolidated proceeding. Orders for the joint carriage of the consolidated proceeding by the two law practices were conditional upon the plaintiffs and their solicitors undertaking to conduct the proceeding in accordance with a co-operation protocol.

18 On 16 December 2021, the plaintiffs filed a consolidated writ and statement of claim. Noumi filed its defence on 8 April 2022. Deloitte filed its defence on 8 April 2022.

19 Group members were defined in the consolidated writ and statement of claim ('statement of claim') as persons who:

> 1.1. during the period between 7 December 2014 and 24 June 2020, inclusive (Claim Period), acquired:
>
> (a) an interest in fully paid ordinary shares (FNP Shares) in the First Defendant (FNP);
>
> (b) an interest in American Depository Receipts that represent FNP Shares (FNP ADRs); and/or
>
> (c) long exposure to FNP Shares by entering into equity swap confirmations in respect of ordinary shares in FNP (FNP Equity Swaps);
>
> 1.2. have suffered loss or damage by reason of the conduct of the defendants as pleaded in this Consolidated Statement of Claim; and
>
> 1.3. were not during any part of the Claim Period, and are not as at the date of this Consolidated Statement of Claim, any of the following:
>
> (a) a related party (as defined by s 228 of the Corporations Act 2001 (Cth) (Corporations Act) of either FNP or the Second Defendant

(Deloitte);

(b) a related body corporate (as defined by s 50 of the Corporations Act) of either FNP or Deloitte;

(c) an associated entity (as defined by s 50AAA of the Corporations Act) of either FNP or Deloitte;

(d) an officer or a close associate (as defined by s 9 of the Corporations Act) of either FNP or Deloitte; or

(e) a Justice or the Chief Justice of the Supreme Court of Victoria, or a Justice or the Chief Justice of the High Court of Australia.

20 The statement of claim alleges that Noumi:

(a) engaged in misleading or deceptive conduct in contravention of s 1041H of the *Corporations Act*, s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*') and s 18 of the *Australian Consumer Law* ('ACL'); and

(b) breached its continuous disclosure obligations under s 674 of the *Corporations Act*.

21 The plaintiffs allege that Noumi overstated earnings and profits, overvalued assets, failed to record capital works in progress in accordance with Noumi's policy, overvalued trade receivables, and failed to record inventory accurately and in accordance with its inventory policy including by recording large quantities of expired or otherwise unsaleable stock. They allege that Noumi made such misstatements while aware (by virtue of its the knowledge of its former Chief Executive Officer, Mr MacLeod and former Chief Financial Officer, Mr Nicholas) of the information comprising the 'true position' of the company's financial accounts.

22 The case pleaded against Deloitte is that Deloitte:

(a) in issuing its yearly audits and half-yearly reviews of Noumi's financial accounts, engaged in misleading or deceptive conduct under s 1041H of the *Corporations Act*, s 12DA(1) of the *ASIC Act* and s 18 of the ACL; and

(b) made false or misleading statements with respect to its yearly audits and half-yearly reviews of Noumi's financial accounts when it knew or ought reasonably to have known that statements in those audits and reviews were false in a material particular or materially misleading, and therefore contravened s 1041E of the *Corporations Act*.

23 The plaintiffs allege that in its capacity as Noumi's external auditor Deloitte prepared half-year reviews and full-year audits containing representations that Deloitte had not become aware of any matters that gave it reason to believe that Noumi's financial reports did not give a true and fair view of Noumi's financial position. Deloitte's reviews also represented that it had exercised the skill and care required of a competent professional company auditor, conducted its audits in accordance with applicable 'Auditing Standards' and based its findings on having obtained reasonable assurance from Noumi that its financial reports were free from material misstatement. It is alleged that such representations by Deloitte did not represent the true state of Noumi's financial position, nor Deloitte's professional conduct.

24 The plaintiffs' claims arise in the context of various disclosures made by Noumi in 2020 about its financial position. It is pleaded by the plaintiffs and admitted by the defendants that:

(a) On 29 May 2020, Noumi made a market disclosure about an expected 'one-off non-cash write down of the carrying value of inventory' in FY20, estimated to be in the amount of approximately $25 million.

(b) On 23 June 2020, Noumi released a statement that its CFO, Mr Nicholas, had resigned.

(c) On 24 June 2020, Noumi released a statement that its Managing Director and CEO, Mr MacLeod, was 'on leave pending a further announcement that is expected to be made early next week'.

(d) Also on 24 June 2020, Noumi entered a trading halt which lasted nine months.

(e) On 25 June 2020, Noumi disclosed the company's estimate of the 'one-off non-cash write-down of the carrying value of inventory in FY20' foreshadowed in the 29 May 2020 trading update as being approximately $25 million had increased to approximately $60 million, to reflect 'provisioning for obsolete stock, out of date stock and product withdrawals', and that the obsolete and out-of-date stock dated 'from the current year back to 2017'.

(f) On 30 June 2020, Noumi disclosed that on 29 June 2020, it had accepted the resignation of Mr MacLeod as Managing Director and CEO.

(g) On 30 November 2020, Noumi released a statement to the ASX entitled '2020 Full-Year Financial Results Release' in which it stated that the total impact of adjustments and write-downs for FY2020 and 'prior periods' was approximately $590 million, including: $372.8 million from a reduction in asset values reflecting changes to accounting policies and practices related to the capitalisation of capital works costs; $75.9 million in write-downs of goodwill and brands; $60.1 million in write-downs of out-of-date, unsaleable and obsolete inventory; and $38.9 million from a reduction in value of capitalised new product costs reflecting changes to accounting policies and practices.

25 The plaintiffs allege these public disclosures coincided with falls in Noumi's share price.

26 The objective facts are that after the release of the 29 May 2020 trading update, Noumi's share price fell from $4.36 per share at close of trade on 28 May 2020 to $3.45 per share at close of trade on 2 June 2020. After the release of the 23 June 2020 CFO resignation announcement and CEO leave announcement on 24 June 2020, Noumi's share price fell from $3.52 at close of trade on 23 June 2020 to $3.10 at the commencement of the pause of trading on 24 June 2020. After the pause in trading on 24 June 2020, Noumi's share price fell from $3.10 per share at close of trade on 24 June 2020 to $0.53 per share at close of trade on the next full day of trading, 22 March 2021.

27 The plaintiffs allege that during the Claim Period, Noumi and Deloitte's

contraventions, alone or in any combination, caused the market price of Noumi shares, ADRs and Equity Swaps to be inflated beyond their true value or the true market price that would have existed if not for the defendants' contraventions. The corollary is that had the true position been disclosed, there would have been a material negative effect on the price of Noumi's shares. In this way, the plaintiffs' case relies on the theory of 'market-based causation'.

28 The plaintiffs and group members claim compensation for loss and damage pursuant to s 1041I of the *Corporations Act*, s 12GF of the *ASIC Act* and/or s 236 of the ACL. Further and in the alternative, the plaintiffs and group members claim compensation from Noumi pursuant to s 1317HA of the *Corporations Act*.

29 In its defence Noumi admits that it represented it had complied with all applicable provisions of chapter 2M and s 674 of the *Corporations Act* and that it made various restatements of its financial position, in relation to which reasonable minds may differ. Noumi denies that it engaged in misleading or deceptive conduct and denies the allegations concerning loss and damage.

30 Noumi pleads a proportionate liability defence, alleging that by operation of the retainer between Noumi and Deloitte, Deloitte was required to provide services with reasonable care and skill and owed Noumi a duty in tort to take reasonable care. Noumi's proportionate liability defence pleads that if the plaintiffs have suffered loss and damage as alleged (which is denied), then Deloitte's conduct caused that loss and damage. Therefore, the misleading and deceptive conduct claims made by the plaintiffs pursuant to s 1041H, s 12DA(1) of the *ASIC Act* and s 18 of the ACL are apportionable claims. Noumi pleads that if it is liable to the plaintiffs for those alleged claims, then its liability is limited to an amount reflecting that proportion of the loss and damage claimed that the Court considers just and Noumi cannot be required to compensate the plaintiffs for more than their proportion as determined by the Court.

31 On 8 April 2022, Noumi filed a Notice of Contribution against Deloitte. By that notice Noumi claimed to be entitled to contribution from Deloitte pursuant to Part IV of the

Wrongs Act 1958 (Vic) in respect of any sum which the plaintiffs or group members may recover against Noumi, to the extent of such amount as the Court considers just and equitable having regard to Deloitte's responsibility for damages as pleaded by the plaintiffs.

32 In its defence, Deloitte denies the allegations of contravening conduct made against it in the plaintiffs' pleadings. In substance, Deloitte claims to have acted to a reasonable professional standard and relied on management representations from Noumi officers. Deloitte also pleads proportionate liability against Noumi with respect to apportionable misleading and deceptive conduct claims by the plaintiffs against both defendants. Alternatively, Deloitte pleads that it acted honestly and ought fairly to be excused from any liability for the misleading and deceptive conduct claims brought against it.

33 On 12 April 2022, Deloitte filed a Third Party Notice against Noumi. By that notice Deloitte alleges that Noumi misrepresented the state of its financial accounts to Deloitte and thereby engaged in misleading and deceptive conduct in contravention of s 1041H of the *Corporations Act*, s 12DA of the *ASIC Act* and s 18 of the ACL. Deloitte pleads that to the extent that it made representations alleged by the plaintiffs, it did so in reliance on the representations made to it by Noumi. As a result, Noumi breached the retainer with Deloitte. Deloitte claims an entitlement to recover from Noumi any loss or damage caused by Noumi's misleading or deceptive conduct and/or breach of the retainer. Deloitte also claims an entitlement to contribution and/or indemnity from Noumi pursuant to Part IV of the *Wrongs Act 1958* (Vic) with respect to any misleading and deceptive conduct contraventions.

34 In the Amended Statement of Agreed Facts filed 15 April 2025 ('ASOF') (and the earlier Statement of Agreed Facts dated 13 January 2025) Noumi admitted that it engaged in two continuous disclosure contraventions of s 674(2) of the *Corporations Act*.

35 The ASOF leaves the following matters in contest:

(a) whether Noumi engaged in misleading or deceptive conduct in contravention of s 1041H of the *Corporations Act*, s 12DA(1) of the *ASIC Act* and s 18 of the ACL;

(b) whether Deloitte engaged in misleading or deceptive conduct under s 1041H of the *Corporations Act*, s 12DA(1) of the *ASIC Act* and s 18 of the ACL;

(c) whether Deloitte made false or misleading statements with respect to its yearly audits and half-yearly reviews of Noumi's financial accounts when it knew or ought reasonably to have known that statements in those audits and reviews were false in a material particular or were materially misleading, and therefore contravened s 1041E of the *Corporations Act*;

(d) how each of Noumi and Deloitte's proportionate liability defences may operate;

(e) the effect of Noumi's Notice of Contribution; and

(f) the effect of Deloitte's Third Party Notice.

C. The ASIC proceeding

36 On 7 March 2023, ASIC commenced the ASIC proceeding, a civil penalty proceeding against Noumi, Mr MacLeod and Mr Nicholas in the Federal Court of Australia.

37 ASIC alleged breaches by Noumi of its continuous disclosure obligations during the period 29 August 2019 to 25 May 2020, in contravention of s 674 of the *Corporations Act*. ASIC alleged that Mr MacLeod and Mr Nicholas were involved in Noumi's continuous disclosure contraventions.

38 The ASIC claim period (i.e. 29 August 2019 to 25 May 2020) falls entirely within the Claim Period applicable to group members in this proceeding (i.e. 7 December 2014 to 24 June 2020).

39 By its defence in the ASIC proceeding dated 11 August 2023 Noumi admitted that it engaged in two contraventions of s 674(2) of the *Corporations Act*.

40 On 12 July 2024 an Amended Statement of Agreed Facts was filed in the ASIC proceeding ('ASIC ASOF'). The ASIC ASOF included admissions by Noumi relevant to the issues in dispute in this proceeding.

41 Noumi and ASIC agreed to seek declarations in the ASIC proceeding reflecting the admissions in the ASIC ASOF. They agreed and proposed to the Federal Court that Noumi be ordered to pay a civil penalty of $5 million, to be paid by way of instalments.

42 The ASIC proceeding was listed in the Federal Court for final hearing on the question of liability and relief on 18 July 2024.

43 By application filed 17 July 2024, the plaintiffs in this proceeding sought leave to intervene in the ASIC proceeding to seek an order pursuant to s 1317QF(2)(b) and/or s 1317QF(3) of the *Corporations Act* that the pecuniary penalty to be paid by Noumi be paid into Court until such time as this proceeding is finally resolved (whether by a settlement approval or by a judgment of this Court).

44 The plaintiffs sought orders pursuant to s 1317QF in circumstances where settlement negotiations between the parties to this proceeding were on foot. They did so in order to keep the pecuniary penalty funds potentially available to the subset of group members who acquired Noumi shares in the ASIC claim period.

45 On 5 August 2024, Jackman J delivered reasons and made orders in *ASIC v Noumi Limited (No 3)*.[2] The parties submitted, and Jackman J accepted, that the imposition of a pecuniary penalty was necessary and appropriate in the circumstances. His Honour made the declarations sought by ASIC and Noumi as to Noumi's contraventions of s 674 of the *Corporations Act* by failing to notify the ASX of the 'FY2019 Information' and the 'HY20 Combined Information'. His Honour ordered that Noumi pay the Commonwealth a pecuniary penalty in the amount of $5 million in respect of those contraventions of s 674(2), in the following instalments:

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2 [2024] FCA 862.

(a) $2 million within 28 days of the date of the Order;

(b) $1.5 million within 12 months of the date of the Order; and

(c) $1.5 million within 24 months of the date of the Order.

46 Jackman J also made an Order on 5 August 2024 that:[3]

> Subject to further order, including any orders under s 1317QF(3) of the Act, the pecuniary penalty payable under order 3 is to be paid into Court pursuant to r 2.42(1)(b) of the Federal Court Rules.

47 That Order was made pending further consideration by ASIC of whether any further orders should be made in respect of the application under s 1317QF.

48 On 8 August 2024, Jackman J made a further Order:

> Pursuant to s 1317QF(3) of the *Corporations Act 2001* (Cth) (Act), and subject to further order:
>
> (a) the whole of the pecuniary penalty payable into Court in accordance with order 3 made on 5 August 2024 is to remain available until 30 June 2028 (or such other date as subsequently ordered by the Court on further application pursuant to order 2 below) as funds in Court for the payment of any compensation order made under s 1317HA of the Act for damage that resulted from the contraventions the subject of the declarations made on 5 August 2024;
>
> (b) any application by any person to access the funds in Court is to be served on the solicitors for the Plaintiff (ASIC) and the First Defendant (FFG) in these proceedings...

D. The settlement approval application

49 The settlement approval application was filed on 11 April 2024.

50 In support of the approval application the parties relied on extensive evidence and submissions. Some parts of the evidence filed by the parties were subject to a claim or claims of confidentiality. The confidentiality regime was agreed by the parties and is reflected in the orders I propose to make in disposing of the application, discussed in section N of these reasons. The confidentiality claims fall into three tiers: tier 1 being material confidential to the parties (to be seen only by the parties and the Court), tier

[3] *Noumi (No 3)* [2024] FCA 862 [98] *('Noumi (No 3)')*.

2 being material confidential to the plaintiffs (to be seen only by the plaintiffs and the Court) and tier 3 being confidential to the law practice by whom such evidence and submissions were filed (to be seen only by that law practice, the client of that law practice, the funder of that law practice and the Court).

51 The material relied on by the plaintiffs in support of the substantive application comprises the following:

(a) the eleventh affidavit of Emma Olivia Pelka-Caven of Slater and Gordon dated 25 March 2025, as amended on 14 and 15 April 2025. The eleventh Pelka-Caven affidavit addresses Ms Pelka-Caven's experience, the procedural history, the Gehrke proceeding and the consolidated proceeding, discovery, the mediations, the settlement agreement and conditions, its merits and the settlement distribution scheme, the response from group members, the distribution of the proposed settlement notice, late registrations and the ASIC proceeding. The eleventh Pelka-Caven affidavit exhibits a bundle of documents subject to a tier 2 confidentiality claim which includes the confidential opinion of counsel for the plaintiffs dated 25 March 2025. Parts of the eleventh Pelka-Caven affidavit are subject to both tier 1 and tier 2 confidentiality claims;

(b) the twelfth affidavit of Ms Pelka-Caven also dated 25 March 2025. The twelfth Pelka-Caven affidavit addresses the GCO, its reasonableness, the costs incurred and risks assumed by Slater and Gordon acting on a GCO basis and the return to Slater and Gordon if the proposed settlement is approved. The twelfth Pelka-Caven affidavit is subject to both tier 2 and tier 3 confidentiality claims;

(c) the fifth affidavit of Jeremy Zimet of PFM dated 19 December 2024. The fifth Zimet affidavit addresses the distribution and content of the notice of proposed settlement, the ASIC proceeding and Mr Zimet's class action settlement experience. Parts of the fifth Zimet affidavit and its exhibit are subject to a tier 2 confidentiality claim;

(d) the sixth affidavit of Mr Zimet dated 25 March 2025, amended on 16 April 2025. The sixth Zimet affidavit concerns Mr Zimet's relevant experience, group member engagement, the costs of administering the settlement distribution scheme and administrator, loss assessment and Mr Buch's reimbursement claim. Parts of the sixth Zimet affidavit and its exhibit are subject to a tier 2 confidentiality claim;

(e) the seventh affidavit of Mr Zimet dated 25 March 2025. The seventh Zimet affidavit addresses the proposed GCO, the background to Omni Bridgeway (Fund 5) Australian Invt Pty Ltd's ('Omni Bridgeway') involvement as the funder, an overview of PFM's costs, the return for each party under a 22% GCO, the risks assumed by PFM and Omni Bridgeway and the reasonableness of costs. Parts of the seventh Zimet affidavit are subject to a tier 2 and a tier 3 confidentiality claim;

(f) the affidavit of Victoria Louise Sparks dated 16 April 2025. The Sparks affidavit exhibits the confidential affidavit of Noumi's general counsel and company secretary, Mr Coss, affirmed on 6 November 2024. This exhibit is the subject of a tier 1 confidentiality claim; and

(g) the plaintiffs' outline of submissions dated 25 March 2025.

52 Noumi relies on its outline of submissions dated 2 April 2025.

53 The parties jointly rely on the ASOF filed 15 April 2025 which contains admissions as to continuous disclosure contraventions by Noumi which mirror the admissions made by Noumi in the ASIC proceeding.

E. The proposed settlement

54 The Settlement Deed provides that the defendants will pay the plaintiffs and group members $43 million in full and final settlement of their claims in the proceeding, comprised of an $11,565,000 contribution from Noumi and a $31,435,000 contribution from Deloitte.

55 Pursuant to the Settlement Deed, the GCO, being 22% of the Settlement Sum, or such other percentage as Court determines, is to be deducted. In addition each of Mr Gehrke and Mr Buch is to be paid an amount of $17,500. The costs of administering the Settlement Distribution Scheme are estimated to be $400,000. With the exception of those deductions, the Settlement Sum is available for distribution to the plaintiffs and group members.

56 The Settlement Deed is binding on the parties subject to the Court making an Order under Part 4A of the Act approving the settlement as between the parties and approving a Settlement Distribution Scheme.

57 Public information relating to the financial position of Noumi published in FY23 and FY24 provides important context both as to the timing and as to the fact of the settlement.

58 In 2023, Noumi made statements to the ASX which caused the plaintiffs to hold serious concerns regarding Noumi's ongoing financial position and the ability to recover compensation from it if the proceeding were to continue and to be successful. The 2023 statements to the ASX included:

(a) its FY23 Financial Report dated 28 February 2023, which provided that 'should [it] be unsuccessful in its defence of the proceedings, [Noumi] may become liable for material compensation amounts. There is a material risk that [Noumi] will have insufficient funds to be able to pay these compensation amounts' and 'the Directors are proactively taking steps to manage and mitigate the risks associated with the [litigation]'; and

(b) its FY23 Annual Report, which provided that 'due to the uncertainty surrounding the outcomes of [the Noumi Class Action and the ASIC Proceeding], the quantum of compensation, penalties and/or costs for which the Group may be liable, and whether the Group will have access to sufficient funds to pay these amounts, a material uncertainty exists which may cast significant doubt on the Group's ability to continue as a going concern and

therefore whether it may be able to realise its assets and discharge its liabilities in the normal course of business'.

59 In *Noumi (No 3)* Jackman J referred to Noumi's evidence of its financial position as at December 2023. His Honour did so by reference to the affidavit evidence of Noumi's CFO:[4]

> (a) Noumi has a significant deficiency of assets over liabilities, with an asset position as at 31 December 2023 of negative $235.2 million: 27.6.24 affidavit at [10]. Noumi has reported deteriorating negative net assets since FY22. In addition, it has reported a net loss after tax each year since FY20 (as restated).
>
> (b) Noumi has significant financial liabilities, in particular, in respect of the convertible notes. From October 2023, Noumi was required to start paying a minimum 5% quarterly cash interest on the notes, which for FY25 equates to approximately $4.5 million per quarter (or approximately $18.4 million per year): 27.6.24 affidavit at [22]–[26]. The maturity date of the notes is May 2027. At maturity, the noteholders can elect to redeem the notes or convert the face value of the notes into shares at a set conversion price. The notes are recorded in Noumi's balance sheet at a "fair value," which as at 31 December 2023 was $331.8 million. However, fair value does not reflect either the face value of the notes plus accrued interest or the amount payable on redemption. As at 31 December 2023, the face value of the notes plus accrued interest was $356.3 million and the redemption value was $537.5 million: 27.6.24 affidavit at [27]. In circumstances where, as at 26 June 2024, Noumi's shares were trading at 11 cents per share and the average conversion price was 63.5 cents, there is currently little commercial incentive for a noteholder to exercise the conversion rights: 27.6.24 affidavit at [28]–[29].
>
> (c) Noumi has restrictions on access to the undrawn capacity on its credit facilities. Noumi has three types of credit facility: a revolving credit facility, equally funded by HSBC and NAB (Revolver Facility), a full recourse and limited recourse debtor finance facility provided by HSBC, and equipment financing facilities. The current undrawn limit on the Revolver Facility is $18 million, which can be drawn down for general corporate purposes, excluding cash payments in connection with the convertible notes, or settlement or other litigation costs (Senior Syndicated Facility Agreement (SFA), cl 3.1). The undrawn limits on the debtor finance facilities are only available to the extent Noumi has unsold qualifying invoices. As Noumi sells all qualifying invoices to HSBC on a timely basis, there is no opportunity to further access these limits. Noumi's equipment financing facilities are fully drawn.
>
> (d) Noumi's limited cash reserves and cash flows are required to meet ongoing trading obligations. Noumi's free cash flow for FY23 was

[4] *Noumi (No 3)* [2024] FCA 862 [95].

negative $8.6 million and, as at 27 June 2024, Noumi continued to forecast a negative cash flow for FY24. Noumi's latest reported cash balance (as at 31 March 2024) was approximately $10 million higher than it otherwise would have been as a result of expenses that were expected to be paid that quarter but shifted into later quarters. The adjusted balance, taking into account those deferred expenses, is $14.7 million. Further, any consideration of Noumi's available cash reserves needs to take into account that end-of-month cash balances are not representative of the low-point of Noumi's monthly liquidity cycle.

(e) Noumi's EBITDA for HY24 was $23.1 million. While this was an improvement on HY23, that improvement was budgeted and needs to continue in order to satisfy Noumi's existing liabilities.

60 On 27 August 2024 Noumi published its results for FY24. The company recorded a net loss after tax of $98.3 million for FY24. Its excess of liabilities over assets deteriorated from $203.5 million in FY23 to $304.9 million in FY24. The FY24 directors' report repeated a similar going concern qualification as in prior year reports noting that no liability has been recognised in the financial statements for any settlement and/or costs for which the company may be liable in this proceeding.

61 The 16 October 2024 Settlement Deed included a condition precedent that Noumi provide information to the plaintiffs in relation to its financial position.

62 Pursuant to that condition precedent, Noumi provided Mr Coss's confidential affidavit (being the confidential affidavit exhibited to the Sparks affidavit) concerning its then current financial position and outlook. The confidential affidavit addressed such matters as alternative restructuring outcomes for Noumi in the event the parties do not proceed with the proposed settlement, and the insurance position of Noumi so far as relevant to the claims made in the proceeding, including disclosure of the erosion of the total amount of insurance by defence costs.

63 Following the provision of that evidence, as contemplated by the condition precedent in the Settlement Deed, the plaintiffs formed the view that based on Noumi's financial position as disclosed in that information, the plaintiffs and group members would likely recover more money from Noumi by way of the proposed settlement than if the proceeding continued. On 31 October 2024, the plaintiffs communicated to the defendants that they had reached the state of satisfaction contemplated by the

condition precedent.

F. The principles

64 Section 33V of the Act provides as follows:

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

65 Section 33V confers two distinct powers upon the Court. Section 33V(1) gives the Court power to approve settlement. Section 33V(2) confers power to approve the distribution of payments.

66 The principles to be applied on an application for approval under s 33V are well established. The Court must consider whether the proposed settlement is fair and reasonable as between the parties having regard to the claims of the group members bound by the settlement; whether it is in the interests of group members as a whole and not just in the interests of the plaintiffs and the defendant; and whether the assessment and distribution of the Settlement Sum to individual group members *inter se* is fair and reasonable.[5]

67 In *Botsman v Bolitho*, the Court of Appeal relevantly stated as follows:[6]

> It is an essential starting point to identify the settlement and its terms. It is commonplace that a deed of settlement may address more than the settlement of the claims against the defendant and will also deal with the distribution of settlement money, including to a litigation funder. The structure of sub-ss 33V(1) and (2) suggests that such payments may be distributions of money that has been paid under a settlement to which the Court has given approval under s 33V(1). Those distributions are the subject of separate Court approval under s 33V(2).
>
> The question of fairness interposes itself at various levels. Most obviously,

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5 *Lynden Iddles & Anor v Fonterra Aust Pty Ltd & Ors* [2023] VSC 566 [17], citing *Williams v FAI Home Security Pty Ltd [No 4]* (2000) 180 ALR 459, 465–6 [19]; *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2007) 236 ALR 322, 332–6 [30]–[40]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) [No 3]* (2017) 343 ALR 476, 499–500 [81]–[85]; *Lenehan v Powercor Australia Ltd (No 2)* [2020] VSC 159 [20] (Nichols J).

6 [2018] VSCA 278 [203]–[207].

there will need to be consideration of the fairness of a proposed settlement sum.

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

That assessment does not involve a simple calculus but calls for matters of judgment based on imperfect knowledge and is influenced by the appetite for risk. It will be informed by the complexity and duration of the litigation and the stage at which the settlement occurs.[85] It is important to acknowledge that it is the state of imperfect knowledge and the existence of risks that will have likely induced the settlement. It follows that those matters should be accorded a degree of prominence in any assessment of the reasonableness of the settlement.

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

68 As Matthews J stated in *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)*:[7]

> [t]he same considerations apply as for the settlement of a class action under Part IVA of the *Federal Court of Australia Act 1976* (Cth), and the statements of legal principles in Federal Court decisions are generally apposite.

69 As Matthews J said in *Uber*:[8]

> [t]he reasonableness of a settlement must necessarily involve consideration of the approval of any funding commission and legal costs, as this will affect what money group members obtain from the pool in the event that I approve the settlement.

70 The factors which may be taken into account in assessing whether the proposed settlement represents a fair and reasonable compromise of the claims made on behalf of group members have been considered in a number of other decisions of this Court.[9]

71 The Court's Practice Note SC GEN 10 Conduct of Group Proceedings (Class Actions) (second revision) ('Practice Note') lists factors which parties applying for Court

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7 [2024] VSC 733[48], fn 28 ('*Uber*').

8 [2024] VSC 733 [49].

9 *Allen & Anor v G8 Education Ltd (No 4)* [2024] VSC 487 ('*Allen v G8*'); *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)* [2024] VSC 733; *Bopping & Anor v Monash IVF Pty Ltd & Ors* [2024] VSC 785; *Botsman v Bolitho* [2018] VSCA 278; *Fuller & Anor v Allianz Australia Insurance Ltd & Anor (Settlement Approval)* [2025] VSC 160.

approval of a settlement are required to address. The parties in this case have addressed each of those factors, where relevant, in their evidence and submissions filed in support of the approval application. It is unnecessary to discuss each of the factors listed in the Practice Note when determining whether or not the settlement should be approved.

72 Having read the material provided to the Court in advance of the hearing I determined that it was not necessary in this case to appoint a contradictor to assist the Court to assess whether the settlement is fair and reasonable and whether the GCO should be amended.

73 In considering whether the settlement should be approved I have placed particular reliance on the helpful comprehensive confidential opinion from counsel for the plaintiffs. I have also been assisted by the submissions filed by Noumi and by oral submissions made during the hearing. I have also had regard to the fact that there is no objection to the settlement from any group member.

G. Is the settlement fair and reasonable as between the parties?

74 It is convenient to pay particular attention to four matters that are material to a consideration of whether the proposed settlement is fair and reasonable as between the parties.

G.1 The stage and complexity of the proceeding

75 The first matter concerns the stage the proceeding has reached.

76 Although the proceeding is a 2020 proceeding, the parties have not yet filed evidence. In that context, the settlement has been reached at a relatively early stage of the proceeding.

77 The Claim Period is roughly six years. The factual circumstances applicable to the claim are not the same across the Claim Period. That gives rise to some complexities. The differing factual circumstances that apply are relevant to an assessment of the prospects of success of the various group members and the prospects of success of the

proceeding as a whole. The length of the Claim Period has ramifications for the scope and content of expert evidence. It can reasonably be expected that if the settlement is not approved, expert evidence for trial would need to include detailed forensic accounting and audit evidence covering the whole of the six year Claim Period with detailed exploration of a number of different scenarios.

78 The bulk of the costs incurred by the plaintiffs' solicitors to date have been in the preparation of pleadings, an incomplete discovery process and relating to the lengthy mediation process. If the settlement is not approved, the preparation of lay and expert evidence for trial will be an onerous and expensive undertaking for all parties.

79 There is much that is unknown about the competing cases in the absence of lay and expert evidence. There is necessarily significant uncertainty about how the case would run at trial. It goes without saying that it is difficult in the absence of lay and expert evidence to accurately evaluate the prospects of success of the plaintiffs' claim against either or both defendants.

G.2 Risks associated with establishing liability, loss and damage

80 There are risks associated with all litigation, the present proceeding is no exception. There are liability risks which differ in respect of both defendants and there are risks in relation to the way in which the plaintiffs put their loss by reference to market-based causation.

81 While the parties have filed an ASOF in which Noumi admits to contraventions, including two contraventions of s 674(2) of the *Corporations Act* relevant to Noumi's revenue and inventory, if the proposed settlement were to be rejected, as noted above, a number of legal and factual issues remain live and in contest.

82 Putting contested liability issues relating to Noumi to one side, it is difficult to assess Deloitte's realistic exposure to liability for the claims by the plaintiffs and group members against it in the absence of discovery and detailed expert evidence. The claims against Deloitte are attended by considerable legal and factual complexity. The plaintiffs accept that the pleading against Deloitte is expressed at a high level of

generality and that it would be necessary to replead those claims following a review of discovery and on the basis of expert evidence. If the claim against Deloitte were to proceed substantial delays of 18 months to two years would be likely before the case against Deloitte would be ready for trial.

83 An assessment of Deloitte's likely exposure is complicated by the Deloitte defences of proportionate liability and its third party claim made by reference to the role and consequences of acts or omissions on the part of Noumi.

84 The plaintiffs' case on causation and loss is pleaded on the basis of the theory of market-based causation. The availability to a plaintiff of market-based causation as a means to prove the casual link between statutory breaches and changes in share price has not been resolved at the appellate level in Australia.

85 Noumi filed detailed submissions on the approval application concerning the plaintiffs' reliance on 'market-based causation'. Noumi submitted the plaintiffs' case would have faced great difficulty and expense establishing how any particular contravening conduct caused the market to inflate the trading price of the relevant securities.

86 Noumi referred to *Davis v Wilson*,[10] a recent shareholder class action, where Shariff J ruled that the evidence in that case did not establish a causal relationship between movements in Quintis Ltd's reported net assets and its share price.

87 In *Davis v Wilson* Shariff J referred to *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited*[11] where Beach J gave detailed consideration to the theory and logic of 'market-based causation'. His Honour's analysis was later summarised Jackman J in *Crowley v Worley Ltd (No 2)*:[12]

> The concept of market-based causation in this context was the subject of thorough analysis by Beach J in Myer, in which it was accepted that market-based causation is a valid means under Australian law of establishing causally-connected loss where misconduct has caused the price of securities in an

10 [2025] FCA 108 [1670], [1714]–[1751].
11 [2019] FCA 1747; 293 FCR 29; 140 ACSR 38 ('*Myer*').
12 [2023] FCA 1613 [171]-[172]. Jackman J's summary adopted in *Davis v Wilson* [2025] FCA 108 [1663].

> efficient, publicly-traded market to be inflated. Beach J held that there were three well-established mechanisms for causation in misleading or deceptive conduct cases: [1656]. The first category is direct causation, which requires proof that the applicant relied upon some impression created by the respondent's misleading act or omission: [1657]. Second, there is "active indirect causation", being the scenario where a respondent's misleading conduct induces some reaction in a particular person, and the applicant would have acted differently but for that reaction by the particular person, but there is no additional requirement that the applicant was aware of or relied on the respondent's conduct: [1659]. Third, there is "passive indirect causation", being the scenario where the respondent's misleading conduct induces some reaction in a person or persons, and that reaction itself causes loss to the applicant without any requirement for a reaction by the applicant: [1660]. Pausing there, that reasoning, and in particular the existence of the category of "passive indirect causation", was expressly approved in *Braham v ACN 101 482 580 Pty Ltd* [2020] VSCA 108 at [155]–[156] (Tate, McLeish and Niall JJA); *Re DCA Enterprises Pty Ltd* [2023] NSWSC 11; (2023) 166 ACSR 156 at [164]–[165] (Black J); and *Re Mediation & Online Dispute Resolution Operating Network Pty Ltd* [2022] NSWSC 5 at [103]–[105] (Rees J).

88 As recently noted by Watson J in *Allen v G8*,[13] shareholder class actions have particular risks in relation to plaintiffs and group members establishing causation and loss. This proceeding is no exception. This is not the occasion to determine the validity or otherwise of market-based causation as an appropriate means of establishing causation and loss in a class action. It is sufficient for present purposes to note that the reliance on market-based causation as the means of establishing causation and loss is not without risk for the plaintiffs and group members. The settlement removes that risk for the plaintiffs and group members.

G.3. Contribution and proportionate liability issues

89 The settlement that has been arrived at, documented in the Settlement Deed, involves both parties making payment to the plaintiffs and group members with a denial of liability in exchange for being released from the plaintiffs' claims.

90 The defendants' positions in opposition to the plaintiffs' claims are not aligned. As already noted the defendants rely on proportionate liability defences, they have pursued cross claims and third party claims against one another.

91 The proportionate liability defences, the Notice of Contribution and the Third Party

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13 *Allen & Anor v G8 Education Ltd (No 4)* [2024] VSC 487 [32] (Watson J).

Notice create significant difficulty for the parties in estimating relative contribution, should liability be established.

92 On the approval application Noumi referred to *Selig v Wealthsure Pty Ltd*,[14] where the High Court unanimously found that the proportionate liability regime in Div 2A of the *Corporations Act* applied only to claims of misleading or deceptive conduct based upon a contravention of s 1041H. Noumi submitted that it may be inferred that that authority is why Third Party Notices were issued in respect of the s 674 continuous disclosure allegations. How s 674 would operate in the circumstances of this case cannot be easily predicted at this stage in the proceeding. This is but one element of the uncertainties that exist concerning the likely outcome in the litigation because of the competing positions adopted by the two defendants.

93 To put it neutrally, the proportionality defences and the cross claims create material uncertainty as to liability. These disputes between the defendants make it impractical for the plaintiffs to settle their claims against just one of the defendants because, if they were to do so, a risk would remain that the pursued defendant could bring the other defendant back in to the proceeding.

94 A complete extraction of Noumi from the proceeding could not occur without a resolution being reached between Noumi and Deloitte.

95 In practice, if the parties were to reach an in-principle settlement, it had to be on a basis that involved both defendants.

96 I consider a significant element in favour of approval of the proposed settlement is that it involves both a financial contribution from and release in favour of both defendants and all claims.

G.4 The financial position of Noumi

97 The Settlement Sum is materially less than the potential estimated collective losses of group members, assuming the proceeding were to succeed on both liability and

[14] [2015] HCA 18; (2015) 225 CLR 661; (2015) 320 ALR 47.

quantum. That is, including assuming that market-based causation were to be established. However, a favourable judgment is of no utility and of no benefit to group members unless it is accompanied by payment from the defendants in satisfaction of the judgment.

98 Noumi's financial position during the 2023 and 2024 financial years is referred to earlier in these reasons. I have already referred to the condition of the Settlement Deed which required the provision of confidential financial information by Noumi to the plaintiffs. In support of the settlement approval application I was provided with confidential financial information concerning Noumi. In light of the financial information available to me on an open and on a confidential basis I accept the plaintiffs' submission that Noumi's financial issues are a material consideration in favour of the proposed settlement being approved in the interests of the plaintiffs and group members.

99 It is clear from the stage reached in the litigation, with evidence not yet having been filed, that any trial would likely not take place for at least 18 months to 2 years. Avoiding such a lengthy delay is a material factor in favour of the settlement so far as group members are concerned.

100 The risk, in the case of Noumi, is that assuming the plaintiffs are successful on liability and quantum, there may be issues following a contested trial and a judgment, followed potentially by an appeal, about the successful enforcement of a judgment against Noumi. That uncertainty and risk about the future is to be weighed against the certainty for the plaintiffs and group members of an agreed settlement, now rather than a long way into the future.

101 I accept these matters are material considerations in favour of a finding that the proposed settlement is fair and reasonable as between the plaintiffs and group members and Noumi.

102 The contribution to be made to the Settlement Sum by Deloitte is significantly greater than the contribution to be made by Noumi. I have already referred to the legal and

factual complexity of the claims by the plaintiffs and group members against Deloitte, to some of the defences relied on by Deloitte, including that claims against it are apportionable, and to the third party claim by Deloitte against Noumi. Having regard to these matters and to the risks and uncertainties associated with the claim against Deloitte I also accept that the settlement is fair and reasonable as between the plaintiffs and group members and Deloitte.

H. Is the settlement reasonable as between the group members?

103 In *Camilleri v The Trust Company (Nominees) Ltd* Moshinsky J outlined some of the factors to be considered when determining whether a proposed settlement is reasonable as between the group members:[15]

> (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.

104 I am satisfied that the Settlement Distribution Scheme makes appropriate arrangements for the division of the Settlement Sum between the two plaintiffs and the group members in a manner that is fair and reasonable having regard to the interests of the group members as a whole.

105 Under the Settlement Deed the plaintiffs and group members will not recover the entirety of the financial loss they claim to have suffered as a result of defendants' actions. It is necessary to apportion the Settlement Sum that remains after the

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15 [2015] FCA 1468 [43]-[44] ('*Camilleri*').

payment of costs pursuant to the GCO and other expenses ('the Residual Settlement Sum') in a manner that is fair and reasonable as between the group members.

106 It is proposed that each individual Registered Group Members ('RGM')'s distribution of the Settlement Sum and also the plaintiffs' share of the Settlement Sum will be calculated by Omni Bridgeway using a confidential complex mathematical loss assessment formula.

107 At the hearing of the approval application, I directed the plaintiffs to provide a confidential note explaining certain elements of the loss assessment formula which were not otherwise clear and which it was not appropriate to interrogate during the hearing in open court. I have been assisted by that note. It has helpfully addressed the elements in the formula about which I elliptically enquired of the plaintiffs' counsel during the hearing.

108 The confidential formula is complex and involves a number of different elements. It is not possible to discuss the individual elements, nor is it appropriate to detail each of those elements in view of the confidentiality that exists over the formula. There are, however, some general observations that can be made about the formula.

109 The approach the formula takes to calculating the individual loss and the compensation paid to each group member adopts a methodology that has been adopted in previous cases.

110 The formula relies on the same or similar information to that which the plaintiffs' solicitors and counsel expect would have been the subject of forensic evidence filed in the proceeding had it not settled. Such expert evidence would have been directed to estimating inflation value that would have been present in each Noumi security acquired during a particular sub-period.

111 The Claim Period is lengthy. The percentage adjustment for litigation risk discount is not uniform across the Claim Period. The percentage adjustment which has been applied has been determined by the plaintiffs' solicitors and counsel as being

appropriate to reflect the varying strengths and weaknesses of plaintiffs' and group members' claims at various points in time during the Claim Period. The plaintiffs have filed confidential evidence which explains why particular percentage discounts have been applied to particular sub-periods across the Claim Period to account for litigation risk. The confidential evidence provides a sound basis for the differential litigation risk percentages that are to be applied.

112 Returning to the factors to which Moshinsky J referred in *Camilleri* where relevant, I am satisfied:

(a) the Settlement Distribution Scheme subjects all claims to the same principles and procedures;

(b) to the extent the assessment methodology reflects 'judgement calls' concerning litigation risk, the approach adopted is consistent with the case to be advanced at trial and is supportable;

(c) the assessment methodology is likely to deliver a broadly fair assessment; and

(d) the Settlement Distribution Scheme does not involve special treatment of the plaintiffs or some group members.

113 In all circumstances I am satisfied that the Settlement Distribution Scheme is fair and reasonable as between the group members.

I. Is the amount proposed to be paid to the lead plaintiffs appropriate?

114 When approving a settlement, the Court has power pursuant to s 33V(2) of the Act to make such orders as it thinks fit with respect to the distribution of any money, including interest, paid under the settlement. This includes payments to a plaintiff in a group proceeding.[16]

115 It is commonplace for a payment to be made to the named plaintiff or plaintiffs in a group proceeding to provide compensation for the time, labour, trouble and

[16] *Fuller & Anor v Allianz Australia Insurance Ltd & Anor (Settlement Approval)* [2025] VSC 160 [147].

inconvenience associated with the performance of their role as lead plaintiff.[17]

116 The reimbursement sum of $35,000 is proposed to be paid to the plaintiffs in equal shares ($17,500 each), in recognition of the time and costs incurred by Mr Gehrke and Mr Buch in instructing as the two lead plaintiffs.

117 The settlement notice, approved by the Order made on 23 January 2025 ('January Order'), gave notice of an amount of about $35,000 in total, to be reimbursed to each of the plaintiffs for this purpose ('Settlement Notice'). Mr Zimet has given evidence that he is not aware of any objections received by Omni Bridgeway from any group members in response to that aspect of the Settlement Notice.

118 The role of a representative applicant involves time, inconvenience and stress. The proposed payments to Mr Gehrke and Mr Buch are appropriate when regard is had to the various categories of work performed, as explained in the evidence.

119 Ms Pelka-Caven provided evidence summarising expense claims by applicants that have recently been approved in class action proceedings. Her evidence establishes that the proposed payments are on the low side in comparison to the cases to which she referred.

120 I consider the proposed payments to Mr Gehrke and Mr Buch are fair and reasonable, having regard to their roles and to the interests of group members.

J. Is the Settlement Distribution Scheme appropriate?

121 The proposed Settlement Distribution Scheme is to be administered by Mr Zimet, Principal Lawyer at PFM ('Administrator'), with the assistance of delegates where necessary.

122 The proposed Settlement Distribution Scheme contains provisions to the following effect:

(a) Mr Zimet will be appointed as Administrator, and will hold the Settlement Sum

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

on trust in accordance with the Settlement Deed;

(b) There will be a process for corrections to the RGM trading data;

(c) The Administrator will distribute the Settlement Sum (and any interest accrued after settlement is approved by the Court and any applicable appeal period has elapsed) on the following basis:

(i) the plaintiffs will be reimbursed the sum of $17,500 each for their reasonable time and costs they incurred in prosecuting the proceeding on behalf of group members;

(ii) the legal costs of the plaintiffs and group members will be shared between the RGMs, and will be calculated as a percentage of the Settlement Sum at a rate of 22%;

(iii) the 'administration costs' (being the costs of administering the Settlement Distribution Scheme and the costs of administering the ASIC Penalty Settlement Distribution Scheme, in total estimated to be around $400,000) be deducted from the Settlement Sum;

(iv) the Residual Settlement Sum, after deducting the plaintiffs' legal costs, the costs of administering the Settlement Distribution Scheme and the plaintiffs' reimbursement (in each case, as approved by the Court) will be divided *pro rata* between all RGMs in accordance with the loss assessment formula; and

(v) payments to RGMs calculated pursuant to the loss assessment formula to be an amount less than $30 referred to as '*De Minimis* Sum will not be distributed.

123 As noted in item (v) above, distribution amounts less than $30 will not be distributed because the administrative time and expense is not proportionate to the return to the RGM. Similar provisions are often approved regarding small residual sums in the

class actions context.[18] I approve of notional losses of less than $30 being rolled back into the settlement pool for distribution to group members who have suffered a more substantial material loss, particularly when regard is had to the distribution costs that would attach to such notional amounts.

124 The proposed timeline of settlement administration, assuming approval, includes the following key steps:

(a) RGMs received a 'Proof of Claim Letter' requesting that RGM to provide verification documentation. The Proof of Claim Letters have been sent and the deadline to provide verification documentation has passed.

(b) Group members could have objected to the proposed Settlement Distribution Scheme by returning a notice of objection to the Court by 1 April 2025. That deadline has passed and the Court did not receive any objections.

(c) The Court makes an Order approving the proposed settlement.

(d) Letters are sent to RGMs asking them to confirm any changes to claim data, referred to in the proposed timeline, or share trade data and provide adequate information.

(e) RGMs receive distribution notices, as defined in the proposed timeline, stating the amount of compensation they will receive and requesting bank account details and tax file number and/or Australian Business Number (as applicable). There is a deadline by which RGM must provide their bank account details.

(f) RGMs will be sent a notice setting out the taxation component of the RGMs.

(g) The initial distribution is made to RGM. This is expected to occur 24 weeks after the Court makes orders approving the proposed settlement or five weeks after the Federal Court makes the order sought by the plaintiffs in accordance

[18] *Fuller & Anor v Allianz Australia Insurance Ltd & Anor (Settlement Approval)* [2025] VSC 160 [108].

with s 1317QF of the *Corporations Act*.

(h) The Administrator contacts RGM who did not comply with the deadline to provide their banking details or in respect of who the initial distribution was unsuccessful, requiring information necessary to facilitate the payment.

(i) Second distribution to RGM entitled to distributions who responded to the request for further information commences.

(j) Final distribution occurs following which the Administrator is to pay any remaining amount as a charitable donation to the prescribed charity.

125 As contemplated by the Settlement Deed and as submitted by the plaintiffs, I will appoint Mr Zimet as Administrator and appoint PFM as Trustee of the Settlement Sum the Settlement Distribution Scheme.

126 I accept the submission that it is efficient to have Mr Zimet perform the role of Administrator, which if not performed by the plaintiffs' legal representatives would need to be performed by a third party provider. Nominating a third party provider would likely involve a tender process, which itself would delay distribution to RGMs and erode the Residual Settlement Sum.

127 There are clear benefits in having the same firm that ran the proceeding appointed to administer the settlement. That firm holds detailed background knowledge and associated data of the proceeding, and has in place administrative processes to deal with communicating with the group members, which can be leveraged to make the administration more efficient than would be the case with a third party provider.

128 A related question is what administrative costs should be paid to PFM from the Settlement Sum for the administrative processes. Overall administrative costs of approximately $400,000 are sought to be approved.

129 Mr Zimet's evidence is that the amount of $399,983.61 for administration costs ($328,000 for administering the Settlement Distribution Scheme, $72,000 for

administering the 'ASIC Penalty Settlement Distribution Scheme' which concerns the possible distribution of the penalty from the Federal Court proceedings of the penalty sum, inclusive of an estimated cost of $103,962.01 (GST inclusive) for work undertaken by Omni Bridgeway to assist the Administrator) is fair and reasonable. There are some costs savings due to the proposed combined administration of the Settlement Distribution Scheme and the ASIC Penalty Settlement Distribution Scheme. If the Federal Court does not make an order providing for the ASIC penalty sum to be paid pursuant to the ASIC proceeding, it is likely that the administration costs will be less than $400,000.

130 On the basis of preliminary budgeting based on Mr Zimet's understanding of the necessary work required in order to administer the Settlement Distribution Scheme and the ASIC Penalty Settlement Distribution Scheme and on the basis of his own experience in administering class action settlement distribution schemes, Mr Zimet's evidence is that the proposed administration costs represents good value for group members, noting that:

(a) the amount is intended to be sufficient to cover the administration of two settlement distribution schemes, being the Settlement Distribution Scheme and the ASIC Penalty Settlement Distribution Scheme;

(b) the costs of administering the Settlement Distribution Scheme only is about 80% of the proposed administration costs;

(c) the Omni Bridgeway estimate is a fixed fee quote to perform work in respect of both the Settlement Distribution Scheme and the ASIC Penalty Sum Settlement Distribution Scheme. PFM has negotiated for Omni Bridgeway to limit its estimate to $103,962.01 in respect of both the Settlement Distribution Scheme and the ASIC Penalty Settlement Distribution Scheme despite that being the same figure for the fixed fee quote in respect of the Settlement Distribution Scheme only; and

(d) utilising the services of Omni Bridgeway will reduce the overall administration

costs compared to a scenario where either or both PFM and Slater and Gordon carried out all of that work. This is the case because Omni Bridgeway has experience with administration of similar settlement distribution schemes in securities class actions and has familiarity with the RGMs in this matter by reason of its client services role.

131 The proposed administration costs are in line with the amount previously notified to plaintiffs and group members in the Settlement Notice distributed on 3 February 2025 (which advised group members of 'an amount of up to $400,000' for administration costs).

132 Taking the estimates provided:

(a) the cost of administering the Settlement Sum will be around $328,000, which is approximately 0.76% of the Settlement Sum;

(b) the cost of administering the Settlement Sum to approximately 7000 group members will be roughly $47 each; and

(c) the cost of administering the ASIC penalty sum will be around $72,000, which is approximately 1.44% of the penalty sum.

133 Based on the estimates provided and Mr Zimet's evidence, I accept that the proposed administration costs are not unreasonable and present a fair deal with RGMs and 'ASIC Period group members' as defined in the Settlement Deed:

> all Group Members who, during the period from 29 August 2019 to 25 May 2020 (inclusive) acquired:
>
> (a) an interest in fully paid ordinary shares in Noumi (Noumi Shares);
>
> (b) an interest in American Depository Receipts that represent Noumi Shares; and/or(c) long exposure to Noumi Shares by entering into equity swap confirmations in respect of ordinary shares in Noumi, and who have not validly opted out of the Proceeding in accordance with section 33J of the Act.

K. Should unregistered group members be permitted to participate?

134 On 28 September 2023, Nichols J made an Order which, amongst other things,

approved a form of notice to be given to group members ('September Notice') concerning claim registration, opt out and class closure ('Class Closure Order'). That Order was made pursuant to s 33ZF and 33ZG of the Act.

135 Those sections are in the following terms:

> **33ZF General power of court to make orders**
>
> In any proceeding (including an appeal) conducted under this Part the Court may, of its own motion or on application by a party, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.
>
> **33ZG Order may specify a date by which group members must take a step**
>
> Without limiting the operation of section 33ZF, an order made under that section may—
>
> (a) set out a step that group members or a specified class of group members must take to be entitled to—
>
> (i) any relief under section 33Z; or
>
> (ii) any payment out of a fund constituted under section 33ZA; or
>
> (iii) obtain any other benefit arising out of the proceeding—
>
> irrespective of whether the Court has made a decision on liability or there has been an admission by the defendant on liability;
>
> (b) specify a date after which, if the step referred to in paragraph (a) has not been taken by a group member to whom the order applies, the group member is not entitled to any relief or payment or to obtain any other benefit referred to in that paragraph.

136 The Class Closure Order made by Nichols J is what is sometimes described as a 'soft class closure' order. As I said in *Anderson-Vaughan v AAI Limited (No 2)*:[19]

> A soft class closure order is used to describe an order which requires group members to register as a precondition to an entitlement to share in a settlement reached at or following a mediation and prior to the commencement of the trial, being a settlement later approved by the Court.
>
> A soft class closure order does not remove group members who do not register from the represented class and does not affect the entitlement of any unregistered group member to benefit from any judgment in favour of the plaintiff or any settlement arrived at after the commencement of the trial.

137 A soft class closure process is intended to facilitate the provision of more accurate and

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[19] *Anderson-Vaughan v AAI Limited (No 2)* [2024] VSC 65 [12] ('*AAI*').

complete information as to quantum to the legal practitioners involved in the proceeding, making it more likely that a rational settlement will be achieved.[20]

138 The Class Closure Order has effect unless the Court exercises its discretion pursuant to s 33ZF of the Act to order otherwise. In exercising the s 33ZF power the Court has a protective role in respect of group members as a whole to whose interests primary consideration must be given.[21]

139 If each of the persons who seek to participate in the settlement as late registrants are permitted to do so, this will have the effect of reducing the amount otherwise returned to existing registered group members by 6.41%. Such an impact upon the entitlement of those group members who have registered in accordance with previous Orders is material. Although the impact is material it is relevant to note, as discussed below, that the parties negotiated the settlement on the assumption that the majority of unregistered group members by value would be permitted to participate in the settlement.

140 An unregistered group member will suffer prejudice if they are bound by the settlement but are not able to able to obtain a share of the Settlement Sum because of the operation of the Class Closure Order. That mere prejudice alone is not sufficient for the Court to make an order undoing the operation of the Class Closure Order. That is the case because that risk of prejudice was a factor in the determination to make the Class Closure Order and to approve the September Notice, with the Court's discretion being exercised for the purpose of making the 'desirable ends of settlement' more likely.[22]

141 In order to be permitted to participate in the proposed settlement, the unregistered group members must sufficiently demonstrate unfair prejudice to them in the

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20 *Andrianakis v Uber Technologies & Ors; Salem v Uber Technologies & Ors* [2023] VSC 415 [27] citing *Regent Holdings Pty Ltd v State of Victoria and Anor* (2012) 36 VR 424, 429–430 [20]–[23].

21 *Andrianakis v Uber Technologies Inc & Ors (Settlement Approval)* [2024] VSC 733; *Stallard v Treasury Wine Estates Ltd* [2020] VSC 679 [20] (Nichols J).

22 *Andrianakis v Uber Technologies Inc & Ors (Settlement Approval)* [2024] VSC 733 [62] (Matthews J); *Andrianakis v Uber Technologies & Ors; Salem v Uber Technologies & Ors* [2023] VSC 415 [27] (Nichols J).

operation of the Class Closure Order.[23] As Matthews J observed in *Uber*, '[t]his is a high threshold'.[24]

142 When considering the applications by persons who failed to register in accordance with the Class Closure Order to participate in the settlement I have applied the principles approved of and adopted by Matthews J in *Uber*.[25] I have done so on the basis, as stated by her Honour, that the assessment of reasons and evidence provided by unregistered group members in support of their applications to participate in the settlement should be undertaken having regard to the characteristics of the class and the Court's protective jurisdiction.[26]

The September Notice and the Settlement Notice

143 There is no issue with the form or adequacy of the September Notice or the Settlement Notice to group members in this case.

144 The September Notice explained the effect of the Class Closure Order to group members. It included a warning concerning the consequences of failure to register. The September Notice explained:

> (a) If you are a group member you **must** register by **15 November 2023** in order to be eligible if there is a settlement before trial reached at the mediation on 4 December 2023 or before 3 May 2024.
>
> …
>
> If you do nothing, you will remain a group member in the class action but, subject to further order of the Court, you **will not** be permitted to participate in any settlement reached at mediation or that occurs by 3 May 2024.

145 More detail about registration was provided at Part 4 of the September Notice, 'Option 1 — Register Your Interest To Receive Compensation':

> 4.2 You must register if you wish to be eligible to claim money from any settlement of the Freedom Foods Class Action monies resulting from a settlement at the December 2023 Court Ordered Mediation or by 3 May

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23 *Andrianakis v Uber Technologies Inc & Ors (Settlement Approval)* [2024] VSC 733 [63]; *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2018) 358 ALR 382, 392 [44]; *Andrianakis v Uber Technologies & Ors; Salem v Uber Technologies & Ors* [2023] VSC 415 [30].

24 *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)* [2024] VSC 733 [63].

25 *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)* [2024] VSC 733 [75].

26 *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)* [2024] VSC 733 [71] (Matthews J).

2024.

4.4 You must register your claim by **4.00pm AEDT on 15 November 2023** to be eligible to participate in any pre-trial settlement.

146 The Notice cautioned that it is unknown whether a further Court-ordered mediation will occur and what further notice, if any, the Court may require is provided to group members at that point. The Notice set out that 'it is possible' that if a group member 'remain[s] an unregistered group member' then they may not be permitted to seek any benefit of any settlement 'even if that settlement occurs after 3 May 2024', unless leave of the Court is given.

147 The January Order timetabled the plaintiffs' settlement approval application, including the procedure for the distribution of the approved Settlement Notice.

148 The Settlement Notice set timelines for group members to take steps in relation to the proposed settlement. It explained that one of the options available to unregistered group members was to apply for the Court to consider their late registration by providing evidence of their circumstances, addressing why they did not register in time:

> If you did not register your claim, you are not a Registered Group Member and are not eligible to participate in the settlement and distribution of the Class Action Sum. Options for Unregistered Group Members are described below …
>
> 51. If you are an Unregistered Group Member who would like to apply for the Court to consider your late registration (in order to be a Registered Group Member) you must provide evidence of your circumstances, addressing why you did not register on time. Your evidence must be in the form of an affidavit. You may also provide written submissions (of no more than 2 pages). You must submit your affidavit (and submissions if any) to the plaintiffs' solicitors at freedomfoods@omnibridgeway.comby no later than 4:00pm (AEDT) on 11 March 2025. The Court has ordered that the plaintiffs' solicitors collect all applications for late registration and provide them to the Court.
>
> 52. The Court will consider applications for late registration filed by 11 March 2025, on the basis of the evidence received, and may decide to allow or refuse your application.
>
> 53. If you intend to obtain independent legal advice you should do so immediately.

The Evidence in Support of Late Registration

149 The parties to the proceeding were content for all unregistered group members who wished to do so to participate in the settlement. That being the case, only limited evidence was filed prior to the hearing addressing whether it was appropriate or otherwise for the Court to permit those persons to participate.

150 There are two broad cohorts of persons who failed to register prior to 15 November 2023 and who wish to participate in the settlement. The 'First Cohort' comprises 57 persons who sought to register, for the most part, not long after the 15 November 2023 deadline. The 'Second Cohort' comprises 61 persons who sought to register much later, with one exception, having submitted material in support of participation pursuant to the timeline specified in the January Order.

151 Following a review of the evidence in anticipation of the approval hearing and being conscious of the observations by Matthews J in *Uber*[27] I formed the opinion the existing evidence was insufficient to enable the Court to give appropriate consideration to whether all or some of the persons who are members of the First Cohort should be permitted to participate.

152 Accordingly, my Chambers sent an email to the practitioners giving group members in the First Cohort until 16 April 2025, the day before the hearing of the approval application, to provide evidence and written submissions addressing why they should be given leave to participate. On 17 April 2025, I made an Order allowing further time, until 8 May 2025, for group members in the First Cohort to provide any further evidence in support of being permitted to participate in the settlement ('April Order').

153 Following the approval hearing and pursuant to the April Order the Court now has an appropriate body of evidence and information, including helpful spreadsheets prepared by the plaintiffs' solicitors, to enable a proper evaluation of the claims of each of the applicants for late registration in accordance with the decision in *Uber*.[28]

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27 *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)* [2024] VSC 733 [63].

28 *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)* [2024] VSC 733 [63] (Matthews J).

154 There is now quite a volume of material concerning applications for late registration, relevant to the position of each applicant. In considering that material I have been much assisted by the associates who assisted me with the hearing in relation to this proceeding, who have been involved in the further organisation of the material and assisting me in the process of verification of the various bases relied on by group members in support of participation by them in the settlement.

155 The evidence and information now available concerning late registration comprises:

(a) the eleventh Pelka-Caven affidavit dated 25 March 2025;

(b) an email and affidavit from one group member dated 7 April 2025;

(c) the eighth Zimet affidavit dated 16 April 2025 with exhibits;

(d) a spreadsheet prepared by the plaintiffs' solicitors summarising the First Cohort Material dated 16 April 2025, and amended 9 May 2025 ('First Cohort Spreadsheet');

(e) affidavits and any written submissions (of no more than two pages in length) prepared by applicants for late registration, in accordance with the Settlement Notice ('Second Cohort Material');

(f) a spreadsheet prepared by the plaintiffs' solicitors summarising the Second Cohort Material dated 20 March 2025, amended 16 April 2025 ('Second Cohort Spreadsheet'); and

(g) affidavits and any written submissions (of no more than two pages in length) prepared in response to the Order of 17 April 2025, being the extended late registrant material received by the Court on 9 May 2025.

The First Cohort

156 The First Cohort is constituted of 57 group members who did not register their claims in accordance with the September Notice that required registration by 15 November 2023.

157 The total losses of the First Cohort are approximately $16,120,190.72. Those losses are large because they include claims by industry superannuation funds:

(a) CareSuper – estimated losses of $4,621,517.06;

(b) Dimensional – estimated losses of $4,902,330.71; and

(c) UniSuper – estimated losses of $5,793,662.19.

158 The evidence concerning these applicants for late registration discloses that:

(a) 36 group members, submitted their member registration form within two days of the registration deadline;

(b) 13 group members submitted their member registration form more than two days late but still in November 2023; and

(c) 8 group members submitted their member registration form between December 2023 and August 2024.

159 In the context of the relatively insignificant delay in registration, the parties having reached a negotiated settlement on the assumption these group members should be participants in any settlement, I grant leave for the 36 group members who submitted their registration form within two days to participate in the settlement. For the avoidance of doubt, those group members are identified by the following numbers, 550023, 550128, 550036, 550127, 550115, 550018, 550120, 550121, 550124, 550125, 552464, 553160, 553184, 553186, 554314, 554312, 554315, 550076, 554311, 383636, 383640, 383643, 383632, 383646, 383641, 383642, 383631, 383633, 383637, 383634, 383590, 383644, 383635, 383645, 383639, and 383638.

160 I will permit late registration by those of the 13 members whose registration forms were submitted prior to the end of November 2023, whose late registration was due to the failure by CareSuper or by a financial advisor to register on their behalf prior to 15 November 2023. I will also allow participation in the settlement by those group members in this category whose application for late registration is supported by an

affidavit explaining the circumstances.

161 I will not permit late registration and therefore participation in the settlement by those of the 13 persons in the First Cohort who registered by the end of November 2023 but who failed to provide an explanatory affidavit pursuant to the April Order. To permit those persons to participate would be to undermine the obligations of parties and practitioners to comply with orders of the Court governing the conduct of and participation by group members in this proceeding. In particular, the Class Closure Order, the opportunity afforded by the Settlement Notice to apply of which those persons did not avail themselves and the April Order.

162 I will allow late registration and participation in the settlement by group members identified by the following numbers: 554416, 550032, 546988, 554558, 554626, 554633, 554634 and 554635. Of the 13 members whose registration forms were submitted prior to the end of November 2023, for the reasons stated in the previous paragraph, I will not permit the persons identified by the plaintiffs by the following numbers: 554382, 554376, 554384, 554417 and 554527 to participate in the settlement.

163 In relation to the remaining 8 group members falling within the First Cohort:

(a) the following group members are permitted to participate as late registrants:

(i) group member 554742 – failure to register due to professional advisor's failure; and

(ii) group member 554783 – failure to register due to dealing with family illness, the family member died shortly afterwards; and

(b) group members 554784, 555511, 549426, 554740, 578677, and 554417 provided no, or no sufficient evidence or explanation of their reasons for failure to register prior to 15 November 2023. These group members failed to satisfy the threshold to which Matthews J referred in *Uber* and are not permitted to participate in the settlement.

The Second Cohort

164 The Second Cohort of 61 group members who seek to be permitted to register late and to participate in the settlement seek to do so pursuant to the January Order. Included in the Second Cohort are two group members who sought to register after the 11 March 2025 deadline for late registration specified in the January Order had passed. The total losses claimed by the Second Cohort are approximately $177,826.38.

165 As required by paragraph 15 of the January Order, the plaintiffs' solicitors provided soft copies of the applications for late registration lodged with them by members of the Second Cohort together with a spreadsheet summarising the substance of the applications. A revised version of the Second Cohort Spreadsheet was provided to the Court on 16 April 2025.

166 59 of the 61 group members in this Second Cohort submitted an affidavit in accordance with the process specified in the Settlement Notice. One group member sent material to the Court on 16 April 2025. The other group member sent material to the plaintiffs' solicitors on 7 May 2025, well past the late registration deadline.

167 I have considered the material provided. I have been greatly assisted by the Second Cohort Spreadsheet prepared by the plaintiffs' solicitors.

168 The evidence given by Mr Zimet puts group members falling within the Second Cohort into categories explaining the reason or reasons provided for late registration. Those categories include the death of a relative, illness, claiming to have been unaware of the proceeding or to have not received any communications and believing the email in respect of registration was a scam, confusion or a miscommunication. Understandably the categories are reasonably broad. Some members of the Second Cohort feature in multiple categories.

Death of a relative (Category 1)

169 There are 4 applications by Second Cohort unregistered group members supported by evidence which mention the death of a relative, in combination with illness or distress, being the reason for the registration deadline being missed or as a basis for seeking a

grant of leave. Each of these applications is meritorious and demonstrates a connection between the death or distress and the failure to register. I grant leave to each of these group members to participate in the settlement. They are group members: 33039, 33066, Mr Lock and Mr Cavnoudias, who are in this category but who it appears do not have member IDs attributed to them in the Second Cohort Spreadsheet.

Medical reasons (Category 2)

170 I agree with the view expressed by Matthews J in *Uber*[29] that a group member's assertion of medical issues (either their own issues or those a family member for whom they have caring responsibilities) will not disclose unfair prejudice in the operation of the registration deadline unless there is something that ties the medical issues to why the group member was not able to register in compliance with the Class Closure Order.

171 Where there is no, or no sufficient, link between the medical reason and missing the registration deadline, no unfair prejudice is established. Applying the criteria in *Uber* to which I have referred I grant leave to the following group members to participate in the settlement: 33028, 33158, 33062 and Ms Dykgraaf who is in this category but whom it appears does not have a member ID attributed to her in the spreadsheet provided by the plaintiffs' solicitors.

172 I refuse leave to Ms Ogrodnik who is also in this category but who does not have a member ID attributed to her in the Second Cohort Spreadsheet.

No knowledge of the proceeding (Category 3)

173 8 group members state that their reason for failing to register is that they had no knowledge of the proceeding generally prior to receiving the Settlement Notice. This includes the application seeking leave received on 7 May 2025, well after the late registration deadline.

174 For this category of group members, reasons which specifically identify and address,

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[29] *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)* [2024] VSC 733 [149]-[150].

for example, the time and place of relevant events, and the particular circumstances that caused or resulted in them not registering in accordance with earlier Orders will be more persuasive than reasons which are vague and general in nature. An unsupported assertion will not demonstrate unfair prejudice. None of the 8 applications in this category demonstrate unfair prejudice. Each such application, being those of group members 33038, 33033, 33032, 33056, 33153, 33064 607346 and 33068 is refused.

No knowledge of registration deadline (Category 4)

175 21 group members applied for leave supported by evidence stating that they had no knowledge of the 15 November 2023 deadline or did not receive the Class Closure Notice. The same considerations apply to this category as to the group members in category 3.[30] On that basis the applications for late registration by group members 33146, 33054, 33137, 33046, 33150 and 33034 are allowed. The applications by group members 33037, 33141, 33140, 33139 (also 33035), 33136, 33135, 33036, 33148, 33160, 33155, 33156, 33152, 33069, Mr Sasidharan and Ms Speed, who are in this category but to whom it appears no member IDs have been attributed in the Second Cohort Spreadsheet, are refused.

Mistaken belief in registration (Category 5)

176 There are 7 unregistered group members whose evidence indicates that they held a mistaken belief that they had previously registered to participate in the proceeding. Where the evidence demonstrates that the group member sought to register their interest in this proceeding and provides a persuasive and credible reason for the mistaken belief, I accept that that will be sufficient to demonstrate unfair prejudice.[31] However, where the applicant gives evidence that they completed what they thought was a registration process but there is no evidence that that process was connected to this proceeding (for example, it does not refer to Slater and Gordon, PFM or the Supreme Court), the reasons are not sufficiently persuasive to constitute unfair

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30 Analysis adopted in *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)* [2024] VSC 733 [144]-[146] (Matthews J).

31 *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)* [2024] VSC 733 [168] (Matthews J).

prejudice.[32]

177 Where the evidence demonstrates a reasonable basis for the mistaken belief such as an email from Slater and Gordon to the group member stating that 'Since you have registered with us…' (as in the case of group members 33061 and 33931) or factors such as personal or financial hardship, I will grant leave to these group members.

178 For the reasons discussed the applications for late registration by group members 33031, 33040, 33143, 33061 and 33931 are allowed to participate in the settlement. The applications by group member 33055 and Mr Scundi, who is in this category but to whom it appears no member ID has been attributed in the Second Cohort Spreadsheet, are refused.

Confusion or misunderstanding (Category 6)

179 There are 10 group members whose explanation for not registering by the deadline is due to confusion or a misunderstanding. Unless persons in this category demonstrate special vulnerabilities the failure to follow up confusion or a misunderstanding and the failure to take steps to clarify the position will generally mean the matters relied on are insufficient to permit late registration.[33]

180 Adopting that approach to persons in this category, group members 33157, 33030 and 33067 are allowed to participate in the settlement. The applications by group members 33142, 33149, 33159, 33065, 33070, 33154 and Mr Verco, who is in this category but to whom it appears no member ID has been attributed in the Second Cohort Spreadsheet are refused.

Missed deadline by days (Category 7)

181 I will allow group member 33051 who submitted his registration on 21 November 2023 to participate in the settlement.

Third Party Issue (Category 8)

182 I will allow the late registration application by group members 33063 and 33147 who

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32 *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)* [2024] VSC 733 [169] (Matthews J).
33 *Andrianakis v Uber Technologies Inc and Others (Settlement Approval)* [2024] VSC 733 [177] (Matthews J).

relied on their financial advisers to forward the registration form after they had completed it. I refuse the application by group member 33138 whose grounds otherwise fall within this category.

Other (Category 9)

183 5 applications for late registration fall within category 9. The applications by group members 33071 and 33072 are allowed. The application by group member 33029 is refused.

184 For the avoidance of doubt, the applicants for late registration whose applications I have allowed are RGMs for the purposes of the Settlement Distribution Scheme and are entitled to participate in the settlement.

L. Should the GCO be varied?

185 Section 33ZDA of the Act relevantly provides:

> **Group costs orders**
>
> (1) On application by the plaintiff in any group proceeding, the Court, if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding, may make an order —
>
> (a) that the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being the percentage set out in the order; and
>
> (b) that liability for payment of the legal costs must be shared among the plaintiff and all group members.
>
> …
>
> (3) The Court, by order during the course of the proceeding, may amend a group costs order, including, but not limited to, amendment of any percentage ordered under subsection (1)(a).

186 On 8 November 2022, Nichols J granted the plaintiffs' application for a GCO under s 33ZDA(1) of the Act.[34] Her Honour ordered that the legal costs payable to the solicitors for the plaintiffs and group members, Slater and Gordon and PFM, be calculated at 22%, inclusive of GST, of the amount of any award or settlement that

[34] *Gehrke v Noumi Ltd* [2022] VSC 672.

may be recovered in the proceeding (up to the conclusion of the trial of common issues), with such payment to be shared equally between the two law practices.

187 Pursuant to the GCO the legal costs, inclusive of GST, to which the plaintiffs' solicitors are entitled are $9,460,000 (22% of $43 million). This means that unless the GCO is varied pursuant to s 33ZDA(3) of the Act, that Slater and Gordon and PFM will each be entitled to receive $4,730,000.

188 The ruling by Nichols J approving the GCO at a rate of 22% emphasised that the Court was satisfied that:[35]

(a) making the GCO would provide the plaintiffs and group members certainty that they would recover no less than 78% of any amount recovered on settlement or judgment, which is a real and substantial benefit;

(b) neither Mr Gehrke nor Mr Buch was the beneficiary of a contractual arrangement that was more beneficial than the proposed GCO, including by reference to the conclusions reached in respect of alternative funding models;

(c) there was a real prospect of group members obtaining a better financial outcome should a GCO at the rate of 22% be made, than would be achievable should the plaintiffs obtain third party funding without a GCO, which was the likely alternative means of funding should a GCO be refused; and

(d) there was sufficient evidence of the appropriateness of the proposed rate at this time, however the appropriateness must be reviewed at a later date.

Section 33ZDA(3)

189 Section 33ZDA(3) of the Act allows the Court to ensure that once information informing proportionality becomes available, a review of the GCO rate can be undertaken. That is so as to ensure that the percentage fixed pursuant to s 33ZDA(1) remains appropriate.[36] The percentage set pursuant to s 33ZDA(1) serves as a default

35 *Gehrke v Noumi Ltd* [2022] VSC 672 [64].
36 *Mumford and EML Payments Limited* [2022] VSC 750.

position from which the Court will undertake the task required by s 33ZDA(3). As stated by Watson J in *Allen v G8*, pursuant to s 33ZDA(3) I am tasked with assessing whether the remuneration under the GCO is proportionate in light of the known facts.[37] At the point at which s 33ZDA(3) comes into play, the uncertainty about cost and duration will have been resolved and the range of possibilities will have been narrowed to one.[38]

190 In *Allen v G8*, Watson J said as follows in relation to the statutory power to amend a GCO:[39]

> (a) The power to amend a group costs order only arises in circumstances where the court was satisfied that it was 'appropriate or necessary to ensure that justice is done in the proceeding' to make the original order.
>
> (b) The consideration of whether to exercise the power under s 33ZDA is not an occasion for a hearing *de novo* regarding the appropriateness of the group costs order.
>
> (c) Rather, the power to amend should only be exercised if the court is satisfied that circumstances now mean that an amendment is appropriate or necessary to ensure that justice is done in the proceeding. Whilst the language of s 33ZDA(3) contains no express limitation, such a limitation arises by necessary implication from the structure of s 33ZDA and the conditions on the original exercise of power under s 33ZDA(1).
>
> (d) Close attention should be paid to the reasons for the original group costs order.
>
> (e) The court should ensure that costs payable to the lawyer under the group costs order remain proportionate in that they continue to represent an appropriate reward in the context of the effort and investment of the legal practice, the duration of the proceedings and the risks which were undertaken under the group costs order.

191 I agree with and adopt his Honour's summary of the relevant principles.

192 The statutory model introduced by s 33ZDA invites the question whether the costs allowed are, among other things, proportional to the risk undertaken by the law firm in funding the proceeding.[40] The answer to this question will engage considerations

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37 *Allen & Anor v G8 Education Ltd (No 4)* [2024] VSC 487 [66] (Watson J).
38 *Allen & Anor v G8 Education Ltd (No 4)* [2024] VSC 487 [66] (Watson J).
39 *Allen & Anor v G8 Education Ltd (No 4)* [2024] VSC 487 [63].
40 *Allen v G8 Education Ltd* [2022] VSC 32 [90] (Nichols J).

of proportionality and reasonableness.[41] The Court must consider the circumstances operating at the time of the settlement approval application, such as the costs incurred by the law practice and the risks to that practice, in order to be satisfied that the GCO rate is proportionate.[42]

193 In *Allen v G8* Watson J considered that it was appropriate to take into account evidence of the costs on an hourly rate basis, the law firm's internal rate of return ('IRR') for its investment in the proceeding and its return on investment ('ROI').[43] The IRR and ROI metrics are commonly used by litigation funders as a measure of their outcomes. His Honour accepted that these metrics take into account the timing of cashflows and are useful measures of comparison between the operation of the GCO and group proceedings financed by a litigation funder.[44]

194 In relation to the comparison between the GCO and the law practice's costs on an hourly basis, his Honour accepted that Parliament has enacted a new method of calculation of costs by s 33ZDA.[45] Section 33ZDA contemplates that costs will sometimes be more than those calculated on an hourly basis and will sometimes be less. Therefore, the comparison with time-based billing alone is not determinative on the question of proportionality. That said, Watson J noted that the comparison with professional fees on an hourly basis provides a useful cross-check in that together with the figure expended on disbursements, it produces a calculation of the effective cost of the provision of 'litigation funding' in the proceeding.[46] That litigation funding cost can be directly compared to funding commissions in the third party litigation funding market.[47]

195 The law practices do not seek to be separately compensated for the extra step of making the application to the Federal Court pursuant to s 1317Q and the proposed

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41 *Allen v G8 Education Ltd* [2022] VSC 32 [90] (Nichols J).
42 *Fuller & Anor v Allianz Australia Insurance Ltd & Anor (Settlement Approval)* [2025] VSC 160 [161] (Matthews J).
43 *Allen & Anor v G8 Education Ltd (No 4)* [2024] VSC 487 [74].
44 *Allen & Anor v G8 Education Ltd (No 4)* [2024] VSC 487 [71].
45 *Allen & Anor v G8 Education Ltd (No 4)* [2024] VSC 487 [75].
46 *Allen & Anor v G8 Education Ltd (No 4)* [2024] VSC 487 [75].
47 *Allen & Anor v G8 Education Ltd (No 4)* [2024] VSC 487 [75].

pathway to making the ASIC penalty sum available for distribution to group members who fall within the ASIC claim period.

196 Neither the plaintiffs nor the law firms acting for the plaintiffs in this case seek to vary the rate of the GCO. No group members have objected to the proposed settlement inclusive of the GCO fixed at 22%.

197 The fact neither law practice seeks a variation to the GCO percentage and the fact there is no objection to 22% of the Settlement Sum being applied as per the GCO are relevant to my consideration of whether the GCO should be varied, but are not determinative. The question remains whether the Court should exercise its power to amend the GCO.

Evidence relevant to a potential variation of the GCO Percentage

198 The plaintiffs and the law practices submit that the GCO percentage fixed at 22% is fair and reasonable having regard to the evidence, including the confidential evidence. Their evidence is that after the final order for the GCO is made, after the reimbursement payments are made to the two plaintiffs and the administration costs are paid, the distribution to remaining group members would be $33.1 million or 77% of the Settlement Sum. They submit that would be a more favourable return than the most likely counterfactual to the GCO, being third party funding. In light of the evidence I accept that submission.

199 Slater and Gordon provided confidential evidence to the Court including:

(a) Slater and Gordon's 'hypothetical professional fees', the time-based recorded fees which will not be billed on the assumption the firm is to be paid pursuant to a GCO; and

(b) Slater and Gordon's ROI and IRR.

200 PFM led evidence that it has been paid 75% of its professional fees by its litigation funder Omni Bridgeway, in accordance with an agreement between PFM and Omni Bridgeway.

201 PFM provided evidence that if the settlement is approved based on the existing GCO at 22% PFM will receive no money because its 50% share ($4,730,000) will go to its funder, Omni Bridgeway, in accordance with their agreement.

202 The evidence filed on behalf of PFM is that Omni Bridgeway expended $5,251,817.51(inclusive of GST) on financing the proceeding. It follows that Omni Bridgeway will not recover its expenses, and will receive a negative return. In addition, the remaining 25% of PFM's professional fees which were not paid in the course of the litigation by Omni Bridgeway will remain unpaid.

203 Pursuant to the Order of Nichols J made on 21 December 2021, Mr Roland Matters was appointed as special (costs) referee in the proceeding. Paragraph 1(a) of that Order obliged Mr Matters to conduct inquiries every six months as to the question of whether any work conducted by PFM and Slater and Gordon was performed by reason of there being two firms jointly representing the plaintiffs rather than one firm. The purpose of the reports was to identify any duplicated work by reason of joint carriage (and the implementation of a cooperation protocol between the two firms).

204 Mr Matters has provided six confidential costs reports. In summary, Mr Matters opines that during the first five reporting periods, between 18 November 2021 and 30 June 2024, there was some duplication of work. Mr Matters' analysis shows that as the proceeding progressed, the rate of duplicated work fell. There was no duplication of work in the period from 1 July 2024 to 31 December 2025. I have been assisted by the data and analysis provided by Mr Matters.

205 Taking into account the total amount of work considered by Mr Matters to be duplicated work and the period to which it relates, approximately 31 months from 1 July 2024 to 31 December 2025, I consider that the amount of duplicated work has been minimal. In the context of the confidential evidence provided to the Court as to Slater and Gordon's ROI and IRR and evidence from PFM, in particular that 25% of PFM's professional fees will remain unpaid, the value of the duplicated work undertaken does not reach a threshold that would warrant the Court adjusting the

rate of the GCO.

206 I have had regard to the evidence, including confidential evidence regarding costs, risks and the financial returns to each of Slater and Gordon and PFM. I accept and adopt the confidential opinion of counsel which opines that the proposed GCO rate of 22% is fair and reasonable having regard to the fact that the Settlement Sum is substantially lower than the recovery ranges estimated in the evidence put before the Court for the purposes of seeking the GCO of 22%, and having regard to the work done and the risks carried as well as the fact that the firms will not receive disproportionate returns.

207 In all of the circumstances and applying the criteria referred to by Watson J in *Allen v G8*, there is no proper basis to make an order pursuant to s 33ZDA(3) of the Act varying the 22% GCO determined by Nichols J.

M. Orders relevant to the ASIC penalty sum

208 Section 1317QF of the *Corporations Act* provides:

> (1) This section applies if a court considers that it is appropriate to:
>
> > (a) make a pecuniary penalty order against a person in relation to a contravention of a civil penalty provision; or
>
> …
>
> (2) In making the pecuniary penalty order or relinquishment order or imposing the fine, the court:
>
> > (a) must consider the effect that making the order or imposing the fine would have on the amount available to pay:
> >
> > > (i) compensation to which persons might reasonably be expected to be entitled under section 961M, 1317H, 1317HA, 1317HB, 1317HC or 1317HE; or
>
> …
>
> > (b) give preference to making an appropriate amount available for refunds and compensation under those sections.
>
> (3) If the court gives preference to making an appropriate amount available for refunds and compensation under paragraph (2)(b), the court may also make such orders as the court thinks fit for the purpose of ensuring that the amount remains available for the payment of:

> (a) compensation under section 961M, 1317H, 1317HA, 1317HB, 1317HC or 1317HE …

209 As is apparent from its terms, s 1317QF requires that in circumstances where the Court considers it is appropriate to make a pecuniary penalty order, the Court must consider the effect that making the order would have on the amount available to pay certain kinds of statutory compensation and to give preference to making an appropriate amount available for that compensation.

210 On 5 August 2024 Jackman J made declarations of contraventions of s 674(2) of the *Corporations Act* by Noumi.[48] His Honour made a pecuniary penalty order against Noumi in respect of those contraventions. His Honour ordered that subject to further order, including any order pursuant to s 1317QF(3), the pecuniary penalty is to be paid into Court. The ASIC penalty sum of $5 million was ordered to be paid in three instalments. The first instalment of $2 million has been paid, the next instalment of $1.5 million is to be paid by 5 August 2025 and the final instalment of $1.5 million is to be paid by 5 August 2026.

211 In his reasons for decision Jackman J:

(a) found that the contraventions materially prejudiced the interests of acquirers of shares in Noumi and were serious because they substantially affected the price of those shares by reason of non-disclosure of matters overseen by Noumi's CEO and CFO;[49]

(b) observed that s 1317QF relevantly requires the Court to consider the effect that making an order would have on the amount available to pay certain kinds of statutory compensation, and to give preference to making an appropriate amount available for making that compensation. However, the section does not specify any particular way in which that preference is to be given which will depend on the particular circumstances of the case; and[50]

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48 *ASIC v Noumi Limited (No 3)* [2024] FCA 862.
49 *ASIC v Noumi Limited (No 3)* [2024] FCA 862 [54].
50 *ASIC v Noumi Limited (No 3)* [2024] FCA 862 [97].

(c) noted the agreed position between ASIC and Noumi that having regard to the existence of this group proceeding it was appropriate that, subject to further order, the amount of the ASIC penalty sum should be paid into Court.[51]

212 The Federal Court has power pursuant to s 1317QF (3) of the *Corporations Act* to determine whether the ASIC penalty sum will be made available to the group members.

213 The path to potential recovery by ASIC Period group members of all or part of the ASIC penalty sum is a little complicated. It involves both this Court and the Federal Court being persuaded to favourably exercise jurisdiction in favour of the ASIC Period group members.

214 Section 1317HA(1) of the *Corporations Act* provides:

> (1) A Court may order a person (the ***liable person***) to compensate another person (including a corporation), registered scheme or notified foreign passport fund for damage suffered by the person, scheme or fund if:
>
> (a) the liable person has contravened a financial services civil penalty provision; and
>
> (b) the damage resulted from the contravention.
>
> The order must specify the amount of compensation.

215 The Settlement Deed contains provisions which are concerned to provide group members whose claims arise in the ASIC claim period with a basis on which to be entitled to compensation under s 1317HA of the *Corporations Act* and therefore a basis on which the Federal Court could exercise the power in s 1317QF(3) to make the ASIC penalty sum available as a payment of compensation to ASIC Period group members.

216 As submitted on behalf the plaintiffs, the contemplated steps under the Settlement Deed to enliven this basis are as follows:

> a. The Statement of Agreed Facts at Schedule 1 to the Settlement Deed is intended to create the factual foundation for the Supreme Court of Victoria to make, in the exercise of its discretion and if it is so minded, the Admitted

[51] *ASIC v Noumi Limited (No 3)* [2024] FCA 862 [2].

Matters Compensation Order.

b. Upon the Supreme Court making the Admitted Matters Compensation Order, the order is intended to create a legal entitlement to compensation on the part of ASIC Period Group Members pursuant to s 1317HA of the Corporations Act;

c. This legal entitlement is intended to establish a basis for the Federal Court of Australia (again, in the exercise of its discretion and if it is so minded) to exercise the power in s 1317QF to make the civil penalty sum of $5 million ordered against Noumi in the ASIC proceeding available for the payment of compensation to the ASIC Period Group Members.

217 Given the proposed pathway to potentially making the ASIC penalty sum available as compensation is dependent upon the exercise of discretion both by this Court and by the Federal Court, it is accurate, as the plaintiffs submit, to describe this potential benefit as a contingent benefit of the proposed settlement. It is a benefit that is in addition to the payment of the Settlement Sum to all RGMs who have not opted out of the proceeding.

218 It is important to note that to be eligible to participate in any distribution in favour of group members of all or part of the ASIC penalty sum, it is not necessary or a precondition to such participation that a group member has registered to participate in this proceeding.

219 While the parties recognise that any entitlement to the ASIC penalty sum is contingent upon the favourable exercise of jurisdiction both by this Court and by the Federal Court, the Settlement Deed includes a proposed ASIC Penalty Settlement Distribution Scheme for the possible distribution of the ASIC penalty sum. The principles for the distribution of that sum pursuant to the ASIC Penalty Settlement Distribution Scheme, should it occur, are the same as the principles that apply in the case of the Settlement Distribution Scheme which I have found to be fair and reasonable as between group members. Mr Zimet is also proposed to be the Settlement Deed Administrator of the ASIC Penalty Settlement Distribution Scheme. The estimated cost of $72,000 of administration of the ASIC Penalty Settlement Distribution Scheme forms part of the $400,000 to administer the Settlement Distribution Scheme to which I have previously referred.

220 The plaintiffs have given undertakings on their own behalf and on behalf of Eligible Group Members, to the effect that they will not take any step to seek to recover any part of the ASIC penalty sum other than by way of s 1317QF of the *Corporations Act*.

221 As submitted on behalf of the plaintiffs, any entitlement to the ASIC penalty sum would not 'arise from' and would not be 'pursuant to' the settlement as those terms are used in the Class Closure Order. If the entitlement to the ASIC penalty sum crystallises, it would be pursuant to the exercise by this Court of its power to make the 'Admitted Matters Compensation Order' (meaning an order in the terms set out in Schedule 2 of the Settlement Deed or on substantially equivalent terms) and any subsequent exercise of power by the Federal Court to make the ASIC penalty sum available to group members whose claims fall within the 'ASIC claim period' being 29 August 2019 – 25 May 2020.

222 The plaintiffs intend to make an application in the Federal Court on the basis that Noumi have admitted to contraventions in the ASIC proceeding that fall within the Claim Period in this proceeding and that the claim against Noumi in this proceeding settled for a low sum having regard to Noumi's financial circumstances.

223 Pursuant to the Settlement Deed, to give effect to the steps referred to above, the parties have filed the ASOF in this proceeding in accordance with s 191 of the *Evidence Act 2008* (Vic). The ASOF mirrors the admissions made by Noumi in the ASIC proceeding and provides a factual basis on which the parties rely to seek declarations and the compensation in the form of the 'Admitted Matters Compensation Order'.

224 The plaintiffs' submissions contemplate steps taken by this Court that would assist the plaintiffs to persuade the Federal Court to exercise its power to make the ASIC penalty sum available for compensation to Eligible Group Members. From this Court, the plaintiffs seek declarations and orders by consent on the basis of the ASOF dated 15 April 2025 filed in this proceeding. The plaintiffs' plan is to use such declarations and orders as a factual and legal basis to seek payment in the Federal Court of the ASIC penalty sum. The plaintiffs proceed on the basis that such declarations and

orders would create a proper basis for the Federal Court to be satisfied that there have been declared in this proceeding mirror contraventions to those found to have been made out by the Federal Court in the ASIC proceeding.

225 There is clear overlap between the admitted contraventions of s 674(2) of the *Corporations Act*, the subject matter of the ASOF which relate to Noumi's revenue and inventory, and the pleaded claims in this proceeding. By way of example, the Court was directed to paragraph 79.1 of the statement of claim which contains allegations about inaccuracies in Noumi's earnings and profit not reflecting the true position, a matter that is admitted by Noumi in relation to the ASIC claim period in the ASIC proceeding. Another example of overlap is at paragraph 79.4(b) of the statement of claim where allegations are made about accounts irregularities in relation to inventory, including concerning obsolete or expired stock.

226 The plaintiffs seek the following declarations and orders:

> **Declarations and Compensation Order**
>
> 9. A declaration pursuant to s 1317E(1) of the Corporations Act 2001 (Cth) (Corporations Act) that, in the period on and from 29 August 2019 until 25 May 2020, Noumi contravened s 674(2) of the Corporations Act by failing to notify the ASX of the FY19 Information, namely that:
>
> > (a) FY19 Disclosed Inventories (being the inventories disclosed as current assets in the FY19 Financial Report) were $120.2 million which included Not Saleable Inventory of approximately $31.77 million;
> >
> > (b) Noumi had not made sufficient or adequate provisions and had failed to write down the value of the FY19 Disclosed Inventories to account for the Not Saleable Inventory;
> >
> > (c) the FY19 Disclosed Inventories were overstated by approximately $31.77 million as a result of the inclusion of the Not Saleable Inventory;
> >
> > (d) by reason of one or more of the matters referred to in subparagraphs (a)-(c) above, the FY19 Disclosed Inventories were not recorded in the FY19 Financial Report in accordance with Noumi's Inventory Accounting Policy; and
> >
> > (e) by reason of one or more of the matters referred to in subparagraphs (a)-(d) above, the financial statements and notes in the FY19 Financial Report did not give a true or fair view of the financial position and performance of Noumi.
>
> 10. A declaration pursuant to s 13l7E(l) of the Act that, in the period on and

from 27 February 2020 until 25 May 2020, the First Defendant contravened s 674(2) of the Act by failing to notify the ASX of the HY20 Inventory Information and the HY20 Revenue Information (together, the HY20 Combined Information), namely that:

(a) the HY20 Disclosed Inventories (being the inventories disclosed as current assets in the HY20 Financial Report) were $122.3 million which included Not Saleable Inventory of approximately $36.6 million;

(b) Noumi had not made sufficient or adequate provisions and/or had failed to write- down the value of the HY20 Disclosed Inventories, to account for the Not Saleable Inventory;

(c) the HY20 Disclosed Inventories were overstated by approximately $36.6 million as a result of the inclusion of the Not Saleable Inventory;

(d) by reason of one or more of the matters referred to in subparagraphs (a)-(c) above, the HY20 Disclosed Inventories were not recorded in the HY20 Financial Report in accordance with Noumi's Inventory Accounting Policy;

(e) the HY20 Disclosed Revenue (being the revenue from sale of goods disclosed in the HY20 Financial Report) included the Lactoferrin Invoice Amounts despite the existence of the Non-Revenue Information (being that in the period from 1 July 2019 until 31 December 2019, no lactoferrin the subject of the Lactoferrin Invoices was delivered to Interfood, Interfood had the right to cancel the order because CNCA and sample approval had not been obtained by June 2019 and no payment was made by Interfood to Noumi in respect of the Lactoferrin Invoices);

(f) Noumi failed to reduce the value of the HY20 Disclosed Revenue to account for the Non-Revenue Information;

(g) the HY20 Disclosed Revenue was overstated by at least $9.8 million as a result of the Non-Revenue Information;

(h) the HY20 Disclosed Profit included the Lactoferrin Invoice Amounts despite the existence of the Non-Revenue Information and the Lactoferrin Profit Information (being that the Lactoferrin Invoice Amounts contributed at least $8.5 million towards Noumi's gross profit recorded in the HY20 Financial Report);

(i) the HY20 Disclosed Profit was overstated by at least $8.5 million as a result of the Non-Revenue Information and the Lactoferrin Profit Information;

(j) by reason of one or more of the matters referred to in subparagraphs (e) to (i) above, the HY20 Disclosed Revenue and the HY20 Disclosed Profit were not recorded in the HY20 Financial Report in accordance with the Revenue Accounting Policy; and

(k) by reason of one or more of the matters referred to in subparagraphs (a)-(j) above, the financial statements and notes in the HY20 Financial Report did not give a true or fair view of the financial position and

performance of Noumi.

> 11. An order pursuant to s 1317HA of the Corporations Act that Noumi compensate Eligible Group Members in respect of damage suffered by them as a result of the contraventions of s 674(2) of the Corporations Act referred to in paragraph 9 and 10 above, in the amount of $5 million (in total for all Eligible Group Members), but with payment of such compensation by Noumi to Eligible Group Members to be limited to the amount which Eligible Group Members may receive (if any) by way of distribution of some or all of the pecuniary penalty amount of $5 million to be paid by Noumi in instalments pursuant to the Pecuniary Penalty Orders, pursuant to any Section 1317QF Application which has or may be made by or on behalf of Eligible Group Members.

227 On the basis of the ASOF and the undertakings provided by the plaintiffs, I am satisfied that it is appropriate, and very much in the interests of the plaintiffs and group members, to make the declarations and orders sought in the Admitted Matters Compensation Order.

N. Confidentiality Orders

228 The plaintiffs seek confidentiality orders on the basis of s 18(1)(a) of the *Open Court Act 2013* (Vic) and the inherent jurisdiction of the Court.

229 Broadly, the plaintiffs' claims for confidentiality are respect of the following categories of documents:

(a) information that is confidential to Noumi, including the Settlement Deed conditions precedent materials and insurance information;

(b) the confidential exhibit to eleventh Pelka-Caven affidavit which exhibits confidential opinion of counsel;[52]

(c) various paragraphs in the eleventh Pelka-Caven affidavit, the twelfth Pelka-Caven affidavit, the sixth Zimet affidavit, the seventh Zimet Affidavit and the Eighth Zimet affidavit which candidly disclose Ms Pelka-Caven's and Mr Zimet's confidential opinions on various legal matters;

(d) various paragraphs in the twelfth Pelka-Caven affidavit and the seventh Zimet

[52] See for confidentiality orders concerning such opinions eg *Burke v Ash Sounds Pty Ltd (No 4)* [2020] VSC 581 at [22] (Incerti J); *Cantor v Audi Australia Pty Limited (No 5)* [2020] FCA 637 [275]-[278] (Foster J).

affidavit, and the exhibits to the eighth Zimet affidavit, which contain confidential and internal information about the conduct of Slater and Gordon and PFM's businesses, and which might reasonably be expected to confer a tactical advantage on another party to the proceeding;

(e) confidentiality is claimed over group member contact information in the eighth Zimet affidavit; and

(f) the terms of the Settlement Deed, which are confidential.

230 The plaintiffs filed an amended summons on 11 April 2025, two additional copies of the summons were provided to Chambers, one by each of the plaintiffs' law practices which sought confidentiality orders peculiar to the individual plaintiffs and the law practice representing each plaintiff. On 12 May 2025, draft orders dealing with confidentiality issues reflecting matters discussed during the 17 April 2025 hearing were provided to my Chambers. These draft orders set out the plaintiffs' confidentiality claims in Schedule B. Two confidential versions of the orders were provided to the Court, accounting for the fact that Mr Gehrke and Mr Buch make different claims for confidentiality over the information detailed in Schedule B.

231 I will grant the plaintiffs leave to file the following documents in redacted form:

(a) eleventh Pelka-Caven affidavit;

(b) twelfth Pelka-Caven affidavit;

(c) sixth Zimet affidavit and confidential exhibit JAZ-16;

(d) seventh Zimet affidavit;

(e) eighth Zimet affidavit and exhibits JAZ-15 and JAZ-16; and

(f) first Sparks affidavit.

232 The plaintiffs seek that each item in the table of redactions annexed as Schedule B to the orders be made confidential and not be published or made available to any person,

subject to:

(a) the parties' right to provide the confidential materials to the Federal Court on a confidential basis, and solely for the purpose of the s 1317QF application; and

(b) the plaintiffs' right to provide the materials confidential only to the plaintiffs (but not to Noumi) to ASIC on a confidential basis and solely for the purpose of the s 1317QF application.

233 I will make these confidentiality orders.

234 At the settlement approval hearing, the plaintiffs clarified that it is agreed that Noumi's contribution to the settlement is not confidential.

235 In short, for the reasons advanced by the plaintiffs' counsel, it is appropriate to make the confidentiality orders sought.

O. Disposition

236 In summary, I have concluded that:

(a) The Court should approve the proposed settlement under s 33V(1) of the Act.

(b) The proposed orders in respect of the distribution of the Settlement Sum are appropriate.

(c) The GCO made on 8 November 2022 should not be amended pursuant to s 33ZDA(3) of the Act.

(d) It is appropriate to approve the Settlement Distribution Scheme, to appoint Mr Zimet as scheme administrator and to do so on the basis of the $400,000 cost estimate.

(e) A number, but not all of, the group members falling within the First Cohort and the Second Cohort are permitted to participate in the settlement.

(f) It is appropriate to make the Admitted Matters Compensation Order with a

view to facilitating access by ASIC Period group members to the ASIC penalty sum.

(g) It is appropriate to make the confidentiality orders sought by the plaintiffs.

237 I will make orders substantially in accordance with the draft orders dated 12 May 2025.

238 By **12:00pm** on **27 June 2025**, the plaintiffs' solicitors should provide a revised, non-confidential form of order that picks up the registration status of the First Cohort and Second Cohort of late registrants in accordance with these reasons and any other adjustments required as a result of these reasons.

CERTIFICATE

I certify that this and the 62 preceding pages are a true copy of the reasons for ruling of Delany J of the Supreme Court of Victoria delivered on 25 June 2025 and revised on 27 June 2025.

DATED this twenty-seventh day of June 2025.

.....
Associate