FEDERAL COURT OF AUSTRALIA

Compumod Investments Pty Limited as trustee for the Compumod Pty Limited Staff Superannuation Fund v Universal Equivalent Technology Limited (Settlement Approval) [2024] FCA 571

File number:	NSD 917 of 2020
Judgment of:	**LEE J**
Date of judgment:	27 May 2024
Catchwords:	**REPRESENTATIVE PROCEEDINGS** – application for settlement approval pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) – closed class representative proceeding – where proposed settlement resolves part of the justiciable controversy – authority of representative applicant to deal with the claims of group members – how claims of group members are quelled under Pt IVA – confidentiality orders in Pt IVA proceedings – fairness and reasonableness of settlement proposal – settlement approved
Legislation:	*Corporations Act 2001* (Cth) s 444D(1) *Federal Court of Australia Act 1976* (Cth) Pt IVA, ss 33C, 33V, 33ZB, 33ZF *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) s 4
Cases cited:	*Dyczynski v Gibson* [2020] FCAFC 120; (2020) 280 FCR 583 *Fowkes v Boston Scientific Corporation* [2023] FCA 230 *J & J Richards Super Pty Ltd v Linchpin Capital Group Limited (No 2)* [2023] FCA 509 *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	24

Date of hearing:	27 May 2024
Counsel for the applicant:	Mr J Giles SC
Solicitor for the applicant:	Hicksons Lawyers
Counsel for the first respondent:	The first respondent did not appear
Counsel for the second respondent:	Mr L Moretti
Solicitor for the second respondent:	Ashurst
Counsel for the third to sixth respondents:	Mr J Gilmour (solicitor advocate)
Solicitor for the third to sixth respondents:	Wotton + Keaney

ORDERS

NSD 917 of 2020

BETWEEN:	**COMPUMOD INVESTMENTS PTY LIMITED AS TRUSTEE FOR THE COMPUMOD PTY LIMITED STAFF SUPERANNUATION FUND** Applicant
AND:	**UNIVERSAL EQUIVALENT TECHNOLOGY LIMITED (FORMERLY A.C.N. 603 323 182 LIMITED AND FORMERLY AXSESSTODAY LIMITED)** First Respondent
	PRICEWATERHOUSECOOPERS SECURITIES LIMITED Second Respondent
	HARDY (UNDERWRITING AGENCIES) LIMITED, MANAGING AGENT FOR AND ON BEHALF OF LLOYD'S SYNDICATE HDU 382 (and others named in the Schedule) Third Respondent

ORDER MADE BY: **LEE J**

DATE OF ORDER: **27 MAY 2024**

THE COURT ORDERS THAT:

1. Pursuant to s 33V(1) of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), the settlement of the representative proceeding brought by the representative applicant against the third to sixth respondents (**Settling Respondents**), including the dismissal of the claims against the Settling Respondents be approved upon the terms set out in the Deed of Settlement and Release entered into between the applicant and the Settling Respondents executed on 3 May 2024 (**Settlement Deed**).

2. There be no order as to costs of the proceeding between the applicant and the Settling Respondents, and any extant costs orders between those parties be vacated and, for the avoidance of doubt, this order is not to affect any extant costs order relating to the second respondent or the costs of the proceeding relating to the second respondent.

3. The Settlement Sum provided for in the Settlement Deed be paid into the trust account of the applicant's solicitors, on the terms provided for in the Settlement Deed, to be

held on trust for the applicant, group members and Therium Litigation Finance Atlas AFP IC, pending the determination of these proceedings and any appeal or further order of this Court.

4. Pursuant to s 33ZB(a) of the FCA Act, the persons affected by these orders are:

   (a) the applicant;

   (b) all group members who have not opted-out;

   (c) the Settling Respondents; and

   (d) the second respondent.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(Delivered *ex tempore*, revised from the transcript)

LEE J:

A INTRODUCTION AND BACKGROUND

1 This is a settlement approval application pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) in a closed class representative proceeding. The proceeding concerns a corporate bond raising marketed and sold to retail investors, including the applicant (**Compumod**) (and about 277 other group members), based on a prospectus (**prospectus**) that allegedly mis-stated or failed to disclose relevant information. The borrower, Axsesstoday Limited (**AXL**), failed a short time after the bond issue and, consequently, the retail investors who purchased bonds have allegedly suffered losses in the realm of $37.5 million.

2 Compumod alleges that the respondents were responsible for the misleading statements: AXL as the issuer of the prospectus, and the second respondent (**PwC**) as a person knowingly involved in AXL's failures and as a person who prepared the *pro forma* accounts for the purposes of publishing the prospectus and, as a result, engaged in misleading and deceptive conduct. It is said that those combined failures meant that Compumod and the group members invested in a product without knowing the proper risk profile, resulting in loss.

3 Following a mediation and the deregistration of AXL, the pleadings were amended to join the third to sixth respondents (**insurer respondents**) pursuant to s 4 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW). The proposed settlement before the Court today concerns the quelling only of claims as between Compumod (and group members) and the insurer respondents.

4 The Court has been provided with, among other things, a comprehensive confidential opinion on the proposed settlement prepared by counsel for Compumod, Mr Giles SC and Mr O'Neill (**confidential opinion**), and an executed deed of settlement (**deed**), which was marked Exhibit B on the application. What follows is largely drawn from the confidential opinion and, subject to some matters that I have clarified during the course of oral submissions this morning, I am amply satisfied that the settlement should be approved.

B THE APPLICATION

5 It is necessary to set out the orders sought on the application, which are relevantly in the following terms:

> **Interlocutory orders sought:**
>
> 1. Pursuant to s 33V(1) of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), the settlement of the representative proceeding brought by the representative applicant against the third to sixth respondents (**Settling Respondents**), including the dismissal of the claims against the Settling Respondents be approved upon the terms set out in the Deed of Settlement and Release entered into between the applicant and the Settling Respondents executed on 3 May 2024 (**Settlement Deed**).
>
> 2. By consent of the parties to the Settlement Deed, pursuant to s 33V(1) and/or s 33ZF of the FCA Act, and in order, to the extent possible by law, to give effect to the settlement approved by Order 1, this order does not (and is not intended to) operate so as to affect the applicant's or group members' claims insofar as they relate to the second respondent.
>
> 3. There be no order as to costs of the proceeding between the Applicant and the Settling Respondents, and any extant costs orders between those parties be vacated and, for the avoidance of doubt, this order is not to affect any extant costs order relating to the second respondent or the costs of the proceeding relating to the second respondent.
>
> 4. That the Settlement Sum provided for in the Settlement Deed be paid into the Trust Account of the Applicant's solicitors, on the terms provided for in the Settlement Deed, to be held on trust for the Applicant, Group Members and Therium Litigation Finance Atlas AFP IC, pending the determination of these Proceedings and any appeal or further order of this Court.
>
> 5. Pursuant to section 33ZF of the Act or otherwise, the Court authorises the Applicant *nunc pro tunc* on behalf of the Group Members, to enter into and give effect to the Deed of Settlement and the transactions contemplated in it for and on behalf of the Group Members.
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> 6. Pursuant to s 33ZB(a) of the FCA Act, the persons affected by these orders are:
>
> (a) the applicant;
>
> (b) all group members who have not opted-out;
>
> (c) the Settling Respondents; and
>
> (d) the second respondent.
>
> …

C RELEVANT PRINCIPLES

6 Enough ink has been spilled on the principles informing settlement approval applications, which I set out in *Fowkes v Boston Scientific Corporation* [2023] FCA 230 (at [31]–[45]). In

short, the Court must be satisfied that the settlement constitutes a fair and reasonable compromise of the claims made on behalf of the group members.

7 With that said, for reasons I will explain, and in the light of how the deed on this application has been drafted, it is appropriate once again to dispel some misapprehensions as to how Pt IVA operates to quell the claims of group members. In *J & J Richards Super Pty Ltd v Linchpin Capital Group Limited (No 2)* [2023] FCA 509 (at [25]), I explained that there is a persistent vice of those acting in class actions entering into settlement deeds containing releases and covenants not to sue which (either actually or arguably) go well beyond the authority of the applicant to deal with the claims of group members (as that concept is properly understood and referred to in s 33C of the FCA Act). I set out the applicable law as a member of the Full Court in *Dyczynski v Gibson* [2020] FCAFC 120; (2020) 280 FCR 583 (at 665–666 [338]–[342], Murphy and Colvin JJ agreeing):

> [338] Focussing more specifically on when Pt IVA contemplates that a group member claim is determined, the scheme contemplates that this usually occurs after an initial trial of common issues. Following the determination of common issues, orders are made pursuant to s 33ZB. In *Gill v Ethicon Sàrl (No 3)* (2019) 369 ALR 175; [2019] FCA 587, I described s 33ZB as being the most important provision within Pt IVA, noting (at [4]) that:
>
> > ... (t)his provision provides that a judgment given in a representative proceeding must describe or otherwise identify the group members affected by it and binds all such persons other than any person who has opted-out of the proceeding under s 33J. This provision was described by the Full Court in *Femcare Ltd v Bright* (2000) 100 FCR 331; 172 ALR 713; [2000] FCA 512 at [25] (Black CJ, Sackville and Emmett JJ) as, in one sense, the "pivotal provision" in Pt IVA.
>
> [339] The "statutory estoppel" arising upon the making of a s 33ZB order is the mechanism by which non-party group members are bound by the determination of common questions. The answer to the common questions might (but might not) determine the individual claims of group members. This will depend upon the nature of the claim, and the nature of the answer. In the common circumstance when the answer to a common question or questions is not determinative, it will be necessary for the group members' claims to be determined, usually following a "declassing" order.
>
> [340] But there can be departures from this norm: apart from the position of "sample" group members already referred to, it might be that the Court considers it utile and consistent with the overarching purpose to separate out and determine before all other issues a common issue, which might be determinative of a claim of a group member. In this case, Pt IVA contains a protection: absent leave being granted to the contrary, such a separate determination of a final issue could not occur without giving the group members a right to opt out: s 33J(4).
>
> [341] But what if the Court decides to not just identify whether a group member has a claim (as that concept has been explained above) but to go further to

determine whether that claim, following hearing evidence and submissions, amounts to a right or entitlement?

[342] By stating the question in this way, it becomes obvious that this amounts to a determination of a justiciable controversy between one actor (the group member) and another (the respondent). Such a controversy is only allowed to be determined without hearing from a non-party group member to the extent the controversy involves only common issues. This is because the statutory estoppel binds the group member and the applicant is heard in relation to the common issues. As was explained by French CJ, Kiefel, Keane and Nettle JJ in *Timbercorp Finance Pty Ltd (in liq) v Collins* (2016) 259 CLR 212; 339 ALR 11; [2016] HCA 44 (*Timbercorp*) (at [39], [53]–[54]), the applicant in a class action is not a privy in interest of the group members with respect to the group members' individual claims, meaning the applicant's representative capacity is limited. If, unusually, the claim of the group member is to be determined in advance of a trial and otherwise than by determination of purely common issues, it is necessary for orders to be made identifying that this step is occurring, that the group member has notice it is occurring, and has the opportunity of adducing evidence and making submissions as to the merits of the claim.

8 I then turned to the question of settlements and finality (at 675–677 [389]–[400]):

[389] … section [33ZB] is in the following terms:

> 33ZB *Effect of judgment*
>
> A judgment given in a representative proceeding:
>
> (a) must describe or otherwise identify the group members who will be affected by it; and
>
> (b) binds all such persons other than any person who has opted out of the proceeding under section 33J.

[390] The term judgment is defined in s 4 of the Act as follows:

> *judgment* means:
>
> (a) a judgment, decree or order, whether final or interlocutory; or
>
> (b) a sentence;
>
> and includes a conviction.

[391] Properly analysed, the way that the statutory scheme works to bind non-parties to an order made by the Court, is by operation of s 33ZB. Orders made settling a class action under s 33V should, in order to bind group members in relation to the individual claims, be accompanied by s 33ZB orders: see *Courtney (in a representative capacity on behalf of the persons referred to in paragraph 1 of the eighth amended statement of claim) v Medtel Pty Ltd (No 5)* (2004) 212 ALR 311; [2004] FCA 1406 (*Courtney v Medtel*) (at [54] per Sackville J); *Dillon v RBS Group (Australia) Pty Ltd (No 2)* [2018] FCA 395 (*Dillon (No 2)*) (at [48]–[49] per Lee J). As I observed in *Clark v National Australia Bank Ltd (No 2)* [2020] FCA 652 (at [24]) in relation to group member claims the subject of a s 33V settlement, the:

> … non-party claims are "settled" not through the operation of common

> law principles upon dismissal of a proceeding, but through the operation of statute. The reason why the group members although non-parties are bound to the s 33V settlement order is by the making of a s 33ZB order, which means the settlement order binds group members who did not opt-out.

[392] I am aware that there has been some differences in approach to the binding of group members to a settlement. In the early days of Pt IVA, it was common for respondents to seek contractual releases from group members or procure deed polls. The releases and indemnities procured sometimes purported to seek releases for claims that went beyond the scope of the claim the subject of the class action. This practice has been deprecated (see *Dillon (No 2)* (at [58]–[59])) and seems to have thankfully fallen into desuetude.

[393] But despite the operation of s 33ZB in its application to settlements binding group members being explained by Sackville J 16 years ago in *Courtney v Medtel*, there appears to remain some residual confusion. It is not unusual to see applicants executing deeds which require them to seek orders pursuant to s 33ZF of Act purporting to authorise applicants "*nunc pro tunc* to enter and give effect to" a settlement deed for and on behalf of group members, which deed includes releases and indemnities. Such orders can be seen in cases such as *Laszczuk v Bendigo & Adelaide Bank Ltd* [2020] VSCA 17 (at [49]–[62] per Whelan, Hargrave and Emerton JJA); *Newstart 123 Pty Ltd v Billabong International Ltd* (2016) 343 ALR 662; [2016] FCA 1194 (*Newstart 123 Pty Ltd*) (at [55]–[62] per Beach J); *Camilleri v Trust Company (Nominees) Ltd* [2015] FCA 1468 (per Moshinsky J) and in *City of Swan v McGraw-Hill Companies, Inc* (2016) 112 ACSR 65 at 75; [2016] FCA 343 (per Wigney J). An order of this type was also sought and made in *Clarke (as trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (recs and mgrs apptd) (in liq)* [2014] VSC 516 (per Croft J) and was later considered by the Victorian Court of Appeal in *Byrne v Javelin Asset Management Pty Ltd* [2016] VSCA 214 (*Byrne*) (at [55]–[58] per Hansen, Ferguson and McLeish JJA) and *Bendigo and Adelaide Bank Ltd v Pekell Delaire Holdings Pty Ltd* (2017) 118 ACSR 592; [2017] VSCA 51 (*Pekell*) (at [58] per Santamaria, Ferguson and McLeish JJA).

[394] In *Byrne* (at [55]–[56]), the Victorian Court of Appeal observed:

> Section 3(1) of the *Supreme Court Act* defines 'judgment' to include an 'order'. The parties contended that an order approving a settlement under s 33V is therefore a 'judgment given in a group proceeding' within the meaning of s 33ZB, with the result that when an order approving a settlement is made group members are bound, not only by the order, but by the settlement itself. There is obviously much to commend this result, as it is not to be supposed that the legislature contemplated that a settlement approved by the Court would not bind group members, in the same way as a judgment would have if the proceeding had not been compromised. That was also the view taken by Sackville J in C*ourtney v Medtel Pty Ltd (No 5)*. At the same time, it is common for orders to be made declaring that a plaintiff, group members and other parties are bound by the settlement pursuant to s 33ZF, which provides for the Court to make any order it thinks 'appropriate or necessary to ensure that justice is done in the proceeding'. Alternatively, there are many instances, of which the present case is one, where the Court has made an order authorising a plaintiff to enter into and give effect to the settlement on behalf of

> group members. Again, s 33ZF is an available source of power for such an order. In approving the present deed of settlement, Croft J ordered, among other things, that the plaintiffs in the group proceedings 'have the authority' of the group members '*nunc pro tunc*, to enter into and give effect to the deed of settlement and the transactions contemplated thereby for and on behalf of' the group members.
>
> In the circumstances, it is not necessary to decide whether, in the absence of an order such as those that might be made under s 33ZF, a settlement of a group proceeding is binding upon group members once approved by the Court, by operation of s 33ZB. It suffices that the present settlement was binding on group members by virtue of the orders made by the Court in this particular case.
>
> (citations omitted)

[395] Further, in *Pekell* (at [58]), the Court noted that a s 33ZF order supplies the privity which would otherwise be absent in respect of a judgment binding group members, with the result that the group proceedings may be settled "on whatever terms the parties have agreed and the Court has approved".

[396] For my part, and with respect to the Victorian Court of Appeal who appeared to harbour some doubts as to the issue, I do not think there is any doubt whatsoever about the operation of s 33ZB in binding group members to a settlement. Further, the notion that it is open for applicants to settle claims of group members beyond the claim the subject of a class action is not one which can be reconciled with the foundational notion that an applicant is only entitled to deal with any other person's rights to the extent that the applicant is representing those rights, and that it is wrong in principle for an applicant to presume to deal with the rights of third parties except to the extent that they are empowered by statute to deal with those rights: see *Dillon (No 2)* (at [60]–[61]). Those rights can be adequately dealt with upon a settlement by the quelling of the claim of a group member by the making of a s 33ZB order. It is inconsistent with the nature of the role of a representative party under Pt IVA of the Act, as part of seeking to resolve a representative proceeding, to seek to settle all individual claims of group members howsoever arising against a respondent (in contradistinction to the claim the subject of the class action).

[397] Returning more specifically to the practice of seeking s 33ZF orders, if a s 33ZB order is made, then these s 33ZF orders are at best surplusage, and should be seen as inconsistent with the statutory scheme. Indeed, they appear often to be sought as a mechanism or device whereby releases can be procured by a respondent which may go further than the claim (as the word is to be understood in its s 33C sense).

[398] Having said this, two points of qualification should be made as to where s 33ZF orders could be appropriate. *First*, there may, of course, be cases, perhaps in class actions involving a relatively small number of group members who are represented, where the Court can be satisfied that individualised instructions have been given by group members to give releases which travel beyond the claims the subject of the proceeding. Questions of authority of the representative do not then arise. *Secondly*, there *may* also be cases where it may be within the scope of the authority of a representative applicant to give releases authorised by the Court to a privy of the respondent, but this complication need not be explored: see for example the discussion in *Newstart*

123 Pty Ltd (at [57]); see also *Melbourne City Investments Pty Ltd (now called ACN 161 046 304 Pty Ltd) v Treasury Wine Estates Ltd [2019] FCA 804* (per Foster J at [59]–[62]).

[399] This preferable approach of making s 33ZB orders is consistent with what the High Court was saying in *Timbercorp* (at [53]–[54]) where, as I noted in *Dillon (No 2)* (at [39]), the plurality explained that a group member has a privity of interest with an applicant in the claim the subject of the class action and so "must claim under or through the person of whom he is said to be a privy": see also *Ramsay v Pigram* (1968) 118 CLR 271 at 279; [1968] ALR 419 (per Barwick CJ).

[400] Before leaving this topic, I should note that although some s 33V settlement approvals do not appear to have been accompanied by a s 33ZB order (a course which, in my view, should be deprecated) or even a s 33ZF order of the type identified above, this does not mean that group members in those settled class actions would be somehow free to agitate their claims. The privy of those group members settled the case and, in most of those cases, after notice was provided to group members. Although it is not possible to generalise, it is difficult to see why a group member who has been notified of a proposed s 33V application by his privy and does nothing, would be entitled to assert that the settlement does not bind him.

D THE SETTLEMENT DEED

9 On 10 May 2024, when this matter first came before me, I was concerned that the terms of the deed contained a very expansive definition of "Claim" which, together with the definition of "Related Parties" and the releases and covenants provided for in cl 6, meant that it may have been arguable that the proposed releases encompassed *all* claims of any description, or any other remedy, whether known or unknown as at the date of the deed, against any of the released parties, including their past or present directors, officers, partners, principals, servants contractors and agents and any related body corporate (cl 1.1). As I noted then (T3.30):

> HIS HONOUR: There's a definition of related party in claims, which is just far too broad. It couldn't possibly be the subject of an approval. The way in which claims are extinguished is by operation of section 33 – an order under section 33ZB. But if you look at the definition of related parties and look at the definition of claims, it extends well beyond anything that is quelled by reason of the resolution of the claims by order of the court. The court has made a number of – on a number of occasions, said that the way in which claims are resolved is by the making of the court order, not by deeds entered *inter partes* between the parties, and the whole notion of seeking *nunc pro tunc* orders to enter into the deed, for example. And it's also you've got covenants not to sue, all this sort of stuff. That just misunderstands the statutory scheme.

10 As it turns out, as has been explained by Mr Giles and confirmed on behalf of the solicitor for the insurer respondents, Mr Gilmour, the mutual intention of the parties to the deed is to release *only* the claims made by Compumod and/or on behalf of the group members in this proceeding. When closely examined, this is reflected in the overall proper construction of the deed. I am satisfied the only claims of the group members the subject of the releases and covenants is the

claim as that term is used in s 33C of the FCA Act. Accordingly, despite the impression that one would first receive from reading the expansively and somewhat inconsistently drafted deed, it is not in dispute that the deed is appropriately limited in accordance with the principles outlined above.

E THE PROPOSED SETTLEMENT

11 Having dealt with this preliminary matter, I am satisfied that the proposed settlement is fair and reasonable and in the interests of group members for the following reasons.

12 *First*, it is evident that the available insurance proceeds are limited. There is, at the very least, a real risk that costs incurred by the insurer respondents will continue to erode the available proceeds and diminish the prospect of recovery for group members.

13 *Secondly*, and relatedly, the paction reached under the deed involves the payment of the bulk of the available insurance proceeds. It is likely that less than the available proceeds would remain recoverable following any determination of common questions.

14 *Thirdly*, PwC has contended that the deed of company arrangement (**DOCA**) did not compromise PwC's claim against AXL because it did not have a "claim" within the meaning of s 444D(1) of the *Corporations Act 2001* (Cth) as at the date of the DOCA. It is said that one effect of the deregistration of AXL was that the cross-claim was necessarily limited to available insurance proceeds.

15 In these circumstances, and for the reasons set out in the confidential opinion, the proposed settlement is fair and reasonable. The job of the Court is not to second-guess that judgment by persons who know far more about the matter than the judge approving the settlement. It is clear that highly experienced counsel and solicitors have assessed the relevant factors and have considered that it is in the interests of the group members.

F THREE FURTHER MATTERS

16 For completeness, it is necessary to deal with three further matters.

17 The *first* is that it had been proposed that the settlement sum (which, in effect, represents the bulk of the available insurance proceeds obtainable) was to be paid into the trust account of Compumod's solicitors. I was concerned that this may have meant that it was being held for a considerable period in circumstances where the sum was not attracting interest. It has been explained to me, however, that the proposed settlement contemplates a two-step proposal

whereby the money is initially placed into a trust account, and then into a controlled-money account. Hence, even if any distribution is delayed for a considerable period, the capital sum will at least attract interest and, in turn, be distributed for the benefit of group members.

18 The *second* issue relates, again, to an expansive provision in the deed concerning confidentiality. This Court has observed on a number of occasions that Pt IVA proceedings are a *public procedure*. As I explained in *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289 (at [102]–[107]):

> [102] The Court has recently observed a trend in Part IVA approval hearings for wide-ranging confidentiality orders to be sought. That trend should be discouraged. In *Caason Investments v Cao (No 2)* at [8], Murphy J noted that the applicants before him had made "blanket claims of confidentiality and sought blanket confidentiality or non-publication orders". His Honour went on to note at [8]-[9]:
>
> > It is wrong to assume that confidentiality or non-publication orders will be routinely or automatically made. Part VAA of the Act provides that the starting point for consideration of such orders, and it is mandatory under s 37AE for the Court to take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice. The Court must be satisfied that the order is necessary "to prevent prejudice to the proper administration of justice" (s 37AG(1)(a)), and "necessary" is a "strong word": *Hogan v Australian Crime Commission* (2010) 240 CLR 651; [2010] HCA 21 at [30].
> >
> > There is a basis for treating some of the applicants' material as confidential (at least until settlement approval orders made) but the application for confidentiality orders was far too broad and wasted the time of the parties and the Court. There is a public interest in not making overly broad confidentiality orders in approving settlements in class actions, particularly the interests of class members in having a proper understanding of a settlement which affects their interests.
>
> [103] I made similar observations in *Dillon v RBS Group (Australia) Pty Limited (No 2)* [2018] FCA 395 at [79] and *Lifeplan v S&P Global* at [68].
>
> [104] This practice has also not gone unremarked outside the Court. The ALRC in DP 85 (at 127) asked the following question:
>
> > **Question 7-2** In the interests of transparency and open justice, should the terms of class action settlements be made public? If so, what, if any, limits on the disclosure should be permitted to protect the interests of the parties?
>
> [105] In answering this question, the ALRC made reference to the fact that in civil litigation, protecting the terms of settlement under the veil of confidentiality often has some value to one or more parties and can "incentivise settlements". The ALRC recognised, however, that class action settlements are different from other settlements, principally because the law requires the Court to approve any settlement. That approval is designed to protect the interests of

> class members who have not been active participants. Moreover, court orders and judgments are ordinarily public, reflecting the fundamental notion that the Court is an arm of government and that "the primary objective of the administration of justice is to safeguard the public interest in open justice": see s 37AE of the FCAA.
>
> [106] In the article to which I have made reference above, (Legg, M, *Class Action Settlements in Australia*) Professor Legg observes as follows (at 619):
>
> > Class actions also frequently perform a public function by being employed to vindicate broader statutory policies such as disclosure to the securities market, prohibiting cartels or fostering safe pharmaceuticals. Class actions are not simply disputes between private parties about private rights. A reasoned judgment is necessary to protect absent group members and to provide the community with confidence as to the operation of class actions and the underlying laws that are the subject of the proceedings.
> >
> > (Footnotes omitted)
>
> [107] I agree with these observations. **These are not just private bargains between parties resolving the disputes between them. The settlement of a class action has an important public dimension.** Not only is it appropriate that the community have access to relevant information about the operation of class actions and how public resources are being used by private commercial enterprises but also, as Professor Legg explains, there is a legitimate interest in the community having access to information as to the operation of the "underlying laws" relevant to the present cases, being the statutory norms prohibiting misleading and deceptive conduct which constituted the primary basis upon which relief was sought in these proceedings.
>
> (Emphasis added)

19 In other words, the claims the subject of Pt IVA proceedings extend beyond the parties to the litigation, the consequences of which (either through the resolution of common issues or by the resolution of group members' claims through settlement) have an important public dimension. It is consistent with open justice principles that settlements of representative proceedings are public, and show the operation of the class action regime to those interested in obtaining information as to how parties (including in some cases litigation funders) are using public resources. There may be some occasions where a small number of group members give express instructions to keep a settlement confidential, but this is a world away from the present matter, or any other large-scale representative proceeding. Having said this, and notwithstanding the terms of the deed, there is no such inhibition in the details of the settlement being conveyed to those interested.

20 The *third* is a *cri de coeur*.

21 I feel somewhat like John the Baptist crying into the wilderness in relation to this point, but this is a deed which requires the applicant to seek an order in the following terms:

5. Pursuant to section 33ZF of the Act or otherwise, the Court authorises the Applicant *nunc pro tunc* on behalf of the Group Members, to enter into and give effect to the Deed of Settlement and the transactions contemplated in it for and on behalf of the Group Members.

22 I will say it yet again. This is *not* the way in which group members' claims are resolved. The claims of the group members are resolved by a statutory estoppel which arises pursuant to the making of settlement approval orders accompanied by an order under s 33ZB of the FCA Act. The claims of the group members are not quelled by giving an applicant authority to make a bargain *inter partes* and entering into it on behalf of group members. Such orders were commonly made at an earlier stage in the evolution of Pt IVA, but, in my view, misapprehend the nature of the Court's role in dealing with the claims of the group members and the way the scheme of Pt IVA operates.

23 In any event, I am grateful for the economical and efficient way in which the settlement approval application has been prepared by both counsel and the solicitors. It has enabled me to deal with this application efficiently and is a model for the way in which such applications ought to be conducted.

G CONCLUSION AND ORDERS

24 Accordingly, I will make the following orders:

1. Pursuant to s 33V(1) of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), the settlement of the representative proceeding brought by the representative applicant against the third to sixth respondents (**Settling Respondents**), including the dismissal of the claims against the Settling Respondents be approved upon the terms set out in the Deed of Settlement and Release entered into between the applicant and the Settling Respondents executed on 3 May 2024 (**Settlement Deed**).

2. There be no order as to costs of the proceeding between the applicant and the Settling Respondents, and any extant costs orders between those parties be vacated and, for the avoidance of doubt, this order is not to affect any extant costs order relating to the second respondent or the costs of the proceeding relating to the second respondent.

3. The Settlement Sum provided for in the Settlement Deed be paid into the trust account of the applicant's solicitors, on the terms provided for in the Settlement Deed, to be held on trust for the applicant, group members and Therium Litigation Finance Atlas AFP IC, pending the determination of these proceedings and any appeal or further order of this Court.

4. Pursuant to s 33ZB(a) of the FCA Act, the persons affected by these orders are:

   (a) the applicant;

   (b) all group members who have not opted-out;

(c) the Settling Respondents; and

(d) the second respondent.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Lee.

Associate: M. Punch

Dated: 30 May 2024

SCHEDULE OF PARTIES

NSD 917 of 2020

Respondents

Fourth Respondent:	LIBERTY MANAGING AGENCY LIMITED FOR AND ON BEHALF OF SYNDICATE 4473
Fifth Respondent:	ASTA MANAGING AGENCY LTD ACTING FOR AND ON BEHALF OF EVEREST SYNDICATE 2786
Sixth Respondent:	ARCH UNDERWRITING AT LLOYD'S LIMITED FOR AND ON BEHALF OF SYNDICATE 2012