

FEDERAL COURT OF AUSTRALIA

Whittenbury v Vocation Limited (in liquidation) [2021] FCA 829

File number: VID 434 of 2015

Judgment of: **ANASTASSIOU J**

Date of judgment: 23 July 2021

Catchwords: **REPRESENTATIVE PROCEEDINGS** – application for approval of settlement of representative proceeding commenced under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) – where there are two law firms and two litigation funders involved in consolidated proceeding – whether proposed settlement is fair and reasonable and in interests of group members – whether proposed deductions were fair and reasonable – whether proposed treatment of unregistered group members is fair and reasonable – approval granted

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth), s 12DA
Australian Consumer Law being Schedule 2 to the *Competition and Consumer Act 2010* (Cth), s 18
Corporations Act 2001 (Cth), ss 1041E, 1041H
Federal Court of Australia Act 1976 (Cth), ss 33V, 33X, 33Y

Cases cited: *All Options Pty Ltd v Flightdeck Geelong Pty Ltd* [2019] FCA 588
Andrews v Australia and New Zealand Banking Group Ltd [2019] FCA 2216
Australian Securities and Investments Commission v Vocation Ltd (in liquidation) [2019] FCA 807; 371 ALR 155
Blairgowrie Trading Ltd v Allco Finance Group Ltd (No 3) [2017] FCA 330; 343 ALR 476
Bradgate (Trustee) v Ashley Services Group Limited (No 2) [2019] FCA 1210
Camilleri v The Trust Company (Nominees) Ltd [2015] FCA 1468
Haeshurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia [2020] NSWCA 66; 101 NSWLR 890; 379 ALR 556
Houghton v Arms [2006] HCA 59; 225 CLR 553

Smith v Commonwealth of Australia (No 2) [2020] FCA 837

Wetdal Pty Ltd as Trustee for the BlueCo Two Superannuation Fund v Estia Health Limited [2021] FCA 475

Wigmans v AMP Ltd [2020] NSWCA 104; 102 NSWLR 199; 381 ALR 100

Division: General Division

Registry: Victoria

National Practice Area: Commercial and Corporations

Sub-area: Corporations and Corporate Insolvency

Number of paragraphs: 58

Date of hearing: 19 March 2021

Counsel for the Applicant: Mr Attiwill QC and Mr W. A D Edwards

Solicitors for the Applicant: Maurice Blackburn and Slater and Gordon

Counsel for the First Respondent/Seventh Cross-Respondent for the Third and Fifth Cross- Claims: Ms S. Gory

Solicitor for the First Respondent/Seventh Cross-Respondent for the Third and Fifth Cross- Claims: Gilbert & Tobin

Counsel for the Second Respondent: Mr M. Garner

Solicitor for the Second Respondent: Herbert Smith Freehills

Counsel for the Third Respondent/First Cross-Respondent to the Third and Fifth Cross Claims/Cross-Claimant to the Sixth Cross-Claim: Mr S. Lawrence

Solicitor for the Third Respondent/First Cross-

Respondent to the Third and Fifth Cross Claims/Cross-Claimant to the Sixth Cross-Claim:

Solicitor for the Fourth Respondent/First Cross-Respondent to the Third and Fifth Cross Claims/Cross-Claimant to the Seventh Cross-Claim:

Ms J. McLennan of Clyde & Co

Solicitor for the Fifth Respondent/ Third Cross-Respondent to Third and Fifth Cross Claims/Cross-Claimant to the Fourth Cross-Claim:

Mr A. Salgo of Baker & McKenzie

Solicitor for the Cross-Respondent to the First, Second, Fourth, Sixth and Seventh Cross-Claim/ Cross Claimant for the Fifth Cross-Claim

Ms B. Cunningham of MinterEllison

Counsel for the Fourth, Fifth and Sixth Cross-Respondents to the Third and Fifth Cross-Claims

Mr D. Blazer

Solicitor for the Fourth, Fifth and Sixth Cross-Respondents to the Third and Fifth Cross-Claims

Allen & Overy

ORDERS

VID 434 of 2015

BETWEEN: **CHERYL WHITTENBURY**
Applicant

AND: **VOCATION LIMITED (IN LIQUIDATION)**
First Respondent

PRICEWATERHOSE COOPERS (A FIRM) (ABN 52 780 433 757)
Second Respondent

MARK EDWARD HUTCHINSON (and others named in the
Schedule)
Third Respondent

ORDER MADE BY: **ANASTASSIOU J**

DATE OF ORDER: **23 JULY 2021**

THE COURT ORDERS THAT:

1. Pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) (the **Act**), settlement of the proceeding is approved upon the terms set out in:
 - (a) the Settlement Agreement dated 30 November 2020 executed by the Applicant, the Respondents and, the Cross Respondents (together, **Respondents**), Slater and Gordon, Maurice Blackburn, Omni Bridgeway Limited and International Litigation Funding Partners Pte Ltd; and
 - (b) the Settlement Distribution Scheme (and any annexures therein) as annexed to the affidavit of Andrew Paull dated 11 March 2021.

(together, **Settlement Documents**).
2. Pursuant to s 33ZF of the Act or otherwise, the Court authorises the Applicant nunc pro tunc for and on behalf of the Group Members (being those persons who meet the definition of “Group Member” in the Second Further Amended Consolidated Statement of Claim and who did not file an opt out notice) (**Bound Group Members**) to enter

into and give effect to the Settlement Documents and the transactions contemplated for and on behalf of Group Members.

3. Pursuant to s 33ZB of the Act, the persons affected and bound by the settlement of the proceedings be the Applicant, the Respondents, the Bound Group Members, Omni Bridgeway Limited and International Litigation Funding Partners Pte Ltd.

Applicant's Costs and Expenses

4. Pursuant to s 54A(3) of the Act and r 28.67(1) of the *Federal Court Rules 2011* (Cth), the report of Catherine Dealehr (appointed as referee pursuant to Order 11 made by the Court on 17 December 2020) (**Costs Referee**) be adopted.
5. Pursuant to s 33V of the Act for the purposes of the Settlement Distribution Scheme approved pursuant to Order 1 the following distributions from monies paid under the settlement be approved:
 - (a) \$6,505,760.10 for the funding commission payable under group members' funding agreements with Omni Bridgeway Limited (which amount, aggregated with the amount in sub-paragraph (b) below, is the "Aggregate Funding Commission" referred to in clause 4.1(b) of the Settlement Distribution Scheme);
 - (b) \$4,413,588.04 for the funding commission payable under group members' funding agreements with International Litigation Funding Partners Pte Ltd (which amount, aggregated with the amount in sub-paragraph (a) above, is the "Aggregate Funding Commission" referred to in clause 4.1(b) of the Settlement Distribution Scheme);
 - (c) \$5,191,294.07 (being the amount approved as fair and reasonable by the Costs Referee) for the legal costs and disbursements referred to as the "Slater and Gordon Costs" in clause 4.1(g) of the Settlement Distribution Scheme;
 - (d) 7,567,385.66 (being the amount approved as fair and reasonable by the Costs Referee) for the legal costs and disbursements referred to as the "Maurice Blackburn Costs" in clause 4.1(g) of the Settlement Distribution Scheme;
 - (e) \$20,000.00 for the Applicant's reasonable claim for compensation for time spent and/or expenses incurred in the interests of prosecuting the proceeding on

behalf of Group Members as a whole (referred to as the “Applicant’s Reimbursement Payment” in clause 4.1(g) of the Settlement Distribution Scheme);

- (f) \$158,144.50 for the costs and disbursements of the administration of the Settlement Distribution Scheme from the date of the approval of the Settlement to the date of completion of distribution of the Settlement Sum (referred to as the “Administration Costs” in clause 4.1(g) of the Settlement Distribution Scheme).

Appointment of Administrators

- 6. Pursuant to s 33ZF of the Act, Slater & Gordon Ltd and Maurice Blackburn Pty Ltd be appointed jointly as Administrators of the Settlement Distribution Scheme to act in accordance with the Settlement Distribution Scheme subject to any direction of the Court, and to have the powers and immunities conferred by the Settlement Distribution Scheme on the Administrators.

Late Registrants

- 7. Pursuant to s 33V and/or s 33ZF of the Act, for the purposes of the Settlement Distribution Scheme approved pursuant to Order 1, any group member who registered a claim following the Court’s orders made on 17 December 2020 up to and including 4 March 2021 is a “Registered Group Member” within the meaning of sub-paragraph (c) of the definition of that term in cl 11 of the Settlement Distribution Scheme.

Other

- 8. The proceeding be dismissed (including for the avoidance of doubt all Cross Claims) on the basis that the dismissal is a defence and absolute bar to any claim (either directly or indirectly) or proceeding by the Applicant or any Group Member or any Respondent in relation to the subject matter of the proceeding, without prejudice to and without derogating from:

- (a) the right of any party to the Settlement Agreement to make an application to enforce the Settlement Agreement in a new proceeding; or
 - (b) the right of any Registered Group Member to make application to the Court in accordance with the terms of the Settlement Distribution Scheme; or
 - (c) the right of the Administrator of the Settlement Distribution Scheme to refer any issues relating to the Settlement Distribution Scheme to the Court for direction or determination in accordance with the terms of the Settlement Distribution Scheme; or
 - (d) the right of any Respondent to bring any cross-claim in respect of their liability in relation to a proceeding brought or a demand made by any person who is not a Bound Group Member against any of the Respondents or their Related Parties in respect of the Proceeding (whether arising at common law, in equity or under statute). “Related Parties” as used herein has the meaning set out in the Settlement Agreement. In relation to the Second Respondent, “Related Parties” has the interpretation set out at cl 2.1(m) of the Settlement Agreement.
9. There be no order as to costs as between the Applicant and the Respondents.
10. All costs orders previously made in the proceeding are vacated.
11. All amounts paid into Court by or on behalf of the Applicant as security for the Respondent’s costs of the proceeding, and any interest accrued on those amounts, be repaid.

Confidentiality

12. Pursuant to ss 37AF and 37AG(1) of the Act in order to prevent prejudice to the proper administration of justice, the following documents be treated as confidential, not be published or made available and not be disclosed to any person or entity except to Anastassiou J, his or her personal staff, any officer of the Court authorised by Anastassiou J, the Applicant, her legal representatives, Omni-Bridgeway Ltd and International Litigation Funding Partners, and such permitted disclosures to be upon terms that none of those parties or persons disclose that material or any part thereof to any person or entity:

- (a) the unredacted form of the First Affidavit of Andrew Paull dated 11 March 2021;
- (b) the Second Confidential Affidavit of Andrew Paull dated 11 March 2021;
- (c) the unredacted form of the Affidavit of Andrew Watson dated 11 March 2021;
- (d) Confidential Opinion of Richard Attiwill QC and William Edwards dated 11 March 2021; and
- (e) report of Cate Mary Dealehr dated 5 March 2021.

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

REASONS FOR JUDGMENT

ANASTASSIOU J:

INTRODUCTION

1 The Applicant, by her interlocutory application dated 16 December 2020, seeks orders for the approval of the settlement of this proceeding pursuant to s 33V of the *Federal Court of Australia Act* (Cth) (**Settlement Approval**). The Applicant also seeks approval of a scheme for distribution of the settlement sum.

2 For the reasons that follow, I am satisfied that the settlement is fair and reasonable in all relevant aspects and is in the interests of group members. Further, the proposed distribution for which the Settlement Distribution Scheme (**SDS**) provides is fair and reasonable, and properly permits group members who registered after the mediation (**Late Registrants**) to participate in the settlement.

3 Accordingly, I give approval to the proposed settlement, including the SDS, and shall make the orders sought by the Applicant which give effect to the settlement and ancillary matters.

BACKGROUND

4 The Applicant commenced proceedings in this Court on 20 August 2015 pursuant to Part IV of the Act on behalf of persons (**Group Members**) who acquired interests in fully paid ordinary shares in **Vocation Limited** in the period between 27 November 2013 and 4 December 2014 (inclusive) (the **Relevant Period**), and who allege they suffered loss or damage by reason of the conduct of the Respondents, the subject of the claims in this proceeding.

5 The Applicant was represented by Maurice Blackburn and funded by International Limited Funding Partner Pte Ltd (**ILFP**). This proceeding is a consolidated proceeding. On 26 February 2015, Mr Karageorgiou (the **Karageorgiou Applicant**) commenced a separate representative proceeding against Vocation in the Supreme Court of Victoria (**Karageorgiou Proceeding**). The Karageorgiou Applicant was represented by Slater and Gordon and funded by IMF Bentham Ltd (now known as Omni Bridgeway Ltd (**OBL**)).

6 On 17 March 2017, Middleton J made orders pursuant to r 30.11 of the *Federal Court Rules* 2011 (Cth) (the **17 March 2017 Orders**) consolidating the Karageorgiou Proceeding with this proceeding (thereby forming the **Consolidated Proceeding**). The Consolidated Proceeding is jointly funded by ILFP and OBL, collectively the **Funders**. Following Mr Karageorgiou's

death on or around 24 January 2018, and by orders made at a hearing on 20 April 2018, the Applicant became the sole representative Applicant in the Consolidated Proceeding, jointly represented by Maurice Blackburn and Slater and Gordon.

Joinder of PricewaterhouseCoopers and D&O parties as respondents

7 On 21 March 2017, in accordance with the 17 March 2017 Orders, the Applicant filed a consolidated statement of claim, which amongst other things, introduced allegations in respect of the Second Respondent, PricewaterhouseCoopers (**PwC**).

8 On 11 November 2019, the Applicant amended her statement of claim, bringing claims directly against certain of Vocation’s directors and officers, being Mark Hutchinson (Chief Executive Officer and executive Managing Director), John Dawkins AO (Non-Executive Chairman) and Manvinder Grewal (Chief Financial Officer and company secretary) (together, the **D&O Respondents**).

Mediation and Settlement Agreement

9 Following a protracted mediation that commenced in mid-2019, the parties entered into a **Settlement Agreement** on 30 November 2020. Pursuant to the Settlement Agreement, the sum of \$50 million (**Settlement Sum**) was paid into an interest bearing account on 1 December 2020 and is held on trust pending approval by this Court of the settlement. The SDS, which governs the proposed distribution of the settlement fund, has also been agreed subject to approval.

10 Pursuant to the terms of the Settlement Agreement and the SDS, the following amounts are to be deducted from the Settlement Sum: \$5,191,294.07 for Slater and Gordon legal costs; \$7,567,385.66 for Maurice Blackburn legal costs; \$20,000 for the reimbursement of the Applicant’s time and effort in the litigation; and \$158,144.50 for the administration costs of the SDS. The funding commission payable to ILFP is \$4,413,588.04, and \$6,505,760.10 is payable to OBL. After deducting these amounts from the Settlement Sum, approximately \$26,165,745.44, being approximately 52.31% of the Settlement Sum, is the net amount available to Group Members.

Class Closure Orders and Late Registrants

11 On 7 December 2018, the Court made ‘class closure’ orders:

- (1) facilitating the distribution of an Opt Out and Claim Registration Notice to Group Members;
- (2) fixing the date by which a Group Member may opt out of the proceeding as 4 March 2019;
- (3) requiring that any Group Member who wished to participate in any settlement reached in the proceeding register their claim;
- (4) deeming as registered, for the purpose of the class closure orders, any person who had retained either Slater and Gordon or Maurice Blackburn to represent them in relation to the proceeding and/or who had engaged the Funders to provide litigation funding services in connection with the proceeding;
- (5) providing that any Group Member who did not opt out or complete a registration form would remain a group member for all purposes, including for the purpose of being bound by any judgment in this proceeding and being entitled to participate in any award of damages by the Court if the proceeding did not settle; and
- (6) stating that those group members who did not opt out or complete a registration form would not be entitled to receive a distribution from any settlement of the proceeding reached before the hearing, subject to any further order of the Court.

12 At the conclusion of the class closure process in March 2019 there were:

- (1) 616 Group Members who had acquired 83,352,950 Vocation shares (net) in the Relevant Period who were deemed to have registered by virtue of having retained Maurice Blackburn or Slater and Gordon, or entered funding agreements with ILFP/OBL; and
- (2) 96 Group Members who had acquired 29,730,915 Vocation shares (net) in the Relevant Period who had not retained either law firm or entered into a funding in agreement with either funder, but which had registered their claims in accordance with the process set out in the class closure orders (together the **Registered Group Members**).

13 Pursuant to orders made by Middleton J on 17 December 2020, a Notice of Proposed Settlement was distributed to Registered Group Members, as well as being published on the Vocation Class Action website and advertised in one weekday edition of nine Australian newspapers. The Notice informed Registered Group Members about: (1) the basic parameters of the settlement, including the aggregate Settlement Sum of approximately \$50 million; (2) the

estimated amount of the proposed deductions; and (3) that the amount of compensation each group member would receive would be calculated in accordance with the SDS and depend on, amongst other things, the number of shares purchased by the Registered Group Member and the date of purchase, whether any shares were sold, the total amount of deductions from the Settlement Sum approved by the Court and any interest earned on the Settlement Sum prior to final distributions. As well as this, Group Members were sent a notice of their estimated distribution. In written submissions filed on 11 March 2021, the Applicant confirmed that this estimate remained reliable and the proposed deductions identified in the Notice of Proposed Settlement had not materially increased.

14 Since the distribution of the Notice of Proposed Settlement, an additional 22 Late Registrants have sought to participate in the proposed settlement. The Applicant does not oppose an order permitting the Late Registrants to participate in the proposed settlement, having regard to the negligible impact upon the distribution to Registered Group Members of allowing the Late Registrants to participate.

The applicant's claim in the proceeding

15 Before turning to the now well-established principles to be applied in an application for approval of a settlement of a Group Proceeding under Part IVA of the Act, it is necessary to briefly describe the Applicant's claims.

16 The claims made against the First Respondent, Vocation, concern alleged misleading statements in, and material omissions from, the prospectus which preceded Vocation's Initial Public Offering (**IPO**). These claims are made pursuant to ss 728 and 729 of the *Corporations Act 2001* (Cth); s 1041H of the Corporations Act; s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and s 18 of the Australian Consumer Law (Schedule 2 to the *Australian Competition and Consumer Act 2010* (Cth)) (**ACL**).

17 The claims made against the Second Respondent, PwC, are brought in respect of Vocation shares acquired on or after 21 August 2014. The Applicant alleges that the Second Respondent made misstatements to Vocation and the market, involving alleged failures to disclose: (1) revenue recognition policy changes; (2) funding and enrolment suspensions; and (3) that there was material uncertainty about Vocation's ability to continue as a going concern. Further, the Applicant claims that the Second Respondent engaged in misleading and deceptive conduct in connection with its audit of Vocation's accounts for the financial year ended 30 June 2014.

These claims are made pursuant to ss 1041E and 1041H of the Corporations Act, s 12DA of the ASIC Act and s 18 of the ACL.

18 The claims in relation to the D&O Respondents are founded upon alleged misleading representations made by the D&O Respondents. These claims are made pursuant to s 1041H of the Act, s 12DA of the ASIC Act and s 18 of the ACL.

Cross-claims

19 In total, seven cross-claims were issued by the Respondents and Cross-Respondents. The cross-claims are as follows:

- (1) Vocation filed the first cross-claim against Johnson Winter and Slattery (**JWS**), which was Vocation's legal adviser both: (1) at the time the Prospectus for the IPO was issued and which Vocation alleges that JWS advised it that the Prospectus contained all necessary information; and (2) in mid-2014, from which it sought advice as to whether to disclose funding and enrolment suspensions to the Australian Stock Exchange (**ASX**);
- (2) PWC filed the second cross-claim in the Consolidated Proceeding against JWS, repeating Vocation's allegations against JWS;
- (3) PWC filed the third cross-claim against Vocation, the D&O Respondents and three other directors of Vocation (together the **D&O Cross Respondents**) repeating against them all of the allegations in the Applicant's claim against Vocation;
- (4) Mr John Dawkins filed the fourth cross-claim against JWS, repeating Vocation's allegations against that firm;
- (5) JWS filed the fifth cross-claim against Vocation and the D&O Cross Respondents, repeating PwC's cross-claim against those parties; and
- (6) Mr Hutchinson and Mr Grewal filed the sixth and seventh cross-claims against JWS, repeating Vocation's claim against that firm.

Evidence and materials relied upon by the Applicant

20 The Applicant relies upon the following evidence and materials:

- (1) the affidavit of Andrew Paull affirmed 11 March 2021, which, among other things, exhibits:
 - (a) the Settlement Agreement dated 30 November 2020; and

- (b) the proposed amended SDS;
- (2) the affidavit of Andrew Paull affirmed 11 March 2021, which exhibits the confidential Counsel Opinion of Mr Richard Attiwill QC and Mr William Edwards;
- (3) the affidavit of Andrew Paull affirmed 16 March 2021, which makes corrections to Mr Paull's earlier affidavit;
- (4) the affidavit of Andrew John Watson sworn 11 March 2021;
- (5) the second affidavit of Andrew John Watson sworn 23 March 2021; and
- (6) a costs report of Cate Dealehr, independent costs referee, dated 5 March 2021 (the **Independent Costs Report**).

21 The Applicant also referred to her own written submissions dated 11 March 2021, as well as the Second Respondent's written submissions dated 17 March 2021, in support of the proposed settlement.

22 The Applicant sought confidentiality orders in respect of certain parts of the affidavit material relied on by the Applicant. As one would expect, confidentiality is sought in respect of the joint opinion prepared by senior and junior counsel for the Applicant (Mr Richard Attiwill QC and Mr William Edwards) dated 11 March 2021 (the **Joint Opinion**). Confidentiality orders are also sought in relation to the two affidavits of Andrew Paull dated 11 March 2021, the affidavit of Andrew Watson dated 11 March 2021 as well as the Independent Costs Report. I am satisfied that it is appropriate to make confidentiality orders in respect of the parts of the Applicant's materials in respect of which confidentiality is claimed. I shall state my reasons for this conclusion below.

Applicable principles

23 The settlement of a representative proceeding requires the approval of the Court pursuant to s 33V of the Act. The relevant principles are well-established and I respectfully adopt the economical statement of principles in *Bradgate (Trustee) v Ashley Services Group Limited (No 2)* [2019] FCA 1210 at [9]-[10] (Middleton J):

The principles applicable to court approval of settlements of representative proceedings are well-established. The fundamental task of the Court is to determine whether the settlement is fair and reasonable having regard to the interests of the group members who will be bound by it. Justice Lee recently summarised the applicable principles in *McKenzie v Cash Converters International Ltd (No 3)* [2019] FCA 10 at [24] as follows:

First, the Court assumes an onerous and protective role in relation to group

members' interests, in some ways similar to Court approval of settlements on behalf of persons with a legal disability; secondly, the Court must be astute to recognise that the interests of the parties before it and those of the group as a whole (or as between some members of the group and other members) may not wholly coincide; thirdly, and connected to the second point, the Court should be alive to the possibility that a settlement may reflect conflicts of interest or conflicts of duty and interest between participants in the common enterprise which has conducted the representative proceeding; fourthly, the Court should understand that at that point of settlement approval, the interests of the parties have merged in the settlement and both sides may not critique the settlement from the perspectives of the group members who may suffer a detriment or obtain lesser benefits through the settlement; fifthly, the Court must decide whether the proposed settlement is within the range of reasonable outcomes, not whether it is the best outcome which might have been won by better bargaining (in this way, the Court's task is not to second-guess the applicant's lawyers, and it should recognise that different applicants and different lawyers will have different appetites for risk).

(Citations omitted)

Further, when the Court performs its supervisory and protective role, and in particular when assessing whether the proposed settlement falls within the range of reasonable outcomes, the Court relies heavily on the applicant's counsel who, as guided by [14.4] of the Class Actions Practice Note (GPN-CA), should address the following factors:

- (1) the complexity and likely duration of the litigation;
- (2) the reaction of the class to the settlement;
- (3) the stage of the proceedings;
- (4) the risks of establishing liability;
- (5) the risks of establishing loss or damage;
- (6) the risks of maintaining a class action;
- (7) the ability of the respondent to withstand a greater judgment;
- (8) the range of reasonableness of the settlement in light of the best recovery;
- (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation; and
- (10) the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.

CONSIDERATION

24 I have been greatly assisted by a thorough confidential Joint Opinion. As Middleton J observed in *Bradgate* at [10], the Court relies heavily on the applicant's counsel in assessing whether the proposed settlement falls within the range of reasonable outcomes. The confidential opinion provided by Mr Attiwill and Mr Edwards, addresses each of the matters required by the Class Action Practice Note in detail. The Court is necessarily constrained not to disclose the content

of counsel's opinion, as the substance of the reasons advanced by counsel in support of the reasonableness of the settlement may be of significance to Group Members who have opted out of the proceeding, and potentially also competitors for the provision of legal services, or litigation funding, irrespective of whether the settlement is approved.

25 The Joint Opinion describes the background to the Applicant's claims, provides a summary of the parties, as well as the claims and cross-claims in the proceeding. I have described above the background to the claims and cross-claims and it is unnecessary to say anything further about those claims and cross-claims. In the Joint Opinion, counsel referred expressly to their respective substantial involvement in the conduct of the proceeding. It was appropriate for them to do so, especially having regard to the quite lengthy period since the proceeding was commenced. Senior Counsel, Mr Attiwill, has had strategic oversight and principal conduct of the proceeding since early 2019. Mr Edwards was engaged as junior counsel since the proceeding commenced, and prior to Mr Attiwill's engagement, worked in consultation with three other senior counsel and other counsel junior to him.

26 The Joint Opinion contains a cogent summary of the principles applicable to the approval of a settlement pursuant to s 33V of the Act, though it is unnecessary to say anything further concerning those principles, save to observe that the summary of them given in the Joint Opinion, together with the topics addressed in the Joint Opinion, reveals that counsel understood their role, and their duties to the Court.

27 In their Joint Opinion, counsel opine that the settlement embodied in the Settlement Agreement is fair and reasonable having regard to the matters generally required to be considered in accordance with the Class Action Practice Note.

28 There is no question that the proceeding is highly complex, legally and factually. The proceeding was commenced in 2015 and there remains unresolved interlocutory issues, including claims of privilege. Though the proceeding is well advanced, if the settlement was not approved, it is unlikely that it would be ready for trial until 2022. Even if the proceeding is successful on common issues of liability, there is risk in establishing loss at the upper range of the Applicant's claims. Further, there are risks that if an aggregate loss theory (such as market based causation) was not established at trial, it may be necessary for each Group Member to prove reliance upon the contravening conduct. This could conceivably require a series of second-stage trials of individual Group Member's claims.

- 29 The proceeding is intertwined with cross-claims that cannot practically be settled separately. Certain Respondents may not be able to meet a judgment in excess of the limits of relevant insurance cover. I shall refer below to the consideration given to the insurance position of Vocation and the directors and officers of Vocation.
- 30 The principal claim is against Vocation, which was formed as a result of a merger in late-2013 of a number of private companies involved in providing private vocational education and training. The claims arise from allegedly misleading statements in, or omission from, the prospectus used in connection with the IPO of Vocation. The misleading statements or omissions concerned non-compliance with regulations governing the provision of education services by the businesses that became part of Vocation's business upon its listing on the ASX. Vocation entered into liquidation after the proceeding was commenced.
- 31 The Joint Opinion contains a granular analysis of the true prospects of success of the claims against Vocation. It includes a detailed analysis of the forensic and evidentiary risks associated with the claims. The Joint Opinion analyses the key documentary support of the claims, as well as the substantial reliance upon inferences that might be drawn from documents and other evidence, as well as the risk that necessary inferences may not be established.
- 32 The Joint Opinion considers in similar detail the claims against PwC. PwC was Vocation's auditor in the 2014 financial year, which was the first period in which Vocation was a reporting entity. There are three aspects to the claims against PwC. First, that Vocation's revenue recognition policies brought forward material amounts of profit into the 2014 financial year. Second, that PwC failed to disclose, following compliance audits, that payments of \$14.4 million under Vocation's major contracts with the Victorian Department of Education had been suspended. Third, PwC failed to disclose that there was material uncertainty about Vocation's ability to continue as a going concern.
- 33 The Joint Opinion also considers the forensic evidentiary and legal obstacles to the claims against PwC. Particular attention is given to the risks associated with the non-apportionable claims against PwC under s 1041E of the Corporations Act, including whether that section properly construed contains a mental element that could give rise to criminal liability, and thus should be construed narrowly and may be subject to a higher standard of proof.
- 34 The claims against the D&O Respondents overlap in substance with the claims against PwC. They were drafted with the benefit of factual findings made in *Australian Securities and*

Investments Commission v Vocation Ltd (in liquidation) [2019] FCA 807; 371 ALR 155 (Nicholas J) (**ASIC Proceeding**).

35 The claims made in the ASIC Proceeding against the D&O Respondents were essentially for breaches of directors' duties. The Applicant's claims in this proceeding do not include breaches of directors' duties by the D&O Respondents. Rather, the Applicant alleges misleading conduct by them, essentially co-extensive with Vocation's misleading conduct.

36 The Joint Opinion contains a detailed analysis of the prospects of the claims against the D&O Respondents, including the risks in relation to the attribution of the D&O Respondents' conduct to Vocation and the concurrent personal responsibility of directors for their role in causing the company to engage in misleading conduct: see, eg, *Houghton v Arms* [2006] HCA 59; 225 CLR 553 at [40] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Australian Securities and Investments Commission v Narain* [2008] FCAFC 120; 169 FCR 211 at [94]-[97] (Jacobson and Gordon JJ), cited with approval in *All Options Pty Ltd v Flightdeck Geelong Pty Ltd* [2019] FCA 588 at [99] (Steward J).

37 In addition to an analysis of the claims against Vocation, PwC and the D&O Respondents, the Joint Opinion canvasses in detail other issues of application to all claims, in particular causation, loss and damage and the recoverability of any judgment. In relation to causation, the Joint Opinion analyses the prospects of establishing one or more of the four causation theories propounded in the claims: "no transaction case", "market based causation", "modified market based causation" and "reliance based causation". Counsels' analysis of the many forensic, evidentiary and legal risks associated with the different theories of causation is comprehensive and insightful. As I have mentioned above, counsel note, correctly, that a significant risk of maintaining the proceeding is that if an aggregate loss theory is not established, there may be a necessity for individual Group Members to prove reliance, potentially requiring a series of second stage trials.

38 Some of the Group Members have claims against Vocation only due to the timing of their acquisition of shares in Vocation. Their ability to recover any judgment for damages is constrained by the remaining unspent limits of a **Prospectus Liability Policy** held by Vocation. Counsel have estimated the likely remaining limit, allowing for likely defence costs spent to date. A similar issue arises in relation to the insurance policy held by Vocation as cover for liability by the D&O Respondents. In the event that the claims against PwC were to fail, relevant Group Members would be confined to the unspent limit of the **D&O Policy**.

39 It is not necessary, or appropriate, to disclose the aggregate limits of cover provided under the Prospectus Liability Policy or the D&O Policy. The latter policy was not produced to the Applicant in discovery, or in answer to a subpoena. However, during the hearing of the application, I asked that the D&O Policy be provided to the Court for inspection by the Court only. As a result of that inspection, I am satisfied that assumptions made by counsel for the Applicant concerning the extent of the D&O cover were reasonable. I am also satisfied that certain assumptions made by counsel for the Applicant concerning the extent of the Prospectus cover and the erosion of that cover caused by the expenditure of defence costs, and the likely further erosion of that cover if the proceeding is not settled, are also reasonable.

40 The limits to recoverability due to the level of insurance cover and its likely erosion on defence costs are highly material considerations in relation to the ultimate question of whether the proposed settlement is fair and reasonable. These matters are plainly relevant considerations which must be taken into account, even though these factors are not amenable to measurement, or to a common risk assessment in percentage terms. These factors are properly to be taken into account as a pervasive overlay that should inform an assessment of the reasonableness of the settlement, depending of course on the different assumptions that might be made concerning the prospects of success against particular respondents in relation to different causes of action. In their Joint Opinion, counsel have grappled with this amorphous factor.

41 The claims and cross-claims in this proceeding form a complex Venn diagram. The complexity of the claims and cross-claims is compounded by a mixture of apportionable and non-apportionable claims. The latter factor adds further permutations in relation to potential outcomes of the proceeding and must therefore be taken into account, so far as possible, in relation to the overall assessment of both prospects of success and prospects of recovery. Again, counsel for the Applicant have astutely grappled with this factor and the myriad of scenarios that arise because of it.

42 For the above reasons, I am satisfied that the Settlement Sum of \$50 million is fair and reasonable. I am also satisfied that it is appropriate and reasonable that the Applicant give releases and covenants not to sue on her own behalf and on behalf of bound Group Members, subject to such releases and covenants not to sue applying only to claims the subject of the proceeding. As Lee J explained in *Smith v Commonwealth of Australia (No 2)* [2020] FCA 837 at [145]:

...the reason why settlements of class actions work is that the claim as between the

applicant and the respondent is settled in accordance with usual principles that attend settlement of litigation between parties. The reason why there is a settlement and quelling of the claims as between the group members and the respondent, is that by a combined operation of ss 33V and 33ZB a “statutory estoppel” is created. That is why it is important for a s 33ZB order to accompany a s 33V order. This reflects the fact that orders are being made which bind persons who are not parties to the proceeding.

43 As I have said above, I am satisfied that it is fair and reasonable for Late Registrants to participate in the settlement having regard to: (1) the orders of Middleton J dated 17 December 2020, which gave unregistered Group Members the opportunity to participate in the distribution of the settlement upon further order of the Court; (2) the class closure orders of 7 December 2018, in particular paragraph 53(b), which contemplates that Late Registrant may be admitted to participate in the settlement subject to further order of the Court; and (3) s 33V(2) of the Act.

44 Further, I am satisfied that the amount to be distributed to Late Registrants will not materially adversely affect the distribution of the Settlement Sum to Group Members. While there are a number of authorities that have considered the validity of class closure orders generally (see, eg, *Haeslhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia* [2020] NSWCA 66; 101 NSWLR 890; 379 ALR 556; *Wigmans v AMP Ltd* [2020] NSWCA 104; 102 NSWLR 199; 381 ALR 100; *Wetdal Pty Ltd as Trustee for the BlueCo Two Superannuation Fund v Estia Health Limited* [2021] FCA 475), it is unnecessary for me to decide this issue, given that the orders of Middleton J dated 17 December 2020 afforded unregistered group members a further opportunity to participate in the settlement.

The SDS and deductions from the Settlement Sum

45 The Applicant also seeks approval, as is required, of the SDS. The SDS is integral to the Settlement Agreement and therefore also to an assessment of the reasonableness of the proposed settlement.

46 The SDS provides for a formula, described as a Confidential Loss Assessment **Formula**, to be used for the distribution of the net proceeds of the Settlement Sum to Group Members. The Formula values all Group Member claims on the same basis and divides the net fund on a pro-rata basis. The Formula adopts the no-transaction measure of damages on a blended Last-In, First-Out (**LIFO**)/First-In, First-Out (**FIFO**) trade-matching basis to ascertain the number of damaged shares held by each group member, and thus, the value of their claims. In my view, this is a reasonable approach to the task. The alternative of individually valuing the unique circumstances of each claim by Group Members would be prohibitively time consuming and

expensive. I respectfully agree with the observations made by Moshinsky J in *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468 at [43] that it is relevant to consider: “whether the costs of a more perfect assessment procedure would erode the notional benefits of a more exact distribution.” In the present circumstances, it would be counterproductive to engage in a bespoke assessment of individual claims. For these reasons, I consider this Formula is an appropriate methodology for the distribution of the balance of the Settlement Sum as between the Group Members.

Deduction of Legal Costs

47 On 17 December 2020, Middleton J made orders appointing Ms Catherine Mary Dealehr a special costs referee pursuant to s 33ZF(1) and/or s 37P(2) and/or s 54 of the Act, and Division 28.6 of the Rules. Ms Dealehr was directed to assess the quantum of costs and disbursements incurred by Slater and Gordon and Maurice Blackburn, and to opine on the reasonableness of the costs incurred. On 5 March 2021, Ms Dealehr provided a report to the Court addressing the questions she had been asked. The report is thorough, extensive and detailed. I accept Ms Dealehr’s conclusions concerning the quantum of costs and disbursements incurred by each of the law firms and her opinion as to the reasonableness of those costs and disbursements.

48 Ms Dealehr rejected some of the costs incurred by the law firms and arrived at the following sums: \$5,191,294.07 in respect of Slater and Gordon’s costs and \$7,567,385.66 in respect of Maurice Blackburn’s costs. These are undoubtedly substantial sums. However, the quantum of the costs must be viewed in the context of the complexity of the proceeding. In their Joint Opinion, counsel for the Applicant explain that: “the complexity of this proceeding was by no means ordinary and in our experience our instructors at both firms have conscientiously attended to the litigation with a view to attempting to obtain the best possible outcome for the Applicant and Group Members”.

49 The question of the proportionality of the costs must be kept steadily in mind. However, what is meant by proportionality must be properly understood and applied. I respectfully agree with the observations made by Beach J in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (No 3)* [2017] FCA 330; 343 ALR 476 at [181] and [183]:

But what is claimed for legal costs should not be disproportionate to the nature of the context, the litigation involved and the expected benefit. The Court should not approve an amount that is disproportionate. But such an assessment cannot be made on the simplistic basis that the costs claimed are high in absolute dollar terms or high as a percentage of the total recovery. In the latter case, spending \$0.50 to recover an expected \$1.00 may be proportionate if it is necessary to spend the \$0.50. In the former

case, the absolute dollar amount as a free-standing figure is an irrelevant metric. The question is to compare it with the benefit sought to be gained from the litigation. Moreover, one should be careful not to use hindsight bias. The question is the benefit reasonably expected to be achieved, not the benefit actually achieved. Proportionality looks to the expected realistic return at the time the work being charged for was performed, not the known return at a time remote from when the work was performed; at the later time, circumstances may have changed to alter the calculus, but that would not deny that the work performed and its cost was proportionate at the time it was performed. Perhaps the costs claimed can be compared with the known return, but such a comparison ought not to be confused with a true proportionality analysis. Nevertheless, any disparity with the known return may invite the question whether the costs were disproportionate, but would not sufficiently answer that question.

...

Now it may be suggested that the concept of avoiding hindsight bias has no part to play in considering the 'fairness' of the legal costs. The concept of 'fairness' is the overarching theme for judicial approval of settlements under s 33 V, albeit not the statutory language as such. But fairness is a broad concept. And the integers feeding into that overall assessment need to be assessed, qualitatively and quantitatively, and then balanced overall to consider whether the settlement and net recoveries to group members are fair. But let me assume for the moment that each integer of the settlement needs to be 'fair' to group members (as distinct from some only being 'fair', but nevertheless the overall settlement being "fair"). And let me assume for the moment that one is addressing one integer, being legal costs, and its fairness. Feeding into the question (if fairness of legal costs are many factors. It is difficult to see why you would not consider the fairness and reasonableness of the work at the time it was performed and in the context of the returns then expected. It is difficult to see why the applicant or group member would perceive that to be anything other than fair. No doubt the actual outcome of a case may also feed into the question of fairness. But in a case where the applicant and lawyer are not co-venturers, and with contingency fees not being allowed under the Australian model, it is difficult to see why the lawyer's fees should be artificially taxed down by the actual outcome; the actual outcome is a risk borne by the applicant and group members (and the litigation funder), but not the independent lawyer who is not sharing in the returns of the enterprise.

50 In my view, though the quantum of the costs of each of the law firms is very substantial, they are not disproportionate to the settlement that has been achieved, having regard to the complexity of the proceeding and the independent assessment of Ms Dealehr. In any event, for the reasons discussed below in connection with there also being two litigation funders, it is too late to question the wisdom or otherwise of that course.

Applicant's reimbursement payment

51 The SDS makes provision for the payment of \$20,000 to the Applicant as reimbursement for the time she spent carrying out her role on behalf of Group Members. The claim is supported by an affidavit of Andrew Watson sworn on 11 March 2021. Having regard to the modest sum claimed, I agree with the approach taken by Middleton J in *Andrews v Australia and New Zealand Banking Group Ltd* [2019] FCA 2216 at [32], that it is sufficient for the claim to be

supported by affidavit evidence, without requiring detailed documentary proof in the form of time recording or the like.

Litigation Funding Commission, Administration Costs and Equalisation

52 The SDS provides for the deduction of litigation funding commissions to be paid by those who had entered into funding agreements, the **Funded Group Members**, with OBL or ILFP. The total amount to be paid to OBL and ILFP is referred to as the Aggregate Funding Commission. The Aggregate Funding Commission is \$10,919,348.10.

53 Before considering the quantum of the Aggregate Funding Commission, it should be noted that it is proposed that this sum be spread between Funded and unfunded Group Members, applying an equalisation formula. **Unfunded Group Members** were those who had not entered into funding agreements but had identified themselves prior to the settlement. The equalisation formula will also be applied to spread the legal costs between Funded and Unfunded Group Members. The equalisation methodology involves essentially the funding commission being treated as a cost of the litigation, spread across all those who benefit from the litigation. In my view, the equalisation of the funding commission in this way is fair and reasonable as between the Group Members who stand to benefit from the settlement. It is also reasonable to include in that methodology Late Registrants and the costs of administering the SDS.

54 The quantum of the funding commissions is substantial. Due to the procedural history of this litigation, referred to above, there are two litigation funders as well as two law firms. The funding commissions to which the litigation funders are entitled is \$4,413,588.04 for ILFP and \$6,505,760.10 for OBL.

55 The reasonableness of the funding commissions is opined upon by the relevant responsible partners, being Mr Paull of Slater and Gordon and Mr Watson of Maurice Blackburn. Exhibited to Mr Watson's affidavit sworn on 23 March 2021 is an empirical study undertaken by Professor Morabito of Monash University, published in a paper entitled, "An Evidence Based Approach to Class Action Reform in Australia: Common Fund Orders, Funding Fees and Reimbursement Payments", which Mr Watson's relies on in support of his opinion that the Aggregate Funding Commission is reasonable when compared in percentage terms with other funding commissions which have been approved. In that affidavit, Mr Watson deposes at [9]:

... The combined funding commission sought by ILFP and Omni Bridgeway Limited (**OBL**) amounts to 21.83% of the settlement fund. Based on my knowledge and experience, this effective rate is reasonable and is below the range commonly observed

for funded representative proceedings commenced in 2015. The effective rate is also below the median percentage of settlement funds consumed by funding fees in all funded representative proceedings settled to the end of 2018 brackets 25% and all funded representative proceedings settled in the period from January 2013 to December 2018 brackets 25.5% according to empirical research conducted by Prof Vince Morabito published in January 2019.’

56 In my view, the litigation having proceeded thus far with two law firms and two litigation funders, it would be inappropriate at this late stage to view that course with suspicion. Accordingly, I shall consider the reasonableness of the Aggregate Funding Commission on that basis. Further, it may be said in favour of that approach that, as a matter of logic, if the two commissions are reasonable in aggregate that rather suggests there is no mischief in having two litigation funders. The same logic would apply to there being more than one law firm.

57 As a matter of logic that may be so, but that reasoning does not exclude the possibility that the aggregate legal costs and Aggregate Funding Commission might have been materially lower had there been but one litigation funder and one law firm. However, as I have said, in my view it is too late at this stage to, in effect, second guess those charged with conducting the litigation from its inception, or at least from the point in time of the two proceedings being consolidated. Accordingly, based upon the evidence given by Mr Watson and Mr Paull, I find that the Aggregate Funding Commission is reasonable in the circumstances.

DISPOSITION

58 For the reasons given above, I will make orders approving the Settlement Agreement and the SDS and the consequential orders sought by the Applicant.

I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Anastassiou.

Associate:

Dated: 23 July 2021

SCHEDULE OF PARTIES

VID 434 of 2015

Respondents

Second Respondent: PRICEWATERHOUSECOOPERS (A FIRM) (ABN 52
780 433 757)

Third Respondent: MARK EDWARD HUTCHINSON

Fourth Respondent: MANVIDER GREWAL

Fifth Respondent: JOHN SYDNEY DAWKINS

First Cross-Claim

Cross-claimant: VOCATION LIMITED (ACN 166 631 330)

Cross-respondent: THE PARTNERS OF JOHNSON WINTER &
SLATTERY

Second Cross-Claim

Cross-claimant: PRICEWATERHOUSECOOPERS (A FIRM) (ABN 52
780 433 757)

Cross-respondent: THE PARTNERS OF JOHNSON WINTER &
SLATTERY

Third Cross-Claim

Cross-claimant: PRICEWATERHOUSECOOPERS (A FIRM) (ABN 52
780 433 757)

First Cross-respondent: MARK EDWARD HUTCHINSON

Second Cross-respondent: MANVINDER GREWAL

Third Cross-respondent: JOHN SYDNEY DAWKINS

Fourth Cross-respondent: STEPHEN JOHN TUCKER

Fifth Cross-respondent: MICHELLE KIM TREDENICK

Sixth Cross-respondent: DOUGLAS JAMES HALLEY

Seventh Cross-respondent: VOCATION LIMITED (ACN 166 631 330)

Fourth Cross-Claim

Cross-claimant: JOHN SYDNEY DAWKINS

Cross-respondent: THE PARTNERS OF JOHNSON WINTER &
SLATTERY

Fifth Cross-Claim

Cross-claimant: THE PARTNERS OF JOHNSON WINTER &
SLATTERY

First Cross-respondent: MARK EDWARD HUTCHINSON

Second Cross-respondent: MANVINDER GREWAL

Third Cross-respondent: JOHN SYDNEY DAWKINS

Fourth Cross-respondent: STEPHEN JOHN TUCKER

Fifth Cross-respondent: MICHELLE KIM TREDENICK

Sixth Cross-respondent: DOUGLAS JAMES HALLEY

Seventh Cross-respondent: VOCATION LIMITED (ACN 166 631 330)

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Cross-respondent: THE PARTNERS OF JOHNSON WINTER &
SLATTERY