FEDERAL COURT OF AUSTRALIA

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

File number:	NSD 1908 of 2016 NSD 1155 of 2017 NSD 1388 of 2018
Judge:	**LEE J**
Date of judgment:	5 June 2020
Catchwords:	**REPRESENTATIVE PROCEEDINGS** – applications for approval of settlements of three class actions pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) – where three class actions commenced against the Commonwealth – where each class action advanced claims in nuisance, negligence and for contraventions of *Environment Protection and Biodiversity Conservation Act 1999* (Cth) – where claims alleged damage in relation to land and business value diminution caused by use of firefighting foam containing per- and poly-fluoroalkyl substances at Royal Australian Air Force bases – where large number of submissions made by group members opposed to approval of the settlements – where several group members made oral submissions during hearing of applications for settlement approval – consideration of views of and feelings expressed by objectors – where proposed settlement sums as a percentage of the best possible quantum recoverable "excellent" – proposed deductions from settlement sum to be paid to litigation funder – consideration of principles concerning proposed deductions for litigation funding costs – where proposed percentage of deductions from settlement sum to be paid to litigation funder substantially lower that percentage funder entitled to under funding agreements – proposed percentage deduction just – proposed deductions from settlement sum for legal costs – where two class actions commenced by one firm of solicitors and third class action brought by separate firm – where three class actions case managed together – where one class action could have been brought as a matter of law and practicality – where legal costs would have been reduced if proceedings brought as one class action – consideration of special circumstances of these class actions – where expense sharing order proposed to distribute costs incurred in one class action across two class actions commenced by same solicitors – consideration

	of relevant principles – where referee appointed to inquire into and report upon reasonableness of legal costs in all proceedings – where reports of referee in each proceeding adopted by the Court in full – proposed deductions allowed – proposed deductions from settlement sum for representative applicants – consideration of relevant principles – where applicants in one class action sought payments to be made to members of a class action "steering committee" – where proposed quantum of payments excessive – where representative applicant in one class action subject to harassment by reason of having acted in that capacity – payment to an applicant allowed in an amount that exceeds recompense for time spent acting in representative capacity – settlements approved **HIGH COURT AND FEDERAL COURT** – where non-confidential opinions and submissions filed on settlement approval applications contained sufficiently detailed information – consideration of fundamental principle of open justice – applications for approval considered without regard to confidential opinions
Legislation:	*Federal Court of Australia Act 1976* (Cth) ss 22, 23, Pt IVA, ss 33C, 33K, 33V, 33ZB, 33ZF, 37AE *Environment Protection and Biodiversity Conservation Act 1999* (Cth) *Federal Court Rules 2011* (Cth) r 1.32 Class Actions Practice Note (GPN-CA) para 15.5
Cases cited:	*Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* [2000] NSWCA 198; (2000) 181 ALR 694 *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289 *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 626 *Russell v Russell* (1976) 134 CLR 495 *Turner v Tesa Mining (NSW) Pty Limited* [2019] FCA 1644; (2019) 290 IR 388
Date of hearing:	4 and 5 June 2020
Registry:	New South Wales
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National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
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Counsel for the Applicants in NSD 1908 of 2016:	Mr IR Pike SC with Mr JS Burnett
Solicitor for the Applicants in NSD 1908 of 2016:	Dentons
Counsel for the Applicants in NSD 1155 of 2017 and NSD 1388 of 2018:	Mr WAD Edwards with Mr RJ May
Solicitor for the Applicants in NSD 1155 of 2017 and NSD 1388 of 2018:	Shine Lawyers
Counsel for the Respondents:	Mr R Lancaster SC with Ms A Lyons
Solicitor for the Respondents in NSD 1908 of 2016:	Australian Government Solicitor
Solicitor for the Respondents in NSD 1155 of 2017 and NSD 1388 of 2018:	King & Wood Mallesons
Counsel for the Intervener, Omni Bridgeway Ltd:	Mr John Sheahan QC
Solicitor for the Intervener, Omni Bridgeway Ltd:	Arnold Bloch Leibler

ORDERS

NSD 1908 of 2016

BETWEEN:	**GAVIN SMITH** First Applicant
	KIM SMITH Second Applicant
	ANN AND LINDSAY CLOUT SMSF PTY LTD ACN 154 516 006 (and others named in the Schedule) Third Applicant
AND:	**COMMONWEALTH OF AUSTRALIA (DEPARTMENT OF DEFENCE)** Respondent

JUDGE:	**LEE J**
DATE OF ORDER:	**5 JUNE 2020**

THE COURT ORDERS THAT:

Settlement approval

1. Pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**), the settlement of this proceeding be approved on the terms set out in:

   (a) the Settlement Deed dated 5 June 2020 in the form being pages 55 to 85 of exhibit BA-3 to the affidavit of Benjamin Allen affirmed 3 June 2020 (**Deed**), on the basis that the Deed only binds Group Members as set out in these orders and otherwise takes effect between the parties to the Deed; and

   (b) the Settlement Distribution Scheme in the form being pages 128 to 151 of exhibit BA-1 to the affidavit of Benjamin Allen affirmed 28 May 2020 (**SDS**) as amended per Annexure A below.

2. Pursuant to s 33ZB of the FCAA, the persons affected and bound by the settlement of these proceedings are the Applicants, the Respondent and Group Members.

Additional Group Members

3. Pursuant to s 33K, and/or 33ZF of the FCAA, each of Tysmor Pty Limited and Ms Michelle Alley are:

   (a) added as Group Members; and

   (b) are "Claimants" for the purposes of the SDS.

Appointment of Administrator and Independent Counsel

4. Pursuant to s 33ZF of the FCAA, Benjamin Allen, solicitor, be appointed as Administrator of the SDS to act in accordance with the SDS subject to any direction of the Court, and to have the powers and immunities conferred by the SDS on the Administrator.

5. Pursuant to s 33ZF of the FCAA, James Mack be appointed as Independent Counsel of the SDS to act in accordance with the SDS subject to any direction of the Court, and to have the powers and immunities conferred by the SDS on the Independent Counsel.

Deductions from settlement sum for the purposes of the SDS

6. The report dated 31 May 2020 of Roland Matters, appointed as Referee pursuant to the Court's Orders dated 6 April 2020, is adopted in full.

7. Pursuant to s 33V(2) of the FCAA, the Court approves the following just deductions from the settlement sum only:

   (a) the "Applicants' Legal Costs and Disbursements" in the amount of $9,037,245.41;

   (b) the "Reimbursement Payment" in the total amount of $120,000 to be distributed by the Administrator in a manner which best represents the extent of work performed in a representative capacity as between the Applicants, Sample Group Members and Steering Committee Members, being Gavin Smith, Kim Smith, Ann Clout, Lindsay Clout, John Hewitt, Melissa Marshall, Nick Marshall, Cain Gorfine, Rhianna Gorfine, Kim-leeanne King, Suzanne Walker and Joanne Robinson (with any dispute as to the distribution to be resolved by the Independent Counsel as an umpire);

   (c) the "Funding Costs" in the amount of $21,500,000; and

   (d) the "Funding Expenses" in the amount of $646,177.

Administration Costs

8. Any application for "Administration Costs" to be deducted from the settlement sum is to be made to Justice Lee and is to be notified by sending to the Associate to Justice Lee an affidavit from the Administrator deposing to the costs of the administration on a per property basis and explaining, with specificity, why there has been any departure from the estimate provided to the Court during the settlement approval hearing, with any such application to be determined on the papers.

Consequential matters

9. The Court notes that the proceeding is to be dismissed with no order as to costs but such an order for dismissal is not to be made until after an order relating to the deduction of any Administration Costs is made and the Administrator has provided to the Associate to Justice Lee a minute of order (containing a draft order dismissing the proceeding) together with written confirmation that the administration is complete.

10. All previous costs orders are vacated.

11. Pursuant to r 1.39 of the *Federal Court Rules 2011* (Cth) or otherwise, the time for any application for leave to appeal or the institution of any appeal from these orders be extended to the later of the time permitted under rr 35.13 and/or 36.03 or 14 days from the date of publication of reasons for judgment.

Confidentiality

12 Pursuant to ss 37AF and 37AG of the Act, to prevent prejudice to the proper administration of justice, the second paragraph on page 270 of exhibit BA-1 to the affidavit of Benjamin Allen affirmed 28 May 2020 remain confidential until further order.

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

ANNEXURE A

AMENDMENT TO SDS

31. → A Claimant requesting a review shall pay the costs of the Review calculated at:¶

(a). → $800 exclusive of GST for the first two hours' attendance by the Independent Counsel (or any part thereof) and $450 per hour exclusive of GST for each subsequent hour (or any part thereof); and ¶

(b). → $1,500 exclusive of GST per property for any further valuation/s of the property if such is sought,¶

such costs to be deducted from any payments to be made to the person seeking the review unless the Independent Counsel forms the view that the request for Review was appropriate and/or justified or the Claimant obtained an outcome that was at least 10% greater than their Final Settlement Entitlement in which case the costs of the Review is to be taken from the Settlement Distribution Fund. ¶

ORDERS

NSD 1155 of 2017

BETWEEN:	**BRADLEY JAMES HUDSON** First Applicant
	SHARYN DANELLE HUDSON Second Applicant
	MEATIES PTY LTD ACN 113 651 755 AS TRUSTEE FOR THE BSTS UNIT TRUST Third Applicant
AND:	**COMMONWEALTH OF AUSTRALIA** Respondent
JUDGE:	**LEE J**
DATE OF ORDER:	**5 JUNE 2020**

THE COURT ORDERS THAT:

Settlement approval

1. Pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**), the settlement of this proceeding be approved on the terms set out in:

   (a) the Settlement Deed dated 5 June 2020 in the form being pages 47 to 72 of the affidavit of Joshua Aylward affirmed 5 June 2020 (**Deed**), on the basis that the Deed only binds Group Members as set out in these orders and otherwise takes effect between the parties to the Deed; and

   (b) the Settlement Distribution Scheme in the form being pages 195 to 217 of the exhibit to the affidavit of Joshua Ian Aylward affirmed 29 May 2020 (**SDS**) as amended per Annexure A below.

2. Pursuant to s 33ZB of the FCAA, the persons affected and bound by the settlement of these proceedings are the Applicants, the Respondent and Group Members.

Appointment of Administrator and Independent Counsel

3. Pursuant to s 33ZF of the FCAA, Janice Mary Saddler and Joshua Ian Aylward (of Shine Lawyers) be appointed as Administrators of the SDS to act in accordance with

the SDS subject to any direction of the Court, and to have the powers and immunities conferred by the SDS on the Administrator.

4. Pursuant s 33ZF of the FCAA, James Mack be appointed as Independent Counsel of the SDS to act in accordance with the SDS subject to any direction of the Court, and to have the powers and immunities conferred by the SDS on the Independent Counsel.

Deductions from settlement sum for the purposes of the SDS

5. The report dated 1 June 2020 of Roland Matters, appointed as Referee pursuant to the Court's Orders dated 6 April 2020, is adopted in full.

6. Pursuant to s 33V(2) of the FCAA, the Court approves the following just deductions from the settlement sum only:

   (a) the "Applicants' Legal Costs and Disbursements" in the amount of $7,925,000;

   (b) the "Reimbursement Payment" in the amount of:

      (i) $50,000 in respect of the First Applicant;

      (ii) $20,000 in respect of the Second Applicant;

   (c) the "Approval Costs" in the amount of $180,000;

   (d) the "Funding Costs" in the amount of $8,500,000; and

   (e) the "Funding Expenses" in the amount of $128,934.

Consequential matters

7. The Court notes that the proceeding is to be dismissed with no order as to costs but such an order for dismissal is not to be made until the Administrators provide to the Associate to Justice Lee a minute of order (containing a draft order dismissing the proceeding) together with written confirmation that the administration is complete.

8. All previous costs orders are vacated.

9. Pursuant to r 1.39 of the *Federal Court Rules 2011* (Cth) or otherwise, the time for any application for leave to appeal or the institution of any appeal from these orders be extended to the later of the time permitted under rr 35.13 and/or 36.03 or 14 days from the date of publication of reasons for judgment.

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

ANNEXURE A

AMENDMENTS TO SDS

28. A Claimant requesting a review shall pay the costs of the Review calculated at:

(a). $800 exclusive of GST for the first two hours' attendance by the Independent Counsel (or any part thereof) and $450 per hour exclusive of GST for each subsequent hour (or any part thereof); and

(b). $1,500 exclusive of GST per property for any further valuation/s of the property if such is sought,

such costs to be deducted from any payments to be made to the person seeking the review unless the Independent Counsel forms the view that the request for Review was appropriate and/or justified or the Claimant obtained an outcome that was at least 10% greater than their Final Settlement Entitlement in which case the cost of the Review is to be taken from the Settlement Distribution Fund.

ORDERS

NSD 1388 of 2018

BETWEEN:	**KIRSTY BARTLETT** First Applicant
	ANTHONY CRAIG BARTLETT Second Applicant
AND:	**COMMONWEALTH OF AUSTRALIA** Respondent
JUDGE:	**LEE J**
DATE OF ORDER:	**5 JUNE 2020**

THE COURT ORDERS THAT:

Settlement approval

1. Pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**), the settlement of this proceeding be approved on the terms set out in:

   (a) the Settlement Deed dated 5 June 2020 in the form being pages 74 to 99 of the affidavit of Joshua Aylward affirmed 5 June 2020 (**Deed**), on the basis that the Deed only binds Group Members as set out in these orders and otherwise takes effect between the parties to the Deed; and

   (b) the Settlement Distribution Scheme in the form being pages 841 to 862 of the exhibit to the affidavit of Joshua Ian Aylward affirmed 29 May 2020 (**SDS**) as amended per Annexure A below.

2. Pursuant to s 33ZB of the FCAA, the persons affected and bound by the settlement of these proceedings are the Applicants, the Respondent and Group Members.

Late registrations

3. Pursuant to s 33V and/or 33ZF of the FCAA, any group member who has completed and returned the registration form annexed to the orders dated 6 April 2020 to the Applicants' solicitors or funder between 8 May and 3 June 2020 is eligible to benefit from the settlement of this proceeding, and is a "Claimant" for the purposes of the SDS.

Change in group member definition

4. Pursuant to s 33K of the FCAA, criterion (a) of the group member definition in the Second Further Amended Originating Application and Further Amended Statement of Claim is amended so as to provide:

   "(a) as at 23 November 2016 were: (i) the registered owners of a fee simple interest in a lot (within the meaning of the Land Titles Act 2000 (NT)), located in whole or in apart within the area delineated by the solid purple line on the map which is Annexure A to the Statement of Claim; or (ii) Arnold and Gai Whitehouse of 7 Rapide Street, Katherine; or"

Appointment of Administrator and Independent Counsel

5. Pursuant to s 33ZF of the FCAA, Janice Mary Saddler and Joshua Ian Aylward (of Shine Lawyers) be appointed as Administrators of the SDS to act in accordance with the SDS subject to any direction of the Court, and to have the powers and immunities conferred by the SDS on the Administrator.

6. Pursuant to s 33ZF of the FCAA, James Mack be appointed as Independent Counsel of the SDS to act in accordance with the SDS subject to any direction of the Court, and to have the powers and immunities conferred by the SDS on the Independent Counsel.

Deductions from settlement sum for the purposes of the SDS

7. The report dated 3 June 2020 of Roland Matters, appointed as Referee pursuant to the Court's Orders dated 6 April 2020, is adopted in full.

8. Pursuant to s 33V(2) of the FCAA, the Court approves the following just deductions from the settlement sum only:

   (a) the "Applicants' Legal Costs and Disbursements" in the amount of $12,408,000;

   (b) the "Reimbursement Payment" in the amount of:

      (i) $20,000 in respect of the First Applicant;

      (ii) $20,000 in respect of the Second Applicant;

   (c) the "Approval Costs" in the amount of $250,000;

   (d) the "Funding Costs" in the amount of $23,125,000; and

   (e) the "Funding Expenses" in the amount of $113,245.

Consequential matters

9. The Court notes that the proceeding is to be dismissed with no order as to costs but such an order for dismissal is not to be made until the Administrators provide to the Associate to Justice Lee a minute of order (containing a draft order dismissing the proceeding) together with written confirmation that the administration is complete.

10. All previous costs orders are vacated.

11. Pursuant to r 1.39 of the *Federal Court Rules 2011* (Cth) or otherwise, the time for any application for leave to appeal or the institution of any appeal from these orders be extended to the later of the time permitted under rr 35.13 and/or 36.03 or 14 days from the date of publication of reasons for judgment.

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

ANNEXURE A

AMENDMENTS TO THE SDS

30. A Claimant requesting a review shall pay the costs of the Review calculated at:

(a). $800 exclusive of GST for the first two hours' attendance by the Independent Counsel (or any part thereof) and $450 per hour exclusive of GST for each subsequent hour (or any part thereof); and

(b). $1,500 exclusive of GST per property for any further valuation/s of the property if such is sought,

such costs to be deducted from any payments to be made to the person seeking the review unless the Independent Counsel forms the view that the request for independent review was appropriate and/or justified or the Claimaint obtained an outcome that was at least 10% greater than their Final Settlement Entitlement in which case the cost of the Review is to be taken from the Settlement Distribution Fund.

REASONS FOR JUDGMENT

(Revised from the Transcript)

LEE J:

A INTRODUCTION AND NATURE OF APPLICATION

1 These three class actions pursuant to Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (**Act**) are brought on behalf of a number of group members. In cases such as this, it is necessary for the Court to approve the settlement of a class action. The lodestar is whether the settlement is fair and reasonable and in the interests of all group members. In my experience, the settlement of these three proceedings has generated greater interest than the settlement of any other comparable class action, and has involved the Court being provided with a very large number of communications from group members either objecting to, or supporting, the settlement.

2 Not without some hesitation, I have decided to proceed to deliver judgment in respect of the applications immediately. I have adopted this course because it is clear that the class actions have caused, and continue to cause, a good deal of vexation and angst to the group members involved. Whatever I do, there will be people who will be disappointed in the outcome. Whatever the subjective reaction, finality is highly desirable and it is in the interests of both persons who will be pleased, and also those that will be disappointed, for them to know the outcome and hence for them to be able move on (to the extent possible).

3 In proceeding in this way, I wish to stress that I have paid close attention to all of the objections and other communications that I have received, which are all in evidence on the applications. I have had the considerable benefit of reviewing those materials carefully prior to commencing the hearing of the applications, and I have been assisted, during the course of the hearing, by those written communications being supplemented by oral submissions from some group members, and by receiving responses to those written and oral submissions from the legal representatives who act on behalf of the applicants.

4 The hearing of the settlement applications proceeded over two extended days. A tsunami of material was provided by the parties in order to assist the Court in coming to a determination as to whether the settlements should be approved. I would like to record at the outset the considerable assistance I have received from the legal representatives for the applicants who

presented their opinions in relation to the question of whether the settlements are fair and reasonable.

5 The three proceedings are known as the Williamtown class action, the Oakey class action and the Katherine class action. They all have a common thread, which is unnecessary to detail at great length. In short, they involve claims made by group members, being either land owners or business owners, in relation to damages the group members are alleged to have suffered by reason of the use of a certain type of firefighting foam, containing per- and poly-fluoroalkyl substances (**PFAS**), at Royal Australian Air Force (**RAAF**) bases close to the localities in which the group members either reside and/or operate businesses. It will be necessary to focus further on the nature of these claims in a little more detail below.

B PRINCIPLES AND OPEN JUSTICE

6 As noted above, the fundamental question on an application under s 33V of the Act is whether the settlement is a fair and reasonable compromise of the claims made on behalf of group members. There are a large number of cases which have set out well-established parameters for evaluating the fairness and reasonableness for group members of a proposed compromise of a class action. There is no need for me to repeat those matters in any detail other than to note the following overarching matters.

7 The task of the Court, in considering an application, has been described as an onerous one, especially where the application is not opposed. In part, this is because the Court inevitably must rely heavily on the legal representatives to put before it all matters relevant to the Court's consideration; there is always a danger in cases such as the present for the interests of a representative applicant and some or all of the group members to not wholly coincide.

8 Added to this, is the fact that there may be an acute commercial interest in either a funder of litigation and/or a solicitor in achieving a compromise in circumstances where, objectively viewed, it may be thought that it is in the interests of group members, or at least a proportion of group members, to continue with the agitation of their claims and seek them to be resolved by the Court.

9 As a result of this, the power under s 33V is often said to be part of the protective jurisdiction of the Court, not unlike the protective role of Court in relation infant settlements or comprise of litigation involving persons suffering under some form of disability.

10 Importantly, and a matter that I have stressed during the course of the exchanges with group members during the hearing, the focus of the Court is on *the* settlement arising out of the conditional paction agreed between the parties. It is not some sort of inquiry into what *other* settlements might have been thought to be appropriate, or the identification of a figure that the Court regards as the optimal reflection of the underlying merits of the case between the parties.

11 Reasonableness, as one would expect from such an amorphous term, is a range. And the question for me is whether the settlements as proposed fall within a range the Court can characterise as fair and reasonable. Connected to this, is that it is not the Court's role to second-guess the strategic decisions made by the applicants' legal representatives, and that there is no definitive set of factors that may or may not be taken into account in assessing whether the conditional settlement is reasonable.

12 Although there are factors which have been stressed which deserve particular attention (some of which are referred to in the Class Actions Practice Note (GPN-CA) at para 15.5), the inquiry is not in any way fettered so as to amount to a "check-list". It is a broad, evaluative and impressionistic decision, which is not to be seen as a form of calculus.

13 Ordinarily, there is presented to the Court on these applications a confidential opinion prepared by counsel acting for a representative applicant. This opinion will, as with all *ex parte* communications to a court, candidly disclose matters within counsel's knowledge, in the present case, being information which either supports or detracts from the conclusion that the settlement is fair and reasonable. In this respect, this case has been unusual. For two reasons, I thought it appropriate to indicate to the parties well in advance of the settlement hearing that I wished, to the extent possible, for this application to be determined on the basis of materials which were freely available to group members.

14 The *first* reason reflects a fundamental tenet upon which our system of justice operates, namely, the principle of open justice. That principle is one of the most important aspects of our system of justice, and an essential feature of the judicial process: See *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* [2000] NSWCA 198; (2000) 181 ALR 694 (at 703–4 [52]–[57] per Spigelman CJ). The reason why open justice is important, and why it is described as a primary objective of the administration of justice in s 37AE of the Act is that, to the extent possible, proceedings in courts of justice should be exposed fully to public and professional scrutiny and, if necessary, criticism, by well-informed observers who are able to follow and comprehend the information that is taken into account in making decisions which are relevant

to their interests. If interested observers are able to follow and comprehend the evidence, the submissions of parties, the submissions and the reasons for judgment, then the public confidence in the administration of justice will be enhanced and, as Gibbs J (as his Honour then was) observed in *Russell v Russell* (1976) 134 CLR 495 (at 520), "confidence in the integrity and independence of the courts" will be maintained.

15 By reason of this approach, the very comprehensive and detailed opinions provided in the Oakey and Katherine class actions in particular, which are public documents, are testament to the fact that information sufficient to reveal the processes of reasoning which lead to an application for a settlement approval, can be advanced in an open way without the need for confidentiality orders and the attendant lack of transparency.

16 Naturally enough, there will be many cases where confidentiality orders are appropriate. In such cases, there is a necessity for there to be a candid exchange, which is not revealed to a respondent. But there will be cases, and these three complex class actions are examples, where, if proper attention is given to the way in which relevant information can be expressed, the interests of transparency and open justice can be facilitated.

17 The *second* reason why I considered that the applications should be determined by reference to publically available materials was that the respondent, the Commonwealth of Australia, took the view that it would not waive any potential application it may make for me to be disqualified from hearing the initial trial, if I had access to confidential material.

18 The Commonwealth also took this position in relation to a related class action which has been recently commenced involving PFAS contamination at a number of other sites throughout the Commonwealth. The position taken by senior counsel for the Commonwealth was that this was an entirely appropriate approach, as it was not evident there was a need to have access to confidential material and this was not some form of "technical" stance taken by the Commonwealth. I have no doubt that both those appearing and instructing on behalf of the Commonwealth took this view advisedly and after due consideration and believed it was an appropriate course to take.

19 This is a matter upon which minds might reasonably differ. However, it certainly would have assisted in both the case management and hearing of the applications if I could have had an assurance that the point would not be taken, in circumstances where the only information that would be available to the Commonwealth, if an application for apprehended bias was to be

made at a later stage, was the knowledge that I had access to unspecified confidential information. In any event, there is no need to further dwell on this aspect of the matter. As it turned out, for reasons that I will explain, I did not consider it necessary to have regard to any confidential information.

C SUMMARY OF THE SETTLEMENTS

C.1 Williamtown class action

20 Following a mediation, the parties to the Williamtown class action entered into heads of agreement that provided for the payment of the sum of $86 million by the Commonwealth, inclusive of legal costs, funding fees and other expenses. On the assumption that the deductions proposed are permitted from the settlement sum on the approval application, approximately $54 million, or 63 per cent of the settlement sum, will be available for distribution to group members. The following table sets out the relevant figures:

	Item	**Recovery**
1	Land diminution	$44,165,450
2	Business loss (estimated at $50,000 per business)	$3,450,000
3	Inconvenience, distress and vexation (estimated at $50,000 per natural person group member)	$34,500,000
4	Aggravated damages (estimate)	$10,000,000
5	**Total possible claim before costs**	**$92,115,450**
6	*less* legal costs and disbursements incurred (approximate)	*$9,000,000*
7	*plus* recoverable legal costs (estimated at 66%)	$5,940,000
8	**Total possible claim after costs**	**$89,055,450**

Settlement Sum ($86,000,000) as a % of total possible claim after costs	97%
Net Settlement Sum ($54,000,000) as a % of total possible claim after cost	61%

21 In order to understand this table, it is necessary to know something about the individual claims.

22 There were three types of group members: land owner group members, business owner group members, and occupier group members. In broad outline, the allegation was that the firefighting foam used on the RAAF bases which contained PFAS was potentially damaging to the environment and/or potentially caused adverse health effects in humans, its use was unreasonable, and a reasonable person in the position of the Commonwealth would have taken various precautions in respect of the risk of harm posed by it.

23 The three causes of action advanced were as follows:

(1) on behalf of the land owner group members and occupier group members, an action in nuisance on the basis that the use caused unreasonable and substantial interference with the use of land owned and occupied by the group members;

(2) on behalf of all group members, an action in negligence on the basis that the Commonwealth owed and breached a duty of care owed to group members; and

(3) on behalf of all group members, an action for breach of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

24 In the case of land owner group members, the claim for value of loss in relation to land diminution is determined by placing each land owner group member into a relevant zone, and applying various percentage deductions to land valuation figures obtained by the applicant. In determining the business owner group member claims, a claim relating to business loss is determined by placing the various business owner group members, with some degree of generalisation, into various categories and identifying an amount by reference to their claims. A further amount is sought for aggravated and exemplary damages.

25 In addition to these amounts, a claim value figure of $50,000 allocated pro rata to natural person group members has been allocated for inconvenience, distress and vexation.

C.2 Oakey class action

26 The nature of the claim made in the Oakey class action is substantially similar. The core of the damages cases of the land owner group members are essentially the same regardless of which cause of action they sue upon, that is damages representing a diminution in the value of their land. As to the business owner group members, the claim is for consequential loss to their

ability to earn income from the land over and above the diminution of its value (in relation to those business owner group members who are not land owner group members, the claim is essentially of the same character).

27 Like in Williamtown, an amount is sought for aggravated and exemplary damages. Again, it is useful to set out the relevant information concerning the value of claims and its relation to the settlement sum in tabular form as follows:

	Item	**Recovery**
1	Best possible quantum recoverable	$25,161,283.501
2	Likely recoverable costs	$7,654,995.822
3	Best possible quantum recoverable and likely recoverable costs (**Oakey Total Recovery**)	$32,816,279.32
4	Oakey settlement sum as a percentage of Oakey Total Recovery	103.6%
5	Oakey settlement sum less proposed commission and costs as a percentage of Oakey Total Recovery	48.24%

C.3 Katherine class action

28 The claim made by group members in the Katherine class action is essentially the same as that advanced in the Oakey class action. The information concerning the amounts of the claim and its relationship to the settlement sum is set out in the table below:

	Item	**Recovery**
1	Best possible quantum recoverable	$78,719,803.50
2	Likely recoverable costs	$5,825,052.80
3	Best possible quantum recoverable and likely recoverable costs (**Katherine Total Recovery**)	$84,544,856.30
4	Katherine settlement sum as a percentage of Katherine Total Recovery	109.41%
5	Katherine settlement sum less proposed commission and costs as a percentage of Katherine Total Recovery	65.65%

D THE NOTIFICTION AND REACTION OF CLASS MEMBERS TO THE SETTLEMENTS

29 Following the conditional settlements emerging shortly before an initial trial, notification was given to group members. Given the work that had been done earlier during the course of the proceedings to obtain information as to the identity of group members and how they were best contacted, the process of notification proceeded smoothly. By the time of settlement, the Court had received through the Registry (or through my Associate) a very large number of comments relating to the settlement, which continued to trickle in during the course of the two days of the hearing.

30 In going through the communications received up to the commencement of the hearing, my attempt to categorise the communications was that in the Williamtown class action, there were 26 objections, 12 letters of support and one communication was broadly neutral. In the Oakey class action there were 29 objections, one of which was withdrawn. In the Katherine class action there were 24 objections, five communications in support and two were neutral.

31 As it happens, there may be some doubt about these tallies but precise numbers do not really matter. What matters is the content. There are certain general themes that emerge. The first, most important and, if I may say so, moving aspect of the communications, is the dismay and tribulation expressed by group members as to their exposure to alleged harmful chemicals, and their further distress by being involved in the dispute with the Commonwealth.

32 One can only seek to sympathise with those who feel that, through no fault of their own, they have been exposed to a significant injustice. This feeling no doubt has motivated a large number of the objections to the settlements. Given the strongly held views expressed by some as to the Commonwealth's actions, it is understandable why group members (acting in what they perceive to be their best interests) would have different views about the worth of the proposed settlements with the Commonwealth. For some, the proposed settlement is conceptualised as a deliverance - like a cloud lifting; the settlement, if approved, will allow them to put (at least some aspects of) their concerns behind them. For others, the settlement, at a figure which they regard as inadequate to reflect the wrongs they perceive they have suffered, will constitute a further exacerbation of the injustice they already keenly feel.

33 The matter that I would like to stress to those that fall into the latter category, is that there is a big difference between a strong feeling of injustice on the one hand, and establishing at law the

liability of a perceived wrongdoer and recovering damages to address the alleged wrong on the other. In litigation, there is many a slip 'twixt cup and lip.

34 It is evident that a large number of those that have objected to the settlement feel that nothing less than a complete payment of the amount of damages to which they are entitled will be an adequate resolution. To those people, I hope they take some comfort from the fact that I have looked at the case closely and I have no doubt that they have been ably and conscientiously represented by both their solicitors and their counsel, who have not only presented the class actions in a thoroughly professional way, but have advanced any causes of action that have been available.

35 Given that a number of persons made specific oral presentations to the Court during the course of the hearing, I wish to say one or two things about each of them. In doing so, I do not intend to diminish the importance of the other representations that have been provided to the Court in writing, which, as I have already noted, I have read and taken into account.

D.1 Williamtown class action

Mr Rob Roseworne

36 Mr Roseworne is steadfast in his opposition to the proposed settlement. He points to the fact that the premise for the settlement of the class action is that it is for the good of the majority, but notes his view that those who ran the class action were a select group who failed to keep him and others adequately apprised of developments. Further, he makes complaints concerning both the funders and the solicitors. He points to the fact that his view is that at least 100 resident group members are "disgusted" by the proposed settlement and purports to make representations on their behalf.

37 His written material is in evidence. I will not seek to recount it in full. But in short, his view is that the compensation amount conditionally agreed does not come close to restoring group members to the financial position they would have been in, but for the wrong suffered. It is evident that Mr Roseworne feels strongly, and that he has been a long-term critic of the way in which the class action has been managed. Below I will express my views as to the adequacy of the settlement, but I am conscious of the strength with which he and others like him have expressed their views.

Mr Paul Tyszyk

38 Mr Tyszyk provided both a written and oral objection, and is currently a group member who has made both land owner claims and a business owner claim. For reasons that are unnecessary to recount, it became evident that there was some confusion that had arisen as to the nature of the claims he was making. Mr Tyszyk considers he is entitled to a land owner claim relating to a property, a business owner claim in relation to the same property upon which he conducted a removals business, and also a land owner claim which arose with regard to a different property. It became apparent during the course of his oral submissions that, in respect of one of those claims, he was not the proper group member. The correct claimant was the trustee of a standard form family discretionary trust. It appears Mr Tyszyk and, I presume, members of his family, are objects of this discretionary trust. But the difficulties in this regard have been overcome by the pragmatic expedient of a s 33K order being made to allow the group definition to be amended to allow that trustee company to advance a claim.

39 Mr Tyszyk has also made complaints regarding the way in which his claims have been handled. However, in the event the settlement is approved, I am confident that through the independent review process put in place by any settlement distribution scheme, he will be able to raise any difficulties he has concerning the assessments of his claims and the claim of the trustee company with which he is associated.

Ms Samantha Kelly

40 Ms Kelly did not file an objection in writing but did come before the Court in order to express her concerns. She spoke movingly about her 10-month old baby daughter returning PFAS levels almost three times higher than her own. She also spoke of her perceived necessity, following advice from her doctor, to abandon her home (encumbered to a mortgagee), and obtain rental accommodation. Her comments were not, however, directed to either the settlement sum or the proportion of funds that are proposed to be allocated to her solicitors or funder. Her concerns related to the fact that she considered she had been inappropriately exposed to PFAS. She said:

> We have been living this nightmare now for five years. Settlement will provide our young family with fair and reasonable compensation for our losses and offer us hope for the future. If this case was to go to trial, we are terrified of what that would hold. We are terrified about the risks as well as the impact on our future mental health if this fight drags on for many more years.

41 I am satisfied that Ms Kelly's views represent a significant number of group members although, as I have previously indicated, there are also strong views to the contrary.

Mr Ryan Baker

42 Mr Baker bought a property in 2013, approximately two years before the disclosure by the Commonwealth of the contamination to the area surrounding the Williamtown RAAF base. The property was purchased for $340,000. Mr Ryan spent about $80,000 improving the house. Despite this, a recent valuation obtained for the purposes of family law proceedings valued the property at $250,000. In these circumstances, Mr Baker feels strongly that the settlement is unfair from his perspective and, he extrapolates, the community as a whole. He contends that the solicitors "have sold us out for an easy and quick profit at our expense. And we are stuck here." He makes various complaints concerning the level of communication, raises a number of questions about the settlement, and strongly requests that the settlement be rejected and that I "send both lawyers back to reconsider the amounts proposed".

43 Mr Baker is currently a registered group member advancing land owner claims and a business owner claim. I am satisfied, on the basis of the evidence, that there have been communications between the funder and Mr Baker, including Mr Baker completing various questionnaires that have detailed his claims. The point I would make to Mr Baker is that there is a very big difference between a valuation obtained in the course of family law proceedings, presumably leading up to a property settlement, and the valuation exercise of identifying the extent of diminution that is being conducted in this proceeding, both prior to the conditional settlement being struck and that is continuing.

44 It is appropriate at this point to make mention of the fact that during the course of the proceedings, I appointed a referee to inquire into, and report upon, the extent of land diminution in relation to the representative applicants' properties. Additionally, valuations have been performed of funded group members' properties across all proceedings. The valuations that are being performed on behalf of all funded group members in all three proceedings (and are continuing in respect of registered group members who are unfunded, in the Katherine class action) have been informed by the extent of diminution and the approach to land valuation reflected in the report of the referee, which was partly adopted by the Court.

45 It may be that Mr Baker and others have a legitimate complaint as to whether or not their claim has been properly assessed. But in the event the settlements are approved, the review process, embedded in the settlement distribution schemes, give some form of protection, by ensuring

that there is an independent safeguard and an independent check on the approach to assessment of claims.

Mr Cain Gorfine

46 Mr Gorfine was the president of the Williamtown and surrounds resident action group for the last five years, and a member of what is described as the "steering committee" of the Williamtown class action. It is fair to say that Mr Gorfine is an adamant and enthusiastic proponent of the settlement. Mr Gorfine said:

> The hurt, the pain in our community, your Honour, from this contamination – it will take years to heal. That healing needs to start now. We ask the Court not to take this victory away, your Honour, from the community. And happiness or anger is not a strategy or pathway forward.

47 Mr Gorfine described the attainment of an in principle settlement as "one hell of an achievement".

D.2 Oakey class action

Ms Dianne Priddle and Mr David Jefferis

48 Ms Priddle and Mr Jefferis bought an unimproved property in 2005, which they perceived as having the potential for a bull/stud operation. They were excited about the prospect of building a business. With plenty of water from the bores and a creek and nearby feedlots on the Darling Downs, the prospects of conducting a valuable business seemed good. They set to work improving water infrastructure, planting improved pasture, building sheds, constructing cattle yards, and enlarged their house and garden.

49 In June 2014, their life changed radically. They explained that for the last six years they have been distracted, indeed consumed, by their advocacy for their claims for compensation. They noted that:

> We have spoken to and emailed international groups, hosted meetings, spoken endlessly with media, lobbied, joined as one of four community representatives with [National Health and Medical Research Council], been a Qld. Representative for Coalition Against PFAS and spoken at 2 Senate enquiries just to name a few things.

50 They are obviously extremely proud of their stud operation and are distressed that they no longer have land and water that they would regard as being "clean". They stated that they thought the class action would aid them in being able to get back to the life they had prior to becoming aware of the PFAS contamination. They make complaint as to the amount proposed to be paid to both the solicitors and the funder under the settlement, and stress that they feel a

sense of burning injustice that will not be assuaged by the proposed settlement. Additionally, they make complaints concerning communications with their solicitors.

51 It is apparent that Ms Priddle and Mr Jefferis have been indefatigable in their efforts, and have been in communication with both the solicitors, and in particular, with the funder over a long period of time. I accept that Ms Priddle and Mr Jefferis feel the sense of injustice that they have communicated to the Court, both in writing and orally. It is clear that there has been at least some breakdown of trust and confidence between Ms Priddle and Mr Jefferis and the solicitors and the funder. In these circumstances, should the settlement be approved, the concerns of Ms Priddle and Mr Jefferis could at least, in some way, be addressed by ensuring that they are treated differently in the settlement, in that they can proceed immediately to an independent review of the claims that they make, pursuant to the mechanism contained in the settlement distribution scheme. This course was embraced by the applicants.

Ms Jennifer Spencer

52 Ms Spencer expressed her unhappiness and dissatisfaction with the outcome of the class action. She has been a resident of Oakey, and a neighbour of the Oakey Army Aviation Base for 20 years. In 2013, she, together with her family, purchased what she describes as a lovely, rural residential block of five acres, with an underground water bore, and a one megalitre irrigation licence. She had a dream in mind that she could build her family home on that block and have an idyllic rural lifestyle that came with the purchase of such a property. She had race horses and hoped to set up a small training and spelling complex. She notes that all that "came crashing down when I received a letter from the Department of Defence in December 2013, notifying us of the PFAS contamination". She noted that when she opened that letter, she thought "(o)ur lives would never be the same again". She wrote about the toll that this had had on her mental and physical health.

53 She participated in the class action because she thought it was her only hope for compensation. She has been very active in relation to raising awareness of matters relating to PFAS, and feels that all of her pleas have "fallen on deaf ears". She perceives herself as "collateral damage" in the contamination saga. Ms Spencer made oral submissions. She noted that she regarded her property as now worthless. She spoke, if I may say so with respect, very movingly about what she described as a feeling of guilt as a parent, knowing that she could have exposed her son to PFAS contamination, and feels, very acutely, that she has suffered a great injustice.

54 In her written presentation Ms Spencer said that she hoped that the Court would "listen to our stories and really hear us". I wish to stress to Ms Spencer, if it is any consolation, that she can rest assured that the Court has heard her, and it has heard her with crystal clear clarity.

D.3 Katherine class action

Mrs Karen and Mr Josef Perner

55 Mrs and Mr Perner noted that they were pleased that the Commonwealth had agreed to settle, and expressed the view that it took the class action for the claim to be taken seriously. Having said that, they noted that they were of the view that the deductions from the settlement amount for legal, funding and distribution costs "should be borne by the Commonwealth of Australia as a separate settlement or at the very least a 50/50 share of the costs." Their thoughtful written communication suggested various ways in which weightings could be applied during the course of the settlement distribution process to reflect what they would regard as a more appropriate distribution of the settlement proceeds. The further matter that they placed some emphasis upon was the fact that it was not appropriate for late registrants to be included among the people to whom settlement proceeds are to be paid. This is a matter to which I will return below.

Mr Mark Ross

56 Mr Ross raised an issue about the legal costs and other deductions from the settlement sum and requested further substantiation in relation to the issue of the costs incurred. To some extent, as I was able to explain to Mr Ross, this has already been addressed by the appointment by the Court of an independent referee to inquire into and report upon the level of costs that have been charged in relation to the matter. It was clear that Mr Ross' concerns related not only to the legal but also to the funding costs, and he was anxious to ensure that there was no double billing.

Mr Peter Stork

57 Mr Stork similarly made mention of the fact that he regarded the amount paid to the funder as excessive, and also complained about only receiving generic details of his likely settlement distribution. Again, this is a case where I was able to provide some degree of comfort to Mr Stork that, in the event the settlement is approved, if he was unhappy with his settlement distribution, then there would be a mechanism pursuant to the settlement distribution scheme where he could obtain some independent review of the amount that is proposed to be paid to him.

Ms Jo Jennings

58 Ms Jennings and her husband have lived in Katherine since 1985 and have been raising their family at a property in which she currently resides since 1989. She experienced some difficulties in relation to registration and made a request that the Court include late registrants. She considered that there might be a number of reasons why members of the class may not have registered by the deadline, including being isolated during the COVID-19 crisis, limited flights to the Northern Territory and related matters. She stressed the fact that she remained a group member and wished to participate during the settlement. I indicated to Ms Jennings after her oral presentation that I considered it was appropriate that she be allowed to register late. The terms of her registration and others in a similar category I will address later in these reasons.

59 Again, I stress that although I have only referred to those who made oral representation during the course of these reasons, I have reviewed the written representations that were made, including during the course of the hearing, for the purposes of forming my view as to the merits of the proposed settlements.

E BROAD ASSESSMENT OF THE SETTLEMENTS

60 This was a case which, from the perspective of the applicants, was not without some degree of complexity and uncertainty. It is perhaps engaging in a degree of understatement to describe the proceedings as both factually and legally complex. Factually, there were a significant number of reports by experts and referees on issues such as chemistry, toxicology/epidemiology, hydrology, hydrogeology, remediation and valuations. There was also a wealth of lay affidavits that had been filed and the parties had foreshadowed a daunting documentary tender which were comprised, in large part, of a very large number of documents from multiple Commonwealth departments over a 40-year period.

61 As to the legal questions, they were numerous. One which received some focus during the course of the case management hearings prior to the initial trial was the issue of whose knowledge would be attributed to the Commonwealth and whether it was possible to aggregate the knowledge of a number of individuals and, if so, in what circumstances. As to the claim in nuisance, there would have been a substantial contest at trial as to whether there had been an actionable interference with land, with the consequent litigation risk attendant on such a contest. There is no need for me to detail the specifics of that context, which are well

summarised in the opinions provided in both the Oakey and the Katherine class actions, but apply equally to the Williamtown class action.

62 In relation to the claim in negligence, issues of remoteness and causation were not straightforward. It is appropriate that I be somewhat circumspect about canvassing the issues and expressing even preliminary or tentative views about these topics because of the pendency in the Court of another class action raising similar issues. It suffices for present purposes to say that not only the claim in nuisance, but also the claim in negligence and for contravention of the EPBC Act, raised real triable issues relating to liability which, as I say, are summarised comprehensively in the opinions provided in the Oakey and Katherine class actions.

63 Similarly, there are risks in relation to the amount of recoverable damages for both land owner group members and business owner group members, for reasons again canvassed in the opinions provided by counsel. Further, issues relating to the recoverability and quantum of any aggravated and exemplary damages were obviously uncertain at the time of the striking of the conditional bargain, which is the subject of these approval applications.

64 I mentioned above that the approach to s 33V applications is at least, on one level, impressionistic. For someone experienced in class actions, a good starting point is comparing the proposed settlement sum with the best possible recovery that might be able to be attained on behalf of group members. In relation to the Williamtown class action, the settlement sum of $86 million as a percentage of the total possible claim after costs is 97 per cent. In relation to the Oakey class action, the settlement sum as a percentage of the best possible quantum recoverable and likely recoverable costs is 103.6 per cent. In relation to the Katherine class action, the Katherine settlement sum as a percentage of the best possible quantum recoverable and likely recoverable costs is 109.41 per cent.

65 Conscious as I am of the strong feelings that some group members in each of the communities have as to the adequacy of the settlement sum, I should note that when I first saw these percentage figures, my initial reaction was that the gross settlement sums represented not only a recovery that could be regarded as fair and reasonable, but one that could fairly be described as excellent. The total recovery sum, when compared to the overall quantum of claims (and when one has regard to the litigation risk), is very high compared to comparable settlements of other class actions (to the extent that it is possible to make such a broad, evaluative comparison).

66 The real issue on these applications is not the *gross settlement sums* but rather the *net recovery*, being the quantum of the settlement to be distributed to group members. This is reflected in a large number of the objections and, in the next section of these reasons, I will deal with the appropriateness of some of these deductions when I come to considering specific aspects of the proposed settlements.

F CONSIDERATION OF ASPECTS OF THE SETTLEMENTS

F.1 Release and quelling of claims

67 I have written before about the important responsibility of representative applicants to ensure that deeds entered into in resolution of the claims of group members in class actions appropriately reflect the limited nature of the authority which applicants have in relation to group member claims. The claims of group members exist separately from and prior to the class action. The applicant has authority to deal with the "claim" of a group member as that term is used in s 33C of the Act. It has no authority (and no business) to deal with claims that extend beyond the class action.

68 There has been a recognition of this important matter by those acting on behalf of the representative applicants in these cases. The most important illustration of this was the fact that the claims of the group members extended beyond those common issues which were proposed to be agitated at the initial trial. In this sense, these class actions were somewhat unusual. Each group member had a claim in tort for damages. Despite this, the only damages particularised, related primarily to the diminution in the value of property or business conducted by the group members. There was no *pleading* of any claim made by the group members of any personal injury.

69 All parties proceeded to conduct the class actions and proceed to settlement on the basis that any claim a group member may have for damages for present or latent personal injury (if any such claims do, in fact, exist) *would not* be the subject of the class actions and would not be quelled by any settlement of these class actions. Given the potential for an argument to be raised that each group member may have a *singular* claim for damages in tort, this was a matter in respect of which I sought clarity, and it was expressly agreed that the settlements, if approved, would not prevent any claim for damages for personal injury arising out of the same circumstances being made in the future, if a group member was advised to bring such a claim. This was an important component of the way the claims were advanced in these class actions

and which I raised period to mediation, and has informed my approach to the approval of the settlement that emerged.

70 Initially, orders were sought pursuant to s 33ZF to give authority for the applicants *nunc pro tunc* to enter into deeds with the Commonwealth to resolve the claims of group members and binding the group members to the terms of those deeds and service of those deed.

71 In final submissions, such a course has not been persisted in, and different orders are sought which will be addressed below. In my view, this was a sensible course for the parties to take and if the settlements are approved, all the claims of both the applicants and the group members (other than that any aspect of the claims which relate to personal injury) will be resolved, once and for all, by operation of ss 33V and 33ZB of the Act.

F.2 Legal costs

72 As can be seen from the above, a significant quantum of legal costs is proposed to be deducted from the settlements. To the uninitiated, no doubt the amount identified for costs seems staggering. For those involved in Pt IVA proceedings, however, particularly class actions of this complexity, the figure seems a reasonable one. This view has been fortified on closer examination by a referee appointed by the Court. Mr Matters, a highly experienced costs consultant, prepared reports, which have been adopted on the s 33V applications, which reported upon the costs incurred in great detail, and expressed the view that they are reasonably incurred.

73 In making this point about costs, I am not insensible to the fact that it takes two to tango. I came into these matters last year and was concerned to bring the class actions to a conclusion as quickly as I could. Whatever criticisms that group members have as to the attitude the Commonwealth has taken over a long period of time to the complaints they have made concerning their claims, since last year when I have been involved in case managing the litigation, it has been conducted in a highly efficient way and not only the applicants but also the Commonwealth have constructively sought to conduct the litigation with the aim of bringing it to a speedy conclusion.

74 However, Mr Matters did not address the matter which caused me principal concern relating to the quantum of legal costs. There is no doubt that the three proceedings before me today could have been brought in the one class action as a matter of law and as a matter of practicality. It would have been open at the time that the Oakey and Katherine class actions were commenced

by Shine Lawyers, for the step to have been taken to amend the proceeding currently on foot (the Williamtown class action) which was being conducted by Dentons. Despite the submissions of counsel to the contrary, I am comfortably satisfied that if such a course had been taken the (albeit reasonable) costs incurred across these three proceedings, would have been further reduced.

75 I say this notwithstanding that I am conscious of the evidence adduced at the hearing, particularly by the solicitors in the Oakey and Katherine class actions, of conscientious efforts being taken to minimise duplications between not only the Oakey and Katherine class actions, but also between the three proceedings generally. It has often been the case in recent years that for the apparent convenience of either lawyers or funders, multiple class actions have been commenced in circumstances where one proceeding would have done the job.

76 After some reflection, it does not seem to me appropriate that there should be a further arbitrary reduction in any legal costs deducted from the settlements in the particular circumstances of these cases. I would stress, however, that this a special case and that any representative applicants should give close consideration as to commencing separate class actions in circumstances where a common funder is involved, and all claims could be agitated in a class action already on foot.

77 The principal difference in these proceedings from other cases where this phenomenon has been seen was identified in the submissions of Mr Sheahan QC, who noted that this was a "bottom up", rather than "top down" process. In other words, this was not an example of the case, commonly seen in commercial class actions, where the common enterprise of the class action is dreamt up and fastened upon by a funder or by a firm of solicitors and then a class action is then investigated and commenced. Rather, the evidence establishes that these were very much "community-driven" class actions, where those who felt they had been wronged communicated with solicitors on their own account, being professionals in whom they reposed confidence, and commenced the separate proceedings on that basis.

78 Although I harbour a sense of disquiet that the costs could have been reduced if one class action had been commenced, after some reflection, and particularly given, from my perspective, the highly efficient way the cases have been conducted (including by the use of referees), there should be no further reduction in the legal costs otherwise recoverable.

F.3 Uplift

79 In relation to both the Oakey and the Katherine class actions, the solicitors seek an "uplift" in respect of those costs which have been deferred during the currency of the proceedings. I am satisfied on the basis of the reports adopted in those cases that there has been sufficient compliance with the relevant regulatory requirements in relation to the charging of such fees, they are not unreasonable given the overall quantum of the fees, and they should be able to be deducted.

F.4 Deduction of litigation funding charges

80 The litigation funding fees in these proceedings have been the subject of some sustained criticism. There is a live contemporary controversy about litigation funding. I do not propose to enter the arena of this policy debate, save to make a few comments.

81 The term "access to justice" is commonly misused, most often by some funders who fasten upon it as an inapt rhetorical device. To those with a long and close involvement with litigation funding, it is evident that there is not only a danger in generalisation (and assuming all funders are the same), but there is also a danger of using well-worn phrases to obscure the reality that litigation funding is about putting in place a joint commercial enterprise aimed at making money. As I said in *Turner v Tesa Mining (NSW) Pty Limited* [2019] FCA 1644; (2019) 290 IR 388 (at 401 [41]): "the funder is not so much facilitating access to justice by the funded party as itself gaining access to justice for its own purposes".

82 But recognition of this reality does not diminish the importance of litigation funding in allowing these class members to vindicate their claims against the Commonwealth. Without litigation funding, the claims of these group members would not have been litigated in an adversarial way but, rather, they would likely have been placed in the position of being supplicants requesting compensation, in circumstances where they would have been the subject of a significant inequality of arms. I am conscious that others who have alleged that they have suffered damage from PFAS contamination have adopted a different course than joining a class action, and I am aware that other proposed litigation was resolved with claims being compromised without the involvement of a funder. But it strains credulity to think that claims of this complexity and attended by such potential expense could have been litigated to a conclusion without third party funding of some sort. It seems to me a testament to the practical benefits of litigation funding, that these complex and costly claims have been able to be litigated in an efficient and effective way and have procured a proposed settlement. It must be

recalled that an acceptable settlement was only forthcoming after a vast outlay of resources, and the assumption of risk of a third party funder for potential adverse costs.

83 Superficially, it is understandable that much criticism could be made of the quantum of money to be paid to the funder, but there is need to be careful in assessing whether the proposed deduction of the amount paid to the funder is, to use the relevant statutory word in s 33V(2), "just".

84 As I noted in *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289 (at [54] to [55]), in assessing "justice" in this context, it is important that the assessment not be distorted by hindsight bias. Immediately before the initial trial, after all evidence had been prepared and reviewed, and after adoption of some reports of referees, it may be the applicants and group members were entitled to feel some more confidence about their ultimate prospects than when the class action was first contemplated. To look back from where we are now, after a conditional settlement has been struck, and determine whether the common enterprise was likely to yield success when it was first conceived, creates real challenges. Like the position of the class actions the subject of the settlement approved in *Liverpool City Council v McGraw-Hill*, when these cases were commenced, they raised complex issues as to liability. The present cases also raised complex issues as to damages. There is also no reason to suggest that the contractual funding rate (let alone the amount which is proposed to be deducted from the settlement) was greater than what would have been demanded by any other experienced litigation funder at the time the relevant litigation funding agreements that were entered into were agreed. As I said in *Liverpool City Council v McGraw-Hill* (at [55]):

> Just because the funder's ship has come in, it does not seem to me to be a principled basis for changing the bounty, the terms of which were stuck when the voyage commenced.

85 In the submissions from a few group members, there was a good deal of cynicism expressed about the legal system in general, and class actions in particular. But, to my mind, the present cases are a good example of the system working, and working well. Standing back, the total amount proposed to be paid to the litigation funder might be regarded by an observer as being extraordinarily large and it may be thought it represents a disproportionate recovery compared to the amount distributed to group members pursuant to the settlement. However, in this regard, it is appropriate to say two things.

86 *First*, there is a very large disparity between, on the one hand, the amount that will be recovered by the funder pursuant to the terms of any approved settlement scheme (being 25 per cent), and on the other, the amount to which the funder would have been contractually entitled. The precise figures are set out below, but taking it across the three class actions, if the settlement is approved the funder will be paid $53.1 million, when it otherwise would have been entitled pursuant to the terms of the funding agreement to $88.1 million.

87 *Secondly*, there is no reason to believe that the amount to which the funder would have been contractually entitled (*a fortiori* the amount that the funder was to be paid) does not reflect an adequate reflection of the risk of this litigation (assessed *ex ante*) or the appropriate market for funding of litigation of this type.

88 On any view of it, this was complex litigation attended by some risk. Moreover, it is appropriate to focus on the risk when the funding agreements are entered into, not assess the risk after the making of implicit findings (following the reports of referees being adopted) and all the work preparing for hearing had essentially been done. Although I am conscious of the complaints of some group members as to the size of the funding fee deduction, when one compares this to other settlements and the risks involved, the amount of 25 per cent commission across the three proceedings could not be stigmatised as being unreasonable in all the circumstances.

F.5 Deduction of funder's out-of-pocket expenses

89 In addition to the commission, the funder seeks recompense of a number of out-of-pocket expenses. I have had close regard to them. Many funding agreements involve elaborate definitions of project costs, which mean that there is a significant disparity between the amount of so-called "funding commission" and the full amount as paid to a funder. In these cases, care should be taken to scrutinise any additional claim over and above the commission.

90 Initially I had some concern about the fact that significant fees had been paid to persons who might, perhaps not unfairly, be described as "lobbyists". This has been explained in some detail in the evidence and, given the unusual nature of these cases, it does not seem to me it is unreasonable that these recoveries be permitted.

F.6 Payments to representatives

91 Section 33V(2) provides that if the Court gives approval under s 33V(1):

> … it may make such orders as are just with respect to the distribution of any money

> paid under a settlement …

92 The issue of payment to representative applicants who have sacrificed time and/or incurred expenses in prosecuting an action as a representative on behalf of others has been the subject of some discussion in the authorities. In *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 (at [176]), Murphy J described these payments as:

> compensation … for the time and expense attributable to the representative features of the applicant's involvement as a party in the litigation, not to compensate the applicant for the time and expense which are an ordinary incident of the applicant's involvement in his, her or its own interests.

93 There has been further discussion as to the need to disclose the basis of such claims: see, for example, *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 626 (at [62]-[73] per Gordon J).

94 Having said this, focus should always be on the statutory words. The question of whether a proposed payment is "just" is not *necessarily* restricted to only allowing recoveries for the time and expense attributable to the representative role conducted by the applicant. The text, context and purpose of s 33V(2), do not suggest that the circumstances in which payment could be made to an applicant need to be somehow closely circumscribed. For my part, I do not think it is beyond power, or inappropriate as a matter of discretion, to approve a payment, which is not solely related to the time expended by the applicant but, rather, reflects a particular and special hardship proved in the evidence that may have been suffered by an applicant in discharging the representative role. To suggest that an amount struck by reference to the time and expense of acting in a representative capacity is licit seems to me to place an unnecessary gloss on the words of the statute. With these matters in mind, I come to the various claims made in the three proceedings.

Williamtown class action

95 The amount sought for payments in this proceeding is, in my experience, unprecedented.

96 The claim is for $240,000 of the settlement sum to be distributed to 12 applicants, sample group members and steering committee members to reimburse them "for their time, trouble and expenses incurred in representing the class". The evidence of the solicitor for the applicants, Mr Allen, which I accept, is that he is aware that each of the 12 persons identified has spent a considerable amount of time in relation to the class action and this effort went well beyond advancing their individual claims. I am conscious that the solicitor has given evidence that he

subjectively believes an amount of $20,000 being paid to each of these 12 persons is fair and appropriate.

97 At the end of the day, however, this is a discretionary payment and the discretion is one which is guided by what is just. A matter I found very concerning was drawn to my attention this morning. During the course of the hearing, group members of the Oakey class action made powerful and evidently sincere submissions concerning the way in which the claims giving rise to the class action, and its conduct, had affected them. Recorded in a document which I initially marked MFI1 (but will mark as an exhibit in the Oakey class action), was evidence that one of the persons seeking a representative payment in the Williamtown class action mocked the submissions that were being made by the Oakey group members. This conduct was apparently condoned by other persons.

98 This class action has caused great stress to a number of people. It seemed to me remarkable that a representative applicant, who by virtue of that position would have some appreciation of the difficulties that would be encountered by group members in not only progressing their claims, but also having the courage to make submissions to the Court, would make such comments. I have given consideration as to whether, notwithstanding the broad scope of the discretion, this ought to be a relevant consideration when it comes to approving a reimbursement order.

99 I think this conduct reflects poorly on the people concerned. However, I do not think that it ought to divert me from, or influence, my consideration of whether some amount should be paid to people who have engaged in a role which essentially is to the benefit of others and the quantum of that amount. Having said that, it does give me pause to reflect upon whether the evident disquiet among some Williamtown group members may have been partly caused by a less than empathetic way of dealing with the legitimate concerns of others.

100 I think a sum of $20,000 per person is excessive, particularly given the number of persons involved. The proposed figure does not discriminate between applicants, sample group members and steering committee members, but I would have thought it likely there was a sliding scale of representative involvement. In the circumstances, I think it is appropriate to adopt a broad-brush approach, and I would allow an amount of $120,000, which can be divided among the 12 persons in a way that the administrator regards as best reflecting the extent of their involvement in acting in a representative capacity. If there is any dispute, it can be resolved by the independent counsel acting as an umpire.

Katherine class action

101 The settlement scheme in the Katherine class action makes provision for a deduction of a reimbursement payment to the applicants of $20,000 each, being $40,000 in total. The evidence of Mr Aylward, the solicitor for the applicants, deposes to the time that Mr and Mrs Bartlett sacrificed in performing their role as applicants in that proceeding. The reality is that without persons willing to come forward and perform a representative role, a class action cannot be commenced or maintained; and I see no reason why a payment of the amount referred to in the affidavit material ought not be made in the event that the settlement is approved.

Oakey class action

102 Again, in this case, the proposed settlement distribution scheme makes provision for a payment to Mr and Mrs Hudson of an amount of $20,000 each, being $40,000 in total.

103 There are, in fact, three applicants in the Oakey class action: Mr and Mrs Hudson and a company with which they are associated. The evidence of Mr Aylward, which I accept, is that the Oakey class action has placed a heavy toll on the Hudson family. Evidence has been given of how divisive the Oakey class action was within the Oakey community. Since their involvement in the Oakey class action, Mr and Mrs Hudson and their children have been the subject of frequent and sustained abuse by disgruntled community members which includes, as remarkable as it may seem, Mr and Mrs Hudson being spat upon, or at least spat at, while on the main street of Oakey.

104 Mr and Mrs Hudson conducted a café and they would often be confronted at their place of business by community members who were adverse to the notion of a class action being run. Additionally, there is some disturbing evidence, which I will not recount, of how this affected the children of Mr and Mrs Hudson. Mr Aylward also gave the following evidence:

> I believe that a reimbursement payment to Mr and Mrs Hudson of the amount of $20,000 each is fair and reasonable, and that in the light of the toll on Mr Hudson by reason of his role, I would have recommended a higher amount of 20,000 if I considered it consistent with principle to do so.

105 I gather from the evidence that although there has been a toll extracted on the family as a whole, Mr Hudson in particular has suffered particular distress and vexation in conducting his role. Given, as I explained above, the broad nature of the power to make orders which reflect a just distribution of the settlement proceeds, it is appropriate for me to have regard to Mr Aylward's evidence in making a determination.

106 I agree that it is appropriate that Mrs Hudson have an award of $20,000. This amount reflects the time spent acting in a representative capacity. But having regard to the extraordinary circumstances recounted in the evidence (and taking into account the powerful submissions of Mr Edwards in this regard), I consider it is just that Mr Hudson be paid an amount of $50,000 in respect of the conduct of his role as a representative.

F.7 Payment to administrators

107 There was some discussion during the course of the hearing as to the appropriate course to take in respect of the administration of the settlement distribution schemes if the settlements are approved.

108 I have already remarked that these proceedings ought to have been conducted as one class action. One of the benefits of only one class action would have been one solicitor on the record, hence meaning one proposed administrator spanning the claims of all affected group members. In the light of this, I raised with counsel appearing on behalf of the applicants whether it was possible that either the solicitors in the Williamtown class action or the solicitors in the Oakey and Katherine class action would act as an administrator across the three proceedings.

109 It seemed to me that this would have the benefit of ensuring consistency in the administration process as the issues were sufficiently similar and for there to be some economies of scale. This course was opposed by both applicants, although they both indicated that if there was to be one administrator they would, perhaps unsurprisingly, prefer to be that one administrator. On balance, however, particularly given the fact that the solicitors had been engaged in a "bottom up" rather than "top down" way, I think it is appropriate that schemes be administered by the solicitors in whom each of the applicants have expressed a degree of confidence.

110 I am told that in respect of the Williamtown class action it is estimated that an amount of $770 inclusive of GST and disbursements is estimated for concluding the claims of each property, while a sum of $600 inclusive of GST and disbursements is estimated in respect of both the Oakey class action and the Katherine class action. These are nothing more than estimates, and I am sure they are proffered in good faith. My intuitive view is that this seems to be the sort of figure that may be appropriate in the circumstances given the nature of the work that is to be undertaken.

111 I have often referred to the fact that administrations of class actions can often turn into being a cottage industry. I wish to minimise the amount of costs that are incurred in order to maximise

the return to group members. Accordingly, the course I would propose if the settlements are approved is that following the conclusion of the administration, I direct an affidavit be filed by each of the administrators deposing to the cost on a per property basis and explaining, with some specificity, why there has been any departure from the estimates in the event there is such a departure. On balance, I think that the costs of referring out administration costs to a referee would likely be an unnecessary expense.

F.8 Post-mediation costs

112 There have been legal costs which are proposed to be deducted post-mediation and pre-settlement approval. In the case of the Williamtown class action this is estimated at $550,000, in the Oakey class action the amount is $180,000 and in respect of the Katherine class action the amount is $250,000 (although these are estimates). The amount post-mediation proposed to be deducted in relation to the Williamtown class action seems to me to be quite high. Accordingly, in the event that the settlement is approved and an amount reflecting post-mediation costs is proposed to be deducted, I would require this amount to be verified by Mr Matters acting as an independent referee with the costs of the reference to be absorbed by those claiming the costs, rather than being deducted from the sum to be paid to group members. Orders should be provided to the Court in this regard.

113 I would limit the amount of costs associated with this reference process to $1500 given the limited scope of the task. The estimated costs proposed in respect to the Oakey class action and the Katherine class action seem to me to be self-evidently reasonable for the work that has been done. Provided the amount to be deducted does not exceed the estimate then, in the event the settlement is approved, I would be content for this amount to be deducted.

G EXPENSE SHARING

114 This is a topic that only affects the Oakey and Katherine class actions. The evidence filed by the solicitor in respect of these proceedings sets out how the costs that have been incurred in the Oakey class action have also benefited the group members in the later commenced Katherine class action. It is proposed, under the settlement distribution scheme, that group members in the Katherine class action should bear some of the costs that have been incurred in the Oakey class action for their common benefit. I am unaware of any case in which the costs of one representative proceeding have been shared with the group members of another representative proceeding where those costs were incurred for a common benefit.

115 Having said that, I am firmly of the view that the Court has power (at the very least under s 33V(2) of the Act) to make an order to reflect the benefit that has been enjoyed by the Katherine group members in these unusual circumstances. The concept of expense sharing or equalisation has hitherto been examined in the context of the fact that some group members have incurred costs for the benefit of other group members in the one proceeding. As a matter of principle, however, there does not seem to me to be any difference between the situation where costs have been disproportionately visited upon a cohort of group members in one representative proceeding, from the situation where costs have been incurred by group members in one class action for the benefit of group members in another closely connected class action.

116 Not only are these proceedings closely connected, but as both Mr Edwards, who appears on behalf of the applicants in both the Oakey and Katherine class actions, and Mr Sheahan QC, who appears on behalf of the funder in both proceedings, observed, it is appropriate to regard both these proceedings as part of the one overarching common enterprise. Given the breadth of the power contained in s 33V(2) which, as explained above, imposes no limitation other than that the order is to be just, it seems to me that an equalisation order of the type sought would, if the settlements are to be approved, be appropriate.

117 In evidence is a "common benefit costs schedule" reflecting an analysis conducted by Mr Aylward, having reviewed the invoices in both proceedings, of the costs that were incurred for the common benefit of group members in both proceedings. That table is set out below:

Phase	**Oakey common benefit costs proportion (%)**	**Total Oakey Costs for that stage of proceedings (GSTe) ($)**	**Katherine common benefit costs proportion (%)**	**Total Katherine Costs for that stage of the proceedings (GSTe) ($)**
Drafting Statement of Claim	40	482,348	0	-
Particulars	40	118,868	0	-
Evidence and Expert Reports	40	1,213,948	20	535,661

Lay Witnesses	90	565,598	50	414,429
Third party disclosure	100	366,011	100	89,095
Discovery	90	1,146,133	90	1,789,922
Case Management Hearings and Interlocutory Applications	80	309,462	100	389,397
Mediation	70	317,508	100	92,331
Preparation for Hearing	100	247,458	100	258,185
Research	100	129,421	0	-

118 Having identified those common benefit costs, the proposed settlement distribution scheme is derived from determining the proportion of the total Oakey and Katherine settlements (that is, $126.5 million) which is attributable to the claims of each of the various cohorts of group members. As the Oakey group members received 26.88 per cent of the total settlement sum, the scheme notionally allocates that percentage of the common benefit costs which is compared with the sum of the common benefit costs which have already been incurred by them. The difference between the two is carried as an adjustment over to the Katherine class action.

119 Additionally, the funder's contractual commission was calculated in an amount of approximately $26.7 million in the Oakey class action and the amount of $7.6 million in the Katherine class action. Had the Oakey group members borne the same percentage of the total commission earned by IMF which their settlement sum bears (26.88 per cent), they would bear approximately $9.3 million in commission, and the balance of the contractual commission (approximately $17.4 million) would be equalised over the Katherine class action and split between the Katherine funded group members and the Katherine unfunded group members, together with the commission earned by IMF from the former cohort.

120 For this reason, the opinion of counsel explains, the formula transfers $17.4 million in commission to the Katherine class action. The final aspect is that the residual commission in the Oakey class action is reduced consistently with the funder's agreement not to seek more

than 25 per cent of the gross settlement sum by way of commission in the event that equalisation of commission is allowed in the way proposed. Further details of the way this works can be gleaned from the opinion of counsel which is in evidence.

121 As noted by counsel, while this might appear superficially complex, it does seem to me to sensibly provide for a result which is just when considered across both class actions.

122 It might be thought that there would be a power to make an order ensuring that the group members in one class action were not unjustly enriched by reason of taking the benefit of costs incurred in an earlier class action which had been expended to the benefit of both class actions. Given the width of the statutory power it is unnecessary for the purposes of this judgment to form a view as to whether equity would intervene to prevent such an enrichment being retained.

H SETTLEMENT DISTRIBUTION FORMULA

123 A large number of the objections by group members related to the settlement distribution formula that had been proposed in each of the proceedings. The settlement distribution formula that has been adopted in relation to both the Oakey class action and the Katherine class action has been extensively explained in section (f) of the two opinions. I am satisfied, for the reasons that have been expressed by counsel in those parts of the opinions, that the settlement distribution scheme which has been prepared does adopt an appropriate means of dividing the settlement sum among group members *inter se*.

124 Although there is no opinion filed in relation to the Williamtown class action, the matter is addressed to a limited extent in the submissions filed. For example, reference is made to the fact that the land valuation report adopted by the Court found that in respect of the property of Mr Smith, the diminution in value by reason of PFAS contamination was 21.5 per cent. This figure was close to the midpoint between the local property valuation expert evidence served by the applicants and the Commonwealth and, on the basis of the guideline drawn from this information, the applicants in the Williamtown class action adopted a process of zoning to apply across the properties owned by group members (which seems to me to be rational in the circumstances).

125 In identifying the amount that is proposed to be paid, the applicants obtained valuations of all properties owned by the group members and applied those property valuation figures in calculating the amount. In relation to the business owner claims, those claims are substantially less because there are comparatively few of those claims compared to the claims by landowners

and occupiers and, indeed, there is some overlap. It seems to me, that given the particular difficulties in establishing those claims, the approach taken in the proposed settlement distribution scheme appears rational. Unlike the Oakey and Katherine class actions, the proposal in the Williamtown class action is that "there be a broad brush taken to the extent that there is any recovery for inconvenience, distress and vexation", which, although obscuring differences between group members, does not seem to be unreasonable in the circumstances.

126 There is, of course, the prospect that minds might reasonably differ as to various aspects of the settlement distribution scheme, and even when applied there is scope for disagreement as to the ultimate amount to be paid to individual group members. The safeguard the Court has in this regard is that if any individual group member has a legitimate grievance as to the amount to be paid, then there is an independent review mechanism proposed which would allow such issues to be resolved.

I LATE REGISTRANTS

127 This is a matter which is relevant to the Katherine class action only.

128 The Katherine class action, in contradistinction to the Oakey class action and the Williamtown class action, is an open class proceeding. Orders were made, following the reaching of a conditional settlement, that unless group members registered by 7 May 2020, they were not entitled to participate in the settlement without leave of the Court. A significant number of group members did register, however, there are 179 group members with claims, estimated to have an aggregate value of a little over $9.6 million, who have attempted to register after 7 May 2020.

129 By way of comparison, out of those that did register in a timely way, the aggregate value of the claims was around $69.2 million (including those who had already entered into a litigation funding agreement). As counsel for the applicant indicated, there are three options with respect to these group members who have attempted to register late:

- *option 1*, the Court could allow the late attempted registrants to participate in the settlement on the same terms as those who have registered in a timely way;
- *option 2*, the Court could allow the registrants to participate in the settlement, but on terms that they share in the "buffer" that had been allocated in the settlement distribution scheme (and not be permitted to dilute the estimated returns notified to those persons who had registered in time); and

- *option 3*, the Court could decline to grant the late attempted Katherine group members leave to participate.

130 I consider that option 3 ought be rejected out of hand, particularly in the present circumstances. As Ms Jennings noted in her oral submissions, there may be very good reasons as to why some persons failed to register in a timely way, and I do not consider it would be consistent with the interests of justice to exclude persons who have failed to register in time. The approach as to whether the Court should adopt option 1 or option 2 is, in my view, finely balanced.

131 On the one hand, option 1 would reduce (by a figure of apparently five per cent) the amount that would be distributed to group members from the amount that had been notified to them, and upon which, no doubt, some degree of expectation has arisen. In part, the quantum of this distribution has possibly informed the attitude taken by group members as to whether or not they would object to the settlement. The orders of the Court that require persons to take steps by particular dates were meant to be treated seriously. It was natural for the group members who were provided with estimates to act on the basis that such an estimate was accurate.

132 Balanced against this is the fact that in the information communicated to group members it was made explicit that the amount that would be finally paid may be affected by the number of persons ultimately entitled to participate in the settlement.

133 Mr Lancaster SC, on behalf of the Commonwealth, has submitted that it would be appropriate for option 1 to be adopted if the late registrants are allowed to participate in the settlement. The key submission is that it would be appropriate for any group member to participate in the settlement on the same terms.

134 I was originally attracted to option 2, because of the expectation generated by the publication to group members of the likely settlement distribution. On balance, however, the relatively modest diminution in the amount that otherwise would be paid to group members is less of an injustice than depriving the late registrants of a much larger percentage of a claim that otherwise would have been payable to them if they were entitled to participate in the claim on an equal basis.

135 The failure to comply with the Court deadline may have resulted from a number of factors, from neglect to an entirely understandable reason. I think it is unsafe for me to proceed on the basis that there should be, in effect, some degree of punishment meted out to those persons who have registered late. With any settlement the Court is concerned to notify all group

members to allow them to participate, and for the class to be treated equally. I think this end is best achieved by adopting option 1 in the event the settlement is approved.

136 An additional issue concerning late registration involves the position of Mr and Mrs Whitehouse who entered into an unusual contract for the sale of real property. The vendor was the Housing Commission of the Northern Territory and the terms of the conveyance were that the property would be transferred to Mr and Mrs Whitehouse upon finalisation of a regime of instalment payments. It followed that Mr and Mrs Whitehouse only became the registered proprietors of the property after they made their final instalment in 2018, which was after the relevant date in the group member definition. Plainly, however, by 2016, at the very least, they had a right of equity to seek performance of the contract in accordance with its terms upon payment of the instalments.

137 There is no reason, in my view, why an order should not be made under s 33K to allow them to participate as group members in circumstances where the Housing Commission of the Northern Territory, I am told, opted out of the proceeding.

J CONCLUSION

138 One of the matters that is evident is that although there were strong feelings held by some persons who opposed settlement, there is a lack of any appetite by those persons to seek leave to opt out late and continue to maintain their claim against the Commonwealth. In making this comment, I do not make any implicit criticism of persons who opposed the settlement and yet are unenthusiastic about maintaining their claim. The prospect of making an application to opt out and to pursue the claim is, to say the least, a daunting one. It would presumably be necessary to gather together a cohort of such persons and arrange to somehow deal with the prospect of adverse costs.

139 Even Mr Roseworne, who is adamantly opposed to the Williamtown settlement, agreed that one thing he did not wish to do was to opt out and continue his own case. In these circumstances, one must balance the fact that a number of people are unhappy, with the fact that a large number of people are content with the settlement. The figures in this regard speak for themselves. Although there is a very large number of objections compared to other class action settlements, taken as a whole, the level of opposition is heavily outweighed by those who wish the settlement to go ahead.

140 I have given close consideration to the views of those that have opposed these settlements. Much of that opposition was based on what was, with great respect, a somewhat misguided notion that I could somehow compel the Commonwealth to offer a greater amount in some sort of counterfactual settlement. But this is not the real counterfactual. The relevant counterfactual is between the settlements as proposed, and the spectre of continuing with the case and proceeding to an initial trial. In my view, the settlements are fair and reasonable and in the interests of group members in all three proceedings and, accordingly, I propose to approve them.

K ORDERS

141 There has been significant discussion during the course of the hearing as to the proposed orders.

142 I have now been provided with proposed minutes of order which reflect the orders that the applicants propose that I make. During the course of these reasons I have raised a number of issues which require those proposed orders to be varied and, given the lateness of the hour, it seems to me that the appropriate course is for the parties to provide to my Associate copies of revised orders so that those orders can be made in Chambers early next week. Having said that, there are a couple of issues to which I should make reference.

143 The first is the terms of consequential orders which are referred to as being sought pursuant to ss 22, 23, 33V or 33ZF of the Act or FCR 1.32 and/or the Court's implied jurisdiction, that the proceeding is dismissed with no order as to costs and with all previous costs orders vacated with effect from the date in which the final payment is made pursuant to the settlement scheme, and that this order of dismissal will operate "as a defence and absolute bar to any claim or proceeding by the Applicant or Group Member with respect to this proceeding".

144 Counsel for the applicants accepted my characterisation of this order as "mere surplusage", but this is a characterisation disputed by counsel for the Commonwealth. The Commonwealth makes the point, which is not without some force, that the statement that the orders will operate as a bar to the maintenance of any claim may operate as some form of clarification or operate in some educative way. Despite this, I would not be disposed to make such an order. The orders must be read with the reasons.

145 As I have explained more than once, 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.

146 Although there is some force in the suggestion that this may not be immediately apparent to those unfamiliar with class actions, these reasons make it perfectly clear that upon the making of the ss 33V and 33ZB orders, there is no ability for either the applicants or the group members to maintain a claim against the Commonwealth with respect to the damages the subject of these class actions which, as noted above, do not include any claim for personal injury.

147 Finally, I am conscious that these are relatively lengthy *ex tempore* reasons. Given the extent of controversy over the settlements, it may be the case that one or other group member may wish to give consideration as to whether they wish to appeal. It seems to me to be optimal that they have the ability to make the decision about whether that step should be taken with the benefit of the revised reasons that I will publish in due course.

148 Accordingly, I propose to make an order under s 33ZF of the Act extending time for any appeal or any application for leave to appeal to be brought by the later of the time provided for in the Act, or 14 days after the publication of my revised reasons, whichever is the later.

I certify that the preceding one hundred and forty-eight (148) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lee.

Associate: 

Dated: 5 June 2020

SCHEDULE OF PARTIES

NSD 1908 of 2016

Applicants

Fourth Applicant:	ANN CLOUT
Fifth Applicant:	LINDSAY CLOUT
Sixth Applicant:	JOHN ARTHUR HEWITT
Eighth Applicant:	MARSHALLS TRANSPORT PTY LTD
Ninth Applicant:	NICHOLAS MARSHALL
Tenth Applicant:	MELISSA MARSHALL