IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST

S ECI 2019 01926

B E T W E E N

NICOS ANDRIANAKIS Plaintiff

and

UBER TECHNOLOGIES INC and others Defendants

S ECI 2020 01834

A N D B E T W E E N

JAMAL SALEM IN HER CAPACITY AS EXECUTOR FOR THE ESTATE OF ANWAR SALEM Plaintiff

and

UBER TECHNOLOGIES INC and others Defendants

S ECI 2020 03593

A N D B E T W E E N

PETER STEWART Plaintiff

and

UBER TECHNOLOGIES INC and others Defendants

S ECI 2020 04787

A N D B E T W E E N

H.D. ANDREE & M. ANDREE (A PARTNERSHIP) Plaintiff

and

UBER TECHNOLOGIES INC and others Defendants

SUBMISSIONS OF THE CONTRADICTOR

I Introduction and summary

1 We are appointed by the Court as Contradictor to make submissions about the common themes contained in:

(a) the objections lodged by group members to the Plaintiffs' application for approval of the proposed settlement of these proceedings; and

(b) applications by unregistered group members to participate in the proposed settlement that were lodged by 4pm on 2 July 2024 (or for which an extension of time has been granted).

2 In broad terms, our role is to assist the Court by making submissions about the substance of the common themes. We do not represent any group member or category of group members.

3 These submissions are structured as follows:

(a) In Part II below, we set out in detail our role in this case and the functions of court-appointed contradictors.

(b) In Part IIIA, we set out the principles for addressing objections to approvals of class action settlements, and in Part IIIB we give practical guidance for how the Court may consider those objections.

(c) In Part IIIC, we set out an analysis of the number of objections received, and in Part IIID we analyse each category of objections to the settlement received in these proceedings.

(d) In Part IVA, we set out principles and practical guidance regarding applications by unregistered group members to participate in class action settlements.

(e) In Part IVB, we summarise the operation of the class closure orders made in this case, and in Part IVC we set out an analysis of the applications received from unregistered group members.

(f) In Part IVD, we analyse each category of applications by unregistered group members received in these proceedings.

4 We adopt the defined terms used by the Plaintiffs in their written submissions and affidavits.

II The role of the Contradictor in this case

5 On 24 July 2024, the Court appointed us as Contradictor in the settlement approval application. The role of the Contradictor is limited, in accordance with the order 7 of the orders of 24 July 2024, as follows:

> 7. The Contradictor's role is limited to reviewing:
>
> (a) any notices of objection to the proposed settlement that were lodged by group members by 4pm on 2 July 2024 in accordance with paragraph 17 of the Orders dated 19 April 2024 (or in respect of which an extension of time has been granted) (**Objections**); and
>
> (b) any applications by unregistered group members to participate in the proposed settlement that were lodged by 4pm on 2 July 2024 in accordance with paragraph 21 of the Orders dated 19 April 2024 (or in respect of which an extension of time has been granted) (**UGM Applications**)
>
> and making any submissions about the common themes contained in the Objections and UGM Applications.

6 Order 8 provides that the Contradictor is not to act on behalf of any group member or otherwise seek to advance the position of any individual group member. Order 9 provides that the Contradictor's submissions address the merits of the arguments or themes identified in the Objections and the UGM Applications.

7 The terms of our appointment reflect, and are consistent with, observations made in this and other courts regarding the role of a court-appointed contradictor. Contradictors can be appointed to ensure "*there is a real conflict between conflicting interests*", such as where the interests of group members will have their rights determined by the approval of a settlement.[1] "*The role of a Court-appointed contradictor is to put forward all reasonably arguable competing positions on behalf of, and for the benefit of, group members*."[2] The Contradictor's role is not to take every arguable point that might be in group members' interests, "*but rather to exercise the normal and proper forensic judgments of counsel in determining what submissions ought to be made in the interests of those they represent*".[3] That includes explaining to the Court why the Contradictor choose not to make a submission that might be

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1 *Bolitho v Banksia Securities Ltd (No 6)* (2019) 63 VR 291 (***Bolitho No 6***), 322 (John Dixon J).

2 *Gill v Ethicon-Sárl (No 10)* [2023] FCA 228, [42] (Lee J); followed in ***Luke v Aveo*** *Group Limited (No 3)* [2023] FCA 1665, [32]–[33] (Murphy J).

3 *Luke v Aveo* [2023] FCA 1665, [33].

regarded as available, so as to satisfy the Court that the Contradictor has "*not overlooked something that the Court would expect to have been considered*".[4]

8 The orders are expressed in terms of the Contradictor "*reviewing any*" Objections and UGM Applications, and we have been provided with access to the full set of 634 Objections and 6,470 UGM Applications. However, given the volume of the material, the short time between our receiving it and the date of these submissions, the cost to group members of our doing so, and our understanding of the purpose of our appointment, it has not been feasible for us to review each individual Objection or UGM Application. Instead, we have relied on and addressed the common themes identified by Maurice Blackburn as contained in the Objections and UGM Applications. In so doing, we make submissions that we consider are open to be made, and ought to be made, in the interests of all group members. Where we refer to positions taken or arguments made by individual group members, we do so by way of example only, and not to advance the position of that group member.

III Objections to the settlement

A Principles regarding the consideration of objections to a settlement

9 The Plaintiffs have set out the general principles regarding the exercise of the Court's discretion in considering an application under s 33V of the Act for approval of the settlement of a representative proceeding.[5] We agree with those submissions, and add some relevant points below.

10 The role of the Court in considering whether settlement of a class action should be approved reflects the protective jurisdiction of the Court with respect to group members, who are not parties, and who may be unaware of or only partially acquainted with the litigation.[6] The Court is to be satisfied that the proposed settlement is in the interests of group members as a whole, not just the parties.[7] The central question for the Court's consideration is whether the proposed settlement is fair and reasonable having regard to the claims made by group members who will be bound by it.[8] There will rarely be one unique outcome which should be

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4 *Luke v Aveo* [2023] FCA 1665, [33].
5 Plaintiffs' Submissions (**PS**), [25]–[54].
6 *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, [8] (Jacobson, Middleton and Gordon JJ); *Botsman v Bolitho* (2018) 57 VR 68 (Tate, Whelan and Niall JJA) (***Bolitho* VSCA**), [202].
7 *ACCC v Chats House Investments Pty Ltd* (1996) 71 FCR 250, 258 (Branson J); *Bolitho* VSCA, [202].
8 See ***Jarra Creek*** *Central Packing Shed Pty Ltd v Amcor Ltd* [2011] FCA 671, [68]–[77], [82]–[97] (Jessup J).

regarded as fair and reasonable. So long as the proposed settlement falls within the range of fair and reasonable outcomes, taking everything into account, it will qualify for approval.[9]

11 In *Williams v FAI Home Security Pty Ltd (No 4)*,[10] Goldberg J set out a list of nine factors to which a court may have regard when assessing the reasonableness of the proposed settlement. These factors, with some modification, have been set out at paragraph 16.6 of the Court's *Conduct of Group Proceedings (Class Actions)* ***Practice Note*** (SC Gen 10, Second Revision). Those factors include, relevantly for our purposes, the reaction of group members to the settlement (see [16.6(a)]). The factors stated in *Williams* and the Practice Note are a useful guide,[11] including as to the consideration of issues between group members.[12] The relevance of the reaction of group members to the settlement has been reiterated in several subsequent cases.[13] The following general guidance can be distilled from the authorities.

12 The task of a Court in considering a settlement application under s 33V involves asking two critical questions: (1) whether the proposed settlement is fair and reasonable as between the parties, having regard to the claims of group members; and (2) whether the proposed settlement is in the interests of group members as a whole (ie, fairness between group members and not just the parties).[14] In determining the second issue, the Court is required to examine the internal workings of the settlement. Where there is any differentiation between the treatment of individual group members — which may be explicable for reasons including "*the strength of the case of some group member, issues of causation, the effect of legislation on the claim of the independent group member and the nature of the damage sustained by the group member*" — then it will be necessary to determine whether that differentiation is fair and reasonable.[15] As with other aspects of consideration of the proposed settlement, "*there will rarely be one single or obvious way in which a settlement should be framed*" in its

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9 *Jarra Creek*, [72].
10 [2000] FCA 1925, [47].
11 *Thomas v Powercor Australia Ltd* [2011] VSC 614, [13] (Beach J).
12 ***Wheelahan*** *v City of Casey* [2011] VSC 215, [62] (Emerton J).
13 See, eg, *Somers v Box Hill Institute* [2022] VSC 730, [21] (John Dixon J); *Hassan v Victoria* [2023] VSC 478 at [21] (John Dixon J); *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [16] (Beach J); ***Blairgowrie*** *Trading Ltd* ***v Allco*** *Finance Group Ltd (No 3)* [2017] FCA 330, [84] (Beach J) ("the reaction of the class to the settlement"); ***Smith*** *v Commonwealth (No 2)* [2020] FCA 837, [29]–[35] (Lee J).
14 ***Downie*** *v Spiral Foods Pty Ltd* [2015] VSC 190, [45] (J Forrest J), followed in *Bolitho No 6*, [62].
15 *Downie* [2015] VSC 190, [51], [53] (J Forrest J); *Lenehan v Powercor Australia Ltd* [2020] VSC 159, [25] (Nichols J).

differentiations between group members — "*reasonableness is a range, and the question is whether the proposed settlement falls within that range*".[16]

13 Courts have considered a low number of objections to settlement to be a relevant factor in favour of settlement,[17] although perhaps of little weight in some circumstances,[18] and not a factor which can relieve the Court from critically evaluating the settlement in all respects.[19] On the other hand, receipt of a large number of objections is not itself a factor that necessarily tends against approval of a settlement. As Lee J recognised in *Smith*, a case in which a large number of objections was received, "*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*."[20]

14 Objections can assist in identifying "general themes" that go to the fairness and reasonableness (or otherwise) of the proposed settlement.[21] As Emerton J said in *Wheelahan*, group members' reasons for objecting to a settlement "*provide a convenient focus by reference to which the Court will decide matters of fairness and reasonableness*."[22]

B How should the Court, as a practical matter, deal with the objections?

15 The principles stated above provide practical guidance for how the Court may deal with objections in this case.

16 The starting point is that objectors are entitled to have their objections taken into account in the Court's determination of the application for settlement approval. Group members have an obvious interest in the outcome of the application. Section 33X(4) of the Act recognises this by requiring notice to be given to group members before determining an application for settlement under s 33V (unless the Court is satisfied that it is just to determine the application without notice).

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16 ***Camilleri*** *v Trust Company (Nominees) Ltd* [2015] FCA 1468, [5(b)] (Moshinsky J).

17 See, eg, *Camilleri* [2015] FCA 1468, [5(f)] (Moshinsky J) ("[o]nce appropriate notice is given, the absence of objections or other response action from group members is a highly relevant consideration in support of a settlement, and all its elements").

18 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 204 [50] (Murphy, Gleeson and Beach JJ).

19 *Wheelahan* [2011] VSC 215, [34] (Emerton J).

20 [2020] FCA 837, [139].

21 *Smith* [2020] FCA 837, [31].

22 [2011] VSC 215, [63]. See also, to similar effect, *Pearson v Queensland (No 2)* [2020] FCA 619, [183] (Murphy J).

17 Consistently with the Act's recognition of group members' interest in a settlement approval application, the Settlement Notice states that "*All Group Members are entitled to object to the Proposed Settlement*".[23] Importantly, the right to object is not confined to registered group members. Group members who wish to object are to submit a Notice of Objection, together with evidence on affidavit and short written submissions, to the Court.[24] Objectors are also permitted to address the Court orally at the settlement approval hearing, either in person or by a lawyer.[25]

18 In our submission, the process set out in the Settlement Notice combined with the nature of group members' interests in the application gives group members a legitimate expectation that, if they make an objection substantially in accordance with the process set out in the Notice, their objection will be considered by the Court. Although we have not identified authority precisely addressing the point, in determining settlement approval applications, courts have proceeded on the basis that objecting group members are owed procedural fairness.[26]

19 This does not mean the Court needs to determine each objection as if it were an individual application for relief (although it is open to take that course). As set out above at paragraph 14, objections provide a convenient focus on the general themes that go to the fairness and reasonableness of the proposed settlement.

20 Further, where the number of objections are voluminous, the Court may consider the objections by category or theme. By way of illustration, in *Gill v Ethicon Sàrl (No 10)*, Lee J was assisted in the settlement approval application by contradictors who received and categorised approximately 250 objections.[27] The Court received the objections into evidence (by consent), and each were "*read and taken into account*".[28] In delivering his reasons, Lee J "*eschewed setting out specific representations provided to the Court" and instead provided a "summary of the material*"[29] based on the categories identified by the contradictors'

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23 See Settlement Notice (Orders of Matthews J dated 19 April 2024, Annexure A), [33] (emphasis added).
24 Settlement Notice at [30].
25 Settlement Notice at [31].
26 See *Bolitho* VSCA (2018) 57 VR 68, 101 [158], 120 [244], 126 [279], 130–134 [296]–[322] (Tate, Whelan and Niall JJA) (upholding objectors' appeal on grounds including denial of procedural fairness); *Gill v Ethicon-Sárl (No 10)* [2023] FCA 228, [62] (Lee J) (noting appointment of contradictors to assess objections ensured appropriate regard for considerations of procedural fairness).
27 [2023] FCA 228, [60], [62].
28 [2023] FCA 228, [62].
29 [2023] FCA 228, [62]. The summary is set out at [63]–[67].

solicitor, which Lee J was satisfied captured the "*concerns repeatedly put forward*".[30] In our submission, it is open to the Court to follow a similar approach here.

21 Accordingly, in this case, the Court may consider the objections by identifying the themes that emerge from the objections that are relevant to the Court's assessment of the fairness and reasonableness of the proposed settlement, and then consider those themes in determining the application.

C The total number of the objections received, and the number of objections in each category identified by Maurice Blackburn

22 The information summarised in this section is drawn from:

(a) the fifteenth affidavit of Michael Donelly, affirmed on 9 August 2024, which deals with the objections received by Maurice Blackburn (**Objections Affidavit**);

(b) the seventeenth affidavit of Michael Donelly, affirmed on 29 August 2024 (**Second UGM Affidavit**); and

(c) additional information we sought from Maurice Blackburn,[31] which is set out below from paragraph 25, and in the letter from Michael Donelly of Maurice Blackburn to us dated 2 September 2024, which is attached as **Annexure 1** to these submissions (**Donelly Letter**).

23 Maurice Blackburn received a total of 634 objections by the Court-ordered deadlines of 4.00pm on 2 July 2024 and 5 July 2024 (the latter deadline being an extension of time granted to Mr Greg Webb representing Taxicab Investments Pty Ltd).[32] Of those objections, Maurice Blackburn identified that 549 were in fact Purported UGM Applications (that is, objections that were or contained requests by group members to participate in the settlement),[33] and have been treated as such and addressed by us in Part IV below.

24 Some of those 549 Purported UGM Applications also contained objections to the settlement. Those objections are addressed in this part of our submissions.

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30 [2023] FCA 228, [64].
31 Pursuant to order 12 of the orders dated 24 July 2024.
32 Objections Affidavit, [11] (602 objections); Second UGM Affidavit [11] (32 additional objections).
33 Objections Affidavit, [20]–[21] (517 Purported UGM Applications); Second UGM Affidavit [11]–[12] (32 additional Purported UGM Applications).

25 In summary, the additional information we sought and received was that:

(a) we asked Maurice Blackburn to identify which objections were made by registered group members, and which were supported by evidence. Maurice Blackburn provided the information to us in two spreadsheets, and we added that information to our copy of the Thematic Objection Notice Register (about which, see paragraph 26 below);

(b) of the 549 Purported UGM Applications, eight appear to have been filed by registered group members.[34] Of those eight, three identified no ground(s) of objection, three stated that the group member's objection is that they were unaware of the proceeding, and three stated that the group member's objection is that it would be unfair to exclude UGMs from participating in the settlement;

(c) of the 85 objections which were not Purported UGM Applications, 53 were submitted by registered group members, and 32 were submitted by unregistered group members;[35] and

(d) of the 634 objections, 211 were not accompanied by any evidence.

26 We provide with these submissions a copy of the Thematic Objection Notice Register, to which we added the information referred to in paragraph 25(a) above in Columns O, P and Q (**Annexure 2**).

27 We have summarised this information about the objections in the table below. Columns 1 and 2 (theme number and theme description) are a copy of those columns in the table at paragraph 18 of the Objections Affidavit. The information in Column 3 (number of objections) is taken from paragraphs 20–41 of the Objections Affidavit and paragraphs 11–13 of the Second UGM Affidavit and included here for convenience. The information in Column 4 (number of objections made by registered group members) is derived from the additional information provided by Maurice Blackburn pursuant to our request, as set out in paragraph 25(a) above.

[34] Donelly Letter, [3].
[35] Donelly Letter, [4].

Number	Theme Description	Number of objections	Number of objections made by RGMs[36]
1(a)	Objection Notice is, in whole or in part, a Purported UGM Application	549 (all also treated as UGM applications)	8 out of 549
1(b)	Objection Notice is a Purported UGM Application, and identifies no ground(s) of objection	180	3 out of 549
1(c)	Objection Notice is both a Purported UGM Application, and a substantive objection, where the group member's objection is that they were unaware of the proceeding	280	3 out of 549
1(d)	Objection Notice is both a Purported UGM Application, and a substantive objection, where the group member's objection is that it would be unfair to exclude UGMs from participating in the settlement	136	3 out of 549
2	No grounds of objection identified (blank objection)	27	5
3	Settlement amount inadequate	50	44
4	Lack of consultation or transparency	5	4
5	Proposed SDS	10	7
6	Trial should proceed/other defendants should be added	7	6
7	Plaintiff's legal costs and/or proposed funding commission	5	4
8	Other	23	4
9	Incomplete objections	5	1

D The Contradictor's analysis of the categories of objections

28 As set out in the Objections Affidavit,[37] Maurice Blackburn has identified a number of common themes in the objections. Pursuant to the terms of our appointment, we have not reviewed each of the objections, nor conducted our own analysis of the objections for the purposes of identifying common themes.

[36] **RGM**s are Registered Group Members.
[37] Objections Affidavit at [18], [20]–[41]; Donelly Letter at [9].

29 In this section, we set out our submissions regarding how each category of objection may be considered by the Court, based on the examples identified in the Objections Affidavit and other examples we have identified.

30 A threshold question is: should objections received from RGMs be treated differently from objections received from UGMs? We consider the answer to this question is no. As stated in the Settlement Notice, all Group Members are entitled to object.[38] As is apparent from the table set out above, few objections in Categories 1(a)–(d) are from RGMs, and most of the objections in each of Categories 3 to 7 are from RGMs. But this is not significant, as RGMs have no basis to object based on a lack of notice of either the proceedings or the proposed settlement. Some objections are made by UGMs who have not applied to participate in the settlement, or whose applications may be refused. This is also not significant. An objection of substance that can bear on the fairness and reasonableness of the settlement ought to be considered on its merits even if the objector ultimately does not participate in the settlement if approved.

Category 1(a): the Objection Notice is, in whole or in part, a Purported UGM Application

Category 1(b): the Objection Notice is a Purported UGM Application, and identifies no ground(s) of objection

31 As stated above, 549 of the 634 objections in substance comprise or include an application by the group member to participate in the settlement (referred to as a Purported UGM Application). This category overlaps with the other categories — that is, where an objection includes a Purported UGM Application and an objection to the settlement, the objection is in Category 1(a) and one or more of the other categories. Maurice Blackburn has treated all of the 549 Purported UGM Applications as UGM Applications,[39] which means they fall to be determined as set out in Part IV below. We agree with that approach.

32 Of the 549 Purported UGM Applications, 180 did not identify any ground(s) of objection (this is Category 1(b)). These can be set aside for the purposes of considering objections.

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[38] Settlement Notice at [33].
[39] Objections Affidavit at [27].

33 The remaining 369 Purported UGM Applications contain objections. These are to be considered based on the content of their objections, which fall into one or more of the remaining categories as set out below.

Category 1(c): the Objection Notice is both a Purported UGM Application, and a substantive objection, where the group member's objection is that they were unaware of the proceeding

Category 1(d): the Objection Notice is both a Purported UGM Application, and a substantive objection, where the group member's objection is that it would be unfair to exclude UGMs from participating in the settlement

34 These two categories concern Purported UGM Applications in which the substance of the objection is that the settlement should not be approved either because the objector was unaware of the proceeding, or that it would be unfair for the settlement to be approved without permitting all UGMs to participate (or both).

35 Of the objections in these categories:[40]

(a) 213 of the 280 objections in Category 1(c) are supported by evidence;

(b) 91 of the 136 objections in Category 1(d) are supported by evidence; and

(c) 42 objections are in both Category 1(c) and 1(d) and are supported by evidence, which means there are a total of 262 objections[41] in Categories 1(c) and 1(d) that are supported by evidence, and 154 that are not.[42]

36 We consider that objections falling only into Category 1(c) can be considered solely as UGM Applications. Maurice Blackburn considered objections to fall into this category if the objector did not know about the proceeding, stated that many UGMs did not receive proper notice of or were unaware of their rights regarding the proceeding or proposed settlement, or mistakenly thought all group members were automatically included in any potential settlement.[43] The common thread is that the objection is made based on the individual objector

[40] See Annexure 2.
[41] 213 + 91 – 42.
[42] 280 + 136 – 244.
[43] Objections Affidavit at [24].

not receiving notice of the proceeding or the proposed settlement (or mistaking the effect of the notice, if received), and that the objector wishes to participate in the settlement.

37 Whether any individual objector received notice is not a matter that goes to the fairness or reasonableness of the proposed settlement as a whole.[44]

38 Objections in Category 1(d), however, raise a broader point regarding the fairness of approving the proposed settlement in light of asserted deficiencies in the notification process set out in the Court's orders of 21 July 2023 (**Class Closure Orders**) and 19 April 2024 (**Settlement Notification Orders**). These should be considered as going to the fairness of the proposed settlement. An "*important consideration*" in determining an application for settlement approval is "*whether group members were given timely notice of the critical elements, so that they had an opportunity to take steps to protect their own position if they wished*".[45]

39 The objection of [redacted] brings focus to the point.[46] [redacted] deposes that, until March 2024, he had not heard of the class action against Uber or received any correspondence about this proceeding.[47] He has made a UGM Application, but submits that, if his application were refused, he would object to the approval of the settlement.[48]

40 [redacted] is a NSW taxi driver. His evidence is that he does not read newspapers or magazines, watch television, or use social media.[49] He did not hear from other taxi drivers about the 'town hall' meetings conducted by Maurice Blackburn.[50] And, as a driver who does not own a taxi licence, he is not a member of the NSW Taxi Council (**NSWTC**).[51] Accordingly, [redacted] did not receive the Notice of Opt Out or Registration (**Registration Notice**), which he understands was distributed by the NSWTC to its members, published in tabloid newspapers, and handed out at town hall meetings.[52] He gives evidence that notices about the proceedings could have reached him and other drivers by being shown on the

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44 It is, of course, relevant to determining an objector's Purported UGM Application.
45 *Camilleri* [2015] FCA 1468, [5(f)] (Moshinsky J).
46 Objections Affidavit, [24(b)] and MHD-16 at 79; UBCA.001.002.0221.
47 Objections Affidavit, MHD-16 at 83 [7]–[8].
48 Objections Affidavit, MHD-16 at 83 [14], 96 [9].
49 Objections Affidavit, MHD-16 at 85 [29].
50 Objections Affidavit, MHD-16 at 85 [30].
51 Objections Affidavit, MHD-16 at 85 [31].
52 Objections Affidavit, MHD-16 at 85 [28]. (We cannot confirm if the Registration Notice was handed out at town hall meetings; our understanding is those meetings took place before the proceeding was commenced. See paragraph 89 below).

electronic screens used by network operators to communicate with drivers, or by being posted on noticeboards at taxi bases and airport taxi ranks. He also deposes that the town hall meetings could have been held at taxi bases.[53] Based on this evidence, the total number of registered group members, and the number of late registrants, [redacted] submits that the "*notification regime was deficient*".[54] He also criticises the notification regime for prioritising the interests of licence holders, operators and networks (by way of distribution through industry bodies) over drivers.[55]

41 The effectiveness (or otherwise) of a so-called 'soft class closure' notice regime is a matter that can go to the fairness and reasonableness of a settlement. However, in considering the interests of group members as a whole, the effectiveness of the notice regime must be considered alongside group members' interests in the use of soft class closure to promote settlement and the need for efficiency in any notice regime. Of course, whether a notice regime is deficient is a matter for evidence.

42 In this case, Nichols J determined that the Class Closure Orders were "*appropriate to ensure that justice is done in the proceeding*".[56] Her Honour's reasons for doing so included that raising the prospects of settlement would be "*a step towards producing a tangible benefit for group members*", and that soft class closure would do so by making available more accurate and complete information as to the quantum of group members' losses for the purposes of attempting to negotiate a settlement.[57] Her Honour also found that the notice regime proposed by the parties would result in "*appropriate and sufficient notice of the requirement to register an interest in the proceedings as a condition of claiming a benefit*" under a proposed settlement,[58] bearing in mind that unregistered group members retained liberty to apply to the Court if they could "*sufficiently demonstrate unfair prejudice to them*" by the operation of the registration orders.[59]

43 In light of the reasoning of Nichols J, the evidence in the Confidential Affidavit about the matters undertaken by Maurice Blackburn in preparing for mediation, and the fact of the proposed settlement, the Court can proceed on the basis that the Class Closure Orders

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53 Objections Affidavit, MHD-16 at 85–86 [34]–[37].
54 Objections Affidavit, MHD-16 at 97 [12].
55 Objections Affidavit, MHD-16 at 97 [14]–[15].
56 [2023] VSC 415, [26].
57 [2023] VSC 415, [27].
58 [2023] VSC 415, [28].
59 [2023] VSC 415, [30].

advanced the prospects of the settlement that was ultimately reached. If the settlement is otherwise fair and reasonable, this results in a tangible benefit to group members by allowing them to avoid the significant additional costs, risks and uncertainties of litigation.[60] That is a factor of significant weight in considering objections under Categories 1(c) and 1(d).

44 We do not consider that evidence of the kind given by [redacted] is sufficient to show that the notice regime set out in the Class Closure Orders was deficient or otherwise unfair to group members as a whole, for the following reasons:

(a) The raw numbers of RGMs and UGM Applications do not support any firm conclusions regarding the effectiveness of the notice regime. There may be any number of reasons why a group member did not register following the Class Closure Orders. Those reasons could include the group member not receiving notice, deciding not to act on the notice (for whatever reason), being unable to act on the notice for reasons of personal hardship or otherwise, or simply adopting a 'wait and see' approach.

(b) The fact that any individual group member has a good explanation as to how they did not receive the notice does not itself mean that the notice regime was deficient. Orders for distribution of notices issued under s 33X must balance the desirability of as many group members as practicable receiving the notice against the costs of distribution. Accordingly, the Act provides that personal notice must not ordinarily be ordered to be given to each group member,[61] and the *Practice Note* requires the plaintiff's solicitor to ensure that distribution of opt-out notices is "*calculated to best achieve the effective dissemination of the notices among group members in the most cost-effective way*".[62]

(c) Any unfairness or prejudice to individual group members arising from a lack of notice, if substantiated by appropriate evidence, may justify a grant of leave for the group member to participate in the settlement.

45 Of course, evidence given by objectors must be considered in the context of the evidence as a whole. For example, [redacted] evidence that he does not subscribe to the NSWTC's mailing list[63] must be considered alongside evidence that the NSWTC's mailing list included

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60 [2023] VSC 415, [27].
61 Act, s 33Y(4).
62 *Practice Note,* [11.3(d)].
63 Objections Affidavit, MHD-16 at 85 [32].

email addresses for some 5,818 taxi drivers.[64] In any event, if [redacted] UGM Application is granted, his objection (which is made in the alternative) will fall away. The same would apply to other group members who object on this basis as an alternative to a successful UGM Application.

Category 2: No grounds of objection identified (blank objection)

46 Blank objections need not be considered.

Category 3: the settlement amount is inadequate

47 Fifty objectors raised concerns regarding the inadequacy of the settlement amount. This is the most numerous category of objections after those in Category 1. Twenty-four are supported by evidence.

48 It is outside the scope of our appointment for us to make submissions on whether the total settlement sum is fair and reasonable. However, we make submissions below regarding the relevance of the general themes raised by objectors regarding the total settlement sum.

49 Several objectors state that their likely share of the settlement sum will be insufficient to compensate for the loss they have suffered as a result of the Defendants, or to remedy financial insecurity that they find themselves in as a result of the Defendants. For example:

(a) [redacted] states that she owned one taxi licence and two limousine licenses for the purpose of funding her retirement, and otherwise has no superannuation. The loss of the value of the licences means she lost significant funds that should have been available for her retirement.[65]

(b) [redacted] deposes that she purchased a taxi licence based on representations from the Victorian Government that doing so would provide for financial security in retirement. The loss of the value of that licence has left her in debt and struggling to care for her children.[66]

(c) [redacted] deposes that, as a result of Uber's operations in Victoria, to maintain a sustainable income he had to work "*much longer hours often for less fares*", which

64 See Open Affidavit, MHD-15 at 90 [26].
65 Objections Affidavit, MHD-16 at 150; UBCA.001.001.0109_0002.
66 UBCA.001.001.0184_0005.

affected his family and health and caused him stress and medical issues. The proposed settlement should not be approved if it is not adequate to cover his losses.[67]

(d) [redacted] depose that, based on a simple estimate of the total settlement divided by the number of RGMs, the available compensation under the settlement would be much less than the losses they have suffered. Taxi licence holders will therefore receive "*very low compensation compared to the extremely high financial losses incurred as a result of Uber's illegal operation*".[68]

50 Objections of this nature emphasise the importance of the Court's task in scrutinising the proposed settlement. However, it is necessary and appropriate for the Court to assess group members' perspectives on the adequacy of the settlement sum against the risks, costs, and range of likely outcomes had the matter proceeded to trial.

51 Several group members objected on the basis that the settlement sum is not enough to deter Uber and other companies like it from future misconduct.[69] Objections of this nature should not be given any weight, as it is not the purpose of civil proceedings for compensation to be awarded or determined based on deterrence of future civil wrongs.[70]

52 Some objectors expressed confidence in the merits of the case, suggesting that they were of the view that taking the case to trial would certainly result in higher compensation.[71] Objections of this nature should be considered against the assessment of the risks of the case set out in the Confidential Opinion of counsel.

Category 4: there has been a lack of consultation or transparency

53 Five objectors raised objected to the proposed settlement on the basis that group members had not been adequately consulted about it.[72] For example, [redacted] deposes that

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67 UBCA.001.001.0021_0005.

68 UBCA.001.001.0039_0004.

69 See, eg, Objections Affidavit at [30(b)]; objection of [redacted], UBCA.001.001.0021_0005; objection of [redacted], UBCA.001.001.0039_0004; objection of [redacted], UBCA.001.001.0216_0007; objection of [redacted], UBCA.001.001.0049_0004. [redacted] objection is exemplary of 12 in similar form: see Objections Affidavit at [30(c)].

70 Cf. civil penalty proceedings, where the predominant (if not the sole) purpose of civil penalties is deterrence: *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450. Civil penalties are not available to private litigants unless expressly provided for by statute, and are not available as a remedy in the tort of conspiracy.

71 See, eg, objection of [redacted], UBCA.001.001.0049_0004 (referring to "the likelihood of Uber ultimately losing the case").

72 Objections Affidavit at [32].

Maurice Blackburn failed to respond to his questions in a timely way, and that he sees no reason for the need for group members to have signed a confidentiality agreement before receiving full information about the proposed settlement.[73]

54 Mr Donelly deposes as to the reasons for requiring confidentiality undertakings from group members at paragraph 101 of his Open Affidavit. The key reason was that the Confidential Annexures to the SDS contain material relating to claim valuations that is based on evidence that has not been read in open court, and assessments of risk by Maurice Blackburn and counsel (which, we presume, are subject to legal professional privilege).

55 In our submission, it is consistent with the interests of group members as a whole for these matters to be kept confidential and made available to group members upon provision of a confidentiality undertaking. In particular, there is substantial public interest in maintaining confidentiality over counsel's assessment of risks in the Confidential Opinion.

Category 5: objection to the proposed SDS

56 Objections to the proposed SDS are highly relevant to the overall reasonableness and fairness of the proposed settlement, because the objections go to the fairness of the settlement as between group members (that is, fairness *inter se*). Accordingly, we have reviewed each of the 10 objections in this category. Some of the objections in this category were put in summary terms that can be quickly evaluated.[74] We leave these aside. We address each of the objections that raise detailed, substantive concerns about the SDS below.

57 [redacted] objected on the basis that, had each participant in the class action been given an opportunity to substantiate their individual losses upon registration, "*Maurice Blackburn*

[73] Objection of [redacted], UBCA.001.001.0021_0005.

[74] Objection of [redacted], UBCA.001.001.0006_0002 (objecting to the settlement because of its "complexity"); objection of [redacted], UBCA.001.001.0216_0004 (stating that the SDS "disproportionately benefits certain class members over others, failing to equitably address the varying degrees of harm suffered by different individuals within the class"); objection of [redacted], UBCA.001.002.0071_0002 ("Make the settlement more [fair] for those who lost most/or all of their investment; equal process and outcome for owner, operators, drivers and families dependent on this industry"); objection of [redacted], UBCA.001.002.0121_0002 ("however the proposed settlement amount is divided amongst the claimants, it will either be, inadequate or inequitable"); objection of [redacted], UBCA.001.002.0166_0002 ("Any settlement money should be equally divided between all members who [were] active in Taxi industry during the Claim Period").

would have had a much more accurate picture of what the total settlement should have been".[75] [redacted] has set out his estimated losses as an owner of NSW taxi licences.

58 [redacted] objection is to the use in the proposed SDS of a categorical approach to assessing group members' share of the settlement sum, rather than requiring the scheme administrators to conduct individualised loss assessments. Mr Steinhaus's objection can be considered alongside the following points:

(a) As submitted by the Plaintiffs, courts have recognised that the benefits of individualised settlement allocations must be balanced against the costs and practicalities of conducting individualised loss assessments.[76]

(b) The assessment of the appropriateness of the proposed SDS is essentially a pragmatic exercise. The scheme need not be perfectly accurate or efficient to be fair and reasonable. The process of assessing claims under a settlement distribution scheme "*is intended to provide a reasonable process by which claims of Group Members can be processed fairly and efficiently without the need for court intervention*".[77] And, as Mortimer J said in the context of approving a settlement, "*[f]airness and reasonableness are moderate standards, rather than ones which require absolute certainty or confidence in a particular point of view about legal issues, if there can ever be such certainty in the law in any event*."[78]

[redacted]

59 [redacted]

[75] UBCA.001.001.0073_0006.
[76] See PS, [42]–[51].
[77] *Matthews v Ausnet Electricity Services Pty Ltd (Ruling No 43)* [2016] VSC 583, [32] (J Forrest J).
[78] *McAlister v New South Wales (No 2)* [2017] FCA 93, [32].
[79] Confidential Affidavit at [100]–[103].
[80] Confidential Affidavit at [104]–[108].
[81] Confidential Affidavit at [92]–[95], [109].

[redacted]

60 [redacted]

61 Finally, [redacted] objects on the basis that, because the total number of group members or their allocations to the various categories under the SDS have not been determined (or at least estimated), it is impossible to know whether the settlement is fair and reasonable.[85] As a practical matter, it is only possible to determine the total number of group members and the loss categories into which they fall once the process of settlement administration has been conducted. It is inevitable that, at this stage, there will be uncertainty about how and to whom the settlement fund is ultimately distributed.

62 We did not identify any objections to the claims assessment and review processes in the proposed SDS.

Category 6: the trial should proceed or other defendants should be added

63 Some group members object on the basis that other defendants (such as governments or regulators) should be sued as well, or that the matter should go to trial so that Uber's conduct can be publicly examined.[86]

64 Objections in this category can be placed to one side. It was open for group members who wished to bring a claim against Uber and/or other defendants, and take it to trial, to opt out

82 UBCA.001.001.0119_0004.
83 UBCA.001.004.0008_0005.
84 Confidential Affidavit at [134].
85 UBCA.001.004.0008_0005.
86 Objections Affidavit at [34]–[35].

of these proceedings. Of course, it is understandable that group members wish to see Uber held publicly accountable. But as Emerton J said in the context of approving a class action settlement against the City of Casey, a local council, in relation to contaminated land:[87]

> It may be that a full-blown trial of the plaintiffs' claims would further expose the actions of Casey (and/or the EPA and the other defendants) and serve to clear the air. However, that is not the purpose of civil litigation, and objectors should not imagine that the trial of the proceeding will be conducted in the manner of a royal commission so as to satisfy their need for answers and for accountability. It could well be a very prolonged, expensive and ultimately unsatisfactory way of exposing the alleged failures of Casey and/or any of the other defendants and result in limited if any financial benefit to group members.

Category 7: objection to the Plaintiffs' legal costs and/or the proposed funding commission

65 Five objectors raised issues with the plaintiffs' legal costs and/or the proposed funding commission.[88] These are not objections to the proposed settlement as such, but rather to the proposed deduction of legal costs and/or the funding commission from the settlement fund.[89] We have reviewed each of the objections in this category.

66 It is beyond the scope of our appointment to make submissions regarding the appropriateness of allowing the proposed deductions from the settlement fund for Maurice Blackburn's legal fees and Harbour's litigation funding commission and associated application for a common fund order. However, we consider that the Court can approach the objections in this category as follows.

67 The objections regarding legal costs can be considered against the report of the Court-appointed independent costs referee, which was filed on 28 June 2024. The referee was appointed to state, with reasons, her opinion on:[90]

(a) the reasonableness of the Plaintiffs' legal costs and disbursements incurred in relation to the proceeding, up to and including the hearing of the Settlement Approval Application (including costs anticipated and yet to be incurred as at the date of the Report); and

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87 *Wheelahan* [2011] VSC 215, [112].
88 Objections Affidavit at [36].
89 *Luke v Aveo* [2023] FCA 1665, [75] (Murphy J).
90 Orders dated 19 April 2024, Order 28.

(b) the reasonableness of the sum proposed for settlement administration costs.

68 As to the proposed deduction for the litigation funder's commission, none of the objections in this category contained an objection to the quantum or percentage of Harbour's funding commission.

69 Three objectors raised concerns to the effect that the settlement of the proceeding was to the benefit of Harbour and Maurice Blackburn, who stood to gain certainty of payment at the cost of a prospect of a greater total recovery for group members if the matter proceeded to trial.[91] Assessment of these objections will ultimately form part of the Court's overall assessment of the fairness and reasonableness of the settlement in light of the likely costs and risks of the case, as well as the assessment of Harbour's proposed commission in light of the costs it incurred and risks it assumed in funding the case.

Category 8: other

70 Of the 23 objections identified as not falling within one of the above categories, 12 are supported by evidence, and 14 are also categorised as Purported UGM Applications. We have reviewed the objections that are supported by evidence and have not identified any objections that are not, in substance, addressed in the categories set out above.

Category 9: incomplete objections

71 Mr Donelly deposes that five objections were categorised as 'incomplete' on the basis that they did not include any pages identifying the basis of the objection. We have reviewed these and agree with that categorisation. Three of the objections are documents that comprised only the signature page of the Notice of Objection.[92] One is a photograph of the first page only of

[91] Objection of [redacted], UBCA.001.001.0073_0006 ("the only winners in this case that that are assured of getting a fair return a and Maurice Blackburn irrespective of the settlement amount"); Objection of [redacted], UBCA.001.001.0116_0002 ("This settlement may be in the interest of the Funder (Harbour Fund III, LP) due to avoided costs and an accelerated schedule of investment return, however it is not in the interest of Group Members who have a legitimate case against the Defendants and should proceed for the original amount sought"); Objection of [redacted], UBCA.001.002.0275_0002 ("We band together as a class to be available to have a funder risk what we cannot. But this should not give the funder the right to settle early and simply earn themselves a pay day whilst abandoning our financial needs."); Objection of [redacted], UBCA.001.004.0008_0005 ("That is not a fair outcome from this litigation in my view as it basically means the case was only conducted for the benefit of the lawyers and the litigation funder.").

[92] UBCA.001.001.0005; UBCA.001.001.0028; UBCA.001.002.0043.

a Notice of Objection.[93] One is an illegible partial scan of what appears to be a Notice of Objection.[94]

72 These objections can be put to one side.

IV Unregistered Group Members

A Principles regarding applications by UGMs to participate in a settlement

73 As stated above, the Court made the Class Closure Orders on 21 July 2023 providing that group members were to register by 2 October 2023 if they wished to participate in any settlement that was reached before 18 March 2024.

74 The Class Closure Orders have effect unless otherwise ordered by the Court. Whether or not to permit an unregistered group member to participate in a settlement involves the exercise of the Court's discretion under s 33ZF of the Act. It is well-established that when exercising power under s 33ZF, when ensuring justice is done, courts must be astute to protect the best interests of all group members.[95] In the context of the specific question confronting the Court in this proceeding, we make the following submissions.

75 First, the overarching question for the Court in determining the UGM Applications is whether, consistent with the exercise of power in s 33ZF, it is "*appropriate or necessary to ensure that justice is done in the proceeding*" to either grant leave to the UGM to participate in the settlement or to refuse such leave. The test has been expressed in terms that the Court should not permit an UGM application unless it is "*satisfied that it would be unjust to exclude that class member*",[96] or where the group member can "*sufficiently demonstrate unfair prejudice to them in the operation of the* [class closure] *orders*."[97] We do not consider there to be any meaningful difference between these statements of the principle. Self-evidently, a group member who is bound by a settlement but not entitled to participate in the proceeds of it will suffer prejudice. That is an unavoidable consequence of making class closure orders, where greater certainty about the size of the class and the quantum of claims for the purpose of facilitating settlement must be balanced against the risk of prejudice to group members

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93 UBCA.001.002.0058.
94 UBCA.001.003.0008.
95 *Wigmans v AMP Ltd* (2021) 270 CLR 623, [116] (Gageler, Gordon and Edelman JJ).
96 *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2018] FCA 1030, [44] (cited at PS [162]).
97 *Andrianakis v Uber Technologies Inc* [2023] VSC 415, [30] (Nichols J).

who are excluded by the orders. It follows that something more than prejudice is required: the prejudice must be 'unfair' or exclusion must be 'unjust' in order for leave to be granted.

76 Second, the justification for the class closure decision in the particular case is relevant. In the reasons for judgment, Nichols J observed that a particular feature of this proceeding was that there was significant uncertainty about the size of the class and the quantum of the losses of group members, and accepted evidence from the plaintiff that if the proceeding settled on an open basis, there was a significant risk that claims by UGMs would "*have the effect of diluting the recoveries of registered group members, and altering the basis on which the settlement had been reached*."[98] Her Honour determined that closing the class was likely to facilitate settlement (which would produce a tangible benefit for group members), and that she was satisfied that group members would receive appropriate and sufficient notice of the requirement to register an interest in the proceedings.[99]

77 Of course, new or different facts may emerge which warrant the reopening of the class wholly or in part. For example, in *Wedtel Pty Ltd v* ***Estia*** *Health Limited*,[100] it was identified in April 2021 — after the proceeding had settled and settlement notices had been sent to group members, but before the approval hearing – that the original class closure notices sent in March 2020 were erroneously not sent to a significant number of group members. The Court made orders which had the effect that a substantial additional number of group members were permitted to register to participate in the settlement, diluting the returns to be received by other group members by 4 per cent. However, because the distribution error arose from the respondent's service provider using the wrong share register to send the initial notice, the parties agreed to increase the settlement sum accordingly.[101]

78 It follows that partial reopening may be justified where there is persuasive evidence that there has been some deficiency in giving the class closure notice, or where a UGM has provided persuasive evidence that they did not receive notice of the class closure.

79 Third, the Court may require that any application be supported by evidence, and the absence of evidence may justify excluding a group member from participation in the settlement. In this case, the Court has made orders expressly requiring that any UGM Application be

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98 [2023] VSC 415, [17], [26].
99 [2023] VSC 415, [27], [28].
100 [2021] FCA 475 (Beach J).
101 See [31]–[44]; [52]–57].

supported by evidence by way of an affidavit. It is reasonable to assume that any person who has made a UGM Application pursuant to those orders was aware of the requirement to provide evidence.

80 Fourth, the grant of leave to UGMs is likely to dilute the funds available to satisfy the claims of RGMs.[102] While this is not a guaranteed outcome (because RGMs still need to satisfy the loss assessment criteria including by providing evidence where necessary), it is a fair observation that the UGM Applications in this case have been made by group members on the assumption that they *are* entitled to some award from the settlement proceeds. [redacted]

81 Accordingly, and consistently with the Court's obligation under s 33V to consider the fairness and reasonableness of the settlement as between group members, the Court should critically assess the reasons and the evidence provided by a UGM for failing to register by the deadline of 2 October 2023.[104] As J Forrest J put it in *Downie*, the Court should be satisfied that any determination of UGM applications "*appropriately balances the potential desirability of permitting group members who failed to register by the deadline to participate in the settlement on one hand, as against the interest of group members who registered in a timely fashion in not having the amount available to them reduced without proper reason*."[105]

82 The critical assessment of the reasons and evidence provided by UGMs in support of their applications should, however, be undertaken having regard to the characteristics of the class

[102] See the authorities cited in PS fn 186.
[103] Third UGM Affidavit, [99].
[104] *Dorjay Pty Ltd v Aristocrat Leisure Ltd* [2008] FCA 1311 at [21], and see PS [163] and [166(a)] (summarising consideration by Murphy J in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2018] FCA 1030 of certain applications by unregistered group members in that case).
[105] [2015] VSC 190, [166].

and the Court's protective jurisdiction.[106] As Merkel J observed in the context of a class action brought by persons refused refugee status and seeking judicial review:

> …the present matter involves a class action by a group of persons having little command of the English language and, I assume, even less knowledge and understanding of the Australian legal system. In these circumstances no assumption can be made that a failure to raise an issue is based on instructions. That fact, together with the additional fact that the action is a class action under Part IVA, can give rise to a greater responsibility on the part of the Court in relation to the conduct of the hearing.[107]

83 Finally, we have not identified any authority which expressly addresses the question of how, where a proceeding has settled while class closure orders are in force, the Court must approach the determination of UGM Applications;[108] specifically: must the Court consider each separate application, or can it assess like applications as a cohort? The answer to this question involves balancing several competing considerations: the Court's obligations under the *Civil Procedure Act* to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute (ss 7, 8(1)(a)), 9); the interests of RGMs in having the settlement approved and the settlement funds distributed as cheaply and quickly as possible; and the process set out in the Settlement Notice for making an UGM Application which we consider provides group members with a legitimate expectation that their application will be considered by the Court (cf. paragraph 18 above).

84 We have proceeded on the basis that the Court can determine certain cohorts of like UGM Applications on a collective basis (see, for example, paragraph 107 below). However, based on our review of the UGM Applications exhibited as examples to the Third UGM Affidavit, it may not be possible to determine a large percentage of the UGM Applications without

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[106] See *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, [8] (Jacobson, Middleton & Gordon JJ) ("The role of the Court is important and onerous. It is protective. It assumes a role akin to that of a guardian, not unlike the role a court assumes when approving infant compromises" (citations omitted).).

[107] *Nguyen v the Minister for Immigration Local Government and Ethnic Affairs* (1996) 66 FCR 239, 244–45.

[108] The Plaintiffs refer at PS [170]–[173] to three decisions of Beach J: *Blairgowrie v Allco* [2017] FCA 330, an 'open' class action which settled on terms which included a sum for RGMs and a reserve sum for UGMs, who were identified by reference to a (restored) share register. The volume of UGMs who registered far exceeded the estimates contemplated by the reserve sum. Further, a significant number of UGMs registered their claims after the date in the settlement notice ('Late Registrants'). Beach J determined to permit the Late Registrants to participate in the reserve sum in settlement along with the UGMs, on grounds including that the settlement registration period occurred over the summer vacation (late December to mid January): [54]–[78] and [161]–[177]; *Wills v Woolworths Group* (where the settlement approval reasons are silent on the treatment of UGMs: [2022] FCA 1545); and *Zantran Pty Ltd v Crown Resorts Ltd* [2022] FCA 500, where there were no 'live' class closure orders in place at the date of settlement. Of the 6,000+ UGMs who registered to participate in the settlement after it was announced, only 10 sought to participate in the settlement after the settlement registration process had closed, and there being no objection, the Court granted leave: at [25].

reviewing each application.[109] The categorisation of the UGM Applications by Maurice Blackburn helpfully identified common themes, but that process was not designed or intended to assess the merits of the applications and cannot stand as a substitute for that process. That is not to say that significant guidance in that task cannot be derived from the principles above, and we have sought to apply that approach in the submissions which follow.

B Unregistered group member applications

85 The information summarised in this section is drawn from the sixteenth affidavit of Michael Donelly, affirmed on 9 August 2024 (**UGM Affidavit**), the eighteenth affidavit of Michael Donelly, affirmed on 29 August 2024 (**Third UGM Affidavit**), and the Categorised UGM Application Register annexed to the Second UGM Affidavit.

86 Maurice Blackburn has identified a total of **6,470** UGM Applications received by the firm in accordance with the orders of the Court by 2 July 2024, or for which extensions of time were granted by the Court on 24 July 2024, 7 August 2024 and 19 August 2024.

87 Each of the UGM Applications has been reviewed and categorised by Maurice Blackburn. That process has identified, relevantly, whether the application is made by a group member and whether it is accompanied by evidence. The UGM Application was then allocated, where possible, to one or more categories in accordance with the Categorisation Principles.

Notice to Group Members

88 The majority of the UGM Applications are made on the basis that the applicant was not aware of the proceedings until the settlement was announced. We have therefore provided a short overview of the notices given to group members in the proceedings.

89 The proceedings were commenced with the *Andrianakis* proceeding on 3 May 2019. Prior to its commencement, in February 2019, Maurice Blackburn held various 'town hall' meetings arranged by various industry bodies in Sydney, Brisbane and Perth and attended by potential group members.[110] The proceeding received broad media coverage in newspapers, radio, and

[109] Taking a conservative approach to the terms of our appointment, it is beyond the scope of our appointment to make submissions about the various options available to the Court to assess the UGM Applications, but subject to that caveat, we consider it is open to the Court to appoint a referee or judicial registrar to undertake the assessment, on terms which may include that the UGM Applications are to be assessed only on the basis of the information provided (ie, no further evidence), and pursuant to any guidance provided by the Court.

[110] Affidavit of Michael Donelly affirmed 15 June 2023 (in support of the application for class closure orders), annexed to the Open Affidavit, Exhibit MHD-15, page 75, [27].

online, both before it was filed in this Court and in the immediate aftermath of filing.[111] Following the commencement of the proceeding, Maurice Blackburn continued to publicise the litigation and encourage group members to register their claims.

90 By 15 June 2023, approximately 8,500 group members had registered their claims with Maurice Blackburn.[112]

91 On 21 July 2023, the Court made the Class Closure Orders. Pursuant to those orders, the Registration Notice was made available on the websites of the Supreme Court and Maurice Blackburn; sent to each RGM; and sent to 12 industry associations, bodies or individuals in Victoria, New South Wales, Queensland and Western Australia and nationally and distributed by them to their members or networks, informing them of the proceeding and the class deadline. Further, an advertisement containing the critical information in the notice was published in a weekday edition of a popular newspaper in Victoria, New South Wales, Queensland and Western Australia, in English, Greek, Chinese, Italian, Hindi, Bengali and Arabic. The translation of the advertisement in languages other than English was made available on the Maurice Blackburn website, and distributed to any industry associations or group members on request.

92 Following the Class Closure Orders, between 622 and 726 additional group members registered their claims with Maurice Blackburn.[113] Order 5 of the Class Closure Orders provided that any group member who had previously registered their claim with Maurice Blackburn was taken to be a RGM.

93 As 23 April 2024, there were 8,701 registered group members,[114] of whom [redacted] have signed a funding agreement with the Funder.[115]

94 On 19 April 2024, the Court made the Settlement Notification Orders. Those orders, and the text approved by the Court in the Notice of Proposed Settlement (Annexure A to the orders), and the Communication to Unregistered Group Members (Annexure F to the orders) read:

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111 *Andrianakis v Uber Technologies* [2023] VSC 415, [25]; Affidavit of Cameron Hanson affirmed 15 June 2023 (in support of the application for class closure orders), annexed to the Open Affidavit, Exhibit MHD-15, page 101, [8].

112 Affidavit of Michael Donelly affirmed 15 June 2023 (in support of the application for class closure orders), annexed to the Open Affidavit, Exhibit MHD-15, page 75, [29].

113 622: Affidavit of Michael Donelly affirmed 15 April 2024, [42]; 726: Open Affidavit, [77].

114 MD Open Affidavit, [79].

115 [redacted]

> If you are an Unregistered Group Member and you wish to seek permission from the Court to participate in the Proposed Settlement, by 4pm on 2 July 2024, you must **identify the basis on which you think you should be granted permission** and **provide evidence (by way of affidavit) in support of your application for permission**, and any written submissions (of no more than 2 pages in length), by email to Maurice Blackburn …

95 In addition to publishing the above on the online portal established by Maurice Blackburn for UGM applicants, Maurice Blackburn published a template affidavit formatted for the *Andrianakis* and *Salem* proceedings, and a list of authorised affidavit takers in Victoria. Both documents were sourced from the Supreme Court website.[116]

C Analysis of categories of unregistered group members – threshold criteria

96 Based on the principles set out above, we consider that the Court may approach the determination of UGM Applications by first considering, as threshold criteria, whether the application is (1) valid; (2) supported by evidence; and (3) identifies any reason why the group member did not register prior to the settlement. We consider the requirement that UGMs "*identify the basis on which you think you should be granted permission*" to participate in the settlement plainly conveys the expectation that the UGM will provide a reason for not registering prior to the announcement of the settlement.

Invalid applications

97 Maurice Blackburn has identified that an application will be invalid if it is illegible, a duplicate of another application, has been rescinded by the applicant, or is not made by a group member. We agree with this categorisation. There are 109 invalid UGM Applications.

No evidence

98 Applications which are not supported by evidence may be dismissed without further consideration by the Court. The orders of the Court, and the Notice of Proposed Settlement and Communication to Unregistered Group Members approved by the Court, were clear that any UGM Application must be supported by evidence. It is consistent with the principles outlined above to require that applications be supported by evidence, and it is unfair to those UGM Applicants who have provided evidence to disregard or waive that requirement for others.

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[116] MD Open Affidavit, [99].

99 Although the Court's orders provided that evidence should be provided by way of affidavit, Maurice Blackburn has categorised a UGM Application as being supported by evidence where it is accompanied by an affidavit or a statutory declaration. Of the 5,742 UGM Applications supported by evidence, 439 are accompanied by a statutory declaration. Taking into account the demographic profile of the class, we agree that a UGM Application that is accompanied by a statutory declaration should be categorised as complying with the requirement to provide evidence. Further, and for the same reason, we agree with Maurice Blackburn's determination that the affidavit or statutory declaration must be signed to be categorised as 'evidence', that a blank affidavit or statutory declaration is not 'evidence', and that technical noncompliance with documentary forms as outlined in the Categorisation Principles is permissible.[117]

100 There are 619 UGM Applications not supported by evidence.

101 It follows that there are 5,742 valid UGM Applications which are supported by evidence. We refer to these as **Valid UGM Applications**.

No reasons for not registering earlier

102 For the reasons set out at paragraph 96 above, UGM Applications where the group member has not provided any explanation or identified any reason why they did not register prior to the settlement announcement do not, in our opinion, provide a basis on which the group member should be granted to permission to participate in the settlement.

103 It is possible to deal with two categories of UGM Application at the threshold stage. They are category 6 (statement of group membership) and category 9 (financial hardship).[118]

104 ***Category 6***. There are 5,583 Valid UGM Applications where the UGM states in their application that they are a group member.[119] Within this category:

(a) 3,343 have identified an additional basis for participating in the settlement (ie, they also fall within one or more of categories 3–5 and 7–15); and

[117] See Categorisation Principles, [8].
[118] The figures in sub-paragraphs 104 to 106 below were provided by Maurice Blackburn at our request, and are set out in the Donelly Letter (annexed at paragraph 22(c) above).
[119] See Third UGM Affidavit, [50]

(b) 2,240 have been categorised as 'statement of group membership' alone.

105 If the Court (or the parties) intended that group members would be entitled to register to participate in the settlement by reason of their group membership alone, then it is likely that the orders would have expressly stated that requirement and nothing more. Accordingly, and taking into account the matters in paragraph 96 above, we consider it is open to the Court to decline the applications falling into the category in paragraph 104(b) without further consideration.

106 ***Category 9***. There are 709 Valid UGM Applications where the UGM states that they are experiencing financial hardship. Within this category:

(a) all but two[120] have identified an additional basis for participating in the settlement (ie, they also fall within one or more of categories 3–8 and 10–15);

(b) however, 102 Valid UGM Applications have been categorised as falling within category 9 and category 6 and no other categories.

107 That is, 102 applications by UGMs are seeking permission to participate in the settlement on the basis that they are a group member (category 6), and they have suffered financial hardship (category 9). We consider that having experienced financial hardship, or experiencing financial hardship combined with being a group member (and accepting for present purposes the truth of the representations in the evidence), do not, by themselves, provide an explanation for the UGM not registering to participate in the proceeding at an earlier stage. Accordingly, it is open to the Court to decline the applications identified as falling into the categories in paragraph 106(a) and (b) without further consideration. If, however, financial hardship is a factor that contributed to why a UGM was unable to register and that reason is substantiated by evidence, then the UGM Application will also fall into another category. For example (and this example is not taken from any particular UGM Application), if group member states that they are only infrequently able to access their email account due to financial constraints, their application will also appear in category 5.

108 Maurice Blackburn has also identified 71 UGM Applications which do not raise any of the themes set out in the Categorisation Principles, including the catch-all 'other' category. Of those, 63 are not accompanied by evidence. Of the eight which are accompanied by evidence,

[120] UBCA.100.001.0171, UBCA.100.002.1235.

the affidavit or statutory declaration contains no content other than the person's name and signature. These applications may be declined by the Court without further consideration.[121]

109 The effect of the application of the threshold questions, if accepted by the Court, on the number of UGM Applications is as follows:

Column	Theme Description	# UGM Applications	#UGM Applications Remaining
Total UGM Applications:		6,470	
1	Invalid	109	6,631
2	Not supported by evidence	619	5,742
Supported by evidence and:			
6	Statement of group membership as sole reason	2,240	3,502
9	Statement of financial hardship as sole reason	2	3,500
6 + 9	Statement of group membership and financial hardship as only reasons	102	3,398
N/A	No themes raised or 'blank' applications (see Third UGM Affidavit, [79]–[80]	8	3,390

D Analysis of categories of unregistered group members – remaining categories

110 The table below sets out the categories to which the Valid UGM Applications have been allocated by Maurice Blackburn. The table is a modified version of the table at paragraph 23 of the Third UGM Affidavit. The third column contains the number of Valid UGM Applications falling into a particular category (noting that many Valid UGM Applications fall into more than one category), as reflected in the Third UGM Affidavit.

Number	Theme Description	# Valid UGM Applications	Third UGM Affidavit
3	States reason for missing class closure deadline	526	[37]
4	No knowledge of proceeding	3,246	[41]
5	No knowledge of class closure deadline	11	[46]

[121] Donelly Letter, [8].

Number	Theme Description	# Valid UGM Applications	Third UGM Affidavit
6	Statement of group membership	5,583	[50]
7	Medical reasons	104	[55]
8	Language or special vulnerabilities	273	[60]
9	Financial hardship	709	[65]
10	Travel	41	[70]
11–14	Mistaken belief of previous registration in proceedings	41	[75]
15	Other	19	[78]

111 Each of the Valid UGM Applications has been categorised as identifying at least one reason provided by the applicant in support of their application. Save for some limited exceptions, it is not possible to assess the applications by category, because the merit of a particular application will turn on matters specific to that application. For example, one application categorised as 'Travel' may consist of a bare statement that the deponent was overseas, without identifying when, whereas another may state that the deponent was overseas between 1 July and 1 November 2023 and therefore did not receive or was able to learn of the Registration Notice.

112 However, we consider that the following general principles can guide the assessment of the merits of the Valid UGM Applications:

(a) All UGM Applicants will suffer prejudice if they are excluded from participation in the settlement. However, prejudice alone is insufficient to warrant inclusion. UGM Applicants must demonstrate that they will suffer unfair prejudice if they are excluded from participation in the settlement.

(b) Where a UGM was aware of the class closure deadline at the time, but did not take any steps to register, and does not have a persuasive and credible reason for not doing so, they will not have established unfair prejudice.

(c) We are not aware of any deficiency in the distribution of the Registration Notice that would warrant a partial reopening of the class[122] (cf. the situation in *Estia,* at

[122] And see the ruling in this matter on the applications by UGMs to file UGM Applications out of time: *Andrianakis v Uber Technologies, Inc (No 2)* [2024] VSC 436, [42].

paragraph 77 above). However, that does not foreclose that a group member may have a credible explanation for not receiving the Registration Notice.

(d) Where an UGM claims they were not aware of the class closure deadline, but does not offer any explanation for their non-awareness (for example: they are not a member of the industry association charged with distributing the notice; they do not read the newspaper; they rarely or never see or speak to other taxi or hire car drivers, license holders, and operators; they were interstate, overseas, unwell or experiencing other difficulties at the relevant time), then having regard to the principles set out in paragraph 81 above, and taking into account the purpose of the Class Closure Orders, the absence of any deficiency in the distribution of the Registration Notice, and the fact that many thousands of group members did register prior to 2 October 2023, it is open to the Court to decline their application.

(e) Similarly, where an UGM claims they were not aware of the proceeding until the settlement was announced, but does not offer any explanation for their non-awareness (for example: they were not in any of the participating states in early to mid 2019; they do not read the newspaper; they rarely or never see or speak to other taxi or hire car drivers, license holders, and operators), it is open to the Court to decline their application.

(f) Where the UGM claims they were unaware of the proceeding and/or the class closure deadline, and provides an explanation for their lack of awareness, or provides any other reason in support of their application, the reason should be assessed on its merits, having regard to the matters set out in paragraphs 81–82 above. Without intending to be exhaustive, reasons which specifically identify and address, for example, the time and place of relevant events, and the particular circumstances of the deponent, will be more persuasive than reasons which are vague and general in nature.

(g) In other cases, courts have refused to accept UGM Applications where the evidence of the failure to register consists of unsupported assertion (eg, that the deponent was overseas, but without exhibiting an airline ticket or passport record).[123] However, in this case, UGMs were not advised in the 19 April 2024 orders or in the

[123] See the cases cited in PS [163]–[166].

communications to UGMs approved in those orders that they should provide any evidence other than an affidavit, ie, they were not expressly directed to substantiate the evidence in their affidavit with records.[124] Given it appears a large proportion of UGMs (if not group members) speak English as a second language, are unlikely to be familiar with the legal system, and in most cases were not represented or assisted by lawyers, we consider that if the evidence would, if substantiated, be accepted as a good reason for non-registration, it is open to the Court either to accept the reason as stated, or to give those group members an opportunity to substantiate their evidence (but not to provide any additional reasons) before their application is determined.

113 We make the following additional submissions regarding the specific categories in Categorised UGM Application Register.

Category 3: States reason for missing class closure deadline

114 Maurice Blackburn has identified 526 Valid UGM Applications as expressly referring to the class closure deadline, and providing a reason why the deadline was not met.

115 This category of UGM Applications may be divided into two sub-categories:

(a) where the UGM states they were aware of the class closure deadline, and provides a reason for missing it, the merits of the reason provided should be assessed. In our submission, the reasons and evidence provided by an applicant falling into this sub-category should be held to a high standard to justify treating them differently to those RGMs who were aware of the class closure deadline and complied with it;

(b) where the UGM states they were not aware of the class closure deadline (ie, also falls into category 5), but provides a reason for missing it, their application should be determined on the merits of the reason provided, including the weight of the relevant evidence, and having regard to any determination by the Court as to the assessment of reasons falling into categories 4–15 below.

116 By way of example, [redacted] seeks leave to participate in the settlement, and refers to "*significant and special circumstances that prevented me from registering as a Registered*

[124] As stated in PS [165], whether an application should be refused by reason that the UGM failed to provide evidence in a particular form may depend on the terms of the notice; citing *Dorjay Pty Ltd v Aristocrat Leisure Ltd* [2008] FCA 1311, [20].

Group Member for the Uber Class Actions by 2 October 2023 …".[125] The reasons then provided are that English is his second language and he finds it difficult and confusing to understand legal documents written in English, and specifically the registration processes in this case (category 8) and that he was overseas for certain periods (category 10).

117 However, [redacted] then states that he was informed of the registration process through family and colleagues, but by the time he was able to learn more about his rights, and the registration process, it had expired.[126] It is not clear from this evidence if [redacted] was aware of the registration process while it was still open, or if he did not become aware of it until after it had closed. In light of the other reasons provided for missing the registration deadline, we consider that the application should be determined based on the merits of those reasons, which are addressed below.

Category 4: No knowledge of proceeding

Category 5: No knowledge of class closure deadline

118 Categories 4 and 5 apply to UGM Applications where the explanation offered by the applicant for not registering before the settlement is that they were not aware of the proceeding, and/or of the class closure deadline.

119 We refer to paragraphs 112(d) and 112(e) above. Where a Valid UGM Application falling into either or both of these categories does not offer any explanation for the deponent's unawareness of the proceeding and/or the class closure deadline, and while acknowledging that the question is finely balanced, we nevertheless consider it is open to the Court to decline those applications on the basis that insufficient reasons have been provided to satisfy the Court that the UGM would suffer unfair prejudice if excluded, and that would justify the prejudice to RGMs by their inclusion.

120 For example, one UGM Application simply states that the deponent has been "*part of the taxi industry since 1 September 2011 and the reason I have missed the previous registration was not having any awareness of the class action*".[127] No further explanation is provided. It is

[125] UBCA.100.001.0480 at the Third UGM Affidavit, pages 30–34 (Category 3 example).
[126] At [3(d)].
[127] UBCA.100.006.0126 at the Third UGM Affidavit, page 43 ([redacted]) (Category 4 example).

difficult to assess the merits of this application without knowing something more about the deponent's circumstances.

121 However, provision of a reason for the applicant's unawareness of the class deadline will not be enough to justify inclusion; the reason must be assessed according to its merits. For example, [redacted] was the owner of a taxi license in New South Wales at the relevant time.[128] She states that she was aware of the proceeding but assumed that as it was issued in Victoria, she was not included and so did not take any steps to register. She also states that the discussions she had with colleagues did not identify any specific deadline to register, and that she did not see the newspaper advertisement and that the Registration Notice was not sufficiently publicised; for these reasons, she was not aware of the class closure deadline until she had missed it. Against that is her evidence that she had been "*discussing bringing an action against Uber for over a year*", apparently in the period around the time these proceedings were commenced, and that she undertook her own inquiries online and found out that there was a deadline which she had missed. In circumstances where [redacted] was aware of the proceeding, was actively considering bringing proceedings herself against Uber in the relevant period, and was capable of identifying information online about the proceedings without any apparent difficulty, it is open to the Court to determine that her reasons are insufficient to satisfy the Court that she will suffer unfair prejudice if excluded from participation.

Category 6: Statement of group membership

122 As set out above, Valid UGM Applications where the sole basis for seeking inclusion is that the UGM is a group member may be declined by the Court without further consideration, for the reasons in paragraph 105 above.

Category 7: Medical reasons

123 There are 104 Valid UGM Applications where the deponent refers to a medical or health issue.

124 Where the deponent states that they were not able to register prior to 2 October 2023 due to medical reasons, and the evidence is assessed as meritorious and persuasive, including by having regard to at least the matters in paragraph 112(f) and (g) above, we consider the UGM

[128] UBCA.100.002.1614 at the Third UGM Affidavit, pages 44–46 (Category 5 example).

will likely have demonstrated unfair prejudice. However, where the medical issues identified are not sufficiently linked to the deponent's failure to register, they are unlikely to warrant inclusion, having regard to the interests of all group members.

125 For example, [redacted] states that he was not aware of the proceedings until he learned of the settlement. He states that has suffered from a range of physical and mental health issues, which were exacerbated by "*the arrival of Uber and the [Victorian] government's acquisition of my license*" and that "*during this overwhelming period*", he stopped paying attention to the news and had reduced capacity to work and stay informed about industry matters.[129] Accepting without reservation the truth of [redacted] evidence as to his health challenges, we consider the medical issues alone are expressed in too vague a way to constitute an adequate explanation for [redacted] lack of knowledge of the proceeding for a three year period, such as to constitute unfair prejudice.[130]

Category 8: Language or special vulnerabilities

126 There are 273 Valid UGM Applications where the deponent refers to English or language difficulties, or otherwise raises a 'special vulnerability' such as age, legal guardianship or living in a remote area.

127 The nature of 'special vulnerabilities', combined with the Court's protective jurisdiction under Part 4A of the Act,[131] mean that Valid UGM Applications in this category are more likely to contain evidence of unfair prejudice if the UGM is excluded. While these applications should be assessed on their merits, the nature of the special vulnerability identified may warrant some leeway in the assessment of whether the evidence is sufficiently probative.

128 For example, [redacted] is a taxi license holder in Victoria.[132] At the time the *Andrianakis* proceedings were commenced, he was approximately 80 years old. He is not literate in English and has never used a computer in his life. On the day the proceeding was

[129] UBCA.100.002.0438 at the Third UGM Affidavit, pages 56–59.
[130] We note, however, that [redacted] relies on numerous grounds in his application, and that at least one of those grounds (eg, at [8]) may justify his inclusion.
[131] The Court's protective and supervisory role is "a modern and far more specific mirror of Chancery's *parens patriae* jurisdiction, whereby courts of equity could make a diverse range of orders for the protection of children and persons historically regarded as incapable (who could not be heard in a suit before the Court)". *Dyczynski v Gibson* (2020) 280 FCR 583, 678 [402] (Lee J).
[132] UBCA.100.01.0141, Third UGM Affidavit, pages 63–66.

commenced, his son attempted to register [redacted] application with Maurice Blackburn by phone, and received an email with a link to the registration portal, which is annexed to [redacted] affidavit. Unfortunately, online registration was not then completed, but [redacted] assumed that his claim had been registered. While there is no evidence from his son to explain why he did not take any further step to register his father's claim, it is evident that [redacted] acted very quickly in seeking to register his claim, and has been forthcoming that the registration process was not completed. Further, in circumstances where [redacted] is elderly, not literate in English, and not computer literate at all, his reliance on his son to protect his interests was plainly reasonable. These circumstances combined would, we consider, constitute a sufficient basis for the Court to conclude that [redacted] would suffer unfair prejudice if excluded from the settlement.

Category 9: Financial hardship

129 As set out above, UGM Applications where the sole basis for seeking inclusion is that the UGM has suffered financial hardship, or where the only reasons are that they have suffered financial hardship and is a group member, may be declined by the Court without further consideration, for the reasons in paragraph 107 above.

Category 10: Travel

130 There are 41 Valid UGM Applications where the deponent has stated they were travelling or overseas during parts of the proceeding.

131 Where the deponent states that they were not able to register prior to 2 October 2023 because they were travelling or overseas, and the evidence is assessed as meritorious and persuasive, including by having regard to at least the matters in paragraph 112(f) and (g) above (and specifically the need for precision as to the dates of travel), we consider the UGM may have demonstrated unfair prejudice.

132 In other cases, 'travel' has not been a sufficient basis to include a late registrant who otherwise was sent a relevant notice by email.[133] But it is relevant that, in this case, the Registration Notice was not emailed to all potential group members, although some may have received it from the industry associations and other representative persons identified in the Class Closure

[133] See, eg, *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2018] FCA 1030, [67]–[68] (cited at PS [166(c)]).

Orders. Moreover, the Notice was not published in newspapers in states other than Victoria, New South Wales, Queensland and Western Australia, and was only published once in each newspaper in each state during the registration period. It follows, in our opinion, that if a UGM provides credible evidence that they were overseas or in a state other than Victoria, New South Wales, Queensland and Western Australia, between 21 July and 2 October 2023, this may be a reasonable explanation for why they did not register in that period.

133 For example, [redacted] is a former taxi driver in New South Wales, who moved to Pakistan in 2020 (and whose affidavit has been attested by a notary public in Pakistan, suggesting he still lives there).[134] Similarly, [redacted] is a former taxi driver in Victoria, who moved to Tasmania at the end of 2021 (and whose affidavit has been affirmed in Tasmania, suggesting he still lives there).[135] The Registration Notice was not disseminated overseas, or in Tasmania, and while some national industry associations were asked to distribute the notice to their mailing lists, it is not known if those mailing lists included persons who no longer worked in the industry and/or whose physical address had changed. Depending on the Court's approach to evidence of this nature that is not supported by records (see paragraph 112(g) above), this may be sufficient to demonstrate unfair prejudice if persons in the position of [redacted] and [redacted] are not permitted to participate in the settlement.

Categories 11–14: Mistaken belief of previous registration in proceedings

134 There are 41 Valid UGM Applications where the deponent mistakenly believed that they had previously registered to participate in the proceeding, falling into four sub-categories.

135 ***Category 11***. Seven Valid UGM Applications are recorded as indicating a mistaken belief that the applicant has previously registered to participate in the proceedings. Where the evidence demonstrates that the UGM sought to register their interest in this proceeding and provides a persuasive and credible reason for the mistaken belief, we consider this will be sufficient to demonstrate unfair prejudice.

136 However, where the applicant gives evidence that they completed what they thought was a registration process but there is no evidence that that process was connected to this proceeding (ie, it does not refer to Maurice Blackburn, or the Supreme Court, or it occurred at a time

[134] Annexed to the Third UGM Affidavit at pages 82–86 (there is no Bates number on our copy).
[135] UBCA.100.002.0838, Third UGM Affidavit at pages 87–92.

unconnected with these proceedings), then we do not consider that the reasons are sufficiently persuasive to constitute unfair prejudice. It is not unreasonable for the Court to expect that a group member who is prepared to sign up to something, should have regard to what they are signing. It would not be fair to RGMs to permit the inclusion of UGMs who, for example, "*in or about 2018, signed registration paperwork at Melbourne Airport to join the class action against Uber Technologies*",[136] when there is no evidence that Maurice Blackburn conducted any 'in person' registration processes at all, let alone at Melbourne Airport, or in 2018, a year before the proceeding commenced.

137 ***Category 12***. Seven Valid UGM Applications indicate that the deponent registered a different entity with Maurice Blackburn, but failed to register all their relevant entities. Subject to our overarching observations about such evidence being sufficiently persuasive to explain the mistake (ie, specific as to time, place and the particular circumstances of the deponent), we consider this will be sufficient to demonstrate unfair prejudice. The fact that such UGMs registered in some capacity is, we think, probative evidence of their intention to register all claims.

138 ***Category 13***. For the same reasons as set out in paragraph 136 above, the eight group members who have filed Valid UGM Applications and who registered their interest in other legal proceedings will not, without more (such as a special vulnerability), have demonstrated unfair prejudice.[137]

139 ***Category 14***. Fourteen Valid UGM Applications have been recorded as providing other reasons for their mistaken belief that they had registered in the proceedings. Each will turn on their own facts, with the assessment of the merits of these claims having regard to the matters already set out above. For example, [redacted] states that she was "*out of the country when I thought I had registered to be a group member of the class action*," but does not state when she was out of Australia, when she thought she had registered, and the steps she took that led her to think that she was registered.[138] That is not sufficient evidence to establish unfair prejudice.

[136] See UBCA.100.001.0256, Third UGM Affidavit at pages 93–96, page 96, [14].
[137] See, eg, UBCA.100.001.0353, Third UGM Affidavit at pages 107–108 (UGM registered a claim with Gadens law firm in 2017).
[138] UBCA.100.002.0646, Third UGM Affidavit at pages 109–114.

Categories 15: Other

140 There are 19 Valid UGM Applications categorised as 'other'. Of these:

(a) seventeen state that the UGM did not register due to concerns about registration information being used for fraudulent purposes. We do not consider that this is a sufficient basis to demonstrate unfair prejudice, particularly where those concerns appear to have fallen away upon the announcement of the settlement. Moreover, it was open to any UGM who genuinely held these concerns at the time to make their own inquiries, either directly to Maurice Blackburn, or by seeking legal advice;

(b) two raise unique issues arising from the administration of deceased estates.[139] We have reviewed these applications and agree that they require specific consideration as to their merits. In accordance with order 8 of the orders of 24 July 2024 appointing us, we do not make any further submissions regarding these applications;

Particular UGM Applications

141 For the same reasons set out in paragraph 140(b), we do not make any submissions about the 11 applications identified at paragraph 81 of the Third UGM Affidavit as warranting the attention of the Court due to the particular circumstances of why the UGM seeks leave to participate in the settlement.

UGM Applicants represented by Gordon Legal

142 Pursuant to orders made on 7 and 19 August 2024, Gordon Legal filed applications on behalf of 205 UGMs.[140] The Gordon Legal UGM Applications are included in the Categorised UGM Application Register.

143 Of the Gordon Legal UGM Applications, 161 have filed an affidavit or statutory declaration. Those applications should be treated in the same way as other UGM Applications falling into

[139] UBCA.100.002.1183 and UBCA.100.002.0094.

[140] There are 200 persons identified in Schedule A to the orders dated 7 August 2024, and 13 persons identified in Schedule B to the orders dated 7 August 2024. All of the persons in Schedule B are also listed in Schedule A, except for Hassan A. Dhisow (number 2 in Schedule B). A UGM Application has been filed on his behalf: UBCA.200.001.0008. Accordingly, there are 201 persons identified in the 7 August 2024 orders; plus the four identified in Schedule A to orders dated 19 August 2024 = 205 applications.

the categories identified by Maurice Blackburn, and having regard to the matters we have already addressed in these submissions.[141]

144 There is a cohort of 44 UGMs represented by Gordon Legal who have not filed individual affidavits setting out the basis on which they say they should be permitted to participate in the settlement, but who rely instead on two affidavits of Andrew Grech affirmed on 2 and 6 August 2024, and the affidavit of Florence Dato affirmed on 2 August 2024. For the reasons which follow, we consider the Court may decline those applications without further consideration.

145 Mr Grech is a partner of Gordon Legal. His affidavits, in summary, describe demographic characteristics of the group based on a questionnaire prepared by Gordon Legal and distributed to the group. The questionnaires themselves are not in evidence, and it is not stated if all 44 UGMs in this cohort completed the survey. The results provided in Mr Grech's affidavits are, relevantly, that 100 per cent of the respondents were born outside of Australia, 41 per cent describe their literacy in English as limited, 74 per cent describe their literacy in understanding legal documents in English as limited, and 86 per cent do not engage with mainstream social and news media.

146 Ms Dato is a community organizer at the Migrant Workers' Centre, a community legal service and organisation representing the labour rights of migrant workers in Victoria. In brief summary, her evidence identifies common barriers to the legal system experienced by migrants in Australia.

147 We understand these affidavits were tendered in the applications for extensions of time to file the applications, and so we do not make any submissions about their admissibility. However, insofar as the affidavits are relied on as a basis for why this group should be permitted to participate in the settlement, the evidence is of insufficient weight to establish unfair prejudice. In particular, certain critical matters are not identifiable from the affidavits and the questionnaires, including when the applicant first became aware of the proceeding, noting

[141] This includes: (1) 144 persons identified in the orders dated 7 August 2024 at Schedule A to those orders; (2) 13 persons identified in Schedule B to the 7 August 2024 orders; and (2) the four persons identified in Schedule A of the orders dated 19 August 2024. These cohorts are identified as 'Gordon Legal UGMs – Group 1' and 'Gordon Legal UGMs – Group 2' in the Third UGM Affidavit at [88]–[94].

this was in the questionnaire but the answers were not provided,[142] and any explanation for the applicant not registering prior to 2 October 2023.

148 These UGMs also rely on the written submissions filed on their behalf on 6 and 13 August 2024. However, those submissions primarily address the application for an extension of time to file the UGM Applications. They do not address the merits of the applications in any substantive way.

149 We do not consider it would be fair to RGMs, or to the 161 UGM applicants represented by Gordon Legal who have filed evidence, or to all other UGMs who have filed evidence and whose applications fall to be considered on their merits, to grant leave to this cohort of UGMs to participate in the settlement. To grant leave to persons who have not satisfied the minimum criteria for consideration by the Court would place those persons in a privileged position over all others. While we appreciate the unfamiliarity and complexity of the legal system experienced by all participants is exacerbated for persons who were not born in Australia and for whom English is not their first language, nevertheless, the majority of UGMs represented by Gordon Legal (and who share that demographic profile), have taken the trouble to ensure that evidence is placed before the Court to allow their applications to be assessed on their merits. We can see no reason to waive that requirement for this group of applicants.

V Conclusion

150 The Contradictor submits that the approaches to dealing with Objections and UGM Applications set out above are in the interests of group members as a whole, and consistent with the just and efficient exercise by the Court of its jurisdiction under s 33V of the Act.

2 September 2024

K Burke
T Rawlinson

[142] See Affidavit of Andrew Grech dated 2 August 2024 at [8]. Further, at [13], Mr Grech observed that "*on the whole, the Gordon Legal UGMs did not before approximately late March to April 2024 have any knowledge of the Uber Class Action, or the orders made by the Court on 21 July 2023…*" (emphasis added).