IN THE SUPREME COURT OF TASMANIA

BEFORE JUSTICE ESTCOURT

JC & ORS

v

STATE OF TASMANIA

TRANSCRIPT OF PROCEEDINGS
FOR 25TH NOVEMBER 2024

APPEARANCES:

MR ARMSTRONG KC AND MR SLADE FOR THE PLAINTIFFS
MR READ SC AND MS O'FARRELL FOR THE DEFENDANT

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MR ARMSTRONG KC: May it please the Court, my name is Armstrong, initials L.W.L. I appear together with Mr Slade for the plaintiffs on this application. We're instructed by Angela Sdrinis Legal.

5

HIS HONOUR: Thanks, Mr Armstrong.

MR READ SC: If the Court please, I appear with Ms O'Farrell for the State of Tasmania.

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HIS HONOUR: Yes, thanks, Mr Read. Apologies for the confusion over robes. I'm the last one who worries about robes or no robes, but I wasn't sure whether it was an application for judge in chambers or an application to the Court. But it's an interlocutory application.

15

MR ARMSTRONG KC: As your Honour will be aware, there's a little bit of a lively debate as to the nature of these applications, and different courts, indeed different judges on different courts, take different practices.

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HIS HONOUR: It used to be – it used to be the case that for a deed of family settlement it had to be approved by a Full Court.

MR ARMSTRONG KC: Right.

25

HIS HONOUR: So, yes. Anyway, we're here.

MR ARMSTRONG KC: We're spared that one this morning, your Honour.

30

HIS HONOUR: Yep.

<SUBMISSIONS – MR ARMSTRONG KC: As your Honour knows, this is in fact the first class action under part VII of the Supreme Court Civil Procedure Act. So your Honour is yet again tasked with what is for this court a novel exercise this morning. Your Honour knows that
5 this class action concerns former detainees of the Ashley Youth Detention Centre in Deloraine in the north of Tasmania, also known as Ashley.

It's fair to say that Ashley has been notorious for many decades. It
10 has been the subject of numerous government inquiries dating back to the 1920s, and of course most recently was the subject of proceedings in the Commonwealth Government's Royal Commission into institutional responses to child sexual abuse, and the Tasmanian Government's commission of inquiry into child sexual abuse in
15 Tasmanian institutions.

It is not our purpose today to trawl through that sad history relating to Ashley. It will be necessary for me to touch briefly on the allegations that are made in the class action. But for the moment it is sufficient
20 to say that this class action concerned allegations of quite terrible abuse that was visited upon children, mostly boys but also some girls, and was repeated over many years.

If the class action were to go to trial, it would be complex and costly.
25 That tends to be the way of class actions. But this class action has an additional important feature; namely, that if it were to go to trial, then the former detainees and a number of witnesses who would need to be called by way of corroboration of the detainees' evidence would also need to be called to give evidence, and that would likely be a
30 retraumatising experience for all of those persons. Now, your Honour, the parties hope to avoid that potential trial and that potential further trauma.

We wish to record at the outset our appreciation of the representatives
35 of the State of Tasmania for the very constructive way in which they engaged with the plaintiffs from the earliest possible stage of this proceeding. While the parties were engaged in the usual fights with a view to getting the proceeding ready for trial, we also anticipated that the Court would order us to engage in settlement discussions.
40

I will take your Honour later this morning to the evidence that's before the Court regarding the careful, thoughtful and detailed work that was done by both parties to prepare for the mediation. But the happy result is that in June this year, the plaintiffs and the State agreed upon terms
45 for a proposed settlement of the class action. So this is not just the

first class action in Tasmania, it is also the first one to reach a settlement.

Importantly, as your Honour knows, a class action is not like other court cases when it comes to settlement. Unlike most other cases, a class action can't be settled simply by agreement between the plaintiff and the defendant. A class action affects the rights of the class members who are not immediately before the Court. And so part VII of the Supreme Court Civil Procedure Act requires the Court to play a special protective role to ensure that the interests of the class members have been treated fairly.

For that reason, a settlement can only be a proposed settlement unless and until it is approved by the Court. And the process for getting approval is a demanding one. We have approached that task in the present application in a manner that reflects the practices that have evolved in other courts that have class action regimes similar to part VII in this court. And so we have made an application that we propose be heard by the Court in three stages.

Stage 1 came before your Honour back in July this year. At that time we applied to the Court for approval from your Honour, for notices to be sent to the class members informing them about the proposed settlement and their rights in relation to the proposed settlement. We also asked your Honour to make orders setting a timetable for other steps to be taken to prepare for today's hearing. And your Honour made those orders in July. I'll refer to them today as the July orders. I'll come in a moment to the steps that were taken to comply with the July orders, but today's hearing is stage 2 of the three-stage application.

Now that the notices have been sent to class members and the evidence has been filed broadly in accordance with the timetable that your Honour set, today we are asking the Court to approve the settlement. I'll be taking your Honour to the evidence and to the legal principles that, in our respectful submission, we say ought to satisfy your Honour that the settlement proposed by the parties in this case is fair and reasonable, having regard to the interests of the group members considered as a whole, and that it is appropriate for approval by your Honour.

Now, if your Honour does approve the settlement, then it will need to be implemented. As your Honour is aware from the papers that have already been filed, the settlement provides for a payment by the State of Tasmania of seventy-five million dollars in full and final settlement of all of the claims by the settlement group members in the proceeding.

We need to undertake the process of sharing that money out among the represented persons. It's important that the Court supervise that process, and the arrangements that we are proposing to the Court recognise the Court's ongoing role in supervising the implementation of the proposed settlement.

Only once the settlement has been implemented do we reach stage 3 of our intended application, sometime probably in the second half of next year. Once the money has all been distributed to the people entitled to receive it, we'll come back to the Court with a final report as to what's been done to implement the settlement, and at that time we will ask the Court formally to dismiss the proceeding. So in short, today is stage 2 of that three-stage process. Today is our application that your Honour approve the proposed settlement.

Now, for that purpose, we have, for the plaintiffs, filed a large amount of material. The volume of the material reflects the size and complexity of the class action, and it reflects our obligation as the representatives of the plaintiffs and the class members to satisfy your Honour that the settlement is in the interest of the group members. There are two bundles or books of material that have been prepared, available both electronically and in hard copy.

HIS HONOUR: Yes, I have them, thank you.

MR ARMSTRONG KC: Thank you. Just for the record, the first is the application book and the second is a bundle of authorities. I don't need at the moment to dwell on the authorities, but just to formally get onto the record the contents of the application book, there are really four categories of material that are included in that bundle. The first is our interlocutory application, the one that we contemplated be addressed in three stages, and that was first filed in June this year. Then there are the affidavits that the plaintiffs rely on. I'll come back to those in a moment.

And then, for your Honour's convenience, we've reproduced the pleadings, that is, the amended statement of claim and the defence to the original statement of claim, together with some of the other papers that have been filed in the proceeding. And the fourth category is the past orders that have been made by the Court that seemed to us potentially to be relevant to today's application. So, it's not all of the orders, it's just the ones that related to today or might be thought to have related to today.

Now, I mentioned that the affidavits were the most important of the materials in the application book. There are four affidavits, three from

my principal instructor Ms Angela Sdrinis, the principal of Angela Sdrinis Legal. The first affidavit dated 28 June, which was filed in support of the stage 1 part of our application. The second affidavit dated 6 November that has most of the material relevant to today's
5 hearing. And the third affidavit dated 19 November that seeks to bring your Honour up to date with events since the making of the second affidavit. And then the fourth of the plaintiffs' affidavits is a single affidavit from a senior solicitor at Angela Sdrinis Legal; that's Ms Rowena MacDonald.
10
HIS HONOUR: That's 6 November?

MR ARMSTRONG KC: 6 November, that's it, your Honour, thank you. And that, as your Honour may have seen, deals in more detail
15 with some of the practicalities of the work that was done by Angela Sdrinis Legal for the purpose of, in particular, the mediation. And I'll come back to that over the course of today.

HIS HONOUR: I must say that the quality of the documentation
20 provided in support of this application is exemplary.

MR ARMSTRONG KC: Thank you, your Honour. On behalf of the team, we are gratified that your Honour has found it to be of assistance. Now, lastly, in terms of the papers that need to be tabled, as it were,
25 for the application, your Honour, I think, will also have received the plaintiffs' written submissions.

HIS HONOUR: Mhm.

30 MR ARMSTRONG KC: And these are – I should say, because it will become relevant in a moment – the written submissions are not sought to be made confidential. They are open submissions. We are happy for them to be available to anybody that your Honour is content should be permitted to access the written submissions. I'll come back to the
35 confidentiality issues in a moment. And lastly, your Honour, I think your Honour was sent on – late last week, the plaintiffs' proposed form of order –

HIS HONOUR: Yep.
40
MR ARMSTRONG KC: – to be made today. Your Honour will recall that the original application that we filed in June broadly outlined the orders that we would seek today, but there were some placeholder elements. We've now provided that form of order with those
45 placeholders filled in. And subject to a couple of things that I'll come to later this morning, and obviously subject to any amendments that

your Honour thinks appropriate, those would be the form of orders that we would invite, or request, your Honour to make today.

HIS HONOUR: Can I just mention two things now, in case we lose track of them during the course of the morning, about the proposed form of order. In paragraph 1, there's reference at paragraph 1a(1) to the docket judge.

MR ARMSTRONG KC: Yes.

HIS HONOUR: Which of course is a Federal Court term. Is it meant to be the settlement judge, which is the description used in paragraph 19 of the general order?

MR ARMSTRONG KC: Yes, it is, your Honour.

HIS HONOUR: Okay, well, I think that appears once at least. And in paragraph 19 itself, it reads:

> *The administrator have liberty to apply to the associate to his Honour Estcourt J (settlement judge) for directions in relation to any matter arising or in connection with the administration of the SDS.*

Should that – is that intended to mean that the administrator have liberty to apply via the associate to his Honour for directions?

MR ARMSTRONG KC: Yes, sorry.

HIS HONOUR: Rather than suggesting any responsibility on the part of the associate himself.

MR ARMSTRONG KC: Yes, so it's intended – addressed to the associate, or via the associate.

HIS HONOUR: So if we add the word 'via'.

MR ARMSTRONG KC: We'll adjust that, your Honour.

HIS HONOUR: All right, thank you. Yes, please go on.

MR ARMSTRONG KC: Thank you, your Honour. Now, there is one last preliminary matter that I wish to raise with your Honour. There's been discussion between the parties about the way in which the Court might deal with the video recording of today's hearing. The parties have agreed on a form of order, and may I hand it up to your Honour's

associate. But we don't – it may be that your Honour is not minded to actually make these orders just yet.

We thought that perhaps your Honour might wish to wait until the end of the hearing and then determine whether the orders are consistent with your Honour's intentions. But it's broadly a set of orders that provides for today's hearing to be recorded by the court's audiovisual system; that recording then be made available on YouTube; that the transcript likewise be uploaded and available, at least on the Court's website, following the conclusion of this hearing; and that the media and other persons be permitted to use those recordings for any lawful purpose.

HIS HONOUR: All right. Well, yes, perhaps we won't make them until the end of this morning's proceedings, in case something happens during the course of this morning which might prevent publication immediately or as sought.

MR ARMSTRONG KC: Yes, thank you, your Honour. Now, against that background, there are six topics that I propose to deal with this morning. And I should say I am optimistic that I'll be finished by lunchtime. But your Honour knows how bad I am at time estimates.

HIS HONOUR: Mm.

MR ARMSTRONG KC: Please be forgiving.

HIS HONOUR: Well, I dare say I won't expect to hear much from Mr Read.

MR ARMSTRONG KC: Some days are diamonds, your Honour.

MR READ SC: Six lines, I think, your Honour.

HIS HONOUR: Well, in that case, one will cancel the other out. So we should be finished by lunchtime. Thank you.

MR ARMSTRONG KC: Thank you, your Honour. Now, topic A is tasked upon the plaintiffs to satisfy your Honour about our compliance with the July orders regarding the notice to the class members.

Topic B is to outline some general matters which, in our respectful submission, emerge as issues of principle from class actions in other jurisdictions, and that we respectfully suggest might assist your Honour in considering for the first time in this court how applications under s82 of the Supreme Court Civil Procedure Act seeking class

action settlement approval ought to be addressed. Under that topic B I'll touch both on the role of the Court and the reason why some of the evidence that's been filed by the plaintiffs is sought to be kept confidential.

5

Topic C, I will touch very briefly on the procedural history of this class action. I need to explain to your Honour there how the class is made up and how the settlement is proposed to apply to class members. It's also important, in our submission, that we satisfy your Honour that the
10 work done by the plaintiffs in particular prior to the mediation reflects a responsible assessment by the plaintiffs' lawyers of the potential claim values, so that your Honour can be satisfied the class members' interests were properly taken into account before the mediation and at the mediation.
15

HIS HONOUR: Mm. Well, satisfaction as to that, which, subject to anything raised, I have already reached, informs the matter of the relativity between the claim and the settlement at a later stage of my thinking.
20

MR ARMSTRONG KC: Yes.

HIS HONOUR: So –

25 MR ARMSTRONG KC: Yes, and I'll deal with that relativity –

HIS HONOUR: Yeah.

MR ARMSTRONG KC: – specifically as well, your Honour. Now,
30 topic D is really the largest topic for today, because there I propose to deal with what we've been careful in our materials to identify as the three principal elements of the settlement.

HIS HONOUR: Mhm.
35

MR ARMSTRONG KC: That is, firstly, the deal as between the plaintiffs and the State for what your Honour knows is often called the inter partes aspect of the settlement. The second element of the proposed arrangements for sharing the settlement money between the
40 plaintiffs and the group members, or what is often called the inter se, S-E, elements. And thirdly, an aspect of that how to share the money issue is the question of the proposed deductions from the settlement fund to pay for legal costs and certain other amounts relating to the proceeding.
45

HIS HONOUR: Being the clawbacks, or the other amounts?

MR ARMSTRONG KC: Yes, your Honour. Your Honour will recall that there's the legal costs.

5 HIS HONOUR: Yes.

MR ARMSTRONG KC: There's some proposed reimbursement payments to the four named plaintiffs.

10 HIS HONOUR: Yes.

MR ARMSTRONG KC: The – what we've called the benefits legislation.

15 HIS HONOUR: The clawbacks.

MR ARMSTRONG KC: Yes, sorry, the clawbacks, I didn't quite hear your Honour.

20 HIS HONOUR: Yeah. Sorry.

MR ARMSTRONG KC: That sort of thing. And then the cost of administration.

25 HIS HONOUR: Yep.

MR ARMSTRONG KC: Topic E, I'll take your Honour very briefly through the orders that we seek today. And then topic F, we might not need to spend much time on. That is, if your Honour has any specific
30 concerns about any aspect of our request for confidentiality orders, then my learned junior Mr Slade will deal with that topic.

HIS HONOUR: Yeah, I don't. I'll just ask Mr Read whether there are any concerns.
35
MR READ SC: None at all, thank you.

HIS HONOUR: Yeah, no. Well, I won't be needing to hear Mr Slade then, thank you.
40
MR ARMSTRONG KC: Thank you, your Honour. I'm sure Mr Slade is pleased to hear that. Now, if I might move, then, to topic A, which is the question of compliance with the orders that your Honour made in July, and also some further orders that were recently made by his
45 Honour the chief justice, which I'll come to in a second. Now, the July orders your Honour will find in the application book at tab 4.4, I don't

think I need to take your Honour to that at the moment. Your Honour probably recalls what they were. But I would invite your Honour to go, please, to tab 2.3 of the application book, which is Ms MacDonald's affidavit.

5

HIS HONOUR: Can you give me, please, page numbers, because I can find them easily within the PDF by navigating that way.

MR ARMSTRONG KC: Certainly, your Honour. Ms MacDonald's
10 affidavit starts at application book page 316, and the passage that I wanted to take your Honour to starts at page 340 at paragraph 146.

HIS HONOUR: I'm afraid it's not working for me. It must be the way the documents are assembled, but 316 is certainly the
15 commencement of Ms MacDonald's affidavit. But I get that as – you'll have to forgive me, I've just had two lots of cataract surgery and my new glasses for reading have not arrived.

MR ARMSTRONG KC: Oh, I'm sorry to hear that, your Honour.
20

HIS HONOUR: No, I'm not, I can see you. 399 on the PDF, Mr Read.

MR READ SC: I've got it at 229, your Honour. We might be looking at different affidavits, though.
25

MR ARMSTRONG KC: Ms MacDonald's affidavit.

MR READ SC: Ah, we've got a different court book, apparently.

30 MR ARMSTRONG KC: Right. In any event, it should be tab 2.3, Ms MacDonald's affidavit, and within that affidavit, paragraph 146.

MR READ SC: Is that under the heading Post-Mediation?

35 MR ARMSTRONG KC: Yes, yes.

HIS HONOUR: Yep, following the mediation and the execution of the deed of settlement.

40 MR ARMSTRONG KC: That's it.

MR READ SC: I have it, thank you, your Honour.

HIS HONOUR: Thank you.

45

MR ARMSTRONG KC: Thank you, your Honour. And, really, just a few short points. Your Honour will see at paragraph 149 that Ms MacDonald refers to the fact that the notice was uploaded to the Angela Sdrinis Legal – or I'll call it ASL now. The notice was uploaded to
5 the ASL website at 151. It was also posted out to the class members. And at 152, the notice or information about the notice and a link – sorry, and an invitation to view the notice was also sent by SMS to the class members.

10 Would your Honour also please note paragraph 154 and following regarding the efforts that were made by ASL to ensure that contact was made with class members where there was an initial failed attempt. And then would your Honour please note paragraph 157 and following, that –
15

HIS HONOUR: Yep.

MR ARMSTRONG KC: – there are some issues regarding a number of group members who, despite having originally instructed ASL to
20 include them in the class action and given some instructions, have subsequently become uncontactable –

HIS HONOUR: Yep.

25 MR ARMSTRONG KC: – that I'll refer to later as the excision group members.

HIS HONOUR: Yep.

30 MR ARMSTRONG KC: And we'll come back to them in due course.

HIS HONOUR: Well, I thought all of this to be unsurprising.

MR ARMSTRONG KC: Yes. Yeah. Having regard to the features of
35 the class, the fact that some of them have dropped off the radar, as it were, is something that was to be expected. Now, would your Honour also please note paragraph 162, which deals with the issue regarding an additional person who came forward and identified themselves as a potential group member.
40

HIS HONOUR: Mhm.

MR ARMSTRONG KC: That process – sorry.

45 HIS HONOUR: Well, I was just going to say, I'm satisfied as to the way in which this has been dealt with.

MR ARMSTRONG KC: Thank you.

HIS HONOUR: And it's fortunate that the assessment of damages
5 involved equated relatively well –

MR ARMSTRONG KC: It did.

HIS HONOUR: – and the add-back into the settlement sum after the
10 excision doesn't affect the settlement sum.

MR ARMSTRONG KC: Yes, that's right. So, thank you, your Honour, that means I can jump over that quite quickly. May I just note for completeness that the outcome in relation to that additional group
15 member is clarified or confirmed in Ms Sdrinis's third affidavit at paragraph 13. And at page 28 of the annexure to that affidavit, your Honour will see the signed authority from that additional group member confirming that they want to be a group member, they don't want to opt out.
20

HIS HONOUR: Yep.

MR ARMSTRONG KC: So, your Honour will have noticed that because of the time constraints that we were under there, we actually
25 took the liberty of writing to the group member telling them that we were going to ask for a very expedited opt-out process for them.

HIS HONOUR: Yep.

30 MR ARMSTRONG KC: And then effectively ask your Honour to ratify that process after the event.

HIS HONOUR: Well, there's a certain amount of serendipity in all that, but it's worked out well.
35

MR ARMSTRONG KC: It has worked out, your Honour. And that's reflected in our orders that I'll come back to at the end of the proceeding. And again, in relation to that serendipity that your Honour referred to, and in relation to some other aspects of the excision group
40 members that I'll come back to in a moment, we do want to record our appreciation for the State's representatives' cooperative approach to dealing with these administrative and practical issues that have arisen.

HIS HONOUR: And you'd be referring to Mr Rapley there, not Mr
45 Read.

MR ARMSTRONG KC: I'm sure it's sui generis, your Honour.

HIS HONOUR: Mhm.

5 MR ARMSTRONG KC: Now, finally, the proposed final list of all of the group members is reproduced in Ms Sdrinis's third affidavit at page 36 of the exhibit, and in the proposed final form of orders that we'll hand up – that we've provided to your Honour. Your Honour might recall that we've reproduced the list of group members, some in red –
10 sorry, some in black text, some struck through in red, some struck through in green, and the strike-throughs indicate people who either opted out and therefore are no longer group members, or we have requested be removed from the proceeding and are no longer group members for that reason.
15
HIS HONOUR: Mhm.

MR ARMSTRONG KC: Now, lastly in terms of compliance with the July orders, your Honour directed in July in order 11 that there be a
20 costs assessor appointed to review the costs proposed to be charged by ASL in relation to the class action.

HIS HONOUR: Sorry, just before you move on there. I'm just looking at that schedule to the 21 November – oh, sorry, it was the 18th of
25 November. No that's the schedule itself. This is the fourth amended notice. That's what I'm looking at. Anyway, the question remains the same. We're now talking, are we not, about 125 plus four?

MR ARMSTRONG KC: Correct.
30
HIS HONOUR: 129 members of the class involved in the settlement.

MR ARMSTRONG KC: Yes.

35 HIS HONOUR: Mm, yes, that's what I thought.

MR ARMSTRONG KC: So the four plaintiffs –

HIS HONOUR: Yep.
40
MR ARMSTRONG KC: – and the 125 further group members –

HIS HONOUR: Well, 124 plus one.

45 MR ARMSTRONG KC: Ah, yes, yes.

HIS HONOUR: Is 125. Yep.

MR ARMSTRONG KC: Yep. Those 129 persons are treated in the settlement papers as the, quote, 'settlement members'.

5

HIS HONOUR: Yep. Thank you.

MR ARMSTRONG KC: Now, I was just mentioning the issue about the costs assessor.

10

HIS HONOUR: Yep.

MR ARMSTRONG KC: We'll come back to that in more detail later. Your Honour appointed Ms Harris –

15

HIS HONOUR: Mhm.

MR ARMSTRONG KC: – from Victoria, a very experienced costs assessor with particular experience in assessing class actions.

20

HIS HONOUR: Yep.

MR ARMSTRONG KC: She has provided two reports to the Court, and I'll take your Honour to those briefly later this morning. And then
25 in relation to the timetable for filing further affidavits, our written submissions et cetera, that was order 16 in July, and although we were late in a couple of respects, we hope that hasn't caused any inconvenience to your Honour.

30 Your Honour also gave leave to us to file material on a confidential basis, subject to us then seeking appropriate orders for confidentiality, and that's been done. Lastly, there was a timetable for any materials that the State wished to file and there are none, and again, we're grateful for that. So that's topic A.

35

Can I move now to topic B, and there are two sub-issues that I wish to address briefly under this topic. The first is some comments regarding the role of the Court in considering whether to approve a class action settlement under part VII of the Supreme Court Civil Procedure Act,
40 and the second is to touch on the explanation as to why evidence is filed on a confidential basis, that being, of course, pretty unusual in court proceedings.

Now, as to the first of those issues, a class action, as I said at the
45 outset, cannot be settled other than by leave of the Court. That's made clear by s82 of the Act. The Act uses broad language, and so the

question is, what is the test that a Court ought to apply in practical terms for assessing whether approval should be given?

HIS HONOUR: I probably need to say, in my own defence, that I'm aware of all of these submissions that you are now making, have considered them, considered the tests. But I think your submissions need to be made for the record, and especially given the fact that these proceedings are being recorded, there will be those who are interested in the process. Mm.

MR ARMSTRONG KC: I think your Honour perceives that that was also my –

HIS HONOUR: Mm, of course.

MR ARMSTRONG KC: – expectation, that – I am very conscious that your Honour is familiar with all of these things –

HIS HONOUR: Mm.

MR ARMSTRONG KC: – and I anticipated that your Honour would want me to make these submissions –

HIS HONOUR: Yes, yes.

MR ARMSTRONG KC: – so that we inform the public.

HIS HONOUR: Yes, yes, I do. Thank you.

MR ARMSTRONG KC: Thank you, your Honour. Now, in terms of the test that has been developed in the different courts that have the type of class action regime that this court has in part VII, it's been addressed in the confidential opinion, prepared by Mr Slade and myself, which your Honour will find behind tab 2.2 of the application book. I don't need your Honour to go to that at the moment. But it's also addressed in our open submissions, at paragraphs 8 to 14 and 53 to 63.

Now, by way of very brief summary, in our respectful submission, what comes through from the jurisprudence that has been developed across the courts that have this type of class action regime is that in an application for approval of a proposed settlement, the Court is not concerned to protect the interests of the named plaintiffs or the defendant. Its concern is the interests of the group members, because in many cases they will not actually have a direct solicitor/client

relationship with the plaintiffs' solicitors. In the present case, in fact, that's not a concern –

HIS HONOUR: Mm.

5

MR ARMSTRONG KC: – because the class members are all clients of ASL.

HIS HONOUR: Yep.

10

MR ARMSTRONG KC: Second, the critical question that has been identified and adopted as the appropriate test for whether a class action settlement ought be approved is whether the proposed settlement, in all of its respects, is fair and reasonable, having regard to the interests

15 of the group members considered as a whole. Now, that formulation, referring to the interests of the group members considered as a whole, reflects the reality that there might be some tension between the interests of different group members

20 That is especially so where a proposed settlement involves the payment of a fixed sum of money to be shared between the class members. Because obviously it's in the interests of each individual that they should get a larger share of that fixed sum and the others should get less. So the question must be what is fair and reasonable, not what is

25 in the interests of any individual group member. The next point is that the courts –

HIS HONOUR: The two are almost synonymous in this case because of the extreme detail into which the plaintiffs' solicitors went in

30 assessing damages for each individual group member.

MR ARMSTRONG KC: Yes. There – your Honour is ahead of me. There is – it's very hard to see how there's any kind of real trade-off between –

35

HIS HONOUR: No tension involved.

MR ARMSTRONG KC: No. That's right. Thank you, your Honour. Now, the next point is that the courts have recognised that the test of

40 what is fair and reasonable requires consideration of a range. There is no single correct figure, or there is usually no single correct figure, or no single way in which a settlement might have been arranged or structured.

45 Different litigants, and indeed different lawyers, have different appetites for risk. An important consideration is that it is only the

named plaintiffs in a class action who face the risk of paying the defendants' legal costs if the class action is unsuccessful. So it's always in the interests of group members not to compromise, but to fight on to the death of the plaintiff.

5

HIS HONOUR: Mm.

MR ARMSTRONG KC: That cannot be the measure for whether a settlement is fair and reasonable.

10

HIS HONOUR: And I'll say here and now that that justifies the uplift, in my view –

MR ARMSTRONG KC: Thank you, your Honour.

15

HIS HONOUR: – for those four –

MR ARMSTRONG KC: Thank you.

20 HIS HONOUR: – individual plaintiffs.

MR ARMSTRONG KC: And for those reasons, the question must be whether the proposed settlement is within a range that the Court can accept is reasonable, having regard to the things that the plaintiffs'
25 lawyers ought be expected to have been in a position to know.

Now, for that purpose, the Court also recognises that the plaintiffs and their lawyers do not have perfect knowledge, or perfect foresight. They are not entitled to special access to information just because it's
30 a class action. And so the Court does not second-guess the plaintiffs' lawyers. Provided the settlement is within the range that the Court assesses would be regarded as reasonable by responsible lawyers who have competently prepared the case for the plaintiffs up to the stage it has reached, then the Court would, ordinarily, incline toward
35 approving the settlement.

HIS HONOUR: Mhm.

MR ARMSTRONG KC: That's all I wanted to say about the role of
40 the Court on today's application. The second subtopic in this topic B is the issue of confidentiality, but it follows from what I've just said. The need to put the Court in the position of assessing the case according to what the plaintiffs' lawyers can be expected to know requires that we, as the plaintiffs' lawyers, disclose to your Honour
45 our reasoning in recommending this settlement to the plaintiffs. Us

having to make that kind of disclosure to the Court is an unusual feature.

HIS HONOUR: Mm.

5

MR ARMSTRONG KC: Not quite unique to class actions, but very unusual in court proceedings generally.

HIS HONOUR: Mm.

10

MR ARMSTRONG KC: As your Honour mentioned a moment ago, the nearest analogue to this kind of disclosure is what your Honour sees in litigation run for children or for people under legal disabilities. And the requirement is that the representatives of the plaintiffs, in their
15 position as officers of the court, not as advocates for a particular outcome, need to disclose to the Court their own views as to the strengths and weaknesses of the plaintiffs' case and of the arrangements that are proposed for settling that case. Now, your Honour has seen a very lengthy and detailed opinion that's been
20 prepared by Mr Slade and myself.

HIS HONOUR: Yep.

MR ARMSTRONG KC: That's been filed on a confidential basis as
25 exhibit – sorry – annexure AS2 to Ms Sdrinis's second affidavit. I'll be referring at times today to parts of that confidential opinion, but I'll do it in code.

HIS HONOUR: Mhm.

30

MR ARMSTRONG KC: I'll draw your Honour's attention to particular paragraphs. I'll also be taking your Honour to parts of our open submissions. For present purposes, your Honour I think will have seen that the confidential opinion goes into great detail regarding the
35 strengths and weaknesses of the claims that were made on behalf of the class. That is, of course, very sensitive information. It's covered by the class members' legal professional privilege.

If it were disclosed and then the settlement were not approved, the
40 State would get an insight into our case that it would not otherwise have, and that might be very advantageous to it in any continued litigation. But that concern also extends beyond the immediate case. My instructors act for other Ashley clients who are not covered by the class action. So even if the settlement here were approved, publication
45 of our opinion could assist the State, at least in its negotiations, in those other cases; that is, it could affect third parties.

That opinion is only provided to the Court because of your Honour's special protective role which is there to protect the group members. In our respectful submission there is no pubic interest in wider disclosure of the confidential opinion. On the contrary, there would be a public detriment, because any class action plaintiffs' lawyers need to be able to be candid with the Court, in particular, revealing any problems that might have justified a discount reflected in a settlement.

HIS HONOUR: Mm.

MR ARMSTRONG KC: That's essential for the Court's role.

HIS HONOUR: One thing that might be of interest to members of the public who are concerned to a particular level, I suppose, is that it's clear and in no way confidential that the settlements arm was assessed in the light of the decision in this court of *Munting v Pollard* –

MR ARMSTRONG KC: Yes.

HIS HONOUR: – which I think everybody might accept raised the level of assessment of damages for cases such as this in this court.

MR ARMSTRONG KC: Yes, your Honour. Now, those are the reasons why some of the material filed by the plaintiffs has been filed on a confidential basis and is sought to be made the subject of ongoing confidentiality orders. There were two last brief things that I wanted to mention under this little topic of confidentiality. The first is – or in fact the Court's role, perhaps, is a more apt way of describing it. First, I just wanted to remind your Honour that we have identified in the opening submissions – sorry, in the open submissions – that your Honour has a range of options available in relation to the present application.

Without limiting them, they at least include that your Honour could approve the proposed settlement in full, your Honour could refuse approval in full, or your Honour could adopt a middle ground, for instance, of approving the deal between the plaintiffs and the State, but not approving the scheme for sharing out the money among the class members, or not approving some or all of the proposed deductions in respect of legal costs and reimbursement payments and suchlike. We've provided in the open submissions at paragraph 61 references to the authorities that have made it clear that that sort of flexibility is available to your Honour.

Second, we've also provided, in the open submissions at paragraph 43, some references to the cases that have dealt with the question of how the Court writes a judgment on applications like this where there is confidential material.

5

I don't need to take your Honour to paragraph 43 in any detail, but when your Honour looks at the pathway decision that we've cited there, and indeed, when your Honour looks at a number of the decisions, for instance under s33V for Victor in the Federal Court jurisprudence, your
10 Honour will see repeatedly the ways in which judges have found it not difficult to refer to issues that have been identified by the plaintiffs' lawyers in confidential material, and acknowledged that those issues have been raised but found ways to reflect that the Court considers that they've been properly considered without actually disclosing the
15 particular risks that might have been identified or the assessments of those risks that were reported to the Court.

HIS HONOUR: Yes, thank you.

20 MR ARMSTRONG KC: That was it for topic B, your Honour. Topic C is to provide a little background to the class action and a quick overview of the procedural history. And I emphasise that I do this because it is important that people understand that although this class action was able to be settled at a very early stage, and although that
25 might sometimes raise a concern that the parties did not have enough information to ensure that the early settlement properly reflected the interest of the class members, for the reasons that I'll explain in a little more detail now, that's not a concern that arises in the present case.

30 HIS HONOUR: Mm. Well, two things need to be noted. The first is that the mediation ran for two weeks, and the second is that a number of specialist and individual reports were obtained –

MR ARMSTRONG KC: Yes.

35

HIS HONOUR: – for that mediation.

MR ARMSTRONG KC: Yes. So just briefly, your Honour, the background to the class action and its procedural history are primarily
40 addressed in the evidence in Ms Sdrinis's second affidavit, the background to the class action at paragraph 23 and following, and then the procedural history of the class action once it got underway at paragraphs 59 through to 89. It's addressed in the confidential opinion in section C at paragraphs 40 to 63, taking things up to the time of the
45 mediation, and it's addressed in the open submissions, also in section C, at paragraphs 17 and following.

HIS HONOUR: Ah, 40 to 63. Commencing page 291 of the court book?

5 MR ARMSTRONG KC: Thank you, your Honour.

HIS HONOUR: Is that right?

MR ARMSTRONG KC: I hope so.

10

HIS HONOUR: Are we talking about the confidential opinion of counsel?

MR ARMSTRONG KC: Yes, your Honour.

15

HIS HONOUR: Yeah.

MR ARMSTRONG KC: The confidential opinion –

20 HIS HONOUR: As discussed in paragraph 35?

MR ARMSTRONG KC: I'm sorry, did your Honour say page 291?

HIS HONOUR: Page 291.

25

MR ARMSTRONG KC: I think, unfortunately, your Honour, it seems that we have different page numbers. Did your Honour have a paragraph?

30 HIS HONOUR: Paragraph 40. Could it be page 223 of 247?

MR ARMSTRONG KC: Yes. Yes. Sorry, your Honour is right. I do actually have page 291.

35 HIS HONOUR: Right.

MR ARMSTRONG KC: So, yes, paragraph 40.

HIS HONOUR: Thank you.

40

MR ARMSTRONG KC: Now, a couple of matters to mention in relation to the structure of the class action. Firstly, as your Honour knows, this is a closed class action. That is, the class members are confined to the persons who are listed by name in a confidential list of
45 the group members that's been filed with the court. They've all been told who they are, they all know who they are. But because of the

nature of the allegations that are made on their behalf, their names are kept confidential.

Second, in relation to the dealings between the class members as
5 between themselves, there is in fact – or it has emerged that in fact there are some – there is a small number of instances where class members have made allegations against other class members.

HIS HONOUR: Mhm.

10

MR ARMSTRONG KC: So, there – in that sense, that limited number of instances, there are different kinds of potential conflict between the class members compared to how they just share in the settlement money. As addressed in Ms MacDonald's affidavit at paragraph 66 –
15 and your Honour, just for the record, will have seen that what's proposed there is that when that kind of conflict was identified, whichever class member came in later in time is being referred to a different firm of solicitors –

20 HIS HONOUR: Yep.

MR ARMSTRONG KC: – for the purpose of participation in the distribution of the settlement money.

25 HIS HONOUR: Yep.

MR ARMSTRONG KC: The other firm listed is Carroll & O'Dea, and we should record our appreciation for that firm's cooperation as well.

30 HIS HONOUR: Yep.

MR ARMSTRONG KC: Now, after the class action had commenced, there were, from the outset, really two pathways or tracks of work that were being undertaken by ASL. On the one hand, there was what we
35 were calling the trial path, the normal work between the plaintiffs and the State to finalise the pleadings between the parties, start to discuss discovery, generally get the class action ready for trial. Ms Sdrinis deals with that work at paragraphs 59 through to 70 of her second affidavit. Now, separately and in parallel to that trial work, there was
40 work being undertaken to prepare for a potential mediation.

HIS HONOUR: Yep.

MR ARMSTRONG KC: Because we were conscious that the court's
45 practice would be to order a pre-trial mediation. Now, although it is in some cases possible to settle a class action without knowing the

values of the individual claims, that was not the approach that was thought to be appropriate in the present case. The challenge, however, was to find a cost-effective way to value the individual class members' claims and come up with a reasonable assessment of the total group-wide loss value. Ms Sdrinis and Ms MacDonald in their affidavits explain that that group-wide loss estimation work commenced as early as August 2022.

In summary, ASL had been collating information about each of the group members as they identified themselves to the firm, and instructed the firm to act for them. That's addressed by Ms Sdrinis in her second affidavit at paragraphs 45 and 49, and Ms MacDonald at paragraphs 38 to 42 and 48 to 54.

From late 2022 and into early 2023, together with cooperation from our friends for the State, there was a process set up to undertake independent medical examinations of at least a sample of the class members. Ms MacDonald addresses this at paragraphs 69 to 74. And that process of referring some of the class members for independent medical examination was contemplated to form a basis on which the plaintiffs and ultimately the State could try and model the potential range of claims across all of the class members without having to send all of them to expensive and time-consuming independent medical examination.

HIS HONOUR: Well, look, if you go any further, it ceases to be a representative action.

MR ARMSTRONG KC: In many respects that's right, your Honour. And of course, as your Honour knows, the real genius of the class action procedure has always been that by focusing on the common questions, the parties get to bring to the fore the costs that are common to all of the class members, and you push back the costs of doing work relating to individual claims, because you don't even need to do that work unless you succeed on the common questions. So, as your Honour has seen –

HIS HONOUR: All of these steps that were taken by the plaintiffs' solicitors were admirable, in my view. The profiling, the categorisation, the investigations that were made.

MR ARMSTRONG KC: Thank you, your Honour. Now, the last thing I'd mention in relation to that work that was being done for the individualised assessments was that your Honour has also seen that in addition to the medical examination work, ASL engaged a specialist forensic accounting and actuarial firm, Vincents, to likewise prepare a

sample of estimates of the economic losses that have been suffered by group members attributable to their experiences at Ashley.

Again, detailed work, highly specialised, very skilful, and importantly, very expensive and not the sort of thing that plaintiffs in a class action would ordinarily do for group members prior to the completion of the trial of the common questions. It was undertaken here, partly because it was going to be necessary for the plaintiffs' own personal claims, but also because there was, as I've said, a cooperative spirit, at least between ourselves and the State, at this stage, that we ought to be working towards a mediation, with as much expedition as possible before everybody dug too deeply into their trenches and was fixated on running a trial.

HIS HONOUR: And you had – or the plaintiffs' solicitors had a manageable number of class members.

MR ARMSTRONG KC: Yes, yes.

HIS HONOUR: It's not as though we're talking thousands.

MR ARMSTRONG KC: No, it's – through this period there was about 160.

HIS HONOUR: Yeah.

MR ARMSTRONG KC: It's a mammoth job but it was still manageable.

HIS HONOUR: But nonetheless a manageable number, speaking relatively.

MR ARMSTRONG KC: Yes, yes. And more manageable if it was able to be modelled rather than every claim fully worked up. Now, all of that work predated the critical discussions that then transpired between parties from about late 2023, which Ms Sdrinis deals with in her second affidavit at paragraph 72 and following. And as a result of the discussions between the plaintiff and – sorry, the plaintiffs and the representatives for the State, the parties jointly approached the Court and asked the Court to effectively put a pause on the orders that had already been made for further steps to get the matter ready for trial.

And that pause was then able to – sorry, the purpose of that pause was to enable the parties confidently to be able to devote as much resources as necessary to trying to prepare for a mediation with a view to settling the proceeding rather than going to trial.

So, from late 2023 the loss estimation work really stepped up. The modelling work that was done that I touched on a moment ago is described by Ms Sdrinis in her second affidavit at paragraph 94, and
5 in much more detail in Ms MacDonald's affidavit from paragraph 81 really through to about paragraph 115. Your Honour has seen that the data that was derived from the medical examinations and from Vincents' analysis of the claims of the sample of group members was used by ASL to inform the way in which they prepared for every
10 individual class member.

A statement of the person's experiences at Ashley – there were different forms of that statement, and in her version, and a shorter form that was exchanged with the State for the purposes of the mediation.
15 And there were quantum assessments that were undertaken by ASL in relation to every individual claim. As part of that process, ASL sought separate legal advice from senior counsel specialising in personal injuries litigation, who I hasten to add, is not me. It was Mr McTaggart KC.
20

HIS HONOUR: Yep.

MR ARMSTRONG KC: And the advice received from Mr McTaggart was also taken – informed the approach that was then adopted by ASL
25 in preparing their quantum assessments of every individual claim. And all of that work was uploaded into an electronic spreadsheet with links to supporting documents as appropriate. There was an internal version of that spreadsheet, and then there was a version that was suitable for exchange for the purpose of mediation, and that was provided to the
30 State prior to the mediation. That's detailed in Ms MacDonald's affidavit at paragraph 137.

Now, lastly, in that regard, can I mention that the matters of legal principle that were adopted by the plaintiffs in preparing their internal
35 assessments of the claim values have been reviewed by Mr Slade and myself in our confidential opinion in section D at paragraphs 92 to 95. And I'll also mention that your Honour will have noticed from Ms MacDonald's affidavit, at paragraphs 104 and 115, that even the internal assessments that were done by ASL were then separately the
40 subject of internal review by Ms Sdrinis herself, with all of her experience as a personal injuries litigator, to make sure that we had crossed every t and dotted every i.

HIS HONOUR: Mm.

45

MR ARMSTRONG KC: Now, the resulting loss matrix, or the mediation version of the loss matrix, was provided to the State, and based on the evidence, in our respectful submission, we would urge your Honour to take the view that the work that was done by the plaintiffs' legal team was carefully reasoned, and was a thorough loss modelling, and the outcome was a very high-quality set of information in relation to the issues that were on the table for discussion at the mediation.

HIS HONOUR: Well, could there ever be a more compelling case for approval?

MR ARMSTRONG KC: We would say no, your Honour.

HIS HONOUR: Well, individual assessments have been carried out responsibly in an acknowledged method and checked by senior counsel independently.

MR ARMSTRONG KC: Yes, very thorough work, your Honour. Now, in the result, as your Honour has observed, the parties did undertake a mediation that lasted over almost an entire two weeks, a very unusually long mediation. But in – and obviously I'm very constrained in what I can say about what happened during the mediation – but we can say that given the calibre of the practitioners involved on both sides, your Honour can be well satisfied that it involved a very considered and robust exchange of views.

HIS HONOUR: Mm.

MR ARMSTRONG KC: Now, lastly, before I move to the next major topic, there is an issue that I need to clarify regarding who are the settlement members for the purposes of today's application. I mentioned a moment ago that at the time of the mediation there were around 160 group members, but there are now 129 settlement members. The reason for the difference is that there – even at the time of the mediation – it was expected that there were likely to be three types of existing group member who either could not or ought not be wrapped up in the proposed settlement.

Now, just briefly, and really for the public record, the first of those three subgroups that ought not be included in the settlement were a group of class members whose instructions to ASL had indicated that they might have abuse-related claims against the State arising not just from experiences at Ashley but also in other State institutions. That is, abuse at Ashley, plus abuse elsewhere. And so they were called

internally, the 'Ashley plus' group members. They were – they have opted out of the proceeding.

HIS HONOUR: Yep.

5

MR ARMSTRONG KC: And the background to that is explained in Ms MacDonald's affidavit at paragraphs 55 to 60 and 134 to 136, and in Ms Sdrinis's second affidavit at 114 to 120. The second of the three groups that needed to be removed were a couple of the class members 10 who it turned out had received payments under the National Redress Scheme. And under the terms for that scheme, they're not able to sue anyone else for that abuse anywhere. That's addressed in Ms Sdrinis's second affidavit at paragraph 115.

15 And the third group who it was not appropriate to include in the proposed settlement were those group members who I referred to earlier as the 'excision' group members. That is, people who had at one time come forward and identified themselves to ASL but then had disappeared, and we've not been able to get further instructions from 20 them sufficient to be able to value their claims or responsibly include them in a settlement.

There were subsequent discussions between the parties regarding the appropriate treatment of those excision group members, and I say again 25 that the plaintiffs wish to record their appreciation for the tremendously responsible and cooperative and compassionate way in which the State's representatives dealt with that issue. By agreement, those excision members will be removed from the class, albeit that they have not opted out of the proceeding.

30

HIS HONOUR: Mhm. Yep.

MR ARMSTRONG KC: The consequence is that their rights are not affected by this settlement. If at some point they come forward and 35 they have claims against the State, and they want to do something about those claims, they will be able to do so in other proceedings. In our respectful submission, your Honour, that is an entirely appropriate and responsible treatment of those excision group members.

40 HIS HONOUR: And against the prospect of that happening again in the interval between today and administration, I must say I approve whole heartedly of the cy-près approach that has been outlined.

MR ARMSTRONG KC: Thank you, your Honour. Yes. We'll come 45 back to that as well. So that was it for topic C. Now, topic D, as I indicated earlier, is the treatment of the three major elements of the

proposed settlement; that is, the inter partes arrangement between the plaintiffs and the State, the inter se arrangements for how the money gets shared between the class members, and thirdly, the proposed deductions. We have been very careful throughout the material to try and delineate between those three aspects of the matters that your Honour is called upon to consider, in part because different considerations arise for each of them.

And we've tried to synthesise, both in the confidential opinion and separately in the open submissions, the principles as Mr Slade and I perceive them to arise from the jurisprudence in other courts. Obviously your Honour is by no means bound by that jurisprudence, but it is, in our respectful submission, actually an appropriate description of the relevant considerations, and we would urge your Honour to adopt it so far as your Honour thinks it appropriate.

Now, the first component of the settlement is the inter partes aspect. This is addressed in the confidential opinion at section F from paragraphs 145 to 225, and separately in our open submissions, also at section F, at paragraphs 64 and following. Now, the inter partes settlement is reflected in the deed of settlement negotiated between the plaintiffs and the State, which your Honour will find in exhibit AS1 to Ms Sdrinis's first affidavit at page 35 of the court book.

HIS HONOUR: Mhm.

MR ARMSTRONG KC: Now, that open version of the deed does not include the annexed list of names of the group members. The list of names is separately reproduced in the application book at page 145 as part of confidential annexure AS2 –

HIS HONOUR: 2, yep –

MR ARMSTRONG KC: – to Ms Sdrinis' –

HIS HONOUR: – a deed with the confidential schedule.

MR ARMSTRONG KC: Yes. Thank you, your Honour.

HIS HONOUR: Yep.

MR ARMSTRONG KC: Now, also just briefly, your Honour recalls that there is the additional group member, and that person who – there was one group member who dropped out, the additional group member swapped in.

HIS HONOUR: Mhm.

MR ARMSTRONG KC: Fortunately, they actually had very similar claim values so it didn't upset the apple cart at all. And that process
5 of swapping out one group member for a new one is explained in Ms Sdrinis's third affidavit at exhibit AS4, and I don't need your Honour to go to it at the moment, but the relevant provision is clause 3.1 and it's just about that swap-out –

10 HIS HONOUR: Yep.

MR ARMSTRONG KC: – process. Now, because we thought it might be of assistance, and frankly because we find it of assistance in our own consideration of the appropriateness of a proposed settlement, the
15 plaintiffs' open submissions have sought to identify the different possible considerations that affect the Court's assessment of whether the settlement is appropriate, by reference to the list of factors that is reflected in the Federal Court's practice note –

20 HIS HONOUR: Yep, yes.

MR ARMSTRONG KC: – for class actions.

HIS HONOUR: No, I've been – I was grateful for that.
25
MR ARMSTRONG KC: It is a use – the courts have been careful to emphasise that it's not a shopping list.

HIS HONOUR: No.
30
MR ARMSTRONG KC: But it is actually very thorough, and it is, in my own experience, hard to find a factor that's not covered there somewhere, so it does tend to get used a little bit like a –

35 HIS HONOUR: Mm.

MR ARMSTRONG KC: – shopping list. Now, the first of these factors is for the Court to have regard to the complexity of the proceeding and its likely duration if there's not a settlement. This is
40 addressed in our open – sorry, our opinion at paragraph 155, and in the submissions at paragraph 69.

Just briefly, in terms of the complexity of this class action, it covers a very long claim period of roughly 50 years. There are very numerous
45 claimants. There are now 129 still covered by the class action. The claims in negligence would require the Court to assess what were the

appropriate practices that should have been adopted at youth detention facilities over the whole of that claim period, and as they evolved from time to time during the claim period, and then compare what were those appropriate practices to what was actually going on at Ashley –
5
HIS HONOUR: Mm.

MR ARMSTRONG KC: – at each particular time during the claim period. One only needs to describe that task to imagine how
10 voluminous the evidence might be, how opaque it might be, how much of a task it might be for the Court to actually be able to nail any of those issues.

HIS HONOUR: Mm. I must say, for my own interest I did something
15 of a back of the envelope calculation. I couldn't see the action taking less, at a absolute minimum, than six months. So –

MR ARMSTRONG KC: That, again, your Honour, is enough to strike fear in the heart of –
20
HIS HONOUR: Mm.

MR ARMSTRONG KC: – perhaps not just the lawyers but also any judge.
25
HIS HONOUR: That's an absolute – that's an absolute minimum, I would have thought.

MR ARMSTRONG KC: Yes. Yes –
30
HIS HONOUR: Possibly the whole of – whole of a year.

MR ARMSTRONG KC: It could be a very long trial, that's right. And then apart from – I don't need to dwell on the other issues of
35 complexity – apart from the sheer length of the trial, it would be, we think, without wishing to presume anything, highly unlikely that the matter could be ready for trial before very late 2025, or more likely sometime in 2026.

40 HIS HONOUR: Mm.

MR ARMSTRONG KC: There's the length of the trial that your Honour has outlined. The Court would then require time to write what would be necessarily a very long judgment. It would require months
45 of judge time to prepare such reasons. And after we got that judgment, let's say, for the sake of argument, perhaps in late 2027 or early 2028,

such a complex proceeding would be ripe for appeals. And so we could add another year to 18 months, perhaps longer, for the appeals. And by the end of the appeals, all we would have done is resolve the common questions between the parties –

5

HIS HONOUR: Mm. That's right.

MR ARMSTRONG KC: – and the four claims of the individual plaintiffs, and then we would have to move to working out how the
10 answers to the common questions –

HIS HONOUR: Informed the –

MR ARMSTRONG KC: – apply –

15

HIS HONOUR: – other 125 people. Mm.

MR ARMSTRONG KC: Exactly. And so your Honour can see that, if this were to run, the delay before the class members would – could
20 hope to see any compensation would run into a not small number of years.

HIS HONOUR: Mm.

25 MR ARMSTRONG KC: Now, all of those problems are avoided by the proposed settlement. Secondly, in terms of the reaction of the class, the class members who are being removed have not objected. They are – in most respects they have given instructions, in the form of opting out, that they are happy to be removed from the class action.

30

In terms of the class members who remain as settlement members, so far as we've had feedback from any of them, it's been uniformly positive. And as your Honour knows, the notices that were sent to the class members, pursuant to the orders that your Honour made in July,
35 invited them to put in notices of objection if any of them wished to object to the proposed settlement. And our searches of the court file indicate that, as at last week, no-one had objected, and we believe that still to be the case.

40 The next factor listed in the Federal Court practice note is for the Court to consider the stage that has been reached in the proceeding. We address this in the confidential opinion at paragraph 186 and in our submissions at paragraph 78. And that's why I took your Honour in some detail before to the work that had been done prior to the
45 mediation.

HIS HONOUR: Mm.

MR ARMSTRONG KC: Although this settlement –

5 HIS HONOUR: Or the stage that's reached in the proceedings has got to be compared to the stage of preparation –

MR ARMSTRONG KC: Yes.

10 HIS HONOUR: – for the proceedings that has been reached.

MR ARMSTRONG KC: Yes. Thank you, your Honour. We'd respectfully adopt that formulation. The stage of preparation of the loss quantification, and I should note as well, the care with which the 15 plaintiffs, and indeed both parties, delineated the issues that were on the table at the mediation is also a critical consideration in that regard. So, the Court can be satisfied that the interests of the class members have been not only properly considered, but as fully worked up as the court could really hope would be done by any class plaintiffs in this 20 kind of proceeding.

HIS HONOUR: Mhm.

MR ARMSTRONG KC: Next in the list of the factors of the risks for 25 the plaintiffs of not being able actually to establish that the State is liable in the first place. We've addressed in the opinion and in the submissions the forensic risks that the plaintiffs would have taken if they had tried to run this case to a trial. I've already referred to the length of time that's involved, the nature of the allegations, the fact 30 that events occurred in a detention centre involving children, the questions about the quality of records that might be available to prove or corroborate any allegation.

Those are addressed in our opinion at paragraph 188 and following. I 35 don't want to go into any more detail about that. Sorry, 188, but also 162 to 170. We have addressed there the forensic risks that the plaintiffs faced.

HIS HONOUR: Mhm. Well, the High Court have raised something of 40 a new one –

MR ARMSTRONG KC: It did.

HIS HONOUR: – in recent times in terms of non-delegable duty for 45 intentional torts.

MR ARMSTRONG KC: Yes, we were very conscious of that when it happened last – I think it was last week, your Honour, yes.

HIS HONOUR: Mhm.

5

MR ARMSTRONG KC: Then separately from the risks of establishing whether the State is actually liable, there are also difficult legal issues in these claims regarding the way in which the Court might actually quantify damages, even if it is found that the State were liable for a
10 given claimant's losses. We address this at paragraph 191 of the opinion and from paragraph 80 of our submissions.

There are as your Honour has just mentioned, difficult questions regarding the principles to be applied to general damages for pain and
15 suffering, and difficult questions regarding the quantification of claims for economic loss; for instance, loss of earnings. Obviously, that becomes a difficult task in a case where the children were already in youth detention.

20 HIS HONOUR: Already in the criminal justice system, yeah.

MR ARMSTRONG KC: Their prospects were not great even before the abuse. And then for many of them, tragically, they graduated from Ashley into the adult justice system. Those are all difficult questions
25 when it comes to valuing economic losses.

The next of the factors is the risk that the proceeding would not be permitted to proceed as a class action, or for any other reason was not able to proceed as a class action. We've addressed this in our opinion
30 at paragraph 197, and we've distinguished there between the risk in relation in the period up to the completion of the initial trial.

I don't want to say any more about that, but as we've discussed a moment ago, different considerations then arise after the initial trial,
35 because even if the plaintiffs, are successful, we've then got to go through – if we weren't able to settle the case, we've then got to go through and work out how the outcome from the initial trial translates into an impact on each of the individual group members, and that is really past the stage of the class action. It would be a massively
40 complicated, time-consuming, expensive, and delayed procedure.

The next factor is the ability of the State to withstand a greater judgment. I don't need to say anything more about that, it's not to our mind a consideration here. Next is the question of comparing the
45 settlement that's been proposed to the potential best-case outcome for

each of the claimants if they were to litigate their action fully through to a judgment and they were wholly successful.

This comparison has been described in some of the authorities, I think
5 it was in *Pearson,* I'll find it for your Honour in a second. No *Coatman.* In *Coatman* at paragraph 75 and following, it's not a terribly realistic point of comparison to just look at the outcome that's been achieved and compare it to the best case. Even if it were, the reason that it's not terribly realistic is because it just doesn't take into account
10 the risks that the plaintiffs wouldn't actually be able to go all the way through to judgment or wouldn't get as good a result.

HIS HONOUR: But it certainly is a consideration where the relativity is great.
15

MR ARMSTRONG KC: Yes, yes. And in our respectful submission, what your Honour sees from the analysis here is that this settlement achieves – actually we think, no. This settlement achieves a very, very good result compared to that analysis. The opinion at paragraph 203
20 and especially from paragraphs 210 to 216 provides your Honour with the assessment, the analysis undertaken by Mr Slade and myself, where we try and do this comparison.

HIS HONOUR: Yeah. Well, I think it's only not a highly relevant
25 issue where the relativity is low.

MR ARMSTRONG KC: Yes.

HIS HONOUR: Because other considerations come into play. Well,
30 when it's high, it answers a lot of my concerns in any event, and I imagine any judge's concerns.

MR ARMSTRONG KC: Yes. The next factor is the – in any event, the – going to be the more realistic one, because it invites consideration
35 of the reasonableness of the settlement, having regard to the risks of the plaintiffs ultimately being able to get through to judgment. And that's addressed in the opinion at paragraphs 219 but especially at paragraph 223. And your Honour will see there that Mr Slade and I have expressed some fairly strong views in that regard.
40

And so that covers off the last of the factors in the Federal Court, which is the terms of advice from counsel. As I mentioned before, ASL got advice before the mediation from Mr McTaggart. Mr Slade, with all of his experience as a class action litigator, both as a solicitor and as
45 counsel, was involved intimately in the preparation for the mediation and the finalisation of the loss estimates. And then there was advice

from the counsel briefed in the class action during the mediation and now reflected in the opinion prepared for your Honour. For all of those reasons, in our respectful submission, the inter partes aspects of the proposed settlement are appropriate for approval.

5

HIS HONOUR: Yep.

MR ARMSTRONG KC: Can I move then to the second element of the proposed settlement, which is the inter se arrangements; that is, the
10 arrangements for sharing the seventy-five million dollars among the class members. As I said a little while ago, there are a discrete set of considerations that apply to this assessment compared to the ones that were addressed in the Federal Court's practice note list of factors.

15 And we've tried to extract the relevant considerations here for your Honour in the confidential opinion in section G, and in the open submissions at section G(1) at paragraphs 96 and following. Now, the settlement distribution scheme in the present case is – was provided to the State after the mediation for comment and – sorry, I should say a
20 draft of it was provided to the State prior to the mediation. It was on the table at the mediation, and it's been revised since the mediation to reflect some additional considerations that have arisen. And we understand that the State has no objections or further comments to make beyond that.

25

HIS HONOUR: Well, if they do, they're confined to six lines.

MR ARMSTRONG KC: Yes, your Honour. And the – Ms Sdrinis's third affidavit at paragraphs 25 to 26 confirms that the proposed SDS
30 is the one that appears for your Honour in exhibit AS1 to her second affidavit at page 114 of the application book.

HIS HONOUR: Yep.

35 MR ARMSTRONG KC: Now, I don't propose to go into great detail about the content of the settlement distribution scheme. For the sake of the record, I'll mention that the overview of the process that's intended to be undertaken is set out in s2 of the SDS – that is, settlement distribution scheme – which for your Honour starts at page
40 116 of the application book. And again, just for the record, the proposal is that Ms Sdrinis will be appointed as the administrator of the SDS –

HIS HONOUR: Yep.

45

MR ARMSTRONG KC: – and is responsible for implementing the SDS in the interests of the group members as a whole, not as the lawyer for any individual claimant.

5 As soon as practicable after the Court makes orders approving the proposed settlement including the SDS, and once the time for any appeals has passed, Ms Sdrinis will use some of the settlement fund to pay legal costs and those other deductions that I mentioned a moment ago, but also start the process of finalising the assessments of the claim
10 values of each of the individual settlement members. Her final – well, proposed final assessments will be notified to each of the settlement members, and each of them will have an opportunity to request a review if they think that some information has been missed.

15 Anyone who seeks a review will initially be referred by Ms Sdrinis herself, and if after that they are still not satisfied, the SDS contemplates an opportunity for a further review, which will be referred to one of the senior counsel who have been nominated in the SDS, including, for instance, Mr McTaggart. And so those KCs or SCs
20 will then undertake their own review of the information available for that settlement member, and determine what the appropriate valuation of their claim ought to be. And that review valuation then stands as the final valuation for that person.

25 HIS HONOUR: Is this all novel, or has this been modelled on other class actions?

MR ARMSTRONG KC: No, this is not novel, your Honour. There are many examples of this kind of review procedure.

30

HIS HONOUR: Yeah.

MR ARMSTRONG KC: Perhaps most pertinently, your Honour could consider, and it's in the book of authorities, Osborne J's settlement
35 approval decision of the 2009 Victorian Black Saturday bushfire case that was reported as *Matthews v SP Electricity*. Might have been *SPI Electricity*, I can't remember now. But certainly that distribution scheme included this kind of review possibility.

40 HIS HONOUR: When Osborne J was first appointed to the Victorian Supreme Court, he'd done nothing but planning cases for decades, and his first trial was a murder trial. His Honour has done some very substantial cases in the two decades, I think, since that occurred.

45 MR ARMSTRONG KC: He did, yes. His Honour was actually, I think, brought down from the Court of Appeal specifically to do –

HIS HONOUR: To do *SPI*?

MR ARMSTRONG KC: To do the *Matthews* settlement approval,
5 because it was such a massive – it was half a billion dollars, ultimately.

HIS HONOUR: Well, it's a thoroughly commendable system of review.

10 MR ARMSTRONG KC: Thank you, your Honour. And so once – perhaps the last point to make, because it's the really important one, is that once all of the individual claim values have been finalised, the available settlement money will be shared out between the class members in the proportion which each individual's claim value bears
15 to the others. And so it is what, as your Honour knows, is usually called a pro rata distribution.

They share – sorry, the relative shares that they get from the settlement fund reflect the relative size of their final claim values. It seems to us
20 – I'll pre-empt something I'll say in a moment – that's the only fair way that the fund could possibly be distributed.

HIS HONOUR: Mm.

25 MR ARMSTRONG KC: So that's the overview of the settlement distribution scheme. There's a lot of detail in it. Although it's based on many precedents: the bushfire cases; the Fairbridge Farm School's class action, again a child abuse institutional child abuse case before Garling J in the Supreme Court of New South Wales; the Northern
30 Territory Youth Justice Centre case that Mr Slade was involved in.

There are many examples of this kind of settlement distribution scheme. We've shamelessly borrowed from those precedents, but it has been very carefully reviewed to make it exactly appropriate, we
35 think, for the particular circumstances of this case. It is very bespoke in that respect.

Now, we've listed in the open submissions the factors that appear to us to emerge from the decisions in other courts regarding the relevant
40 considerations for a Court when considering whether to approve the inter se components of a class action settlement. The first of them is whether the proposed arrangements involve consistent treatment of all of the group members. That is, no-one gets special treatment, no-one gets favouritism. Apart from the fact that some group members are
45 excluded from this settlement – in fact, they have ceased to be group

members altogether – everybody else will be subject to the same assessment principles, so there is no differentiation of treatment.

The only caveat to that is the one I mentioned a little earlier, that –
5 and it's not really a caveat anyway, but where there is a conflict between group members, the second in time is being referred to a different firm. That firm will do the – will assist that person to participate in the claims assessment process, but their actual participation is still subject to the same claims assessment
10 methodology set out in the settlement distribution scheme. That's addressed in the confidential opinion at paragraph 236 and following.

The next factor is whether the proposed assessment methodology itself is reasonable as a matter of law. Mr Slade and I dealt with that in great
15 detail in section D of the confidential opinion. I should say that the claims assessment methodology appears as the schedule to the SDS, at page 136 of the application book. And for the reasons explained by Mr Slade and I, and your Honour's own familiarity with recent decisions in this Court regarding the appropriate principles to apply to
20 assessments of personal injury claims like this, we would urge your Honour to take the view that the assessment methodology is plainly reasonable.

HIS HONOUR: Well, it's also both express and implicit in Mr
25 McTaggart's advice.

MR ARMSTRONG KC: Yes, yes, it is. Thank you, your Honour. The next factor is whether the assessment methodology reflects the case that was proposed to be put at the trial. We hadn't really got that far,
30 but the short answer is yes, it does. That's the confidential opinion at paragraph 244. Next factor is whether the assessment methodology is likely to deliver fair relativities between the class members. Again, for the reasons I advanced a moment ago, that's plainly the case. That's the confidential opinion at paragraph 247.
35

Now, I do want to mention the next factor that the courts with this kind of regime have mentioned, which is: might there have been a cost-effective but more perfect way of assessing individual claims? Now, in our respectful submission, given that your Honour has seen exactly
40 how much work was done to assess these individual claims, there really – it's very hard to see that there is actually a better way that could have been adopted at all.

But we've given thought to whether, perhaps, it might have been cost-
45 effective to bring in new solicitors to act as reviewers; or only have the assessment work done by barristers, that is, outsourced; or whether

there should be compulsory review by independent barristers of every assessment that ASL have made. We address those different options in the confidential opinion at paragraph 251. And, in our respectful submission, none of them would make any sense in the present case.

5

Firstly, the system that has been adopted has produced a very high quality of information. It shows every sign of being reliable. And very importantly, if any of those outsourcing options were to be adopted, it would require these settlement members to have to retell
10 their stories to a new set of lawyers with whom they have no prior relationship. Ms Sdrinis's and Ms MacDonald's assessment, reported to the Court, is that the class members have already found it very, very traumatising to have to tell their stories even to solicitors who they've come to know and trust over the course of some years.

15

HIS HONOUR: Well, I picked this up, in particular, from Ms MacDonald's affidavit.

MR ARMSTRONG KC: Yes. And so, for those reasons, although
20 courts sometimes have looked at the possibility of tendering out the claims administration work under a settlement distribution scheme, in the circumstances of this case, we would urge your Honour to take the view that that's not necessary and actually highly undesirable.

25 HIS HONOUR: Mm. Well, that's certainly the view that I've reached.

MR ARMSTRONG KC: Thank you, your Honour. Now, the next two factors about the proposed deductions and any special treatment of the plaintiffs I'll deal with under the third component. And so, the last of
30 the factors that I wanted to mention in this second element, the inter se aspect of the proposed settlement, is just to draw your Honour's attention to four matters that are covered by the settlement distribution scheme. And I'm doing this because they are the ones that might be regarded as controversial, and they reflect judgement calls by the
35 plaintiffs' legal team, and it's very important, therefore, that we draw them to your Honour's attention.

The first is the appointment of Ms Sdrinis as the administrator. I've already explained why, in our respectful submission, that's
40 appropriate. I don't need to dwell on it any further. Second, your Honour will have seen in our confidential opinion that Mr Slade and I have addressed the question of whether the proposed immunity for Ms Sdrinis that's provided by the settlement distribution scheme is appropriate. That is, she can't be sued for decisions that she makes in
45 good faith in implementing the scheme.

We've explained to your Honour the couple of different approaches that have been taken to that kind of immunity clause in the Federal Court. And we've adopted the one that reflects, as we understand it, the most recent accepted practice.

5

HIS HONOUR: Yep.

MR ARMSTRONG KC: And we'd urge your Honour to adopt that for the reasons that we've explained. Now, the third really important
10 machinery provision in the SDS is that the settlement distribution scheme virtually requires that every settlement member, before they get a payment of compensation, will need to have an initial consultation session with a specialist financial adviser.

15 HIS HONOUR: Yep.

MR ARMSTRONG KC: That is an unusual provision.

HIS HONOUR: I was going to ask whether that was novel.

20

MR ARMSTRONG KC: It's not entirely novel, your Honour. We've given your Honour the citations to the couple of cases where it has already been not just approved but actually required. Mortimer CJ, in the Federal Court in the Northern Territory *Jenkings* youth detention
25 centre case, actually required it as a condition of approval. And Murphy J in – I think we've provided this – yes, in *Pearson*, the Queensland stolen wages, Aboriginal stolen wages case also required it.

30 HIS HONOUR: Does that go down to the level of the banking arrangements, or the advice from the banking association and so on? Is that novel?

MR ARMSTRONG KC: In – I think its inclusion explicitly in the
35 settlement distribution scheme is a level of detail that's beyond what was in the settlement distribution scheme in the other two cases. But when your Honour looks at Mortimer CJ's reasons in *Jenkings* –

HIS HONOUR: Which I have.

40

MR ARMSTRONG KC: – your Honour may have noticed that the – Mr Peter Gartlan from the Financial Counselling Australia was also involved in that settlement distribution scheme, and Mortimer CJ – the original application there from the plaintiffs was that the sum of two
45 hundred thousand dollars be set aside to fund the provision of financial

counselling services to the class members in that case. Mortimer CJ actually concluded that two hundred thousand dollars was not enough –

HIS HONOUR: Right.

MR ARMSTRONG KC: – and required it be increased by a factor of three, and allowed six hundred thousand dollars because her Honour took the view that it was so important that the class members in that case be given the opportunity to have access to specialist financial advice to help them use the money that they were getting prudently.

HIS HONOUR: Yep. I don't think I appreciated who Mr Gartlan was associated with.

MR ARMSTRONG KC: Yes, yes. That's how we know about him and got him involved in this case, because Mr Slade was involved in the *Jenkings* proceedings.

HIS HONOUR: Right, okay.

MR ARMSTRONG KC: And so, Mr Gartlan is put forward as the proposed coordinator of this counselling program, because he's done it before. And it's a government-funded organisation. And with the funds that are proposed to be set aside from the settlement distribution scheme, Mr Gartlan and his team will be able to coordinate a process of providing to each of the settlement members access to a specialist financial adviser who can give them proper investment advice, a financial counsellor who can assist them with debt management and setting up bank accounts, and things like that.

And, also, a specialist trauma counsellor to help them deal with what is likely to be a difficult process for them in having to – just being involved in the settlement is likely to trigger old and harmful memories. And so the idea is that to the – wherever possible, we would like the settlement members to be able to participate in a single meeting with the financial adviser and the financial counsellor and the trauma counsellor at once, so that they can be given a holistic set of recommendations for how to participate in the settlement process and what to do with the money that they get.

HIS HONOUR: Well, it's hard to think of any permissible protection that could be imposed over and above that scheme, it seems to me.

MR ARMSTRONG KC: Quite so.

HIS HONOUR: One can only go so far.

MR ARMSTRONG KC: Yes. We're very conscious, your Honour, that it would perhaps be a step beyond what the Court would regard as appropriate if we did any more than we currently propose.

5

HIS HONOUR: Yep, that what I said. It's hard to think of any permissible protection. Mm.

MR ARMSTRONG KC: Yes. And so I would also say, your Honour,
10 that the amounts of money that were being distributed to the individual class members in the two other cases that I mentioned, *Jenkings* and *Pearson*, were tiny compared to the levels of compensation that each of the class members, each of the settlement members is currently estimated to be getting under this settlement. These are life-changing
15 amounts of money. They reflect the recent trend of decisions in this court and other courts. It is compensation that is an attempt to do what money can to repair the damage that was suffered by these class members.

20 Their lives after Ashley were very adversely affected by their experiences at Ashley. Their future income-earning potential was harmed. Money can only go so far, and frankly not very far at all. But it's all that the civil justice system can do to provide compensation. But because it is attempting to repair the damaged lives that these
25 people subsequently experienced, it's tremendously important that the money be used prudently. And that's why we've pushed it as far as we think we can to require the class members to get advice.

And we can't make them follow the advice, but we hope that they will,
30 so that these compensation payments can be used to make a long-term beneficial impact on the lives of the class members, and to the extent that they have dependents, it's a set of payments that can endure for the benefit of their children and other dependents.

35 Particularly given the precedents that I've mentioned to your Honour and the way that the similar sort of considerations apply in the present case, although it's not common to have this kind of almost compulsory financial advice process as part of the settlement distribution scheme, in the present case we would urge your Honour to the view that it is
40 appropriate and desirable, and in fact, as was the case in *Jenkings*, a distribution scheme that omitted it would be – ought be criticised.

HIS HONOUR: Including sole access bank accounting – bank accounts.

45

MR ARMSTRONG KC: Thank you, your Honour. That's the fourth element; that as part of the – one of the preconditions to Ms Sdrinis being able to pay any compensation to a particular class member will be that they have a bank account in their own name. We don't – once the money gets into their account, we can't control what they do with it –

HIS HONOUR: No.

MR ARMSTRONG KC: – but we can make sure it gets into their hands in the first place. And that seems to us to be tremendously important. So those are the factors that I wish to draw your Honour's attention to in relation to the settlement distribution scheme. It is – sorry, I should also say that the whole scheme, as your Honour knows, remains subject to the Court's supervision, and there is provision for Ms Sdrinis to approach the Court for directions in relation to any issue that might arise in the course of the administration that we haven't been able to predict exactly.

HIS HONOUR: So this is paragraph 19 of the –

MR ARMSTRONG KC: Yes.

HIS HONOUR: – general form of order –

MR ARMSTRONG KC: Yes.

HIS HONOUR: – we spoke about earlier this morning.

MR ARMSTRONG KC: Yes. That's right, your Honour. And, there are a number of other provisions of the settlement distribution scheme that I've not bothered to take your Honour to because they really seem to us to be perfectly normal. Your Honour mentioned the cy-près provision. And so, in that regard, there is a small possibility –

HIS HONOUR: I would have thought, given the sums involved, that it might be a small possibility –

MR ARMSTRONG KC: Yes.

HIS HONOUR: – but it can still happen.

MR ARMSTRONG KC: Yep. A small possibility that at the end of all of the payments, there is a small amount sitting left in the settlement distribution fund. If it's a large amount, Ms Sdrinis will come back to the Court –

HIS HONOUR: Yep.

MR ARMSTRONG KC: – for directions. If it's a small amount, that
5 doesn't actually justify the legal costs of distributing it to the class members or coming back to the Court, then there's provision for that small amount to be paid to a particular –

HIS HONOUR: Go to an organisation.
10
MR ARMSTRONG KC: – nominated charity. Yep. And that's a charity that does work in the field related to this kind of claim.

HIS HONOUR: Yup.
15
MR ARMSTRONG KC: And it's just a very cost-efficient way to deal with the final –

HIS HONOUR: It minimises erosion of that amount of money that
20 might be –

MR ARMSTRONG KC: Exactly so.

HIS HONOUR: – useful somewhere.
25
MR ARMSTRONG KC: Yes. Yep. Exactly so. So, that's it for the inter se components of the proposed settlement.

HIS HONOUR: If anyone would like a morning break, I'm happy to
30 take 15 minutes.

MR ARMSTRONG KC: I'm in your Honour's hands.

HIS HONOUR: Anyone in the well of the court? All right, we'll keep
35 going.

MR ARMSTRONG KC: Thank you, your Honour. Now, the third component of the settlement is the proposed deductions. These are addressed in the confidential opinion – that's section I for India, at
40 paragraphs 281 and following, and in our open submissions at section H. The deductions are for: the legal costs up to today; the future costs, that is, the costs of administering the settlement distribution scheme; thirdly, the proposed reimbursement payment to each of the four named plaintiffs; and fourth, the proposals for
45 withholding certain amounts that are subject to clawback provisions in other legislation.

HIS HONOUR: Yep.

MR ARMSTRONG KC: Now, the largest of those components, of
5 course, is the legal costs. These are addressed in the confidential
opinion at paragraphs 286 to 295, in the open submissions at paragraph
141, and then in the two reports that were prepared by Ms Harris as the
court-appointed costs assessor. The first report deals with the legal
costs, and here I include disbursements, of course, up to the 20th of
10 September.

HIS HONOUR: Yep.

MR ARMSTRONG KC: And the second report is the costs that have
15 been incurred from the 20th of September up till the close of today.
The second report primarily deals with the additional disbursements in
the way of counsel's fees.

HIS HONOUR: This was the one received last week, the 21st of
20 November?

MR ARMSTRONG KC: Yes. Yes, that's the one, your Honour.

HIS HONOUR: All right. Well, I'm certainly not about to
25 second-guess Ms Harris.

MR ARMSTRONG KC: Thank you, your Honour. Just again, for the
record, I should make plain that Angela Sdrinis Legal acted in this
class action on a no win, no fee basis. The firm carried most of the
30 disbursements on its own books, and went without payments of its own
fees for the duration of the litigation.

HIS HONOUR: I think it's important that it be known that there was
no costs provider involved in this case.
35

MR ARMSTRONG KC: No litigation funder.

HIS HONOUR: No litigation funder.

40 MR ARMSTRONG KC: Yes.

HIS HONOUR: And that – that this is not a contingency fee case, as
some people might imagine.

45 MR ARMSTRONG KC: No, that's quite right, your Honour. I should
also say, I think it's important that it's been recognised in the High

Court, and in recent Federal Court decisions, that it's in accordance with the standards that the Court would expect of practitioners, that meritorious claims like this that are otherwise – can't be funded, ought be run, no win, no fee, by a firm that is willing and able to do so. I should say as well that the barristers who have been briefed in this class action, or incidental to the class action, also acted on a part-conditional –

HIS HONOUR: No fee. Yep.

MR ARMSTRONG KC: – fee arrangement. And –

HIS HONOUR: Well, really – is that right? Is that correct way to describe it? Because the barristers really only get an uplift to compensate them for having foregone a large part of their fees until the settlement of the case.

MR ARMSTRONG KC: Yes. Yes. And your Honour's picked up the next point that I was going to make, which is that none of this is a contingency fee arrangement.

HIS HONOUR: No.

MR ARMSTRONG KC: None of the lawyers get a share of the damages; rather, to the extent that any of us have acted on a part, or fully no win, no fee basis, we get to charge an additional 25 per cent of that –

HIS HONOUR: On the unpaid –

MR ARMSTRONG KC: – conditional component.

HIS HONOUR: On the unpaid amount.

MR ARMSTRONG KC: Yes. And that's the – that's only – that's called the uplift, and it's the only uplift that the lawyers get from acting under these kinds of arrangements. Now, again, there are specific principles that courts in other jurisdictions have developed for assessing whether the proposed legal costs in a class action ought be approved.

In our open submissions, we've provided your Honour with a citation and a synthesis of her Honour Nichols J's precis of the relevant principles in *Lenehan v Powercor*, and we commend that synthesis to your Honour's consideration. And then the various factors that were

identified by her Honour are addressed in detail in detail in our open submissions at paragraphs 146 through to 167.

Now, just briefly in relation to Ms Harris's reports, your Honour, I gather, has had a chance to have a look at those reports, and your Honour will see that the way in which Ms Harris has tried to go about making a reliable assessment of the reasonable costs that have been – sorry, has gone about trying to make an assessment of the costs that have been incurred, and that would be regarded by the Court as reasonable –

HIS HONOUR: As reasonable.

MR ARMSTRONG KC: – if they were challenged. She starts by looking at the different costs agreements that ASL had with the named plaintiffs and, actually, most or all of the class members over the course of the proceeding. That's in her section D at paragraph 41 and following. It is important that I draw your Honour's attention – perhaps your Honour might go to Ms Harris's report, which is –

HIS HONOUR: The original 18 October report?

MR ARMSTRONG KC: Yes, your Honour.

HIS HONOUR: 345?

MR ARMSTRONG KC: 345. And in that report at paragraph 57.

HIS HONOUR: Yep.

MR ARMSTRONG KC: I don't want to go into – I don't want to disclose the substance of this, your Honour, but your Honour will see that there's an issue there that Ms Harris has identified, and it's also addressed in the confidential opinion from Mr Slade and myself at paragraph 292. The long and the short of it being that the costs agreements are, in our respectful submission, in proper form and permissible, having regard to the issues in the proceeding.

Then in terms of the methodology that Ms Harris has undertaken, the principles established in *Lenehan*, that I mentioned a moment ago, make clear that the Court here is not trying to do an item-by-item taxation of the costs that have been incurred by the parties. The purpose of this exercise is to come up with a reasonably reliable estimate of the appropriate costs associated with the class action, and to do – to derive that estimate in a cost-effective way. Otherwise –

HIS HONOUR: Well, that – that's why, when I – when I say that I'm not going to second-guess Ms Harris, it's because of that; it's because she's independent, it's because she's experienced in these matters and I'm not, and it's because I don't have the skill and expertise to undertake that sort of assessment. So –

MR ARMSTRONG KC: Yes, thank you, your Honour. She very much is in the position of an expert witness, and she's – as your Honour would expect from an expert witness, has explained in detail the approach that she's taken to work out what costs have been recorded by ASL and which she thinks would be allowed if, in fact, they were contested in a costs hearing in the court. She distinguishes between the period when ASL was charging according to the Court's scale of costs –

HIS HONOUR: Yep.

MR ARMSTRONG KC: – and then the bulk of the period when ASL had revised its costs agreement and was charging hourly rates.

HIS HONOUR: Yep.

MR ARMSTRONG KC: And your Honour will have seen that, in fact, Ms Harris, particularly in that scale costs period, disallows a number of items that otherwise would have been –

HIS HONOUR: Yeah. I wouldn't like to come across her on the other side of the –

MR ARMSTRONG KC: No.

HIS HONOUR: – registrar's taxing table, I don't think.

MR ARMSTRONG KC: No. Now, importantly, although it is not infrequently the case that the solicitors for a plaintiff or applicant will challenge a costs report –

HIS HONOUR: Yep.

MR ARMSTRONG KC: – and say that it's been done too harshly, Ms Harris – sorry, Ms Sdrinis, in her second affidavit at paragraph 194, accepts the allowances that are made by Ms Harris. I should add, though, of course we ask that those allowances be upgraded to include the additional counsel fees that Ms Harris allows in her second report.

HIS HONOUR: Mm. Yep.

MR ARMSTRONG KC: So that's it for the legal costs to date. The next principal category of deductions is for the future costs of administering the settlement distribution scheme.

5

HIS HONOUR: Yep.

MR ARMSTRONG KC: It's addressed – well, this topic is addressed in the confidential opinion at paragraphs 296 and following, in the
10 open submissions at paragraph 175, and in Ms Harris's first report at section K. I don't perceive that I need to dwell on any of the assessments that Ms Harris has made there; she's approved the budget for costs –

15 HIS HONOUR: Yep.

MR ARMSTRONG KC: – for admin costs as reasonable. I did want to draw your Honour's attention to the fact that the administration costs, as defined, don't include the costs of the counselling scheme, an
20 additional five hundred and five thousand dollars. The counselling scheme costs are dealt with separately as what's called a service fund. And –

HIS HONOUR: Yeah, so this is covered in – in the orders sought –
25

MR ARMSTRONG KC: Yes.

HIS HONOUR: – at paragraph 13C?

30 MR ARMSTRONG KC: That's right your Honour.

HIS HONOUR: Yep.

MR ARMSTRONG KC: And so, the admin costs are: the amount that
35 gets paid to Ms – to ASL; the service fund is available to pay for the financial and other counselling that's going to be provided to the class members; anything from the service fund that is not actually required for that purpose will be rolled back into the distribution account –

40 HIS HONOUR: Yes.

MR ARMSTRONG KC: – and ultimately distributed to the class members if it's not needed.

45 HIS HONOUR: That may well account for some residue at the end of the day –

MR ARMSTRONG KC: Yes.

HIS HONOUR: – or could possibly.

5

MR ARMSTRONG KC: Yes, that's right. I should say, we are a little bit hopeful that there won't be much left over from that services fund because the more of it that's spent –

10 HIS HONOUR: The better.

MR ARMSTRONG KC: – we expect it means, the more advice people are getting. And that's really something that we want to urge the class members to embrace. They are being given an opportunity, organised

15 for them, to speak with highly regarded financial advisers specialising in precisely these kinds of payments –

HIS HONOUR: Yes.

20 MR ARMSTRONG KC: – and we really hope that they engage with the financial advisers, listen to the advice, and then actually hire the advisers to act for them –

HIS HONOUR: Yep.

25

MR ARMSTRONG KC: – on an ongoing basis, so that they use this compensation payment prudently over the long term. The last matter I wanted to mention in relation to the administration costs is just to note for your Honour that the SDS contemplates that the administration

30 costs are effectively pre-approved –

HIS HONOUR: Yep.

MR ARMSTRONG KC: – for ASL. That is, it's – they're set as a

35 budget and they're able to be prepaid.

HIS HONOUR: Yep.

MR ARMSTRONG KC: Of course, the alternative would be that they

40 be prepaid – sorry, that they be set as a budget but not actually paid until the end of the proceeding.

HIS HONOUR: Yep.

MR ARMSTRONG KC: But in our respectful submission, given the conscientious work that your Honour can see has been undertaken by ASL –

5 HIS HONOUR: If they've been pre-approved, they should be prepaid.

MR ARMSTRONG KC: Yes, yes, and it puts the firms in funds – the firm in funds to do the various things that need to be done.

10 HIS HONOUR: Yep.

MR ARMSTRONG KC: So, that's it for the administration costs. The third of the four proposed deductions is what's called the reimbursement payment to each of the four named plaintiffs. To be
15 clear, this is a proposed payment of twenty thousand dollars to each of the four gentlemen. The reasons for it are addressed – sorry, its appropriateness is addressed in the confidential opinion at paragraph 304, and the reasons for it are explained in the opening submissions at paragraph 168, and Ms Sdrinis has also addressed it in her second
20 affidavit.

HIS HONOUR: And they are obvious. The extra commitment, the extra work and the extra stress and anxiety –

25 MR ARMSTRONG KC: Yes.

HIS HONOUR: – that it caused each of those individuals needs some recognition, and twenty thousand dollars is a very modest sum.

30 MR ARMSTRONG KC: It is. Yes. Thank you, your Honour. I don't need to say anything more about that, then. The last of the four proposed deductions is really one that's forced on us by other legislation. Some of the group members have been receiving payments under the NDIS, or were receiving payments from Centrelink, or have
35 other obligations, for instance, under the Social Security Act.

HIS HONOUR: I must say I'm impressed at the way in which those various clawback payments have been approached and negotiated.

40 MR ARMSTRONG KC: Yes, and again, in that regard, we're grateful to our friends for the State, your Honour. They've taken on the burden of negotiating with Medicare, for instance –

HIS HONOUR: Yep.

45

MR ARMSTRONG KC: – to try and remove the extent to which we need to deal with Medicare repayments on an individualised basis.

HIS HONOUR: Yep. No, I think that's commendable.

5

MR ARMSTRONG KC: Thank you, your Honour. And then the – so that's it for topic D and the three components of the proposed settlement: the inter partes component, the inter se component, and the proposed deductions. And for all of those reasons, in our – in the
10 plaintiffs' respectful submission, all of the components of the proposed settlement are appropriate and have been prepared in a way that the Court can be satisfied, comfortably, that the proposed settlement is fair and reasonable in the interests of the settlement members considered as a whole.

15

Now, the last – sorry – topic E was the proposed form of order that was sent up to your Honour's chambers last week. Now, your Honour's indicated that he has had a chance to consider these already, so I can, I think, be brief with them. The orders 1 and 2 deal with the proposed
20 arrangements regarding the confidential materials that have been filed, and just to explain, there are some parts of the confidential materials that are so confidential that we think that the confidentiality orders ought to be permanent, and they're dealt with in order 1.

25 There are others that ought to be kept confidential up to the point where the Court has approved the settlement, and they are dealt with in proposed order 2, and the proposal there is that if your Honour makes the orders approving the settlement, then once we allow the appeal period in respect of those orders to expire, that set of the confidential
30 material could be made non-confidential and then be available for inspection by anybody who is otherwise entitled to expect material filed in the court.

I should say, your Honour, that there is an error in the annexure to the
35 general form of order that we provided last week, in that some of the – sorry – the material that is intended to be covered by order 2 is replicated in the part of the annexure or schedule that relates to order 1. Various people will be flogged for that at Salamanca Place at about 1 pm. Tickets are selling fast. But we'll correct that in the form of
40 the order that we'll send to your Honour's associate.

HIS HONOUR: Yep.

MR ARMSTRONG KC: Orders 3 and 4 deal with the excision of group
45 members that I've explained to your Honour, and –

HIS HONOUR: Well, under – yep, sorry, go on.

MR ARMSTRONG KC: And so that's – the excision of those people will be reflected in the fourth amended form 22A notice, and that's the
5 one that will have both the green text and the red text indicating why a particular group member has ceased to be a group member.

HIS HONOUR: Yep.

10 MR ARMSTRONG KC: Orders 5 and 6 just make clear that that list of names, that further list of names will also be kept confidential in the way that all of the others have been, because it's not appropriate to name people who have been the victim or are alleged to have been the victims of child sexual abuse. Order 7 is a machinery provision.
15 Orders 8 and 9 are really the guts of the approval of the settlement today.

HIS HONOUR: Yep.

20 MR ARMSTRONG KC: 8A seeks your Honour's approval of the proposed deed, that is, the inter partes arrangements, and 8C deals with the SDS, which of course relates to the inter se arrangements. Order 9, I should tell your Honour, the notion that it's necessary to give the plaintiffs authority now for them to enter into a settlement on behalf
25 of group members is sometimes doubted by Federal Court judges, but –

HIS HONOUR: So, this is order 9?

MR ARMSTRONG KC: Order 9, but it's – although from time to time
30 doubts have been expressed about it, it is more often included than not.

HIS HONOUR: Yep.

MR ARMSTRONG KC: And we've taken the liberty of including it
35 here, because it does seem to us to have some at least clarifying work to do, even if it is not strictly technically necessary.

HIS HONOUR: No. And section 89C of the Act is simply – provides general powers of the Court to make any such orders.
40
MR ARMSTRONG KC: Yes.

HIS HONOUR: Yep.

45 MR ARMSTRONG KC: Then order 10 provides for the appointment of Ms Sdrinis as the administrator, and then appointment of various of

the other persons who are specifically named in the SDS as having roles to play, so –

HIS HONOUR: Yep. No E in Barns?

5

MR ARMSTRONG KC: I see that, your Honour. That's more flogging, but just extra lashes. And then Mr Gartlan we discussed a moment ago, and Mr Reynolds is an experienced financial advisor from Sydney who was recommended to ASL by Mr Gartlan –

10

HIS HONOUR: Yep.

MR ARMSTRONG KC: – as someone who's had extensive experience in advising people in relation to precisely these types of compensation

15 payments, and so we've asked that he be appointed by the Court as a financial advisor so that the class members, when they're told about the opportunity to get financial advice, also have the reassurance that the person that they're being referred to has accepted an appointment under an instrument approved by the Court.

20

Orders 11 and 12 provide for the approval of the proposed costs to be paid to ASL for its own fees and for the disbursements, including the hard-working barristers, and then order 13 deals with the other – sorry, the other deductions that we discussed a moment ago, the plaintiffs'

25 reimbursement payments, obviously Ms Harris's costs of preparing her reports –

HIS HONOUR: Yep.

30 MR ARMSTRONG KC: – the services fund, 13C, to pay for all of the counselling –

HIS HONOUR: Yep.

35 MR ARMSTRONG KC: – the future administration costs. We haven't provided here for the deductions in respect of the clawback provisions in the legislation.

HIS HONOUR: Because there's statutory obligations?

40

MR ARMSTRONG KC: There's statutory obligations, and they follow from the SDS itself.

HIS HONOUR: Yep.

45

MR ARMSTRONG KC: And we took the view that your Honour, by approving the SDS, has approved every step that needs to be taken under the SDS.

5 HIS HONOUR: Yep.

MR ARMSTRONG KC: Next, it's important to draw your Honour's attention to orders 15 and – sorry, 15 through to 17.

10 HIS HONOUR: Yep.

MR ARMSTRONG KC: As your Honour knows, under the July orders, we sent notices to all of the group members letting them know that there was an application on foot seeking your Honour's approval of the
15 proposed settlement. We take the view that it's important, if your Honour approves the settlement, to tell the class members that what was formerly in prospect has now actually happened, and so the ones who we were proposing to remove as class members are in fact now no longer class members.
20
HIS HONOUR: Yep.

MR ARMSTRONG KC: And the ones who are remaining class members can now be told that this is – I'm not presuming anything
25 here, but if your Honour approves the settlement, they can be told, "It is now a deal."

HIS HONOUR: Yep.

30 MR ARMSTRONG KC: "This is what's going to happen." And in terms of the notice that we propose to send to them, if your Honour could please go to –

HIS HONOUR: So, paragraph D? No?
35
MR ARMSTRONG KC: I was going to invite your Honour to go to schedule C, which is at, I think, page 22.23.

HIS HONOUR: Yep.
40
MR ARMSTRONG KC: That's the notice that's proposed to be sent to the settlement members, and then 22.25 is a different notice that's proposed to be sent to the people who are being removed from the class, to let them know that, "You're no longer covered by this class
45 action. If you want to do something about your rights, you will need to get independent legal advice."

HIS HONOUR: Yep.

MR ARMSTRONG KC: Then –

5

HIS HONOUR: I do like that 'this is not a scam' addition to the notice.

MR ARMSTRONG KC: That's now very frequently adopted in notices
10 in class actions, your Honour, and I am told that one of the best ways to cause people to think that something is a scam is to tell them it's not a scam. So –

HIS HONOUR: Yeah, but nonetheless, it's accompanied with, "For
15 more information, please go to the website," so –

MR ARMSTRONG KC: Yep. Yes, and your Honour will have noticed, we haven't provided a link to anything.

20 HIS HONOUR: No, deliberately.

MR ARMSTRONG KC: Not in the SMS, for instance, yes, yep, for obvious reasons. Then, the remaining issues, your Honour, are the ones that your Honour's already raised with me. The administrator has
25 liberty to apply to the Court, so can come back to the Court to seek directions if the need arises at any time in the course of the administration of the settlement scheme.

And beyond that, the last order that we ask your Honour to make today
30 is simply to adjourn the hearing of our application in respect of the remaining orders until a date to be fixed, and at that later date, once the settlement distribution scheme has been implemented, Ms Sdrinis will prepare a formal report to the Court identifying what's been done, who's being paid what, any issues that have arisen, so that the Court
35 can be satisfied as to the appropriateness of all of the steps that have been taken.

And at that time, if the Court is otherwise content to do so, we will move on our application for orders that the proceeding be dismissed
40 with no further order as to costs. And so at that later time, the class action would be finished.

In terms of the timing for that third-stage application, the process of the administrator liaising with the class members for the purpose of
45 identifying their final assessed claim values is likely to start in about January of next year. That process of finalising the claim values is

likely to continue from January through to about May or June. Certainly, if there are any reviews that are requested, it's likely to continue through to about June, and so if everything goes smoothly, we would expect that we will be in a position distributing compensation payments to the class members in about the middle of next year.

And your Honour will have noticed as well that there is provision in the settlement distribution scheme that once Ms Sdrinis assesses that 70 per cent of the class members have reached the stage of having their claim values finally assessed, she is able to make some partial interim payments to those people, again, subject to the pre-condition that they have to have got financial advice from the approved advisors first. But if the need arises, if for whatever reason there are otherwise likely to be some delays in distributing the settlement funds, we can ameliorate the impact of that by making partial interim distributions.

HIS HONOUR: Yep.

MR ARMSTRONG KC: Again, that's a device that's been adopted in other proceedings.

HIS HONOUR: Well, that makes obvious good sense.

MR ARMSTRONG KC: Yes, yep. I should also say, I meant to mention this before when your Honour asked me about the precedent for review procedures.

HIS HONOUR: Yeah.

MR ARMSTRONG KC: Settlement distribution scheme. Your Honour will have noticed that the settlement distribution scheme provides that if a settlement member seeks a review of their assessment, and the result of that review is not more than 5 per cent higher than the original –

HIS HONOUR: There's a cost consequence.

MR ARMSTRONG KC: – then they may be required to pay the costs of getting that review undertaken. There is a precedent for that, for instance, in the bushfires settlement that I referred your Honour to earlier. And there's a very good reason for it, which we've explained in the open submissions; that is, we don't want a situation where any group member can figure there is no harm in having –

HIS HONOUR: "I'll see if I can do better."

MR ARMSTRONG KC: Yep, 'cause it just increases the costs, increases the delay.

5 HIS HONOUR: For everyone.

MR ARMSTRONG KC: For everybody, and it's not desirable. On the other hand, if they do seek a review and it turns out that something had gone wrong –
10
HIS HONOUR: Then well and good.

MR ARMSTRONG KC: – and they increase their payment as a result, then it was an appropriate review and there should not be a cost
15 consequence. The review costs should just be part of the overall administration costs. Now, I mentioned to your Honour that we would send up to your Honour's associate a revised form of the form of order with the corrected schedule of confidentiality. Sorry, corrected schedule of materials in respect of which the different types of
20 confidentiality order are sought. We'll send that up either this afternoon or tomorrow morning.

HIS HONOUR: Together, with the correction to Mr Barns's name and the alterations to paragraphs 1 and 19 that I mentioned earlier.
25
MR ARMSTRONG KC: Yes.

HIS HONOUR: I think, if the description of the settlement judge is lifted up to paragraph 1 and the docket judge reference is deleted, that
30 should correct it all the way through.

MR ARMSTRONG KC: We'll attend to all of that, your Honour.

HIS HONOUR: All right, thank you. Mr Read – I'm sorry?
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MR ARMSTRONG KC: Unless there is anything further, those are the submissions – sorry, your Honour, before you –

HIS HONOUR: Yes.
40
MR ARMSTRONG KC: Oh, sorry, I am grateful to Mr Slade. There is one important last factor to mention, and I jumped over it because I didn't take your Honour in detail through the deed, because I know your Honour has looked at it. But it is important to mention that a
45 term of the settlement between the parties includes provision that the Premier of Tasmania –

HIS HONOUR: Make an apology.

MR ARMSTRONG KC: – provides an apology to all of the settlement
5 members for the experiences they endured at Ashley. Ms Sdrinis
explains in her affidavit how important that apology is – that kind of
apology is to survivors of child sexual abuse, how much it's
appreciated by the class members in this proceeding, and again, we
want to record our appreciation for the compassionate and responsible
10 way in which the State and especially its legal representatives have
conducted this proceeding. It is an example, in our respectful
submission, of exactly the way this Court would expect practitioners
to conduct themselves in litigation, and we are grateful for it.

15 HIS HONOUR: Well, thank you, Mr Armstrong. Well, obviously the
Premier is to be commended for his willingness to make such an
apology. Because of its importance to the plaintiffs and the class
members and obviously the State litigator, Mr Rapley, is to be
commended, and his counsel Mr Read and Ms O'Farrell. It's clear to
20 me from reading the papers that there has been a great deal of empathy
involved in the mediation and the subsequent proceedings.

HIS HONOUR: Mr Read.

<SUBMISSIONS – MR READ SC: If it please, your Honour, before I come to the six lines, which I now see are nine, it's important that I do put on record some material in relation to the clawbacks, because regrettably they have not reached the stage that the parties would have found ideal. Can I deal first of all your Honour with Medicare.

HIS HONOUR: Yep.

MR READ SC: We are making a move towards getting a bulk payment agreement. Those agreements are recognised by division 3 of part 3 of the Health and Other Services (Compensation) Act 1995.

HIS HONOUR: Yep.

MR READ SC: A piece of Commonwealth legislation, of course. We haven't yet got to a bulk payment agreement. Regrettably, if by the time the settlement moneys are payable, then because the State is a notifiable person under that Act, 10 per cent of the settlement moneys will need to be paid to the Commonwealth and then, to use the vernacular, clawed back from there.

HIS HONOUR: Well, the amount would be nothing like seven point five million.

MR READ SC: Absolutely nothing like it at all. It might be, you know, five million, perhaps.

HIS HONOUR: Yeah.

MR READ SC: It might be two million, we don't know. So that's the effect of section 23 of that Act, your Honour.

HIS HONOUR: Yep.

MR READ SC: Now, then we come to Centrelink and NDIS, and thankfully the regimes are as good as identical under those two Acts. The Centrelink provisions are in part 3.14 of the Social Security Act 1991, subdivision C. Remarkably the sections do not have double A's, double B's and double C's after them. By s1182 –

HIS HONOUR: Well, they've made up for it in numbers.

MR READ SC: – of that Act:

The Secretary may give a written notice to the potential compensation payer –

Here the State:

5

– that the Secretary may wish to recover an amount from the potential compensation payer.

To our knowledge, we've not received –

10

HIS HONOUR: A notice.

MR READ SC: – any such notices. Now, it's a discretionary matter, and that discretion hasn't been exercised. If we then go to NDIS, the
15 mirror provision under the National Disability Insurance Scheme Act 2013 is s109, which gives the CEO in that case a similar discretion. Again, no notices to the State. And it's important we put that on record –

20 HIS HONOUR: On the record, yes, I understand the reason.

MR READ SC: If that's not too late, however, for –

HIS HONOUR: No.

25

MR READ SC: – the authorities, because they can then, under s1184 of the first legislation and under 114 of the NDIS legislation, give a notice to the – someone who is making a payment to one of the group members. Now, that's dealt with under paragraph 9C of the settlement
30 deed, where there's an undertaking by Ms Sdrinis to make those compensation claims.

HIS HONOUR: Yeah.

35 MR READ SC: So that's the position in relation to clawbacks.

HIS HONOUR: So that would endure until the last payment was made?

MR READ SC: Yes, yes, yes. Now, your Honour, having said that,
40 I'll come to the lines.

HIS HONOUR: Yes, thank you.

MR READ SC: In our submission, your Honour, the settlement
45 represents a fair and reasonable outcome for the settlement members, including the plaintiffs, the four plaintiffs for the 129. Many members

of the State Service have worked hard to ensure that this is a fair and reasonable settlement. Settlement is not just a one-sided achievement. We acknowledge not only the contributions of public servants and indeed very senior public servants, but also the cooperation we've
5 received from this Court, the work of the mediator, and the very worthy work of my learned friends for the plaintiffs. We consent to the terms of the settlement proposed, including those changes discussed this morning. If it please.

HIS HONOUR: Yes, thanks, Mr Read. And it goes without saying, the commendations I just made before Mr Read commenced extend to Ms Sdrinis, Ms Atkinson, their colleagues, and Ms Sdrinis's firm. It's clear that there's been a great deal of expertise involved in the compilation and presentation of this claim by Ms Sdrinis and her firm and the counsel retained by her, and everyone concerned in this matter is to be commended for bringing about what I do regard as a fair and reasonable settlement of this action.

I don't propose to delay this matter by reserving a decision and publishing reasons. And I don't for two main reasons. One is that the open submissions of the plaintiffs' counsel, plural, is to be made public or may be made public, so anyone can access that document, and it's the most thorough document that I have ever seen. Not that I've done an approval of a class action, no judge of this court has. But the amount of detail in that set of submissions is such that no-one could want for more information. So, the fact that that can be made available to any interested persons relieves me of the obligation to set out detailed reasons for my willingness to approve this settlement.

The second reason is that these proceedings this morning have been recorded, and in a moment I will make the proposed orders by consent, subject to anything that counsel wish to say, permitting the recording of the proceedings to be released on YouTube immediately. So, for those two reasons, I propose to give a decision now, and that decision is that I will approve the plaintiffs' proposed form of order, approving the settlement of this action in accordance with the settlement deed and making all of the other orders that are necessary to bring about the distribution – the ultimate distribution of the settlement amount.

The only reason I don't make the orders now is that there are some amendments to be made to it. As soon as I've received those amendments and signification from counsel for the defendants that they are in order, I'll make the order approving the settlement under the Act in chambers and notify the parties. I make – unless, Mr Read, there are any submissions about the recording of proceedings orders that were sought by consent?

MR READ SC: No, there are none, thank you, your Honour.

HIS HONOUR: Mr Armstrong?

MR ARMSTRONG KC: No, thank you, your Honour.

HIS HONOUR: All right. Well, I make orders concerning the recording and publication of the recording of the proceedings in terms

of the proposed orders by consent dated 25 November 2024 handed up to me this morning. And I make that order now. Yes, I think – yes, I think I can safely do that. Notwithstanding I don't propose to make the approval order immediately. But that will be done before 1 pm, I
5 assume, being the appointed hour for certain things to occur, apparently.

All right. Well, I thank counsel, and I thank everyone concerned. This is a momentous case, a momentous settlement for the members of the
10 class, and hopefully it will go some way to repairing a number of lives. The court will adjourn.

<THE COURT ADJOURNED