FEDERAL COURT OF AUSTRALIA

Elliott-Carde v McDonald’s Australia Limited (Stay Application) [2023] FCA 1210

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| File numbers: | VID 726 of 2021SAD 127 of 2022 |
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| Judgment of: | **LEE J** |
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| Date of judgment: | 12 October 2023 |
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| Catchwords: | **EMPLOYMENT LAW** – allegations McDonald’s workers were not given ten-minute rest breaks in contravention of applicable industrial instruments and *Fair Work Act 2009* (Cth) (**FW Act**) – class action commenced by individual employees – bewildering array of proceedings commenced by Shop, Distributive and Allied Employees’ Association (**SDA**) before and after commencement of class action – where proceedings concern up to 350,000 workers – where majority of workers minors **REPRESENTATIVE PROCEEDINGS** – application by SDA for stay of class action – where Court faced with choice of joint trial model or continuance of SDA actions alone – where SDA’s approach to date mired in tardiness and indecision– live “rivalry” between class actions and representative-type proceedings brought by unions – comparison between proceedings commenced under Pt IVA of the *Federal Court of Australia Act 1976* (Cth) and other vehicles for determination of representative-type claims– genius of Pt IVA regime to facilitate binding determination of common issues – Pt IVA as effective vehicle for unions to pursue FW Act claims – where joint trial model in best interests of relevant workers – application to stay class action dismissed**EMPLOYMENT LAW** – where Minister for Employment and Workplace Relations intervened in support of SDA’s application – consideration of historic role of unions in protecting employee interests – role not diminished by commencement of class action alongside SDA actions – role enhanced by Pt IVA regime where unions conduct class actions |
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| Legislation: | *Constitution* s 51(xxxv)*Civil Dispute Resolution Act 2011*[(Cth)](https://jade.io/article/216639)*Evidence Act 1995* (Cth) s 144(1)*Fair Work (Registered Organisations) Act 2009* (Cth) Chs 7, 8, 9, 10, Pt 3-4, ss 5(4), 5(5), 12, 176, 177*Fair Work Act 2009* (Cth) Pts 3-4, 4-1, ss 45, 50, 439, 536AA, 539, 540, 545, 546, 550, 558B, 569(1), 570*Federal Court of Australia Act 1976* (Cth) Pts IVA, VB, ss 22, 23, 33C(1), 33D(1), 33F(2), 33T, 33V, 33V(2), 33ZB, 33ZE(1), 37M, 37M(3)*Judiciary Act 1903* (Cth) s 78B*Conciliation and Arbitration Ac*t *1904* (Cth) (repealed) s 142A  |
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| Cases cited: | *Augusta Ventures Ltd v Mt Arthur Coal Pty Ltd* [2020] FCAFC 194; (2020) 283 FCR 123*Australasian Meat Industry Employees’ Union v Fair Work Australia (No 2)* [2012] FCAFC 103; (2012) 203 FCR 430*Australian Securities and Investments Commission v Commonwealth Bank of Australia (No 2)* [2021] FCA 966*Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27; (2006) 226 CLR 256*Bellamy’s Australia Ltd v Basil* [2019] FCAFC 147; (2019) 372 ALR 638*BHP Group Ltd v Impiombato* [2021] FCAFC 93; (2021) 286 FCR 625*BMW Australia Limited v Brewster* [2019] HCA 45; (2019) 269 CLR 574*Bradshaw v BSA Limited (No 2)* [2022] FCA 1440*Burwood Cinema Ltd v Australian Theatrical and Amusement Employees’ Association* (1925) 35 CLR 528*CJMCG Pty Ltd as Trustee for the CJMCG Superannuation Fund v Boral Limited* [2020] FCA 914*Cohen v Beneficial Industrial Loan Corp* 337 US 541 (1949)*Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389*Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5; (2015) 255 CLR 46*Davaria Pty Limited v 7-Eleven Stores Pty Ltd (No 13)* [2023] FCA 84*Dillon v RBS Group (Australia) Pty Limited* [2017] FCA 896; (2017) 252 FCR 150*Dyczynski v Gibson* [2020] FCAFC 120; (2020) 280 FCR 583*Elliott-Carde v McDonald’s Australia Limited* [2023] FCAFC 162*Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 94 FCR 179*Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41*Hunter v Chief Constable of West Midlands Police* [1982] AC 529*Lenthall v Westpac Banking Corporation (No 2)* [2020] FCA 423; (2020) 144 ACSR 573*Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387*News Limited v Australian Rugby Football League Limited* (1996) 64 FCR 410*Parkin v Boral Limited (Opt Out Notices)* [2021] FCA 478*Perera v GetSwift Ltd* [2018] FCA 732; (2018) 263 FCR 1*R v Dunlop Rubber Australia Ltd; ex parte Federated Miscellaneous Workers’ Union of Australia* (1957) 97 CLR 71*Regional Express Holdings Ltd v Australian Federation of Air Pilots* [2017] HCA 55; (2017) 262 CLR 456*Retail and Fast Food Worker’s Union Incorporated v Tantex Holdings Pty Ltd* [2020] FCA 1258; (2019) 299 IR 56*Thomas v Romeo Lockleys Asset Partnership* [2022] FCA 1106*Timbercorp Finance v Collins* [2016] HCA 44; (2016) 259 CLR 212*Tomlinson v Ramsay Food Processing Pty Limited* [2015] HCA 28; (2015) 256 CLR 507*Transport Workers’ Union of Australia v Qantas Airways Ltd (No 4)* [2021] FCA 1602; (2021) 312 IR 133*Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd* (1993) 45 FCR 457*Turner v Tesa Mining (NSW) Pty Ltd* [2019] FCA 1644; (2019) 290 IR 388*Walton v Gardiner* (1993) 177 CLR 378 |
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|  | J Caruana and V Morabito, ‘Australian Unions – the Unknown Class Action Protagonists’ (2011) 30(4) *Civil Justice Quarterly* 382J Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (1st English ed, Stevens and Hayes,1884) |
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| Division: | Fair Work Division |
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| Registry: | Victoria |
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| National Practice Area: | Employment and Industrial Relations |
|  |  |
| Number of paragraphs: | 204 |
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| Date of last submissions: | 22 March 2023 |
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| Date of hearing: | 9 March 2023  |
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| Counsel for the applicants in VID 726 of 2021: | Mr L Armstrong KC with Ms S Kelly, Dr P Turner and Mr D Murphy |
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| Solicitors for the applicants in VID 726 of 2021: | Shine Lawyers |
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| Counsel for the applicant inSAD 127 of 2022: | Mr M Irving KC, Ms G Costello KC, Mr J Fetter, Ms F Knowles and Mr B Slade |
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| Counsel for the respondent in VID 726 of 2021 and second respondent in SAD 127 of 2022: | Mr R Dick SC and Mr D Snyder |
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| Counsel for the first respondent in SAD 127 of 2022: | Mr A Manos and Mr R Glavas |
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| Counsel for the Minister for Employment and Workplace Relations (Intervener): | Mr D Star KC with Mr B Bromberg |
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| Solicitors for the Minister for Employment and Workplace Relations (Intervener): | Australian Government Solicitor |

ORDERS

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|  | VID 726 of 2021 |
|   |
| BETWEEN: | JADE ELLIOTT-CARDEFirst ApplicantDARCY DUNLOPSecond Applicant |
| AND: | MCDONALD’S AUSTRALIA LIMITED (ACN 008 496 928)Respondent |

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|  | SAD 127 of 2022 |
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| BETWEEN: | SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES’ ASSOCIATIONApplicant |
| AND: | BANDEC PTY LTDFirst RespondentMCDONALD’S AUSTRALIA LTDSecond RespondentAK GAZ PTY LTD (and others named in the Schedule)Third Respondent |

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| order made by: | LEE J |
| DATE OF ORDER: | 12 OCTOBER 2023 |

THE COURT ORDERS THAT:

1. The interlocutory application filed by the Shop, Distributive and Allied Employees Association on 16 February 2023 seeking an order that the proceeding *Elliott-Carde and Dunlop v McDonald’s Australia Limited* (VID 726 of 2021) be stayed, be dismissed.

2. These proceedings and all related proceedings be fixed for a case management hearing on a date to be fixed within the next 21 days following a communication from the parties as to a mutually convenient date.

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

REASONS FOR JUDGMENT

LEE J:

# A INTRODUCTION

1 The disposition of this application, which perforce has been deferred pending a Full Court judgment delivered today(*Elliott-Carde v McDonald’s Australia Limited* [2023] FCAFC 162), raises some complicated and novel issues.

2 The Shop, Distributive and Allied Employees’ Association (**SDA**) seeks orders staying a class action, *Jade Elliott-Carde v McDonald’s Australia Limited* (VID 726 of 2021) (**Class Action**), which overlaps with sixteen actions brought by the SDA (**SDA Actions**) pursuant to ss 539 and 540 of the *Fair Work Act 2009* (Cth) (**FW Act**).

3 The Class Action and the SDA Actions allege that workers (**Workers**) currently or formerly employed by McDonald’s Australia Limited (**MAL**) or franchisees did not receive ten-minute rest breaks in contravention of the applicable industrial instruments and provisions of the FW Act.

4 The controversy concerns an estimated 300,000 to 350,000 Workers. The Class Action was commenced in December 2021 and joins only MAL as a respondent. The bewildering array of SDA Actions were commenced both before and after the Class Action. Before the Class Action, the SDA commenced seven proceedings on behalf of named Workers employed by a franchisee against individual franchisees and MAL (**pre-class action cases**); and after the Class Action was started, the SDA commenced: (1) seven proceedings on behalf of named Workers employed by franchisees against individual franchisees and MAL (**post-class action cases**); (2) one proceeding on behalf of 689 Workers employed by MAL (**MAL case**); and (3) one proceeding on behalf of unnamed Workers against 323 franchisees and MAL (**Bandec case**).

5 Save for a very small subset of persons, every person on whose behalf compensation is claimed in any of the SDA Actions is a group member in the Class Action.

6 I have divided the balance of my reasons into the following sections:

B THE PROCEDURAL HISTORY AND THE APPLICATION IN CONTEXT

C APPLICABLE PRINCIPLES AS TO A STAY

D THE ARGUMENT IN FAVOUR OF A STAY

E THE EVIDENTIARY MATERIAL AND RELEVANT FINDINGS

F CONSIDERATION

G THE WAY FORWARD

7 For the reasons that follow, I have determined to dismiss the SDA’s interlocutory application.

# B THE PROCEDURAL HISTORY AND THE APPLICATION IN CONTEXT

8 Some of the procedural background is set out in the Full Court’s reasons (at [327]–[337]). It is regrettably necessary to wade into much more of the detail for present purposes.

9 Competing stay applications were filed which, when the proceedings were docketed to me, I brought on for case management together with an application for approval of opt out notices in the Class Action.

10 During this extended case management hearing in December 2022, I indicated that the competing stay applications were premised on the notion the Court was faced with what amounted to a binary choice: *first*, the Class Action proceeding against only one (albeit the most important) respondent, MAL, to an orthodox trial of common questions plus the individual claims of two lead applicants and, perhaps, one subgroup member (leading to subsequent hearings of individual claims); or *secondly*, the hearing of some of the SDA Actions, which apparently contemplated various test cases chosen from eight McDonald’s stores (engagingly described as “restaurants”) following identification of “sample groups” involving nine respondents (including MAL) out of the approximately 330 respondents joined to the SDA Actions. This would be in circumstances where a determinative issue in the test cases is the foundational common question as to whether the Workers were entitled to the ten-minute rest breaks in accordance with the applicable industrial instruments and requirements of the FW Act (**central common issue**).

11 At the case management hearing, I expressed the need, consistently with Pt VB of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), to fasten upon a proportionate and sensible way to progress the resolution of the overall justiciable controversy. To this end, I raised with the parties my preliminary view that each alternative proposed had unsatisfactory aspects. As to the *first*, there was merit in having all persons who could be liable before the Court at an initial hearing, the regulatory aspect of the matter was of importance and there was a need to ensure that any determination as to the central common issue bound all relevant parties, including all franchisees. As to the *second*, the SDA’s proposal for resolving issues involved an unwieldly hotch-potch of different actions without the manifold procedural benefits of a class action.

12 I expressed the preliminary view that there must be better way. My tentative view was that the best course was to reject the competing applications for a stay and manage the cases towards a joint, limited initial hearing of all proceedings, as quickly as possible. At such a hearing, all parties would be represented, and its outcome would determine the central common issue, any other common issues, and also a small number of representative sample claims for statutory compensation. Although I foreshadowed an initial trial dealing with the circumstances of one franchisee and one non-franchisee store, I proposed to facilitate representation by any franchisee who wished to be heard (given almost all franchisees were represented by one solicitor). Hence, the trial could be conducted in such a way as to have the legal effect of binding *everyone*, including the non-party group members, to the resolution of all common issues. If the case did not then settle, an aspect of this proposal would be that the entitlement of the balance of group members to statutory compensation would be determined within the Class Action including, at least potentially, by determining any claim for an aggregate award, unless the group member had previously opted out (in which case the individual’s compensatory claim would be determined, in the event the applicants prevailed with respect to the central common issue, in the relevant SDA proceeding, along with all other claims advanced in all the SDA Actions, such as pecuniary penalties).

13 This proposed course was the subject of refinement and submissions over thirty pages of transcript, with discussion taking place as to an opt out regime (in circumstances where the draft opt out notice previously proposed by the class action applicants was unsatisfactory). In the course of expressing my preliminary views, the following relevant exchanges then occurred (at T29.15–32.43) (noting Mr Irving KC appeared for the SDA, Ms Kelly for the class action applicants, and Mr Dick SC for MAL):

HIS HONOUR: I’m trying to work out a practical solution that accommodates both proceedings. I know [the SDA] can bring claims for compensation. I know that. And some people may wish you to, in which case they’re perfectly entitled to opt out of the class action. All I’m saying is if they don’t opt out of the class action, it’s going to be determined in the class action.

MR IRVING: But our interest as the SDA is not just – for compensation is not just in relation to those members who come along and say, “We wish to be paid our full award wage.” We also have an interest in making sure that those who quite readily say to the employer, “We’re quite happy to be paid $100 less a week,” the SDA have got an interest in stepping in and saying, “Well, we, the SDA, are not happy that you are receiving compensation.” So, you know, the SDA – unions have an interest in not only ensuring that union members receive their full wage or - - -

HIS HONOUR: It’s anyone who they’re eligible to represent.

MR IRVING: Yes. And unions have an interest in making sure that the compensation and full award wages are paid to – so it’s - - -

HIS HONOUR: I understand that.

MR IRVING: And in those circumstances, the – it is not necessary for the class action to, you know, (a) exist, but (b) for any orders to be made in relation to the class action in terms of - - -

HIS HONOUR: Well, it probably was necessary for it to exist, because you didn’t actually go around and commence the proceedings in a timely way for a number of years, and you’ve done it at the heel of the hunt, and so what I’ve got to do is fashion an appropriate resolution with a laser-like focus on not only – and you make – and this point is made in your submissions and it’s exactly what motivated the preliminary view I had, which serves not only the… legitimate public and industrial purposes that you seek to advance on behalf of the union but also best serves the protective and supervisory role I have in respect of those group members. It involves a deal of fashioning. I know what you’re entitled to do. I know what the applicant is entitled to do. The question is: what is optimal to be done? And that’s why I’m seeking to fashion a solution and why I brought the parties together to give them an idea of my cast of mind to see whether or not this can be resolved. If you want to run a stay application, which seems to me what you’re suggesting you want to do, then I will hear it. All I’m saying to you is… this is not the only case where these sort of things have to be resolved… I’ve got to use whatever case management techniques are available to me in order to best use the resource of the court and… best serve what in a sense are conflicting interests.

MR IRVING: And in terms of the interests of the employees, we’re looking at a class of employees who have got two options. They either have an organisation come along and represent them for free - - -

HIS HONOUR: That’s exactly the reason why… I make it absolutely clear in any notice that they have a choice, that if they wish their compensation to be determined in your claim, this will be the consequence. If they don’t wish to opt out and they have it in the class action, this will be the consequences so they can make a decision, a fully informed decision. I agree with you. That’s why I would never countenance in a million years the sending out of the opt out notice that was proposed by the applicant.

MR IRVING: Yes.

HIS HONOUR: Because it didn’t give them a proper explanation, in my view, of what the downsides and upsides were of remaining in the class action. And the counterfactual is that they have their claim determined in the SDA action and the consequences of that need to be explained in the opt out notice.

MS KELLY: We’ve heard you about that, your Honour. We take the criticism and we will deal with it.

HIS HONOUR: Yes. Well, I will deal with it by doing the notice.

MS KELLY: We will assist.

HIS HONOUR: Yes. Thanks.

MR IRVING: Well, the matter is going to be stood down and perhaps we will - - -

HIS HONOUR: Well, if you can consider your position, if you wish me – I’ve given you an idea of my thinking. I think it’s a pragmatic, sensible solution to a practical problem which actually gets with a degree of laser-like focus as quickly as possible to determining the real issues in this case. If you want to have a stay application, then we will have – then I will determine a stay application. I’ve given you my preliminary views. It doesn’t mean that I have – I won’t listen to you but I must say to you, my strong view is what I – the solution that has emerged through this very useful discussion this morning seems to me to be one which is a sensible resolution. And that’s the key to resolving all of these difficulties which arise whenever you have a clash between proceedings which have a public purpose and proceedings which are motivated essentially – I don’t think the applicants would disagree – by a funder that’s seeking to make money.

MR IRVING: If the court pleases. If you do contemplate determination of the stay application, are you – is your Honour suggesting we have that now or rather put on material in short form and come back - - -

HIS HONOUR: I’m happy to deal with it now. If you say – I’m happy to hear from you and resolve it today. If you say that causes you some unfairness and you wish to have a stay application, then I can’t – particularly in light of the orders that were made before, then I can’t shut you out from putting it on, because no doubt you will say to a Full Court that I’ve denied you procedural fairness. But I would like you to reflect on what I’ve said this morning, think about whether or not you think a stay application is necessary in those circumstances and then whether or not I can deal with it now and deliver a judgment today. Or alternatively, whether we have to come back another day after you’ve put on further evidence and further submissions. Whatever happens, I’m not going to deny you procedural fairness.

MR IRVING: Thank you, your Honour. And we certainly will reflect on what your Honour said …

…

HIS HONOUR: Come back with sensible proposals, hopefully and to the extent they’re not sensible, then I will resolve any differences and then we will set a trial date for that and work backwards.

MR DICK: Excellent. That’s all I wanted to know, your Honour. That makes perfect sense to us.

HIS HONOUR: And by that stage I will know whether I will hear it or somebody else will hear it and then we will work back.

MR DICK: Thank you, your Honour.

HIS HONOUR: And then we hopefully get to dealing with people’s substantive rights rather than having procedural stoushes, as quickly as possible. I will adjourn till 12.

14 After resuming half an hour later, the following exchange took place (at T33.15–20):

MS KELLY: - - - we’re at the question of whether or not my learned friend Mr Irving wishes to press his client’s application for a stay. My concerns are resolved.

HIS HONOUR: All right. Mr Irving.

MR IRVING: **No, we do not. That’s the short answer.**

15 Then, there was some discussion about the involvement of franchisees and the following was said (at T34.15–35.42):

MR IRVING: The next issue is in relation to those who do not opt out, and I notice that the approach taken by Beach J in McKay Super Solutions v Bellamy’s, in which – now, one of the ways in which one could deal with the opt-out issue is that of those who don’t opt out, the default position may be the SDA matter rather than the class action in that respect, in circumstances in which, no matter how socially media aware and acute the – a notice is sent out to minors and those who have recently been minors, there is an extremely high likelihood that those employees will not respond. No matter what their desires might be, they just won’t respond at all. And if the default position is that they are in a system whereby they pay 30 per cent of their very small damages award to the litigation funder and the legal fees accordingly, it is not, in my submission, just to them to - - -

HIS HONOUR: Well, there’s several things to say in response to that. (1) There’s no guarantee it’s 30 per cent. They’re people who are not registered, and any common fund order will have regard to the – looking at it ex ante, the risk that the funder is taking in funding the proceedings. So there’s no suggestion, in respect of those unregistered group members, it would be anything like 30 per cent given they’ve got no adverse cost exposure. Secondly, the whole premise of part IVA is that it works on the basis that the statute provides that notification is given and we have an opt-out regime, and the default position, as I indicated earlier, would be that those compensation claims are advanced in the class action.

MR IRVING: Well, but the opt-out procedure doesn’t need to occur prior to the resolution of – one could defer the opt-out process until - - -

HIS HONOUR: Until when?

MR IRVING: Until one had an understanding of what the level of liability is in the initial trial.

HIS HONOUR: But we can’t do that, because the Act requires me, under section 33J, to fix a date for opt-out before we have any determination of any final issue in the proceeding.

…

HIS HONOUR: it is absolutely imperative that the group members now be apprised of all relevant information in respect of which they need to be apprised to make an informed decision. That’s why it’s critical that there be different opt-out notices to people who have registered, because they’ve already taken a step, and we understand that – they will have contact details, being email addresses, and they will be people who have already made a decision. They also need to be – I’m going to provide an opportunity for those people to opt out, of course, because they haven’t had an opportunity yet to opt out, and they’re going to opt out knowing that if they do opt out, their claim – there are other alternatives to having their claim advanced. So you need have no fear about the fact that these people aren’t going to be told the – what alternatives there are.

16 A further exchange then occurred as to opt out as follows (at T37.4–34):

HIS HONOUR: Well, the question is how we move forward. I think the way we move forward is – well, the first step that needs to be talked about is the question of opt-out notices. So I suppose I should ask Ms – am I cutting across anything else you wanted to say, Mr Irving?

MR IRVING: No, your Honour.

HIS HONOUR: … I do not understand why an opt-out notice should be more than a page. Anything more is just going to confuse people.

MS KELLY: Understood, your Honour.

HIS HONOUR: And it has got to give them an appropriate and fair description of the counterfactual. There also has to be need – and you’re instructed by solicitors who I’ve had this conversation with before. I want some sort of animated - - -

MS KELLY: They’re setting up a TikTok account right now, your Honour.

HIS HONOUR: Yes, some sort of animated – I don’t mean this disrespectfully, but very simple thing which can be distributed by social media, and some real thought be given by your side as to an appropriate mode of distribution of notices, including perhaps notice being displayed in McDonald’s stores, perhaps, or some way in which I’m satisfied that people who are affected by this class action have – so how long you would need to think about those things – speak to Mr Dick and also Mr Irving, because I want them to have input into what they think is fairly being said about the counterfactual.

17 Discussion moved to the issues that would be determined at an initial trial. A conferral between counsel prior to the next case management hearing was proposed to facilitate the creation of a document identifying with precision those issues and steps to ready the initial trial for hearing as soon as possible. The following was then relevantly said (at T39.20–40.4):

HIS HONOUR: Well, we’re in a new year and we’re coming out of today with a new sense of optimism. And hopefully those conferrals can work. If you want me, I will order a conferral in person facilitated by a registrar of the court.

MS KELLY: I’m less concerned about the mode of conferral than the crystallisation of positions in advance of the 17th.

MR DICK: Yes, but that’s because in the past these parties have been having a fight about who should have carriage of the case.

HIS HONOUR: Well, that’s resolved now.

MR DICK: That’s resolved. So I think in terms of what we’ve been discussing today, which is what’s the scope of the initial trial, that is going to be a much easier topic to deal with. So I don’t share my learned friend’s pessimism about the parties sitting down and trying to work something out. We’ve already identified for your Honour, we’ve got probably two stores. We will need to speak with the applicants to see what they’ve got in mind.

HIS HONOUR: Are you pessimistic or optimistic, Mr Irving?

MR DICK: He’s optimistic, very optimistic.

MR IRVING: Sorry?

HIS HONOUR: Are you pessimistic or optimistic about conferral?

MR IRVING: I mean, we’ve provided a six-page document listing all of the factual issues and given an affidavit saying who’s going to be called about what and what discovery is going to be required about it. So I don’t know – I think everyone should just, you know, the legwork has been done.

18 Accordingly, in the light of the above, orders were made dismissing the then extant stay applications and requiring conferral upon the terms of opt out notices and the steps necessary to ready the proposed joint initial trial on agreed issues for hearing.

19 Following conferral, the next case management hearing took place on 6 February 2023 commencing at 10:15am. I understood three issues had arisen for resolution that day. The *first* was leave was sought by the class action applicants to proceed against three franchisees (which was opposed by the SDA); the *second* related to the pleading of the conduct of the SDA which was alleged to be relevant to the question of relief; and the *third* was the content and cost of the opt out process, including the costs of an independent lawyer (I had proposed there be an independent person to whom questions as to the opt out process could be directed by group members). I heard argument all morning and then, at 2:46pm, commenced delivery of what I proposed would be an *ex tempore* judgment in which I said:

… as I have done in cases involving competing class actions, I raised with the parties my intention that there be an independent lawyer appointed who can respond to any queries that members of the class seek assistance – in respect of which group members seek assistance.

There are a couple of lessons from previous experiences that I should note. The first is it is probably appropriate that some sort of FAQ or frequently-asked-questions document be prepared in advance which if not can be agreed by the parties can be settled by me to provide a template response by the independent lawyer to questions that might be regarded as being predictable. My current view is it is probably appropriate that the role is performed why somebody who has had some experience in a similar role in the past, probably a senior, junior barrister, but I am open to suggestions in that regard.

As to the cost, my initial view was it be appropriate … for the costs to be shared between the class action and the SDA on an equal basis. On balance, however, I think it is appropriate that the costs be one borne by the class action applicants. The whole reason why there is opt out is because that is … that that is a fundamental requirement of Part IVA. It is not correct to say that the only reason why there’s a need to have an independent lawyer is because at the heel of the hunt the SDA has commenced proceedings against McDonald’s. It is unnecessary to review the timing and evolutions of the claims. It is sufficient simple to note that there will be a need for there to be a mechanism for explaining the complexities of these matters to a group member irrespective of whether or not there was an extant claim being advanced on their behalf by the industrial association.

Apart from anything else, I would have considered, consistent with my supervisory and protective role, to apprise group members of the fact that there may be other legal mechanisms available for them to seek to agitate for someone to bring action on their behalf even if the SDA proceedings have not been extant. It does not seem to me to be an appropriate exercise of discretion to require the SDA to contribute to paying the costs of this process.

All parties have behaved sensibly in putting in place a sensible resolution to what in truth is a complex problem. As I noted in *Turner v Tesa Mining (NSW) Pty Limited* [2019] FCA 1644; 290 IR 388 at 1, compared to other forms of class actions, what can be described as “industrial class actions” have been rare beasts, but it appears this is now changing.

That change continues and the issue of jointly managing “representative” proceedings brought by industrial associations and class actions involving the same issues throws up new challenges which differ in important respects from the jurisprudence that has now developed in relation to competing class actions. It’s hoped that when these problems arise in the future, they can be resolved in the same cooperative spirit that has been evident in these proceedings. It is now necessary that I descend to the detail of settling the opt-out notice.

20 After then dealing with argument as to the opt out notices, Ms Costello KC (who appeared with Mr Irving KC for the SDA), then said (at T62.32–64.8):

MS COSTELLO: Your Honour, the position that we took in our submissions was that the form of your optout notice and the optout notice proposed by the class action is a de facto stay in that it – in its form. And so before it might be seen that we consent to the process that you’ve described as a consensus, pragmatic approach to the shape of the initial trial and the optout notice I’ve put on the record but it’s not.

HIS HONOUR: No. No. No. No. No. No. I know you – well, sorry. There’s no further issue in relation to the process. That’s why I said the devil is in the detail. I know you don’t consent to the optout notice.

MS COSTELLO: Or the process by which the SDA actions are said to be – come second to the class action process.

HIS HONOUR: How did that come second?

MS COSTELLO: Because your Honour’s observation just in your ruling now was that – was to propose a binary approach that, unless someone opts out of the class action - - -

HIS HONOUR: That’s what was discussed in December. It was consented to.

MS COSTELLO: Well, your Honour, our written submissions that we filed on Friday oppose the binary approach that was the premise underlying your Honour’s draft optout notice and the class action’s optout notice.

HIS HONOUR: Well, you better show me that and explain why that’s not a change of position than the one that emerged at the end of the December hearing.

MS COSTELLO: Because there was no order by your Honour to that effect and nor from my reading of the transcript was there a ruling of the court to that effect.

HIS HONOUR: No. There was no order of the court to that effect. So are you also saying that’s not an inconsistent position that was taken?

MS COSTELLO: By whom, your Honour?

HIS HONOUR: By your client.

MS COSTELLO: No. My client is not taking an inconsistent approach. Your Honour, all the – the class action and - - -

HIS HONOUR: Well, I’ve been working under the misapprehension, I’m afraid. I thought it was quite clear from the transcript on the last occasion. Well, look, I will revoke that ex tempore judgment and we will start again. You want to move on your interlocutory application. Move on your interlocutory application. If you say that’s not by – that that process is not by consent, that is the broad principles are not by consent, then what do you seek? A stay or what do you seek?

MS COSTELLO: Well, if your Honour’s order is that the first trial will now be a trial of the class action claim against both McDonald’s and the franchisees, that is a change in the scenario. That’s the order you’re making today. And so the thing we may stay is a different thing than we sought the stay for before business.

HIS HONOUR: Okay. All right. Well, if you say that I wasn’t sufficiently clear on the last occasion, that is what I had anticipated the class action would be happening. If you say you’re under a misapprehension when – or there was some fault on my part in not explaining that, then the compensation claims – sorry. Let me go back a step. The only thing that’s new today is that there’s a claim being advanced by the class action applicants in respect of the franchisees at the initial trial. That’s the only new thing that’s being raised today and that was a matter of detail, which was not – which I must say was not in my mind on 15 December. Everything else about those principles was the demarcation between penalties and people opting out or there being – and the class action running the compensation claims was everything was discussed on the 15th. If you say that that new thing changes the goalposts and, in effect, you don’t consent to that approach, you’re perfectly open to take that position. That’s fine but I just want see – **I just want to understand with precision what’s the alternative.** And I will withdraw those ex tempore reasons that I have just set down and I will hear whatever application you wish to make as to how I’m supposed to case manage this case.

(Emphasis added).

21 Although I did not doubt the SDA changed tack and took an inconsistent position as between December 2022 and February 2023, because of the way the proposal had come about in December, and the short time the SDA had to obtain instructions in the course of that case management hearing, I wished to ensure the controversy was determined fairly and considered the SDA should have liberty to re-agitate its position concerning the stay of the Class Action without the necessity to prove a material change in circumstances. The other parties exhibited some understandable frustration but did not formally oppose this course.

22 Hence, it was against this unusual background that the SDA renewed its application for a stay. In this regard, the interlocutory application filed by the SDA on 16 February 2023 goes back to its initial, pre-December position and seeks one substantive order: “[s]ubject to further order of the Court, Elliott-Carde and Dunlop v McDonald’s Australia Limited (VID 726 of 2021) be stayed”.

23 Given post-December developments, the class action applicants now no longer press for a stay of the SDA Actions but instead propose a series of procedural orders putting in place a joint trial model along the lines contemplated by the December 2022 orders. As I understand the current proposal, the class action applicants now seek, as part of any initial trial, the determination of their claim for aggregate relief in accordance with prayer 5 of the amended originating application, being an order “under s 545 of the FW Act, further or alternatively s 33Z(1)(e), further or alternatively s 33Z(10)(f) of the [FCA Act] that [MAL] pay compensation to the Applicants and Group Members in an aggregate amount” (**aggregate award**), among other things.

24 In the balance of these reasons, I will describe the general approach now proposed by the class action applicants as the **joint trial model**.

25 Circumstances were complicated further when the SDA then raised two further issues following the filing of the stay application.

26 The *first* was a contention advanced in its written submissions that the decision of O’Callaghan J in *Davaria Pty Limited v 7-Eleven Stores Pty Ltd (No 13)* [2023] FCA 84 threw the Court’s power to make a “settlement common fund order” (**Settlement CFO**) into doubt. The question of power to make such an order is necessarily material to the disposition of the stay application because the basis upon which the Class Action is being conducted assumes the existence of such a power. This caused me to reserve a question for determination by the Full Court (**Reserved Question**) as to whether, if it was just to do so, the Court has the statutory power to make a Settlement CFO pursuant to s 33V of the FCA Act.

27 A Full Court was constituted at short notice, and orders were made for the service of notices pursuant to s 78B of the *Judiciary Act 1903* (Cth). It was initially hoped the power issue could be resolved with alacrity, but several unforeseen matters contributed to some procedural delay. The *first* of these events was the Full Court receiving confirmation the Commonwealth Attorney-General wished to intervene.

28 *Secondly*, when the stay application was heard by me as a single judge a few days following the Full Court hearing, the SDA belatedly submitted that ss 539 and 540 of the FW Act exhaustively prescribe the manner in which proceedings may be brought on behalf of employees in relation to their workplace entitlements, such that by implication, those specific provisions exclude the operation of the general provisions in Pt IVA of the FCA Act. This would mean the Court would lack power to make a Settlement CFO in the Class Action. Consequently, the Full Court allowed argument to be re-opened on this topic and gave leave for written submissions to be filed.

29 Ultimately, the Reserved Question was answered in the affirmative and the SDA’s contention as to ss 539 and 540 of the FW Act was demonstrated to be misconceived, clearing the way for the stay application to be determined: see *McDonald’s* (at [324] per Beach J, [423] per Lee J and [508] per Colvin J).

# C APPLICABLE PRINCIPLES AS TO A STAY

30 This is the first occasion of which I am aware on which the Court has been tasked to determine an application for a stay of a class action on the basis that a form of representative proceeding brought by an industrial organisation is on foot. It is unlikely to be the last.

31 I have elsewhere remarked that “industrial class actions” are no longer rare beasts, and it has been observed by other judges of this Court that the “rivalry” between class actions and proceedings brought by unions or the Fair Work Ombudsman (**FWO**) is “real and apparent”: *Bradshaw v BSA Limited (No 2)* [2022] FCA 1440 (at [136] per Bromberg J). There are presently no less than 31 active representative proceedings in the Employment and Industrial Relations National Practice Area, and, in November 2022, Bromberg J recognised there were at least four sets of proceedings in this Court where a class action and either one or multiple proceedings brought by a union or the FWO were in competition over the same or substantially the same FW Act claims relating to the same or substantially the same groups of employees: *Bradshaw v BSA Limited* (at [136] per Bromberg J). To the best of my knowledge, most are funded cases.

32 It considering this relatively new phenomenon, it is well to revisit some basic principles. But at the outset it is important to make a preliminary point.

33 It is critical not to confuse the question I am asked to determine. Many submissions made by the SDA were directed to the question of which of two vehicles for determining the compensatory claims is best for the Workers and should be allowed to proceed. But, as noted above, the true choice is now far more nuanced. Given the class action applicants no longer seek a stay of the SDA Actions, the Court is now effectively faced with either: (1) managing all these cases forming part of the justiciable controversy towards the joint trial model binding all parties in a form similar to that described in December 2022; or (2) simply staying the Class Action entirely and allowing the cluster of SDA Actions to proceed to hearing through a presently undetermined process of test cases which would have the eventual effect of dealing with all compensation claims.

34 There was no dispute as to power. A stay of proceedings has long been recognised as an available means to prevent misuse of the Court’s procedures which, although perhaps not inconsistent with the literal application of rules of court, would occasion unfairness, or otherwise bring the administration of justice into disrepute among right-thinking people: *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 (at 536 per Lord Diplock).

35 The SDA pointed to the Court’s express statutory powers and its implied power to manage the cases before it. This encompasses the duty, in s 22 of the FCA Act, to grant sufficient remedies to avoid multiplicity of proceedings, and the power to make such orders as the Court thinks “appropriate” in s 23.

36 It was common ground that the power to grant a stay is broad but guided by the necessity that it be exercised judicially and in furtherance of the overarching purpose of civil litigation in this Court: s 37M of the FCA Act. It may be exercised in the interests of justice (*Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5; (2015) 255 CLR 46 (at 58 [36] per French CJ, Hayne, Kiefel, Bell and Keane JJ)), finality (*Tomlinson v Ramsay Food Processing Pty Limited* [2015] HCA 28; (2015) 256 CLR 507 (at 518 [24] per French CJ, Bell, Gageler and Keane JJ)), fairness (*Walton v Gardiner* (1993) 177 CLR 378 (at 393 per Mason CJ, Deane and Dawson JJ)) and the maintenance of public confidence in the administration of justice: *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27; (2006) 226 CLR 256(at 266–267 [14] per Gleeson CJ, Gummow, Hayne and Crennan JJ).

37 Notwithstanding the range of reasons which may justify a stay, it has been said in different contexts that the Court will only order a stay in exceptional circumstances and the moving party bears the burden of demonstrating that a stay is justified on proper grounds. But unnecessary multiplicity of claims has long been regarded as a vice. Unnecessary duplicative proceedings not only vex a respondent but are inimical to the optimal functioning of the processes and resources of the Court. Absent good reason, the Court generally should not allow two or more cases of a representative nature to go forward when one will suffice.

38 The SDA sought a stay relying upon legal principles but did not seek an injunction. I explained the historical antecedents of the existence of a distinct equitable jurisdiction to prevent multiplicity in some detail in *Perera v GetSwift* (at 425 [146]–[165]). In short, as no less an authority than Joseph Story explains in his *Commentaries on Equity Jurisprudence as Administered in England and America* (1st English ed, Stevens and Hayes,1884) (at §900–901), there is a class of cases in respect of which the process of an injunction “is also most beneficially applied … to suppress undue and vexatious litigation”. I adhere to the view I have previously expressed (see *Perera v GetSwift* (at 47 [162])) that continuing a proceeding which has become undue (to both a respondent as being superfluous, and/or as an inutile and oppressive vehicle for pursuing representative claims) could be enjoined in equity, leaving aside the separate notion of any express or implied legal power to protect the integrity of the Court’s processes. There is no present need to go into these principles further because no party called in aid equitable doctrine or remedies.

39 Over the last few years, and for structural and other reasons I have explained, multiplicity disputes between class actions have become commonplace. A body of cases has emerged adopting different remedial responses. What is evident is that there is no “one size fits all” approach: *Wigmans v AMP Limited* [2021] HCA 7; (2021) 270 CLR 623(at 666 [106] per Gageler, Gordon and Edelman JJ). Further, there is no controversy as to the existing jurisprudence in relation to competing class actions, in particular, the multifactorial approach used in *Perera v GetSwift* and approved by the High Court in *Wigmans v AMP*.

40 It important to note, however, that the analogy with competing class actions is ultimately an imperfect and limited one. Unlike competing class actions, as noted above, here one is faced on the one hand with a joint trial model, which includes one class action against one corporation (MAL) said to have accessorial liability; and, on the other hand, the stay of the Class Action but the progress of a miscellany of claims against a vast number of respondents said to be primary contraveners and MAL (the pre-class action cases, the post-class action cases and the Bandec case) together with the MAL case.

41 Hence, although it may be accepted that multiplicity of proceedings is not to be encouraged and may be inimical to interests of justice (*Wigmans v AMP* (at 666 [106] per Gageler, Gordon and Edelman JJ)) and the principles developed in carriage contests can have some adaptability to the present context, a focus of submissions was on factors present here but absent from other multiplicity disputes, including the important industrial role of an organisation such as the SDA and various differences between a class action seeking orders pursuant to Pt 4-1 of the FW Act and an action brought by a registered employee organisation under the FW Act. These matters, together with issues commonly seen in the context of multiplicity disputes, will be addressed below in dealing with the SDA’s arguments in support of the stay.

# D THE ARGUMENTS IN SUPPORT OF A STAY

42 In order to focus the argument, in advance of hearing the stay application, I required each party (and the Minister for Employment and Workplace Relations (**Minister**) who intervened on behalf of the Commonwealth in support of the SDA’s application pursuant to s 569(1) of the FW Act) to produce a document specifying by way of short, numbered propositions the matters they contend the Court is required to take into account in determining the stay application. I desired clarity as to the relevant considerations asserted by those supporting and opposing the stay (and precision as to their positions on what would amount to an irrelevant consideration).

43 The SDA submitted any joint trial model should be rejected and that the administration of justice, the facilitation of the overarching purpose and the interests of the group members in the Class Action will be better served by “the SDA Actions being allowed to continue while the Class Action is stayed until further order”. The reasons why this is the case were various and partly overlapping but could conveniently be summarised into ten broad propositions (leaving aside the contentions already rejected by the Full Court, and incorporating the relevant considerations identified by the SDA in the document I required be filed in advance of oral argument).

44 *First*, unnecessary duplication should be avoided to reduce unnecessary work and costs and a stay of the Class Action would “diminish the inherent oppression to McDonalds caused by the status quo where a common defendant faces two proceedings with overlapping claims” (**First Contention**).

45 *Secondly*, the SDA is a registered employee organisation with important duties and a special role and statutory right to bring actions in relation to affected Workers. It has a regulatory role, which it is fulfilling by seeking large penalties (which the SDA now seeks to be paid half to Workers and half to the SDA) (**Second Contention**).

46 *Thirdly*, the SDA Actions will not burden Workers with deductions from compensation to pay legal costs, a funder’s commission and a payment proposed to be made to the Retail and Fast Food Workers’ Union (**RAFFWU**) for research and investigative work conducted. Instead, the SDA will now ensure the payment of compensation and penalties to all Workers, past and present. The SDA Actions are said to be “commission free actions pursuing allegations against McDonald’s and franchisee employers with the interests of all 300,000 workers at the fore” and “the workers should not be burdened by a less efficient and more expensive procedure”. The SDA stressed the need to protect Workers’ interests “including in relation to net hypothetical returns and costs and funding and how money will be distributed if the claims succeed” (**Third Contention**).

47 *Fourthly*, and connected to the last point, if the currently proposed joint trial model is adopted, unless an employee has opted out, compensation will not be awarded in the SDA Actions and “the SDA claim for compensation for employees (including members) who have not opted out would, implicitly, be lost”. It is said there is a public interest in employees obtaining their full entitlements and that the “wage theft problem is exacerbated, not cured, by permitting the introduction of a litigation funder’s class action business model which gets employees less than the full amounts due because funding costs and legal fees are deducted and the class action vehicle is not tailored to suing all the hundreds of employers who underpaid” (**Fourth Contention**).

48 *Fifthly*, even absent implied repeal, a class action has structural deficiencies because it is not the appropriate vehicle “where there are hundreds of employers and an employee of one franchisee does not have a claim against another franchisee employer who did not employ them”. It is said bringing class action proceedings for all affected Workers “would potentially require around 300 representative applicants and the commencement of around 300 more class actions and more pleaded claims against each defendant”. Further, it is alleged that because the group members were covered by the *McDonald’s Australia Enterprise Agreement 2013* (**EA**) until February 2020 and the *Fast Food Industry Award 2010* (**Award**) thereafter, there is a difficulty in resolving some claims because the class action applicants were not employed after 2019 and so were not affected by some pleaded contraventions, as their employment ceased before the award operated in relation to McDonald’s stores (**Fifth Contention**).

49 *Sixthly*, unlike the SDA Actions, the Class Action has pleading deficiencies in that it does not join the franchisees and only makes claims against a primary wrongdoer for only 20% of the class, the balance requiring a finding of accessorial liability against MAL which “if found, may be apportioned down” (**Sixth Contention**).

50 *Seventhly*, unlike the SDA Actions, the central common issue and any other common issues cannot be heard in the Class Action until in excess of 300,000 people, many of whom are minors, have been given the opportunity to opt out. Opt out is said to be “time consuming, complex and confusing for class members” and those “who do not opt out may find that they are locked out of compensation or are entitled to inadequate compensation if they are bound by the result of an initial trial which may be lost against the secondary wrongdoer” (**Seventh Contention**).

51 *Eighthly*, the key issues in the SDA Actions, going to both compensation and penalties, can be case managed such that test cases can be heard and determined within months (**Eighth Contention**).

52 *Ninthly*,staying the Class Action will provide practical finality and certainty, given that partial success in the Class Action (against MAL only for direct liability) may lead to further compensation claims being brought by the SDA in relation to franchisee employees or unjustly extinguish the rights of Workers to recover full compensation in circumstances where different strategic choices made by the class action applicants would have resulted in full compensation. Relatedly, judgment in the Class Action awarding (or declining to award) compensation will bind group members but not the SDA, which can subsequently bring claims to recover compensation for Workers (**Ninth Contention**).

53 *Tenthly,* the “interests of the litigation funder are an irrelevant consideration” in considering whether a stay should be granted (**Tenth Contention**).

54 The Minister’s contentions in support of the stay were, as one would expect, complementary of some of the SDA’s submissions summarised above, and focussed on the following propositions:

(1) the FW Act and the *Fair Work (Registered Organisations) Act 2009* (Cth) (**RO Act**) both evince a preference in favour of registered employee organisations representing the industrial interests of Workers (who are eligible to be their members) (see the Second Contention above); and

(2) in exercising the discretion to order the stay sought by the SDA, the Court should have regard to: (1) the “special role” of employee organisations and any diminishing effect that allowing the Class Action to proceed might have on the special role afforded to the SDA; and (2) the benefits of such representation for affected Workers, including that they may be financially better off if compensation is awarded in the SDA Actions (see the Second and Third Contentions above).

55 I will come to the consideration of each of these arguments in Section F.2 below. Prior to doing so, it is appropriate to make several findings of fact relevant to the disposition of the stay application (in addition to the findings made as to the relevant procedural history, addressed in Section B above).

# E THE EVIDENTIARY MATERIAL AND RELEVANT FINDINGS

56 I will begin by identifying the material in evidence and then proceed to make findings grouped under five topic headings I consider to be especially relevant.

## E.1 The Evidence

57 The hearing commenced with a series of skirmishes in relation to several affidavits which the SDA sought to have admitted into evidence, including inadmissible purported opinion evidence, which was rejected. In the end, the following affidavits were read:

(1) Mr Michael Anderson Ats affirmed 16 February 2023 (**Ats Affidavit**);

(2) Mr Gerard Dwyer affirmed 7 March 2023 (**Dwyer Affidavit**);

(3) Ms Vicky Antzoulatos sworn 19 August 2022; and

(4) Ms Vicky Antzoulatos sworn 24 November 2022.

58 As it happened, certain paragraphs of a further affidavit, affirmed by Mr Joshua Peak on 8 March 2023 (**Peak Affidavit**), were relied upon during submissions (see, for example, T43.38ff, T46.43ff). This was decidedly odd, given the Peak Affidavit was not in evidence. Senior counsel for the SDA had stated (at T69.17) that the SDA no longer sought to read the Peak Affidavit, and senior counsel for the class action applicants later noted it had been “withdrawn” (T81.16); and this was not disputed by the SDA.

59 Thinking I may have missed something, while preparing these reasons, I directed my Associate to seek confirmation as to whether the parties shared my understanding that the Peak Affidavit did not form part of the evidentiary record. All parties confirmed this was so. I will disregard this material.

60 Finally, the costs disclosure and conditional costs agreement (**Costs Agreement**) of the solicitors for the class action applicants, Shine Lawyers (**Shine**), and the litigation funding agreement between various funding entities and the first applicant in the Class Action, Ms Jade Elliott-Carde (**Litigation Funding Agreement**), were received into evidence.

## E.2 Relevant Findings

### I Background and the Commencement of the Litigation

61 As has already been noted above, the central common issue involves a consideration of the terms of the Award and the EA. As noted in the Introduction (at [4]), the number of Workers affected is estimated as being somewhere in the region of 300,000 to 350,000.

62 The SDA is a substantial, long-established, and significant union entitled to represent the Workers. Delphically, however, in response to a question to senior counsel asking him to identify the SDA membership density of Workers, the response given was initially: “Around 10 per cent, your Honour” (at T37.28). A short pause then followed during which further instructions were provided and then a clarification was made: “Less than 10 percent. There we go” (at T37.28–29). No evidence was adduced on this topic, and I would regard the pinpoint number given as having all the precision of a VFA crowd estimate. All one can say is that only a very small percentage of the Workers are members of the SDA.

63 Because the Peak Affidavit was not read, there was no evidence adduced as to: (a) who within the SDA became aware of non-compliance with the alleged rest break obligations and how this information was imparted; (b) when that person or persons became aware; (c) what was done when that state of awareness first arose; and (d) the contemporaneous reasoning processes of that person or persons for taking the course the evidence reveals the SDA ultimately took. I do not think the absence of evidence is particularly important given what was done (and not done) is revealed by the record. It should be recalled, however, that where a party fails to adduce evidence-in-chief on a relevant matter within the knowledge of witnesses the party calls, the Court should not draw inferences favourable to that party: see [*Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd*](https://jade.io/article/800857) (1991) 22 NSWLR 389 (at [418E](https://jade.io/article/800857/section/795431) per Handley JA). Whatever doubts exist from the incomplete evidence, it is uncontroversial that between 2010 (when the Award commenced) and 16 December 2020 (when the first pre-class action case was filed), the SDA did not commence any proceeding in relation to the matters the subject of the Class Action, notwithstanding the issues raised in these proceedings were first considered by RAFFWU as early as November 2018 and litigation was commenced in the Queensland Registry of this Court in 2019 (QUD 703 of 2019) (**Tantex case**).

64 The Tantex case was heard in June 2020 and later resulted in a judgment (*Retail and Fast Food Workers Union Incorporated v Tantex Holdings Pty Ltd* [2020] FCA 1258; (2019) 299 IR 56) delivered by Logan J in August 2020. The relevant Worker was a former employee of the franchisee respondent, and the franchisee admitted some breaches of the requirements of cl 29.1 of the EA as to ten-minute paid drink breaks (see [6] per Logan J). Again, doing the best I can with the incomplete evidence adduced and the inferences rationally available to be drawn, I find that the SDA must have been aware of the perceived problem, being the central common issue, no later than 2018, and probably well before this time.

65 In any event, the evidence does not establish that the SDA did anything useful when it became aware and, consistently with the misconception later advanced by the SDA that Pt IVA was unavailable to advance the claims of Workers, no class action litigation was commenced by the SDA prior to, or concurrent with, the Tantex case (or indeed any other type of litigation). This is in contrast to the RAFFWU and its solicitors, who immediately commenced discussions about a potential class action against MAL and launched a public campaign for Workers “to register for fair compensation to build potential class action”.

66 But even more perplexing is that even then, the SDA did not move promptly in identifying how the central common issue could be resolved in the most effective way. Despite senior counsel for the SDA submitting the Tantex casewas a “pivot”, the evidence, such as it is, demonstrates that in the period between the delivery of judgment by Logan J and the filing of the Class Action, the SDA apparently thought it was useful to engage in the exercise of taking “initial instructions” from “more than 9,000” Workers. It then apparently took more detailed instructions from about 1,860 Workers and lawyers then took “a combination of supplementary instructions and in-depth instructions from more than 265” Workers. How long this all took is unclear, but it was obviously a substantial exercise. The Ats Affidavit, affirmed by the solicitor for the SDA, provides the SDA:

has a specific team which has been predominantly devoted to work on the SDA actions (in addition to work on the actions done by organisers and legal and industrial officers) which currently has approximately 13 employees, and has had as many as 16 employees at any one time.

67 Why this array of SDA actors was directed to the laborious task of working up individual cases rather than taking focussed and prompt action in relation to what it should have immediately appreciated was a widespread, central common issue on behalf of all Workers is essentially unexplained. What we know is that prior to the Class Action, the SDA commenced proceedings on behalf of 583 workers only, peppered across the pre-class action cases.

68 At the risk of repetition, in this period the SDA must, or should, have been aware not only that there was a widespread problem, but that the overarching purpose of civil litigation demanded that any litigation to resolve the problem *for all Workers* needed to be commenced in some form of representative capacity and that others were spending resources investigating and “book building” in relation to conducting such a case as a class action. It should have also known that the only way of tolling the limitations period for commencing compensation claims on behalf of Workers would be to commence some form of representative action.

69 Counsel for the SDA sought to explain this stasis (in the absence of any evidence) by submitting the SDA did not believe there was a “systemic” problem prior to the decision in *Tantex*. At best, this is very difficult to understand given the nature of the central common issue and the number of Workers. But in any event, it does not account for the lacklustre and misdirected approach taken following *Tantex.*

70 I remarked during oral argument that if the issue had been properly thought through, all the SDA needed was a substantial common issue of fact and law shared between seven or more persons to commence a class action, a not uncommon course taken by unions: see J Caruana and V Morabito, ‘Australian Unions – the Unknown Class Action Protagonists’ (2011) 30(4) *Civil Justice Quarterly* 382. Counsel responded that penalties against the employer are unavailable in a Pt IVA proceeding. This submission is without foundation. Indeed, penal relief under the FW Act is increasingly being sought by funded representative applicants in this Court: see, for example, *Bradshaw v BSA Limited; Augusta Ventures Ltd v Mt Arthur Coal Pty Ltd* [2020] FCAFC 194; (2020) 283 FCR 123. In any event, as I explain below, this submission, together with the later contention that the SDA could not avail itself of the Pt IVA mechanism, suggests the matter was not adequately thought through.

71 What the record reveals is that even when the SDA stirred itself into belated action, it did so in a piecemeal way, commencing the cluster of pre-class action cases and post-class action cases for named Workers. The commencement of litigation by the SDA on behalf of the broader class of Workers employed by 324 franchisees (and which, contrary to the class action applicants’ submissions, was only foreshowed on 23 March 2022) did not occur until the filing of the Bandec case on 11 August 2022 – notably, after conferral had occurred with the class action applicants.

72 By contrast, those responsible for the Class Action moved, if not with alacrity, then at least more promptly than the SDA. As previously noted, in about August 2020, Ms Antzoulatos of Shine commenced discussions with the RAFFWU about investigating a potential class action, the investigation was publicly announced on 30 September 2020 and by 31 October 2021, more than 17,000 Workers had registered to participate in the foreshadowed class action. The continuing investigation, negotiating with litigation funders and undertaking a book build driven by media and online advertising took time, leading to the commencement of the Class Action (and the consequent tolling of the limitation period for all Workers under s 33ZE(1) of the FCA Act) on 6 December 2021. Needless to say, any commercial considerations as to commencing a funded open class proceeding were different than those considered by the SDA, which could self-fund. The SDA did not have to concern itself with book building and the delays and costs this process occasions.

73 In summary, the approach of the SDA in bringing forward the claims of Workers has been suboptimal, and has been characterised by significant and inadequately explained delay. I do not consider there has been any relevant dilatoriness by the class action applicants and their approach has been forensically explicable.

### II Recent Conduct of the Litigation

74 Moreover, without being unduly critical, and in contrast to the approach taken by the class action applicants and MAL, the conduct of the litigation by the SDA since I have been case managing these proceedings has not served to facilitate the case management requirements in Pt VB of the FCA Act. There was the inconsistent position taken as to the stay application evident from Section B of these reasons, and then the belated raising of the “implied repeal” of Pt IVA, which was devoid of merit but was required to be dealt with by the Full Court, contributing to further delay. Moreover, and although it is a relatively minor issue, the affidavit evidence filed in support of this application was drafted without adequate regard for issues of admissibility (including a manifestly inadmissible expert report). While it did not really matter absent detailed objections, the evidence filed by the SDA which was admitted was incomplete and, in parts, confusing.

### III Hypothetical Returns to Workers

75 Understandably, the SDA relied heavily on the fact it will not deduct any commission or legal costs from the amounts recovered as compensation. In the Dwyer Affidavit, Mr Gerard Dwyer, the National Secretary-Treasurer of the SDA, gave unchallenged evidence, which I accept, that:

4. The SDA seeks that 100% of the compensation each relevant worker is entitled to be paid directly to each relevant worker by the relevant employer or MAL. The SDA does not seek and has never sought that any part of the compensation be paid to it, either so it can pay it on to the relevant workers, or for any other purpose.

…

6. The SDA has promised thousands of members and non-members that the SDA will do all it reasonably can to ensure that any money paid for any underpayment or as compensation for any failure to provide rest/drink breaks or anything else will be paid to the relevant worker, along with any interest, with no deduction in favour of the SDA …

76 Even though it might be thought the status of such a “promise” could be uncertain, the matter was put beyond doubt by the provision, by the SDA, of an undertaking to the Court to the same effect.

77 Insofar as the evidence reveals the contractual arrangements underpinning the Class Action, the position is quite different and indeed, in some respects, the funding arrangements in this case are unusual.

78 *First,* unsurprisingly, the solicitors for the class action applicants are entitled to recovery of their professional fees and disbursements upon the successful outcome of the matter pursuant to cl 11 of the Costs Agreement. As is commonly the case, the notion of a “successful outcome” includes judgment in favour of Ms Elliott-Carde; resolution by settlement agreement where compensation, damages or costs are payable to Ms Elliott-Carde’s benefit; or where she receives a sum of money; and the provision of an interest in an asset or some other benefit. But it is an extremely broadly drafted concept and also extends to a reasonable offer of settlement being made which either counsel, *the funder* or Shine reasonably recommends Ms Elliott-Carde accept (see cl 13 of the Costs Agreement). Further, pursuant to cl 33 of the Costs Agreement, the solicitors are contractually entitled to charge a 25 per cent uplift fee on the deferred component of their professional fees upon a successful outcome.

79 *Secondly,* the Litigation Funding Agreement provides for a funder’s fee, being:

(1) an amount to the funder equal to the claimant’s share of the “Project Payments” and “Project Investigation Costs” paid by funder (Litigation Funding Agreement (at cl 6(a)(i))); and

(2) 25 per cent of “Claim Proceeds” received after the claim is filed and before the expiry of 18 months after filing; or 30 per cent of Claim Proceeds received on or after the expiry of 18 months after filing, plus GST if applicable (Litigation Funding Agreement (at cl 6(a)(ii))).

80 *Thirdly,* cll 7(a)–(c) of the Litigation Funding Agreement provides that where additional respondents are added, from the date on which the funder gives notice it agrees to pay for the joinder, an additional 2.5 per cent for each additional respondent is added to the funder’s commission (with a cap of 7.5 per cent). Subject to a matter to which I will come shortly, this might be thought of some relevance as the class action applicants have now foreshadowed joining additional respondents should the stay application be refused.

81 *Fourthly,* and again unusually, the Litigation Funding Agreement makes provision for a payment of $220,000 (inclusive of GST) to RAFFWU for “Research and Development Costs” “associated with the research and development of the Claim prior to the commencement of the claim”: Litigation Funding Agreement (at p 6). The payment to RAFFWU, which in racing terms might be described as a “sling”, ranks as the first priority in the distribution of any amounts received: Litigation Funding Agreement (at cl 6(c)(iii)).

82 In response, the class action applicants submitted that the difference in hypothetical returns is a neutral factor because: (1) it is the price paid for access to the efficiency and protections of Pt IVA; (2) it is addressed by opt out, which gives group members a choice to remain in the Class Action or not; and (3) in the end, if the Class Action is successful, group members’ recoveries will be applied in part to the reimbursement of the funder’s outlays (for legal costs) and payment of its commission (on a common fund basis) and only upon making of “just” orders pursuant to s 33V(2) of the FCA Act, which means that ample protection exists because the Court would determine the reasonable value of costs and remuneration and only allow “just” deductions.

83 As to these points, it is only the third that matters. If there is no stay, the Court, at the end of the day, will control any deductions. For my part, and notwithstanding the terms of the relevant bargains, given what was submitted by Mr Armstrong KC on behalf of the class action applicants, I am entitled to proceed, and will proceed, on the basis that only deductions which are contended by senior counsel to be properly characterised as fair and reasonable or just will be sought upon any favourable settlement or judgment, and the Court, in the exercise of its protective and supervisory role, would only allow any deductions proven to meet that description from any amounts recovered in the Class Action for the benefit of group members.

84 This said, this is not the common case when one is looking at two different potential levels of deductions as is commonly the case on carriage motions between competing class actions. Here, the SDA offers a wholly different approach and looked at the matter solely by reference to anticipated hypothetical returns (and absent factoring in the prospect of any aggregate award), it is in the interests of Workers to have their claims advanced in the manner most likely to produce the best return. The differences between potential recovery in any of the SDA Actions and in the Class Action are stark enough to categorise this factor, taken by itself, as being in favour of the claims of Workers for statutory compensation being advanced otherwise than by funded litigation such as the Class Action.

### IV Characteristics of the Class of Workers

85 It is not unduly stretching the bounds of s 144(1) of the *Evidence Act 1995* (Cth) to form some views as to the likely composition of the class. Anyone who has walked into a chain fast food outlet would have a pretty good idea. Most (but far from all) Workers will be young and working in their first job. Some will be relatively sophisticated in commercial matters, but some will not have any appreciable business acumen. Many will need the remuneration to survive or have adequate means, but no doubt there will also be some who will come from more financially comfortable families who have encouraged the notion that undertaking part-time work is a moral virtue conducive of building maturity, self-reliance, and self-respect.

86 Reflecting differences in intelligence and education, Workers will, of course, vary significantly in their levels of literacy and capacity to understand complex concepts.

87 To the extent the evidence allows more specificity, the proportion of employees engaged at various stores as crew members and managers differs between stores but, very broadly, approximately 92% of the employees are “crew members” and the remainder are shift supervisors or managers.

88 As would be expected, there is much attrition. The turnover of employees differs between stores and differs particularly between crew members and managers, but the attrition rate is about 45% per annum (that is, about 45% of employees cease employment with McDonald’s each year).

89 There have generally been over 100,000 employees engaged in McDonald’s stores at any one time. Currently, over 110,000 employees are engaged in McDonald’s stores
(of which about a third are in regional areas).

90 Consistently with what would be expected, the evidence suggests, and I find, that almost 85% of workers in McDonald’s stores are between 14 and 21 years old and about 65% of crew members are between 14 and 18 years old and are students. It follows that something in the order of 50,000 Workers may presently be minors.

### V Forensic Choices of the Class Action Applicants

91 The Class Action has not joined franchisees and relief in the nature of pecuniary penalties has not been sought. The reasons are obvious. A forensic decision was made by those advising the class action applicants, informed not only by commercial considerations but also by the dictates of Pt VB, that in circumstances where there was one respondent with means, they wished to make the Class Action as simple as possible so as to enable a final hearing of common issues, including the central common issue, with as much despatch as practicable. Whatever be the rights and wrongs of the approach, I do not doubt the view was formed that it would be a folly to join two or more respondents when there is one solvent respondent who, if the central contentions are vindicated, will be on the hook. If the matter can be successfully litigated at an initial trial (and on the assumption an aggregate award is not made or not sought at that time), then a global settlement with MAL will likely follow.

92 I will come to the SDA’s various criticisms of this approach later, but, for now, I am dealing with fact finding. The only other relevant fact I would find in this regard is that given the competence and experience of those advising the class action applicants, I am confident they will make an application to join additional respondents to facilitate a joint trial model if it proceeds and to promote finality. Further, irrespective of the perceived commercial desires of a funder, they will be conscious of their duties to the class action applicants and group members to advance any claim they perceive to be in the overall interests of those they represent (and the non-party group members bound by any result).

# F CONSIDERATION

## F.1 General Observations and Some Preliminary Points

93 The class action applicants accepted that no factor identified by the SDA in its submissions would constitute an irrelevant consideration, but that several considerations relied on by the SDA were neutral in the context of the present application, and several relied on facts not in evidence. I will come to these matters where necessary below.

94 At the outset, however, it is important to make a further preliminary point in addition to that already made at [33] above (about ensuring one does not confuse the question I am now tasked to determine). The further preliminary point is that there is a degree of inexactitude as to the comparison between the joint trial model and whatever regime is put in place to manage the SDA Actions in the event that the Class Action is stayed. The metes and bounds of each potential process of dealing with the claims of the Workers are not presently fixed (even though, as is evident from the transcript extracted at [20] above, I noted I wanted “to understand with precision what’s the alternative” to the joint trial model).

95 In the interlocutory application filed thereafter, no consequential orders (precise or otherwise) are sought by the SDA as to test cases or any preliminary determination; the only substantive order sought is the stay. The Ats Affidavit asserts that a three-week initial trial could get on relatively quickly and would examine the entitlements of Workers at one or two MAL stores and one or two different franchisees. The Court would be asked to determine whether MAL and the franchisees were required to give the relevant Workers breaks as alleged, whether breaks were given and any entitlement to compensation if they were not. Which of the SDA matters would proceed and the mechanism to be used to separate questions and how the findings would bind the array of other parties is presently obscure.

96 When it comes to the joint trial model, a greater degree of assistance can be gained by referring to the detailed programming orders proposed by the class action applicants in advance of the hearing of the stay application. The class action applicants relevantly proposed as follows:

*Compensation claims*

2. Pursuant to section 33ZF of the Act, all claims for compensation by group members in VID 726 of 2021 (the **Class Action**) who have not opted out by the date fixed in Order 15, whether against McDonald’s Australia Limited (**MAL**) or any franchisee, shall be claims in the Class Action and not in the SDA Actions (as defined in the Schedule).

*Joinder of parties to the class action*

3. Pursuant to section 37P(2) of the *Federal Court of Australia Act 1976* (Cth) (the **Act**) and reg 9.05 of the *Federal Court Rules 2011* (Cth), the following are joined as respondents to VID726 of 2021 (the **Class Action**):

a. Cellet Pty Ltd;

b. Garton Group Pty Ltd; and

c. Saronbell Pty Ltd ATF Massalli Family Trust (ABN 76038596731).

4. Pursuant to section 37P(2) of the Act, the Class Action applicants have leave to file and serve a Further Amended Originating Application and a Further Amended Statement of Claim by 4pm on 10 March 2023.

*Opt Out Notice*

5. Pursuant to section 33X(1)(a) of the *Federal Court of Australia Act 1976* (Cth), the terms of the notice of opting out set out in Annexure A to these Orders (**Written GM Notice**) are approved.

6. An audio-visual form of notice to be sent to group members (**Audio-Visual GM Notice**) is to be provided to the chambers of Justice Lee as soon as practicable following conferral between the parties, and in any event, no later than 30 March 2023.

7. Within two weeks of the Court approving the Audio-Visual GM Notice, McDonald’s Australia Limited (**MAL**) is to provide the solicitors for the Class Action applicants (**Shine**) with a list in electronic form of all persons (including their names and last known address, email and mobile phone number), who according to MAL’s records are or may be group members (**List of Known Group Members**).

8. For the avoidance of doubt, the List of Known Group Members is subject to the implied undertaking as to its use.

9. Within fourteen days after receipt of the List of Known Group Members, pursuant to section 33Y(3) or alternatively section 33ZF of the Act, the Written GM Notice and the Audio-Visual GM Notice is to be distributed according to the following procedure:

a. Shine shall send a SMS text to the mobile telephone number provided by MAL in respect of each person on the List of Known Group Members with a mobile telephone number, with the subject line “Federal Court Notice – McDonald’s Rest Breaks Class Action”, with a link to the Written GM Notice and the Audio-Visual GM Notice on the Class Actions page of the Shine website;

b. Shine shall send to each person on the List of Known Group Members with an email address, an email:

i. with the subject line “Federal Court Notice – McDonald’s Rest Breaks Class Action”;

ii. including in the body of the email (not as an attachment) the text of the Written GM Notice and a link to the Audio-Visual GM Notice;

c. Shine shall cause a copy of the:

i. Written GM Notice to be posted prominently on the “Class Actions” page of their website;

ii. Audio-Visual GM Notice to be posted on:

1. Shine’s Facebook Page;

2. Retail and Fast Foot Workers Union’s (**RAFFWU**) Facebook Page;

3. Shine’s Instagram Page;

4. RAFFWU’s Instagram channel;

5. Shine’s YouTube channel;

6. RAFFWU’s YouTube channel;

and thereafter continue to display the Written GM Notice and Audio-Visual GM Notice until the expiry of the Class Deadline.

d. the SDA shall cause a copy of the:

i. Written GM Notice to be posted prominently on the SDA’s website;

ii. Audio-Visual GM Notice to be posted on:

1. the SDA’s Facebook page, including national and state based accounts;

2. the SDA’s Instagram page, including national and state based accounts;

3. the SDA’s YouTube channel.

e. MAL shall cause a copy of the Written GM Notice and the Audio-Visual GM Notice to be posted prominently on its MeTime platform, and thereafter continue to display the Written GM Notice and the Audio-Visual GM Notice until the expiry of the Class Deadline.

10. Within four weeks after receipt of the List of Known Group Members, Shine, the SDA and MAL shall each file and serve an affidavit as to compliance with Order 9.

11. The costs of and incidental to the distribution of the Written GM Notice and the Audio-Visual GM Notice, including in relation to any enquiries received from group members about the same, shall be costs in the proceeding but be paid, in the first instance, by the Class Action applicants.

12. If the solicitors for a party receive a form purporting to be an opt-out form by or after the Class Deadline, they shall forthwith file the form which shall be treated as having been filed on the date it was received by the solicitors (and for the avoidance of doubt, forms received and filed after the Class Deadline shall not, without further order, be treated as having been filed before the Deadline).

13. The solicitors for the parties have leave to inspect the Court file and to copy any opt-out form.

14. Within nine weeks after receipt of the List of Known Group Members, the Class Action applicants shall serve on MAL, the franchisees who are respondents to the class action and the SDA Actions (the **Franchisees**) and the SDA:

a. a list identifying any persons who filed opt-out forms before the Class Deadline; and

b. a list identifying any persons who filed opt-out forms after the Class Deadline.

15. Pursuant to section 33J of the Act, the date before which a person who is or may be a group member may opt out of the proceeding is fixed as [insert] (**Class Deadline**).

*Issues for the Initial trial*

16. Prior to the initial trial referred to in Order 20, and pursuant to section 37P(2) of the Act, by 4pm on [insert date] the legal representatives of the parties are to confer and produce a document entitled “factual and legal issues for determination” which identifies:

a. each substantive contested factual issue in respect of which the parties consider it is necessary for the court to make findings at an initial hearing; and

b. each contested legal issue in respect of which the parties consider it is necessary for the court to determine at an initial hearing.

17. At least three days prior to the conferral referred to in Order 16, the parties exchange a draft of the factual and legal issues for determination document, together with the statement of the likely nature of the evidence each party proposes to adduce at an initial trial of the type as discussed at the case management conference on 13 December 2022.

18. By 4pm on [insert date], the parties are to confer and propose orders in respect of the timetable for the initial trial referred to at Order 20.

19. The proceedings be listed for further case management hearing at the next available date after compliance with Order 18.

20. Subject to further order, there is to be an initial trial on a date to be determined at which the court will determine:

a. all claims for compensation made by the applicants in the class action pursuant to section 545 of the *Fair Work Act 2009* (Cth);

b. claims for compensation made by the SDA pursuant to section 545 of the *Fair Work Act 2009* (Cth) will be determined in respect of:

i. such persons who have opted out by the Class Deadline and are nominated as test cases for the purposes of the SDA Actions; and

ii. sample respondents who have been identified at the case management hearing referred to in Order 19;

c. if the Court determines that one or more of the sample respondents referred to in item (ii) above contravened the *Fair Work Act 2009* (Cth), the SDA’s claim for penalties pursuant to section 546 of the *Fair Work Act 2009* (Cth) against the said respondent(s).

97 As noted above, the class action applicants now press for determination of any entitlement to an aggregate award at the initial trial. For a variety of reasons unnecessary to canvass for present purposes, and subject to hearing from the parties, I consider this is likely to be impracticable. More generally, pending determination of this stay application, I have not heard detailed submissions on these orders and the precise form of opt out (an issue to which I will return) and specific issues to be determined at an initial trial have not been fixed. For present purposes, it suffices to note that what might be described as the broad architecture of each proposed course is tolerably clear, although I have a far better idea of what, in concrete terms, is proposed by the class action applicants.

## F.2 Consideration of the Contentions of the SDA and of the Minister

98 I set out in Section D the ten broad propositions the SDA called in aid and the Minister’s propositions as to why any joint trial model should be rejected and the Class Action be stayed. It is now convenient deal with each of these contentions in turn before turning to other relevant matters.

### I First Contention – Avoidance of Unnecessary Duplication

99 As noted above, it is true to say in the abstract that duplicative proceedings are a vice. Part of the reason is the risk of inconsistent outcomes, vexation to a respondent caused by lack of finality, and increased costs. But in the present circumstances, if anything, these factors point in favour of the joint trial model and against a stay of the Class Action.

100 It is generally true that a potential consequence of allowing duplicative actions to proceed is at least some duplication of costs (see *Bellamy’s Australia Ltd v Basil* [2019] FCAFC 147; (2019) 372 ALR 638 (at 643 [19]–[21] per Murphy, Gleeson and Lee JJ). However, I am far from satisfied fewer costs would be incurred by staying the Class Action and proceeding with the process envisaged by the SDA. The joint trial model provides for the compensatory claims of Workers to be determined across a number of cases (albeit initially heard jointly), but such a result can always arise as a consequence of opt out. Moreover, any duplication of costs at an initial trial can be minimised by active case management.

101 In the end, there is no risk of inconsistent verdicts and finality being undermined by adopting a joint trial proposal (discussed further below). Indeed, the joint hearing proposal promotes these ends and provides an advantage to MAL and franchisees in quelling the controversy (not only through ordinary principles of *res judicata* and issue estoppel) but also, in a Pt IVA proceeding, by the statutory estoppel created by s 33ZB and the procedural flexibility of the potential creation of subgroups and separate binding determinations.

### II Second Contention – The Special Role of the SDA and Diminution of its Role

102 Together with hypothetical net returns, this is one of the two arguments relied upon most heavily in support of a stay of the Class Action.

103 It is worth commencing consideration of this factor by remarking that federally registered employee organisations have played, and continue to play, a special and central role in protecting the interests of workers. As I noted to senior counsel for the Minister (who, together with his junior, provided helpful and cogent submissions), the Minister was pushing at an open door is stressing the importance of registered employee organisations, when needed, being able to enforce, and being seen as able to enforce, the rights of employees though access to litigation in a cost-effective way.

104 Such organisations have long been recognised as a “party principal”, and more than “a mere agent or figurehead” for the employees they represent: *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees’ Association* (1925) 35 CLR 528 (at 551 per Starke J). Indeed, in *R v Dunlop Rubber Australia Ltd; ex parte Federated Miscellaneous Workers’ Union of Australia* (1957) 97 CLR 71 (at 82 per Dixon CJ, Webb, Kitto and Taylor JJ), the High Court concluded it was an accepted constitutional principle that employee organisations may, in the exercise of the power conferred by s 51(xxxv) of the *Constitution*, be established, registered and incorporated so that “in the formulation of demands and the settlement of industrial disputes classes of men in an industry or a group of industries may be represented”: see also *Regional Express Holdings Ltd v Australian Federation of Air Pilots* [2017] HCA 55; (2017) 262 CLR 456 (at 469 [29] per Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ).

105 This status was first enshrined in statute in 1974 (s 142A of the *Conciliation and Arbitration Ac*t *1904* (Cth) (repealed)) and is reflected in the current legislative scheme, namely the FW Act and the RO Act, as follows.

106 *First,* s 5(4) of the RO Act provides that “Parliament’s intention in enacting this Act” includes assisting “employers and employees to promote and protect their economic and social interests through the formation of employer and employee organisations, by providing for the registration of those associations and according rights and privileges to them once registered”. Further, s 5(5) provides that “Parliament recognises and respects the role of employer and employee organisations in facilitating the operation of the workplace relations system.”

107 *Secondly*, registration under the RO Act unlocks rights for members under the FW Act: see the distinction between “industrial associations” and an “organisation”, which has been registered, in s 12 of the FW Act. For completeness, I pause here to note that other terms in the FW Act which refer to employee organisations registered under the RO Act include “employee organisation” and “registered employee association” (see s 12).Those rights and privileges include: creating and maintaining industrial instruments (for example, default rights of representation in enterprise bargaining (see ss 176, 177); the right of entry and investigation regime in Pt 3-4; andstanding (alongside other legal persons including employees and employers) to seek civil remedies under Pt 4-1.

108 As to standing, pursuant to s 539, an employee organisation is given broader standing than an “industrial association” (defined in s 12 of the RO Act). Relevantly, an employee organisation enjoys standing to bring a proceeding to enforce contraventions of ss 45 (“contravening a modern award”), 50 (“contravening an enterprise agreement”) and 558B (“responsibility of responsible franchisor entities and holding companies for certain contraventions”) where an industrial association does not. There is no relevant action that may be brought by an employee organisation under s 539 that cannot also be brought by an affected employee in their own right (cf s 536AA).

109 *Thirdly,* the FW Act empowers litigants to bring proceedings to vindicate and enforce employee entitlements without requiring them to pay the costs of another party. The benefit of s 570 is, of course, also available to an individual litigant who commences an action under Pt 4-1, including a representative applicant. Section 570 of the FW Act operates as a qualification on the Court’s general discretion as to costs promoting equality of arms and is the current manifestation of a long history of provisions which have restricted the making of costs orders under Commonwealth industrial relations legislation: *Australasian Meat Industry Employees’ Union v Fair Work Australia (No 2)* [2012] FCAFC 103; (2012) 203 FCR 430 (at 432 [3] per Jessup and Tracey JJ).

110 *Fourthly,* registration under the RO Act sets minimum standards for the proper operation of registered employee organisations and their officers, including by:

(1) effecting a regime for democratic control of employee organisations and makes them accountable to their members: Ch 7–10 of the RO Act; and

(2) imposing director-like duties on officers of employee organisations, including a duty to exercise their powers and discharge their duties with a specified degree of care and diligence and in good faith (ss 285 and 286); and a duty not to use their position improperly to gain an advantage for themselves or someone else, or cause detriment to the organisation or to another person (s 287). These provisions are all civil remedy provisions attracting significant civil penalties for contravention under Ch 10.

111 The Minister is, with respect, correct to caution against any development that would serve to diminish this special role. I accept this role is entirely consistent with, and promoted by, unions playing an active role in providing access to justice for persons they either represent or are entitled to represent. The Court should be astute not to undermine this special role in determining applications such as the present. But the question here is not whether any fetter should be placed upon registered employee organisations being able to litigate effectively, but rather how one such organisation should have litigated effectively and what is the optimal solution to the circumstances created, in part, by the delays of the SDA and the way the SDA has approached these cases.

112 Hence, at the risk of repetition, I agree the Minister and the SDA are correct in stressing it is important not to lose sight of broader issues of public policy, but one must not lose sight as to *how* this special role to advance industrial interests by litigation is best fulfilled.

113 Reference was made above (at [70]) to Professor Morabito and Ms Caruana’s article ‘Australian Unions – the Unknown Class Action Protagonists’, where the authors, including one of Australia’s leading class action academics, noted (at 383) that the involvement of unions in Pt IVA proceedings has been “largely ignored by legal scholars” and that unions can play a significant role “in protecting and advancing the interests of workers through the use of the class action mechanism” (and to some extent have already done so). After surveying the nature of employee rights likely to be sought to be vindicated by litigation and the barriers to commencing such litigation, the authors note (at 388–389):

The utility of class actions in enforcing the rights of employees in the United States may perhaps be gauged by the increasing use by US employers of “class action waivers” which are essentially mandatory arbitration provisions that prohibit class actions.

Can the involvement of unions in class actions have beneficial effects? Hamilton and Anderson have provided an affirmative answer by drawing attention to the fact that American courts have recognised that:

*“unions possess more resources and information than any individual claimant and are uniquely situated to advance their members’ interests as class representatives … [L]abor unions can be a powerful ally for plaintiffs seeking class relief … Plaintiff’s counsel looking for a source of information, for funding, for a means of reaching out to the individual members of a given class, should consider the possibility that a labor union may be an excellent tool for accomplishing their clients’ goals of obtaining a better workplace.”*

This assessment appears to have been endorsed by the Civil Justice Council of England and Wales (“CJC”) in November 2008 when it recommended the introduction of a new collective action regime for England and Wales. In fact, the CJC recommended that trade unions be included among the “socially responsible collective bodies” that should be allowed to act as representative parties under this proposed collective action regime.

The reference to unions possessing greater resources in the passage quoted above is particularly relevant to the Australian Federal regime given that… the Australian Government refused to implement the measures recommended by the ALRC in order to overcome the cost barriers to the employment of the Pt IVA device …

(Footnotes omitted).

114 As was made plain by the Full Court (comprising Wilcox, Ryan and Madgwick JJ) last century in *Finance Sector Union of Australia v Commonwealth Bank of Australia* (1999) 94 FCR 179 (at 184–186 [14]–[20]), there is no barrier to a union being a representative applicant under Pt IVA and seeking compensatory and penal remedies for the benefit of employees in an appropriate case. Despite this, as Professor Morabito and Ms Caruana point out (at 392), “instances of a union assuming the role of class representative in Pt IVA proceedings have been rare”. Even when a union promotes or participates in promoting a class action, as with the RAFFWU, there seems to be a misconception it is necessary for an employee to fulfil the role of lead applicant. There might be some reason for this in an individual case (although none is readily apparent to me), but if the decision rests upon a misapprehension there is some difficulty with a registered employee organisation being a representative applicant, that notion should be exploded.

115 Even when they are willing to advance representative-type claims, some registered employee organisations seem to have proceeded on the basis that the existence of procedural provisions within the FW Act facilitating one form of “representative” action means that Pt IVA is unavailable (as was evidently the case here). If the resolution of this case has a broader utility, it might be to bring home to any lawyer conducting FW Act litigation that is heretical to think Pt IVA class actions are unavailable or confine the nature of relief that can be sought. As discussed further below, when properly understood, class actions offer protections and procedural advantages not present in other forms of representative or quasi-representative proceedings. That is their *raison d'etre*. Speaking generally, vacating the field for commercial operators is hard to reconcile with best advancing the interests of those persons such organisations are entitled to represent.

116 Faced with a common issue of substance, unions should at least consider entering the arena by becoming representative applicants or assisting a member in conducting Pt IVA litigation. This would not diminish but, in my view, would enhance cost-effective access to justice for employees. When trying to make this point previously, apparently ineffectively, I pointed out that in doing so, such organisations would not generally need to be concerned about providing security for costs, which is often an inhibitor to non-funded class actions: *Turner v Tesa Mining (NSW) Pty Ltd* [2019] FCA 1644; (2019) 290 IR 388 (at 412 [86]).

117 In any event, as we know, an available course for bringing the compensatory claims of the unnamed Workers was adopted, albeit belatedly, by the SDA. As I have previously remarked, superficially, it might be thought in doing so the SDA is performing a “representative” function, comparable with the role of a representative applicant in Pt IVA and other representative functions known to the law, for example, representation by an agent, trustee and tutor or guardian: see *Tomlinson v Ramsay* (at 524 [40] per French CJ, Bell, Gageler and Keane JJ). But there are, for reasons I explained in *McDonald’s* (at [352]–[356]) and *Transport Workers’ Union of Australia v Qantas Airways Ltd (No 4)* [2021] FCA 1602; (2021) 312 IR 133 (at 138–141 [11]–[23]), real differences between representative proceedings and proceedings brought by an employee organisation under the FW Act.

118 Although the mode of “representative” proceeding adopted is not determinative and should not be given disproportionate weight in choosing between whether a joint trial model should be adopted or a stay ordered, the differences amount to a relevant consideration and need to be explained in a little more detail.

119 The most important is the possibility of legitimate disjunct between the interests of affected workers (or a subset of them) and the union’s interests, where the representative applicant in a class action has a duty to act in the interests of all group members. While both a representative applicant and an employee organisation are eligible to bring applications on behalf of other persons (see ss 33C(1) and 33D(1) of the FCA Act and s 539 of the FW Act), statutory eligibility says little of the capacity in which claims are brought.

120 On the one hand, as noted above, a registered employee organisation: is a body separate and distinct from its members; acts in an independent capacity; and is given standing to pursue its legitimate industrial objectives. It “represents a class, not a definite series of individuals”, the membership of which is liable to change, or a group or class “formed by reference to an industrial relationship”: *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387 (at 431 per Dixon J; 404 per Latham CJ; and 418 per Rich and Evatt JJ); *R v Dunlop Rubber* (at 81 per Dixon CJ, Webb, Kitto and Taylor JJ).

121 It was suggested by the SDA in oral submissions that the SDA and its officers “owe fiduciary obligations and act as a regulator”: T23.16–17; T28.9. If this description was being used to characterise the nature of the relationship of the SDA and its officers *qua* the persons the SDA is entitled to represent, the use of “fiduciary” in this context might best be described as a slogan. There is no precise or comprehensive definition of the circumstances in which a person is considered a fiduciary in their relations with another, but a fiduciary relationship is, of course, characterised by trust and confidence, and a person will be in a fiduciary relationship with another when and insofar as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other person to expect that they will act in the other person’s interest to the exclusion of their own interest: see *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41 (at 96–97 per Mason J); *News Limited v Australian Rugby Football League Limited* (1996) 64 FCR 410 (at 538–541 per Lockhart, von Doussa and Sackville JJ).

122 But it is evident that an employee organisation such as the SDA is conducting litigation as a “party principal” and is entitled to act on its own account and in its own interests (subject to the requirements of the RO Act). In *Burwood Cinema v ATAEA* (at 548), Starke J explained the definitive membership of a group a union is entitled to represent cannot be essential, as claims and demands are made for the benefit of “the ever changing body of workmen that constitute the trade”. When one appreciates this indeterminacy, it is at best problematical to describe an organisation such as the SDA as acting as a fiduciary of any of the Workers in the conduct of litigation. This does not detract, however, from the statutory obligations imposed under the RO Act and identified above.

123 The reality is that the interests of an employee organisation may not necessarily align with those of a particular subset of employees whose industrial interests the organisation is entitled to represent. An obvious example is upon settlement. One could readily conceive of circumstances where it would legitimately further an employee organisation’s aims to enter into a bargain with an employer to compromise litigation and effectively (if not technically) extinguish present workers’ claims, provided that in the next round of enterprise bargaining negotiations, the employer agreed to make what are perceived to be more valuable concessions for the then combination of employees going forward. Such a settlement could, of course, be put in place absent Court scrutiny.

124 By way of contrast, a representative applicant is an individual whose claim shares common issues of law and fact with the claims of group members. The relationship has been described in different ways: see, for example, discussion as to fiduciary relationships in *Dyczynski v Gibson* [2020] FCAFC 120; (2020) 280 FCR 583(at 635–636 [209] per Murphy and Colvin JJ); *Wigmans v AMP* (at 646–647 [44] per Kiefel and Keane JJ; 670 [117] per Gageler, Gordon and Edelman JJ); see also authorities from the United States, including the Supreme Court in *Cohen v Beneficial Industrial Loan Corp* 337 US 541 (1949). I prefer to say that the representation by an applicant of group members is a kind of limited statutory agency to deal only with claims within the scope of the class action: *BHP Group Ltd v Impiombato* [2021] FCAFC 93; (2021) 286 FCR 625 (at 632 [27] per Middleton, McKerracher and Lee JJ). Put another way, the representative applicant is a “privy in interest” with respect to the claim the subject of a given proceeding, but not with respect to their individual claims: *Timbercorp Finance v Collins* [2016] HCA 44; (2016) 259 CLR 212 (at 235–236 [53] per French CJ, Kiefel, Keane and Nettle JJ).

125 Whatever else the relationships are and are not, a representative applicant cannot properly represent a class of persons if the interests of the applicant are antagonistic to, or in conflict with, the interests of group members: *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd* (1993) 45 FCR 457 (at 464 per Wilcox J). It is inconsistent with the duties of a representative applicant to act contrary to the interests of the group members represented. More specifically, an applicant would not be acting licitly if the applicant acted contrary to the interests of group members as a whole in the conduct or resolution of the litigation or sought to procure a benefit for a differently constituted group of persons at the expense of group members. A series of protections are built into Pt IVA to ensure the interests of the group members are protected in this regard, most notably, the necessity to secure Court approval of any settlement or discontinuance (s 33V) and the ability to make an application to replace the applicant (s 33T). As such, there is not only a requirement of similarity of interests between the representative party and the group members, but also safeguards.

126 What is also evident is that the Workers here are not privies of the SDA in any relevant respect. Notwithstanding they are affected third parties, as non-parties to the litigation, they are not bound at law or in equity by orders made in the SDA Actions seeking any representative relief on their behalf (such as would be the case by operation of a s 33ZB “statutory estoppel” in a Pt IVA proceeding or in a Chancery representative proceeding). This statement of the position is of course subject to the qualification in this case that it is difficult to see why it would be an appropriate exercise of power to make a compensatory order in the exercise of the discretion in s 545 of the FW Act if a Worker had already had a compensatory claim dealt with on the Worker’s behalf by an employee organisation (or whether any attempt at a “second go” may be prevented by novel arguments reliant upon notions of abuse of process).

127 For present purposes, what matters is that differences in “representative” roles, powers and duties exist. The genius of Pt IVA is that it provides a statutory mechanism for achieving finality on common issues and “issues of commonality” for the benefit of a respondent facing multiple claims but also, importantly, for non-parties. In doing so, Pt IVA has the flexibility to ensure group members can pursue their individual claims optimally, including by the appointment of subgroup representatives or sample claims.

128 As noted above, there is real force in the Minister’s submission that the special statutory role of an employee organisation must be given full effect and not be diminished. I also accept that as a general proposition, from a public policy perspective, if litigation to obtain employee compensation and penal orders is merited, then the conduct of that litigation by a registered employee organisation, or an employee assisted by a registered employee organisation, has real benefits over the commercialisation of such litigation by the involvement of commercial funders. In part, this will be because a registered employee organisation will be more interested in penal orders deterring future contravening conduct and, if conducted efficiently, such litigation provides the prospect of employees obtaining compensation without the added cost of litigation funding.

129 It is the next step in the Minister’s argument that is problematical: the notion that to allow *this* Class Action to proceed may have a “diminishing effect” on the special statutory role of the SDA.

130 The Minister referred to the *material* diminishment of the SDA’s role but did not point to anything in the FW or RO Acts to demonstrate that the continuation of the Class Action in the circumstances of this case would somehow impede the rights and privileges of registered employee organisations more generally. As set out above, a purpose of the provisions granting standing to the FWO and employee organisations is the desirability that employees have access to affordable justice with respect to their workplace rights. The question of how this is best facilitated in an individual case is a bespoke enquiry.

131 Nothing put to me as to standing under s 439 or the FW Act’s costs provision in s 570 said anything of proceedings commenced by employee organisations which did not apply with equal force to Pt IVA proceedings. Nothing about rejecting a stay in this case is meant to, or will, diminish the special role of employee organisations. But if an employee organisation is to fulfil its role by pursuing large scale litigation, this judgment may serve to remind it to do it with celerity, in accordance with the overarching purpose, and in a way that at least considers the most effective procedural mechanism for vindicating numerous, small claims with a substantial common issue.

132 For completeness, I should note the SDA sought to rely upon the decision of Charlesworth J in *Thomas v Romeo Lockleys Asset Partnership* [2022] FCA 1106(at [43]–[53]) in support of the SDA’s exhaustive or unique role. There, her Honour set out the purpose of ss 539 and 570, explaining how the provisions “advance the objectives of the FW Act by providing a means by which employees may assert and enforce their entitlements in a way that does not expose them to an outcome in which any damages or other award is subsumed by their own legal fees”, and reasoned (at [46]):

there is a clear public interest in a regulator such as the Ombudsman having standing to bring claims on behalf of a group of employees, particularly where the claims of each individual employee may be small, and yet the profits gained by employers from contraventions of the FW Act affecting multiple employees may potentially be very large indeed.

133 It suffices to say this passage does no more than explain a policy reason for unions such as the SDA and the FWO to have standing.

### III Third Contention – Difference in Net Hypothetical Returns

134 I can be brief in dealing with this factor because of what I have already said about this topic (at [75]–[84] above) including as to the protective role of the Court in approving any deductions. I accept that the SDA Actions will not burden Workers with deductions from compensation to pay legal costs, a funder’s commission and a payment proposed to be made to RAFFWU, but instead the SDA will ensure the payment of compensation. Accordingly, leaving aside any entitlement arising from the availability of an aggregate award, and despite any controls on deductions, and *all other things being equal*, this factor favours the claims of Workers for statutory compensation being advanced otherwise than by funded litigation such as the Class Action.

135 Two things should be mentioned about the SDA’s submissions on this topic.

136 *First*, the SDA Actions are said to be “commission free actions pursuing allegations against McDonald’s and franchisee employers with the interests of all 300,000 workers at the fore” and “the workers should not be burdened by a less efficient and more expensive procedure”. I reject the premise that the Pt IVA procedure is less efficient: the opposite is true, and as to expense, this downside can, to some extent, be mitigated. There is no reason for me to doubt that the class action applicants and those that advising them will not properly represent the interests of group members.

137 The *second* was the emphasis placed on the fact that the SDA seeks penal orders. Again, this was misdirected, as the joint trial model would see any claim for penal orders still being able to be advanced. I cannot pass from this point without noting the rhetoric of the SDA rang a little hollow in emphasising its worthiness in this respect. It was not lost on me that when the SDA Actions were first commenced, the SDA sought orders that all penal payments go to the SDA. It was only after the Class Action came along, and a stay was in the wings, that “the interests of all 300,000 workers” apparently came to the fore in this regard.

### IV Fourth Contention – The Public Interest in Ensuring Full Entitlements

138 There is a public interest in employees obtaining their full entitlements and it is relevant that the Class Action and the SDA Actions have different funding arrangements such that the amount received by certain Workers in respect of similar claims is liable to differ at the end of the day. The Minister correctly submitted this is reinforced by the unique character of a claim for wages in an employment class action. Indeed, in *Augusta Ventures v Mt Arthur Coal* (at 161 [136]) (cited with approval in *Bradshaw* at [129] per Bromberg J), White J noted that “a claim for wages in respect of work performed does not ordinarily have the same speculative or contingent quality of many Pt IVA actions.”

139 Although this factor does tend to lean in favour of a stay in and of itself, it does not have a great deal of weight.

140 If this case was to proceed to an initial trial of the Class Action as part of a joint trial model, several different outcomes could result. *First*, the class action applicants could fail entirely on liability, in which case the proceeding would be dismissed. *Secondly*, they could succeed on liability and obtain an aggregate award of compensation for the Workers in the Class Action. *Thirdly*, and I suspect more likely than the second scenario, they could succeed on liability for one, or other, or all of the named applicants and a sample group member (with any claim for an aggregate award being found not to be available or deferred for later, and contested, consideration).

141 In the *first* case, there is no compensation at all for anyone. In the *second* scenario, the Workers who opted out and have claims for compensation to be determined in the SDA Actions would be able to feel some confidence about their individual claim. Pending an appeal, there would at least be a prospect that all claims would be settled one way or another. Such a settlement of the Class Action would be subject to s 33V approval and, as explained above, any deductions from the overall settlement sum would need to fair and reasonable and “just”. If the appeal was dismissed, and the aggregate award was sustained, then again, any deductions that would be made would be Court approved.

142 As to the *third* scenario, at least some of the Workers who opted out and have claims for compensation to be determined in the SDA Actions would again be able to feel some confidence about their individual claim. But such an initial success would undoubtedly result in all claims being referred for mediation (if past cases are any guide) and there is a very real prospect that all claims would be settled in one way or another. Such a settlement of the Class Action would be subject to approval pursuant to s 33V of the FCA Act and, as explained above, any deductions from the overall settlement sum would need to be “just”.

143 When these historically more realistic scenarios are properly understood, the spectre of a stately progression of quantification of all individual claims (and consequent differences in the net sums paid to different Workers) is put in proper context. It is a prospect, and such an outcome (even if mitigated by Court order) would be undesirable, but the prospect is not a particularly realistic one if the last quarter century of class action history is any guide.

### V Fifth Contention – Inaptness of Pt IVA Regime

144 The assertions one would need 300 representative applicants and the commencement of around 300 more class actions and that there is some problem with dealing with claims of Workers employed after 2019 are simply wrong and, like several of the SDA’s submissions, reflect a misunderstanding of how Pt IVA works. In rejecting this contention, it is sufficient to refer to my judgments in *Dillon v RBS Group (Australia) Pty Limited* [2017] FCA 896; (2017) 252 FCR 150 (at 158–167 [41]–[75]) and *Dyczynski v Gibson* (at 661–666 [326]–[342]), both of which explain how Pt IVA works to deal with differing, even quite disparate, group member claims.

### VI Sixth Contention – Inaptness of Class Action Pleading and Party Composition

145 The SDA complains the Class Action has not joined the franchisees and only makes claims against MAL which “if found, may be apportioned down”.

146 I accept that while the proceedings have at their heart a common legal question, there are important differences between them.

147 The Class Action was commenced against MAL only. It alleges contraventions of ss 45 and 50 of the FW Act by MAL and each of its franchisees over the period 7 December 2015 to 27 May 2022. In relation to the contraventions by franchisees, it alleges that MAL is liable for the franchisees’ contraventions under s 550 of the FW Act (up to 14 September 2017), and s 558B of the FW Act (from 15 September 2017).

148 In the SDA Actions, the common allegations are that MAL and (in the pre-class action cases, the post-class action cases and the Bandec action) its franchisees contravened the FW Act by failing to: give workers ten-minute breaks (ss 45 and 50); keep records (s 535); roster breaks (s 45); and provide access to National Employment Standards (s 45). It is said that the contraventions of ss 45 and/or 50 arising from the alleged failure to provide workers with ten-minute paid breaks were serious contraventions within the meaning of s 546. In all SDA Actions brought against licensees it is alleged that MAL is liable as an accessory for its franchisee’s failure to give ten-minute breaks (s 550), and in the Bandec action, there is a further allegation that MAL is liable under s 558B of the FW Act for its franchisees’ breaches of the FW Act.

149 All this may be accepted, but so what?

150 The class action applicants have foreshadowed seeking leave to join the relevant franchisees to the initial trial if a joint trial model is adopted. Their failure to claim against the franchisees up until this point is understandable in seeking to simplify proceedings and increase the prospects of an early hearing and has not occasioned operative delay.

151 As to the failure to seek penalties in the Class Action, as I have already explained, penalties would still be able to be sought against MAL or the franchisees if liability is established and, for obvious reasons, would need to be determined after any compensation is awarded (as the extent of any compensation payable could rationally affect the quantum of any penal orders necessary to achieve the objects of deterrence).

### VII Seventh Contention – Opt Out Impracticality and Confusion

152 The SDA contended that a stay of the Class Action will avoid the need to undertake the “time consuming, complex and confusing” opt out process. In brief, it was submitted: (1) the SDA Actions do not “burden” employees to receive, comprehend and act upon an “inevitably complicated” opt out notice; (2) the SDA Actions need not proceed on the “fantastical premise” that an opt out notice has reached and been understood by group members; (3) the vast majority of affected workers are minors, who can only take a step in the Class Action through a litigation guardian (see s 33F(2) of the FCA Act); (4) the need for a period of opt out will delay the proceedings being heard; (5) the SDA Actions do not require the cost of an independent lawyer to advise group members on opt out; (6) satellite litigation as to the form of opt out notices should be avoided; and (7) opt out “risks bringing the administration of justice into disrepute” as group members will be defaulted into an action where the funder and solicitors take a cut of any winnings.

153 These submissions are unpersuasive.

154 They ignore the reality that if the SDA Actions are all litigated through to a conclusion, this model likewise must depend on somehow notifying Workers of the existence of proceedings. The need to convey complex information to Workers is not exclusive to the Class Action.

155 To date, orders as to the form and content of opt out notices have not been made, but if done properly (and subject to the challenges discussed below, there is no basis for proceeding on the assumption it will not be done properly), opt out facilitates and formalises accurate information being conveyed to non-party group members as a mandatory aspect of Pt IVA procedure to facilitate and require an informed choice to be made to allow a group member the opportunity to withdraw from the proceeding.

156 Opt out is not a case management technique selected by the class action applicants: it is the very mechanism selected by the legislature to facilitate efficiency and access to justice. As I explained in *Parkin v Boral Limited (Opt Out Notices)* [2021] FCA 478 (at [15]–[16]):

15 In the second reading speech in the House of Representatives (Commonwealth, Parliamentary Debates, House of Representatives, Second Reading Speech, 14 November 1991) (at 3174), the Attorney-General, Mr M Duffy, after noting that business groups had concerns about the opt out model, stated:

The Government believes that an opt out procedure is preferable on grounds both of equity and efficiency. It ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceedings. It also achieves the goals of obtaining a common, binding decision while leaving a person who wishes to do so free to leave the group and pursue his or her claim separately.

16 From the above, it is evident that the legislature was clearly proceeding on the basis that: (1) group members who do not opt out are bound by the proceeding; (2) Pt IVA was directed at removing a practical barrier to access to justice; and (3) a notice approved by the Court, published by a means approved by the Court, is an adequate way of ensuring that group members are told of the information necessary to exercise the most fundamental right in relation to the proceeding – whether to opt out of it or remain in it and be bound.

157 As can be seen, the right to opt out represents a protection for group members in circumstances where consent is not required for an applicant to represent them: *Perera v GetSwift* [2018] FCA 732; (2018) 263 FCR 1 (at 89 [368] per Lee J). It serves the critical function of facilitating choice.

158 I accept the SDA has a point about the real practical challenges of opt out given the nature of the class and the significant numbers of minors involved (although, each day, the number of Workers under that legal disability will diminish). This will be a complex opt out process, although it is unusual because of the degree of certainty in the choice being presented to the class (that is, the choice is not solely based on a hypothetical future potential alternative, such as bringing their own proceeding; rather, it is between extant proceedings, in which the essential differences will have crystallised by the time of opt out).

159 It is unnecessary for the purposes of this application to determine the form of opt out, but it is useful in considering the SDA’s submission to understand its likely aspects.

160 If the Class Action is not stayed and opt out is to occur, and subject to the submissions of the parties, it is likely to be by way of a series of “notices” (or, perhaps more accurately, communications by different modes) to differing subsets of group members, being:

(1) group members being Workers named in the pre-action cases, the post-action cases and the MAL case (**Group A**);

(2) group members other than Group A members, being Workers who are members of the SDA, and whose claims are presently covered by the Bandec case (**Group B**); and

(3) all other group members (**Group C**).

161 The circumstances of each of these groups are somewhat different and the messages sent to each should be tailored accordingly.

162 Again, subject to hearing from the parties, my preliminary view is that given persons in Group A have, as I understand it, provided instructions to the SDA and agreed to participate in the relevant SDA Action, and without undermining the opt out philosophy reflected in Pt IVA, unless such a Worker elects to have their claim dealt with in the Class Action, their claim for compensation should remain in the relevant SDA Action.

163 Group B comprises persons (and, given my findings above, they are unlikely to be too numerous) who have expressly agreed, by becoming a member of the SDA, that they wish for the SDA to advance their industrial interests and the SDA has done so, not by naming them, but by progressing their claim in the Bandec case. I am, of course, fully cognisant of the reality that the SDA is just as entitled under the FW Act to represent all Workers, not just its members. The ability of the SDA being able to represent all persons it is entitled to represent is fundamental to standing under the FW Act and often, more generally, to unions being able to litigate effectively. But doing the best I can to fashion the best and fairest approach in the present circumstances, the preferable course is to give recognition to this anterior choice of representative and, unless relevant Group B now elect to have their claims dealt with in the Class Action, they should be dealt with in the Bandec case.

164 As to Group C, the position will be the usual one: unless they opt out, they will remain group members and their claim for compensation will be advanced in the Class Action.

165 As to complexity, the Court has always regarded its task of approving notices to group members as part of its protective and supervisory jurisdiction: *Lenthall v Westpac Banking Corporation (No 2)* [2020] FCA 423; (2020) 144 ACSR 573 (at 583 [31] per Lee J). As I have found above, the class will be heterogeneous in some respects but will be skewed towards the young and the unsophisticated in legal matters. There is an especial need for care to ensure the notifications provided to group members are fit for purpose and presented in such a way as to maximise the prospect they are informative, received and understood.

166 Additional safeguards would also need to be put in place. I have previously raised with the parties my intention to adopt a course which, in my experience of class actions with unsophisticated classes, has worked well: that is, to appoint an independent lawyer, armed with a “frequently asked questions” document settled by the Court, who will be in a position to respond to telephone or email queries as to any matters raised by group members relevant to making an informed decision. Minors, or other group members with a legal disability, will be encouraged to have their parent or legal guardian contact the independent lawyer who will be able to apprise them of the steps they need to take.

167 Further, the modes of communication in this case will be important. I have criticised the conservatism of practitioners providing draft “standard form” notices on many occasions, including in *Australian Securities and Investments Commission v Commonwealth Bank of Australia (No 2)* [2021] FCA 966 (at [17]) where I observed:

It is a fairy tale to think that … dense legalistic public advertisements, published in the notices section of daily newspapers, often cheek by jowl with the results of things such as flower shows and greyhound races, amounts to an effective way of communicating information to a broad audience of consumers. The decline in literacy rates in Western societies, and the likelihood that the intended audience is made up of persons at every point of the continuum of sophistication in financial and legal matters, presents real challenges that cannot be simply ignored: J [49]–[51]; see also *Lenthall v Westpac* *Banking Corporation (No 2)*[2020] FCA 423; (2020) 144 ACSR 573 (at 587–8 [45]–[50]).

168 There needs to be close attention given to the content of the notices and, just as importantly, how the content of the notices is communicated, including using graphics and animation. Those acting for applicants in class actions need to think laterally and realistically about digital communication and the use of social media. The initial draft prepared by the class action applicants was not only partial but seriously inadequate as a means of communicating complex concepts in simple terms. It is unnecessary to go further into these matters for present purposes, but I reject the notion that the process of communicating the necessary aspects of the opt out message to each subset of group members is fantastic or cannot be achieved if sufficient care is taken.

169 Finally, I should address the SDA’s suggestion that the continuation of the Class Action alongside the SDA Action will give rise to a de facto “opt in” regime for the SDA Actions. It will not be for those Workers that the SDA has specifically named and for SDA members; the reality is there are competing vehicles for the resolution of the balance of the Workers’ claims – this needs to be resolved in a sensible way. All the joint trial model puts in place is a mechanism to allow informed choice.

### VIII Eight Contention – Timeliness of Initial Hearing

170 The SDA asserts that the key issues in the SDA Actions, going to both compensation and penalties, can be case managed such that test cases can be heard and determined within months. As noted above, despite a request by the Court, sparse detail has been given as to how such a model would work in practice in determining all common issues and how it would produce finality in the same way as the joint trial model.

171 I will come separately below to the approach taken by the SDA thus far to commencing and conducing the compensation claim proceedings, but even leaving this (and any argument as to aggregate awards) to one side, the stay of the Class Action is unlikely to assist in ensuring any of the compensation cases are readied for determination more efficiently. At the very least, I do not consider an initial trial along the lines of the joint trial model will be ready any later than if the Class Action was stayed (and an alternative procedure of test cases resolved the common issues required to be resolved to determine the compensation claims).

### IX Ninth Contention – No Finality Absent a Stay

172 An important part of the SDA’s argument, albeit not embraced by the Minister, was that staying the Class Action will provide practical finality and certainty because judgment in the Class Action awarding (or declining to award) compensation will bind group members but not the SDA, which can subsequently bring claims to recover compensation for Workers.

173 Again, this is not only misconceived, but is a factor which, properly analysed, points in the opposite direction. Three points should be made.

174 *First*, as noted above, leaving aside for present purposes additional issues arising only in the SDA Actions, the joint trial model will lead to the determination of the following issues:

(1) all questions relating to the proper construction of the EA and the Award;

(2) the direct liability of any franchisees named in the Class Action;

(3) the question of MAL’s direct liability for contraventions of ss 45 and 50 of the FW Act in connexion with the alleged failure to provide breaks to the class action applicants;

(4) the question of MAL’s accessorial liability under s 550 of the FW Act in relation to contraventions by franchisees of ss 45 and 50 of the FW Act in relation to the class action applicants;

(5) the question of MAL’s liability under s 558B of the FW Act in relation to contraventions by franchisees of ss 45 and 50 of the FW Act in relation to the class action applicants;

(6) the question of what, if any, compensation can be awarded for contraventions of the kind alleged; and

(7) if compensation can be awarded for contraventions of the kind alleged, what compensation, if any, can be awarded to the class action applicants (and any other individuals whose claims are to be determined at the initial trial).

175 Following a joint trial, the Court’s findings on these issues, to the extent they are relevant in the SDA Actions, will bind the parties to the relevant SDA Actions. The findings will also be relevant (to use a neutral term) to Workers who opted out (or are part of Group A or Group B and did not become part of the Class Action). All other Workers will be expressly bound as either parties to the Class Action (that is, the applicants) or as group members expressly bound by any s 33ZB order. All other parties present at the joint hearing of the proceedings will be bound under usual principles of *res judicata* and issue estoppel.

176 The notion the SDA could turn around after a compensatory claim has been determined in the Class Action and re-litigate the compensatory claims of the Workers bound by the s 33ZB orders relating to their claim is wrong. If the result of the common issues means the foundation of each claim cannot be maintained, that would be the end of the matter. If a Worker bound has the benefit of an aggregate or individual compensatory award, or a payment under an approved settlement extinguishing the compensatory claim that, again, would be the end of the matter. It is risible to suggest a Court would then subsequently exercise its discretion under s 545 to make an additional award when the Worker’s claim had already been resolved in the Class Action.

177 There is the possibility of variations on the way individual claims for compensation are resolved for group members bound at the initial trial (such is the flexibly and utility of Pt IVA and its mechanisms, including declassing) but there is no danger of any double dipping.

178 *Secondly*, the explicit suggestion that some group members will be bound by any judgment in the Class Action against their will is another submission by the SDA which ignores the way class actions operate and the express function of the opt out regime.

179 *Thirdly,* it is said that continuing both proceedings will create a “false economy” in that if the Class Action fails to establish accessorial liability or liability pursuant to s 558B of the FW Act on the part of franchisees, franchisee employees who have not opted out would recover no compensation in the Class Action. Similar circumstances are said to obtain in relation to what the SDA described as “apportionment”. This term was used throughout the SDA’s written submissions to describe the Court’s discretion to make any order the Court considers appropriate in s 545 of the FW Act. It is said that if the Class Action establishes accessorial liability, but the Court finds MAL’s proportionate liability to be minimal, the SDA Actions “will be left to recover the balance from the franchisee employers”. It suffices to respond by noting, as explained above, that such an assertion is incorrect. The parties to any individual applicant or group member claim determined at the initial trial, on the current proposal, will be all relevant respondents.

### X Tenth Contention – Funder Irrelevant

180 The SDA submits that the “interests of the litigation funder are an irrelevant consideration” in considering whether a stay should be granted.

181 This submission was not really developed, and seemed to be a reiteration of the proposition that the primary focus of the Court is on what would be in the best interests of the Workers, not any other player. If the submission meant more than this, it was put too highly.

182 The SDA agreed with the class action applicants and the Minister that, following *Wigmans v AMP,* it is uncontroversial that the effect of litigation funding arrangements is a matter to be considered. This must be the case as the usual rationale for accounting for the effect of litigation funding arrangements is not to facilitate the interests of the funder. Rather, the reality that the Class Action is a commercial enterprise gives the Court cause to scrutinise the funding arrangement with the protection and advancement of the interests of group members in mind: *BMW Australia Limited v Brewster* [2019] HCA 45; (2019) 269 CLR 574 (at 621 [114] per Gageler J).

183 But the position of the litigation funder generally cannot be an irrelevant consideration. The interests of the funder are affected if a stay is granted. As with any stay, the likely consequences of a stay are relevant in considering whether such an order should be made, including the nature and extent of prejudice to any third party. The *weight* to be given to this consideration relative to other relevant considerations is, of course, an entirely different matter. I will address this topic briefly in the next section.

## F.3 Other Relevant Matters

184 Having rejected, or put into proper context, the propositions advanced by the SDA and the Minister, it is evident that the adoption of the joint trial model would better advance the just resolution of all disputes within the overall justiciable controversy according to law and as quickly, inexpensively and efficiently as possible. Given the requirements of s 37M(3) of the FCA Act, I am required to exercise powers and manage these proceedings in a way which best promotes this overarching purpose. What I have said above is sufficient to reject the application for a stay.

185 Moreover, there are two other relevant factors that point in the same direction and by which the merits of rejecting the stay are fortified: (1) the tardiness of the SDA and its consequences for third parties; and (2) the conduct of the litigation to date.

### I The Tardiness of the SDA and its Consequences for Third Parties

186 Of course, *Wigmans v AMP* confirmed there should also be no presumption that the “first in time rule” applies to contests between representative proceedings and, by parity of reasoning, between a class action and “competing” proceedings brought by employee organisations. The time of filing may or may not be a relevant factor in the circumstances of a given case: *Wigmans* *v AMP* (at 649 [52], 662 [94] per Gageler, Gordon and Edelman JJ). It is a less relevant consideration in cases where the competing proceedings have been commenced within a relatively short time of each other: *Wigmans v AMP* (at 667 [107] per Gageler, Gordon and Edelman JJ). I have observed elsewhere (*CJMCG Pty Ltd as Trustee for the CJMCG Superannuation Fund v Boral Limited* [2020] FCA 914 (at [11])) that I am conscious that it is perfectly understandable why a firm of solicitors might be reticent to commence any type of representative proceeding, notwithstanding another representative proceeding has already been, or may about to be, commenced. The commencement of a proceeding is a serious step and leaving aside the fact that, as far as possible, a proposed applicant should take genuine steps to resolve disputes before civil proceedings are instituted (see the *Civil Dispute Resolution Act 2011*[(Cth)](https://jade.io/article/216639)), such a step can only be undertaken when those advising a proposed applicant have conscientiously fulfilled their obligation to satisfy themselves that there is a proper basis for making the allegations set out in the statement of claim. The relevant professional obligations of lawyers, and the encouragement of mature reflection and proper pleading of claims, has informed the view (expressed by judges on several occasions), that any approach to the resolution of multiplicity issues, by a stay or otherwise, that encourages a race to the “courthouse steps” would be highly unfortunate and potentially deleterious to the administration of justice.

187 But here a decision had already been made to commence different types of proceedings naming some but not all affected Workers, and the delay of the SDA in broadening the compensatory claims has had real life consequences. I have made findings above as to delay and the fact the SDA must have been aware that third parties were expending money in preparing a class action while it sat back and only advanced a limited suite of claims.

188 If the SDA had commenced some form of representative proceeding on behalf of all Workers within a reasonable time of learning of the difficulty that lies at the heart of the case, or even a reasonable time after there had been admissions of contravention in the “pivotal” Tantex case, experience would suggest a funded class action would have been a highly unattractive proposition and would not have been commenced.If the choice had been between a funded class action and an “unfunded” class action run by the SDA, and both had been started in a timely fashion, it is difficult to see why the interests of group members would not have required a stay of the funded class action.

189 But this did not happen and the delay of the SDA occasioned costs and expenses. During argument I put the following question to the SDA: if I was otherwise disposed to order a stay, in the event of a successful outcome, why should it not be conditional upon the unnecessary but reasonable sunk costs found to have been occasioned by delay in commencing the Bandec case being paid by the SDA to the solicitors and the funder? I proposed that such a term would involve payment being deferred until the conclusion of the litigation, that is, after any pecuniary penalties have been ordered. The premise upon which the issue was raised is that in the exercise of a broad discretion such as the discretion to order a stay, it is difficult to see why issues of prejudice are irrelevant, be it prejudice to a party or a third party, although the weight to given to any prejudice will necessarily depend upon its nature and extent.

190 I recognise that litigation funders are not obvious objects of sympathy. They run a business and litigation is an inherently chancy business. Returns for funders are generally high, commensurate with the risk assumed. Similarly, an entrepreneurial, publicly-listed law firm should not be confused with a naïf. But neither third party here would reasonably be expected to think the SDA would delay commencing the Bandec case the way it did if it was serious about advancing claims for all Workers. I am satisfied funds were expended to finance the book building and then progress the proceeding without thinking the SDA would delay matters as it did.

191 In any event, following the hearing, my Associate received a written communication from the SDA in the following terms:

The SDA would not oppose an order of the Court, as a condition of the stay of the class action, that if the class action applicants (Elliot-Carde & Dunlop) later become liable for costs or disbursements upon a successful outcome of their claims, that the SDA pay the sum of up to $250,000 towards any obligation of the class action applicants incurred contingently upon success, to reflect costs of the period from commencement of the class action to 11 August 2022 (when the SDA commenced the *Bandec proceeding* – SAD127/2022).

… The SDA takes this position in the interests of justice to the parties, even though in practical terms it would appear unlikely that Shine or the litigation funder would impose costs and funding obligations on the applicants if a stay were granted, and despite the fact that the class action proceeding is brought in a no costs jurisdiction, and despite the proposition that the interests of the litigation funder and Shine are not relevant considerations on the stay.

192 Such an undertaking, which was only proposed at the heel of the hunt and provided grudgingly while asserting that any prejudice to third parties is irrelevant, would have been inadequate, even if I was otherwise minded to grant the stay.

193 *First*, the amount is likely to be inadequate. The class action applicants provided submissions to my Chambers stating they have “completed an internal costing and calculate their costs and disbursements, up to the time the SDA commenced the Bandec proceeding, at approximately $1.2m”. I am sceptical that this quantum represents costs reasonably incurred, but the total is several multiples of the SDA’s offer. I would have thought an adequate undertaking should have been in the terms I suggested.

194 *Secondly,* the undertaking is contingent upon the class action applicants becoming “liable for costs or disbursements upon a successful outcome of their claims”. Although this contingency makes sense in the abstract (as the funder would have receive nothing if the Class Action failed), it is unclear whether “successful outcome” is used consistently with that term as it is defined in the Litigation Funding Agreement.

### II Conduct of the Litigation to Date

195 Again, although it is not determinative in reaching my conclusion to reject the stay, I have already made findings as to the considerable time wasted and opportunity lost in the way in which proceedings were commenced and time was expended in the SDA’s pursuit of this stay application. I regret to say I have misgivings about this litigation moving forward with efficiency and in the interests of those in respect of whom I presently have a protective role in the absence of the Class Action. Further, staying the Class Action in the present circumstances may have a dangerous normative effect, signalling that litigants may behave in a dilatory fashion, run misconceived arguments, and still trump another proceeding in a future, similar application.

### III Other Matters

196 The SDA initially did not proffer any undertakings to the Court. As noted above, at the hearing, I raised with the parties the prospect of ordering a stay upon terms. I invited the SDA to articulate a series of “promises” it made during oral argument with precision and offer them as undertakings to the Court in the event the Court determines to stay the Class Action.

197 This resulted in the proffering of the following undertakings, received by way of email to my Associate during the hearing on 9 March 2023:

(1) “The SDA will litigate the claims to conclusion, be that by judgment or settlement.”

(2) “The SDA will not compromise the claims for compensation in exchange for any benefit to itself, its broader membership or anyone else, such as to improve conditions in future, and nor will the SDA treat claims by members and non-members in any different way.”

(3) “The SDA undertakes to submit any settlement as to compensation to the Court for approval to be assessed if it is in the interest of those employees.”

198 Notwithstanding the mechanism by which (3) was to be achieved was not articulated (although, given the presence of the claims of minors, it may have been practicable) these undertakings largely assuaged my concerns as to the matters raised during argument which caused them to be proffered. I have taken their proffer into account.

# G THE WAY FORWARD

199 It follows that we are now back where we were immediately prior to Christmas last year with no discernible advance on progressing the claims of Workers. In particular, we are no closer to putting in place a regime for the prompt resolution of the central common issue and other common issues. The time has come for collateral disputation to cease and for those who have the responsibility for advancing the claims of Workers to concentrate on the Workers’ interests rather than their own.

200 The only substantive order I propose to make is to dismiss the stay application. No orders for costs have been sought and it is unnecessary for me to consider whether or not an award of costs against the SDA would be justified, notwithstanding the terms of s 570 of the FW Act.

201 I propose to list the proceedings for case management as soon as practicable. I request the parties confer and provide any joint availability to my Chambers within 48 hours, with the view that there will be a listing within the next three weeks. I will also deal, at least in a preliminary fashion, with the likely shape of any joint initial trial.

202 Given the history of the matter, further conferral about the terms of opt out notices and modes of communication is unlikely to be a cost-effective and productive exercise. Accordingly, prior to the case management hearing, the parties should provide my Associate their current draft proposed opt out notice to be sent to the three proposed subgroups of Workers I have identified: Group A, Group B and Group C (see [160] above).

203 These subsets are not set in stone and I will, of course, hear submissions as to the form of any opt out notice and how many different types and modes of opt out communications should be provided to group members.

204 The solicitors for the class action applicants should proceed on the assumption the costs of any independent lawyer referred to in the opt out notices will be paid for initially by the class action applicants (although this cost will be costs in the cause). Those solicitors should also give detailed thought, including after receiving any expert assistance they consider appropriate, to fashioning a notification regime that maximises the ability of recipients to understand the content of the communications conveyed.

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| I certify that the preceding two hundred and four (204) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Lee. |

Associate:

Dated: 12 October 2023

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  | **SAD 127 of 2022** |
| **Respondents** |  |
| Fourth Respondent: | A.F. SPINKS PTY LTD |
| Fifth Respondent: | AARROD PTY LTD |
| Seventh Respondent: | AGOSTINO GROUP HOLDINGS PTY LTD |
| Eighth Respondent: | ALERUN PTY LTD |
| Tenth Respondent: | ALJAWIDA PTY LTD |
| Eleventh Respondent: | ALLEECO PTY LTD |
| Twelfth Respondent: | ALMIC HOLDINGS PTY LTD |
| Thirteenth Respondent: | ALVARO RESTAURANTS PTY LTD |
| Fourteenth Respondent: | ARN TAS INVESTMENTS PTY LTD |
| Fifteenth Respondent: | ANJOHSCO PTY LTD |
| Sixteenth Respondent: | ANMASAL PTY LTD |
| Seventeenth Respondent: | ARCHIE ENTERPRISES PTY LTD |
| Eighteenth Respondent: | ARDEEN PTY LTD |
| Nineteenth Respondent: | ASHDABS PTY LTD |
| Twentieth Respondent: | AUZCAN PTY LTD |
| Twenty First Respondent: | BL FITZGERALD PTY LTD |
| Twenty Second Respondent: | BAKSTON PTY LTD |
| Twenty Third Respondent: | BALLAVARRA PTY LTD |
| Twenty Fourth Respondent: | BALLENA PTY LTD |
| Twenty Fifth Respondent: | BARTASE PTY LTD |
| Twenty Sixth Respondent: | BASILE ENTERPRISES PTY LTD |
| Twenty Seventh Respondent: | BDZ GROUP PTY LTD |
| Twenty Eighth Respondent: | BELVIEW ENTERPRISES PTY LTD |
| Twenty Ninth Respondent: | BERGER PTY LTD |
| Thirtieth Respondent: | BERWICK ENTERPRISES PTY LTD |
| Thirty First Respondent: | BERWICK SOUTH ENTERPRISES PTY LTD |
| Thirty Second Respondent: | BILJAC PTY LTD |
| Thirty Third Respondent: | BK DUNCAN PTY LTD |
| Thirty Fourth Respondent: | BLACKSTEN PTY LTD |
| Thirty Fifth Respondent: | BLENIN PTY LTD |
| Thirty Sixth Respondent: | BRATE PTY LTD |
| Thirty Seventh Respondent: | BRAYCON HOLDINGS PTY LTD |
| Thirty Eighth Respondent: | BRODIE RESTAURANTS PTY LTD |
| Thirty Ninth Respondent: | CABLESCO PTY LTD |
| Fortieth Respondent: | CADMUN PTY LTD |
| Forty First Respondent: | CAHOW PTY LTD |
| Forty Second Respondent: | CAISER PTY LTD |
| Forty Third Respondent: | CAPALOY PTY LTD |
| Forty Fourth Respondent: | CARACAL INVESTMENTS PTY LTD |
| Forty Fifth Respondent: | CEDALLA PTY LTD |
| Forty Sixth Respondent: | CELLET PTY LTD |
| Forty Seventh Respondent: | CENTHEAD PTY LTD |
| Forty Eighth Respondent: | CERTIFY PTY LTD |
| Forty Ninth Respondent: | CHASMIC PTY LTD |
| Fiftieth Respondent: | CHIAPELLO HOLDINGS PTY LTD |
| Fifty First Respondent: | CIRCLES OF GOLD PTY LTD |
| Fifty Second Respondent: | CISKE GROUP PTY LTD |
| Fifty Third Respondent: | CLEMANDOT PTY LTD |
| Fifty Fourth Respondent: | COLEDON PTY LTD |
| Fifty Sixth Respondent: | CORCORAN FOODS PTY LTD |
| Fifty Seventh Respondent: | COYNE ENTERPRISES PTY LTD |
| Fifty Eighth Respondent: | CRAAMA PTY LTD |
| Fifty Ninth Respondent: | CRANBOURNE NORTH ENTERPRISES PTY LTD |
| Sixtieth Respondent: | CRILLION PTY LTD |
| Sixty First Respondent: | DADAK PTY LTD |
| Sixty Second Respondent: | DASTIM PTY LTD |
| Sixty Third Respondent: | DDSN PTY LTD |
| Sixty Fourth Respondent: | DECORUS VITA PTY LTD |
| Sixty Fifth Respondent: | DELICIOUS DOUGH PTY LTD |
| Sixty Sixth Respondent: | DEMI PTY LTD |
| Sixty Seventh Respondent: | DENRICH PTY LTD |
| Sixty Eighth Respondent: | DIRECTWEST PTY LTD |
| Sixty Ninth Respondent: | EASTSIDE QSR PTY LTD |
| Seventieth Respondent: | EBURG PTY LTD |
| Seventy First Respondent: | EDEN CORPORATION PTY LTD |
| Seventy Second Respondent: | EMPAB PTY LTD |
| Seventy Third Respondent: | EMQUEST PTY LTD |
| Seventy Fourth Respondent: | EPREMA HOLDINGS PTY LTD |
| Seventy Fifth Respondent: | EVANS ARCHES PTY LTD |
| Seventy Sixth Respondent: | EVENLITE PTY LTD |
| Seventy Seventh Respondent: | EYRIE HOLDINGS PTY LTD |
| Seventy Eighth Respondent: | F & F LIEW PTY LTD |
| Seventy Ninth Respondent: | F & J MADON PTY LTD |
| Eightieth Respondent: | FAIRLIGHT RESTAURANTS PTY LTD |
| Eighty First Respondent: | FAITH GROUP PTY LTD |
| Eighty Second Respondent: | FAMILY CHIPS PTY LTD |
| Eighty Third Respondent: | FAVOTTO FAMILY RESTAURANTS PTY LTD |
| Eighty Fourth Respondent: | FISCHFOR4INVESTMENTS PTY LTD |
| Eighty Fifth Respondent: | FISHER GRACE PTY LTD |
| Eighty Sixth Respondent: | FOUR REDS PTY LTD |
| Eighty Seventh Respondent: | FOXHOW PTY LTD |
| Eighty Eighth Respondent: | FREELAKE PTY LTD |
| Eighty Ninth Respondent: | FRYDAYS PTY LTD |
| Ninetieth Respondent: | FULLMERE PTY LTD |
| Ninety First Respondent: | FURTHER PROOF PTY LTD |
| Ninety Second Respondent: | GAJJH UNITED PTY LIMITED |
| Ninety Third Respondent: | GAILERO PTY LTD |
| Ninety Fifth Respondent: | GARTON GROUP PTY LTD |
| Ninety Sixth Respondent: | GATMARCOLIN PTY LTD |
| Ninety Seventh Respondent: | GIDLEY HOLDINGS PTY LTD |
| Ninety Eighth Respondent: | GIFF GAFF PTY LTD |
| Ninety Ninth Respondent: | GIQSR PTY LTD |
| One Hundredth Respondent: | GLADSIDE PTY LTD |
| One Hundred and First Respondent: | GLENMORE PTY LTD |
| One Hundred and Second Respondent: | GOLDMAKK PTY LTD |
| One Hundred and Fourth Respondent: | GREENWICH INVESTMENTS (QLD) PTY LTD |
| One Hundred and Fifth Respondent: | GRIFFITH M PTY LTD |
| One Hundred and Sixth Respondent: | H & I SMITH PTY LTD |
| One Hundred and Seventh Respondent: | HALFWAY HAMBURGERS PTY LTD |
| One Hundred and Eighth Respondent: | HANCOCK JONES GROUP PTY LTD |
| One Hundred and Ninth Respondent: | HANGESID PTY LTD |
| One Hundred and Tenth Respondent: | HARRICO PTY LTD |
| One Hundred and Eleventh Respondent: | HAYDAR PTY LTD |
| One Hundred and Eleventh Respondent: | HAYDAR PTY LTD |
| One Hundred and Twelfth Respondent: | HBK HOLDINGS PTY LTD |
| One Hundred and Thirteenth Respondent: | HDF HOLDINGS PTY LTD |
| One Hundred and Fourteenth Respondent: | HIGOAL PTY LTD |
| One Hundred and Fifteenth Respondent: | HOLDEAST PTY LTD |
| One Hundred and Sixteenth Respondent: | HOLDFAST MANAGEMENT SERVICE PTY LTD |
| One Hundred and Seventeenth Respondent: | IMTUM PTY LTD |
| One Hundred and Eighteenth Respondent: | INVERELL M PTY LTD |
| One Hundred and Nineteenth Respondent: | J & E LEMBERG PTY LTD |
| One Hundred and Twentieth Respondent: | J. & M. HODGE PTY LTD |
| One Hundred and Twenty First Respondent: | J SADLER INVESTMENTS PTY LTD |
| One Hundred and Twenty Second Respondent: | JABAC PTY LTD |
| One Hundred and Twenty Third Respondent: | JABBA RESTAURANTS PTY LTD |
| One Hundred and Twenty Fourth Respondent: | JADAM FOODS PTY LTD |
| One Hundred and Twenty Fifth Respondent: | JAELJAM PTY LTD |
| One Hundred and Twenty Sixth Respondent: | JAKIARA QLD PTY LTD |
| One Hundred and Twenty Seventh Respondent: | JALPA FOODS PTY LTD |
| One Hundred and Twenty Eighth Respondent: | JAMADA PTY LTD |
| One Hundred and Twenty Ninth Respondent: | JAMADU (QLD) PTY LTD |
| One Hundred and Thirtieth Respondent: | JAMEL PTY LTD |
| One Hundred and Thirty First Respondent: | JAMERI PTY LTD |
| One Hundred and Thirty Second Respondent: | JANASEL PTY LTD |
| One Hundred and Thirty Third Respondent: | JANDA WHITEHOUSE PTY LTD |
| One Hundred and Thirty Fourth Respondent: | JARRON PTY LTD |
| One Hundred and Thirty Fifth Respondent: | JASIE PTY LTD |
| One Hundred and Thirty Sixth Respondent: | JATAM PTY LTD |
| One Hundred and Thirty Seventh Respondent: | JAVARI PTY LTD |
| One Hundred and Thirty Eighth Respondent: | JAYARK PTY LTD |
| One Hundred and Thirty Ninth Respondent: | JEFFERSON LANE ENTERPRISES PTY LTD |
| One Hundred and Fortieth Respondent: | JEMADA PTY LTD |
| One Hundred and Forty First Respondent: | JESMARDAN PTY LTD |
| One Hundred and Forty Second Respondent: | JETSRUS PTY LTD |
| One Hundred and Forty Fourth Respondent: | JOHN FRANKHAM PTY LTD |
| One Hundred and Forty Fifth Respondent: | JOMIK INVESTMENTS PTY LTD |
| One Hundred and Forty Sixth Respondent: | JONCLO HOLDINGS PTY LTD |
| One Hundred and Forty Seventh Respondent: | JORANDA PTY LTD |
| One Hundred and Forty Eighth Respondent: | JOSHMAT PTY LTD |
| One Hundred and Forty Ninth Respondent: | JUBCAN VENTURE PTY LTD |
| One Hundred and Fiftieth Respondent: | JUSTICE 2 PTY LTD |
| One Hundred and Fifty First Respondent: | KAB (QLD) PTY LTD |
| One Hundred and Fifty Second Respondent: | KAILEV PTY LTD |
| One Hundred and Fifty Fourth Respondent: | KALBAK PTY LTD |
| One Hundred and Fifty Fifth Respondent: | KATAHDIN PTY LTD |
| One Hundred and Fifty Sixth Respondent: | KATHRYN & IAN GARTON GROUP PTY LTD |
| One Hundred and Fifty Seventh Respondent: | KATTERN PTY LTD |
| One Hundred and Fifty Eighth Respondent: | KELLY FAMILY RESTAURANTS PTY LTD |
| One Hundred and Fifty Ninth Respondent: | KELLYCO RESTAURANTS PTY LTD |
| One Hundred and Sixtieth Respondent: | KESBES PTY LTD |
| One Hundred and Sixty First Respondent: | KEW ART PTY LTD |
| One Hundred and Sixty Second Respondent: | KILSYTH FOODS PTY LTD |
| One Hundred and Sixty Third Respondent: | KIRKWAN PTY LTD |
| One Hundred and Sixty Fourth Respondent: | KITTOLINK PTY LTD |
| One Hundred and Sixty Fifth Respondent: | KMA INVESTMENTS PTY LTD |
| One Hundred and Sixty Sixth Respondent: | KNI-TIME PTY LTD |
| One Hundred and Sixty Seventh Respondent: | KRAMFORD PTY LTD |
| One Hundred and Sixty Eighth Respondent: | KWA SIMBI PTY LTD |
| One Hundred and Sixty Ninth Respondent: | KYMAR NOMINEES PTY LTD |
| One Hundred and Seventy First Respondent: | LARDNER HOLDINGS PTY LTD |
| One Hundred and Seventy Second Respondent: | LEVEKE PTY LTD |
| One Hundred and Seventy Third Respondent: | LIME88 PTY LTD |
| One Hundred and Seventy Fourth Respondent: | LONGRIDGE PRESTON PTY LTD |
| One Hundred and Seventy Fifth Respondent: | LOUDOU PTY LTD |
| One Hundred and Seventy Sixth Respondent: | LOWGAN PTY LTD |
| One Hundred and Seventy Eighth Respondent: | LTD INVESTMENTS GROUP PTY LTD |
| One Hundred and Seventy Ninth Respondent: | LUCKY LAKES PTY LTD |
| One Hundred Eightieth Respondent: | LUGESAL PTY LTS |
| One Hundred and Eighty First Respondent: | LVANT MECCA PTY LTD |
| One Hundred and Eighty Second Respondent: | M&P HANLON INVESTMENTS PTY LTD |
| One Hundred and Eighty Third Respondent: | MACEY PTY LTD |
| One Hundred and Eighty Fourth Respondent: | MACKALLAN PTY LTD |
| One Hundred and Eighty Fifth Respondent: | MACTER PTY LTD |
| One Hundred and Eighty Sixth Respondent: | MADIMASE BEYOND 13 PTY LTD |
| One Hundred and Eighty Seventh Respondent: | MADMAC INVESTMENTS PTY LTD |
| One Hundred and Eighty Eighth Respondent: | MADMEL INVESTMENTS PTY LTD |
| One Hundred and Eighty Ninth Respondent: | MADTIME PTY LTD |
| One Hundred and Ninetieth Respondent: | MAJAB ENTERPRISES PTY LTD |
| One Hundred and Ninety First Respondent: | MAJERO INVESTMENTS PTY LTD |
| One Hundred and Ninety Second Respondent: | MAMMATH PTY LTD |
| One Hundred and Ninety Third Respondent: | MANHAD PTY LTD |
| One Hundred and Ninety Fourth Respondent: | MARC AUSTRALIA PTY LTD |
| One Hundred and Ninety Fifth Respondent: | MARJOM PTY LTD |
| One Hundred and Ninety Sixth Respondent: | MARJONS RESTAURANTS PTY LTD |
| One Hundred and Ninety Seventh Respondent: | MATTAUD PTY LTD |
| One Hundred and Ninety Eighth Respondent: | MAYMAC FOODS PTY LTD |
| One Hundred and Ninety Ninth Respondent: | MAZCAR PTY LTD |
| Two Hundredth Respondent: | MAZER PTY LTD |
| Two Hundred and First Respondent: | MC PETERS PTY LTD |
| Two Hundred and Second Respondent: | MCFAMILY ENTERPRISES PTY LTD |
| Two Hundred and Third Respondent: | MCKEIR PTY LTD |
| Two Hundred and Fourth Respondent: | MCKEOUGH GROUP GRETA PTY LTD |
| Two Hundred and Fifth Respondent: | MCMASTER & CO PTY LTD |
| Two Hundred and Sixth Respondent: | MC SQUARED PTY LTD |
| Two Hundred and Seventh Respondent: | MEADOWS FAMILY RESTAURANTS PTY LTD |
| Two Hundred and Eighth Respondent: | MEDURI ENTERPRISES PTY LTD |
| Two Hundred and Ninth Respondent: | MELROSE UNITED PTY LTD |
| Two Hundred and Tenth Respondent: | MELWELLO PTY LTD |
| Two Hundred and Eleventh Respondent: | MEMPHIS CORPORATION PTY LTD |
| Two Hundred and Twelfth Respondent: | MERSEY NOMINEES PTY LTD |
| Two Hundred and Thirteenth Respondent: | METIME INVESTMENTS PTY LTD |
| Two Hundred and Fourteenth Respondent: | MICAN ENTERPRISES PTY LTD |
| Two Hundred and Fifteenth Respondent: | MIELS FAMILY HOLDINGS PTY LTD |
| Two Hundred and Sixteenth Respondent: | MIJAN PTY LTD |
| Two Hundred and Seventeenth Respondent: | MIJO GROUP PTY LTD |
| Two Hundred and Eighteenth Respondent: | MILC NOMINEES PTY LTD |
| Two Hundred and Nineteenth Respondent: | MINSTOL PTY LTD |
| Two Hundred and Twentieth Respondent: | M & M BENSON INVESTMENTS PTY LTD |
| Two Hundred and Twenty First Respondent: | MOJJOS PTY LTD |
| Two Hundred and Twenty Second Respondent: | MPP PTY LTD |
| Two Hundred and Twenty Third Respondent: | MSJI PTY LTD |
| Two Hundred and Twenty Fourth Respondent: | MSJI QLD PTY LTD |
| Two Hundred and Twenty Fifth Respondent: | NEKA ENTERPRISES PTY LTD |
| Two Hundred and Twenty Sixth Respondent: | NELLANDI PTY LTD |
| Two Hundred and Twenty Seventh Respondent: | NEWSTORES PTY LTD |
| Two Hundred and Twenty Eighth Respondent: | NEZCOPIC (HOGAN’S CORNER) PTY LTD |
| Two Hundred and Twenty Ninth Respondent: | NFR HOLDINGS PTY LTD |
| Two Hundred and Thirtieth Respondent: | NGI HOLDINGS PTY LTD |
| Two Hundred and Thirty First Respondent: | N H H C PTY LTD |
| Two Hundred and Thirty Second Respondent: | NICO HOLDINGS PTY LTD |
| Two Hundred and Thirty Third Respondent: | NIEUMORR PTY LTD |
| Two Hundred and Thirty Fourth Respondent: | NIXMAX PTY LTD |
| Two Hundred and Thirty Fifth Respondent: | NO LIMITS PTY LTD |
| Two Hundred and Thirty Sixth Respondent: | NORCLIFFE PTY LTD |
| Two Hundred and Thirty Seventh Respondent: | NORTH SHORE QSR PTY LTD |
| Two Hundred and Thirty Eighth Respondent: | NORTH WEST INVESTMENTS PTY LTD |
| Two Hundred and Thirty Ninth Respondent: | NOWGUNNADOIT PTY LTD |
| Two Hundred and Fortieth Respondent: | OF GROUP PTY LTD |
| Two Hundred and Forty First Respondent: | OHTO PTY LTD |
| Two Hundred and Forty Second Respondent: | ORANGE BEAR AUSTRALIA PTY LTD |
| Two Hundred and Forty Third Respondent: | P J ANNELLS PTY LTD |
| Two Hundred and Forty Fourth Respondent: | PADERSON PTY LTD |
| Two Hundred and Forty Fifth Respondent: | PALSS PTY LTD |
| Two Hundred and Forty Sixth Respondent: | PANAREA ENTERPRISES PTY LTD |
| Two Hundred and Forty Seventh Respondent: | PARAMOR PTY LTD |
| Two Hundred and Forty Eighth Respondent: | PARCORP INVESTMENTS PTY LTD |
| Two Hundred and Forty Ninth Respondent: | PD AND KJ SHAW PTY LTD |
| Two Hundred and Fiftieth Respondent: | PEARSE GROUP PTY LTD |
| Two Hundred and Fifty First Respondent: | PEFIDY PTY LTD |
| Two Hundred and Fifty Second Respondent: | PENFREY NOMINEES PTY LTD |
| Two Hundred and Fifty Third Respondent: | PENNON ENTERPRISES PTY LTD |
| Two Hundred and Fifty Fourth Respondent: | PERTEX PTY LTD |
| Two Hundred and Fifty Fifth Respondent: | PETER & MARCELLE BAIN PTY LTD |
| Two Hundred and Fifty Sixth Respondent: | PETONA PTY LTD |
| Two Hundred and Fifty Seventh Respondent: | PLEXET PTY LTD |
| Two Hundred and Fifty Eighth Respondent: | POLLBURG PTY LTD |
| Two Hundred and Fifty Ninth Respondent: | P S & D R COOMES PTY LTD |
| Two Hundred and Sixtieth Respondent: | PS.ESC PTY LTD |
| Two Hundred and Sixty First Respondent: | QUEBANI PTY LTD |
| Two Hundred and Sixty Second Respondent: | RADWELL NOMINEES PTY LTD |
| Two Hundred and Sixty Third Respondent: | RAH NOMINEES PTY LTD |
| Two Hundred and Sixty Fourth Respondent: | RAINBOW BRIDGE PTY LTD |
| Two Hundred and Sixty Fifth Respondent: | RAW TALENT PTY LTD |
| Two Hundred and Sixty Seventh Respondent: | RELLOM HOLDINGS PTY LTD |
| Two Hundred and Sixty Eighth Respondent: | REMDA PTY LTD |
| Two Hundred and Sixty Ninth Respondent: | RETSILLACM PTY LTD |
| Two Hundred and Seventieth Respondent: | ROBANLOU PTY LTD |
| Two Hundred and Seventy First Respondent: | ROMALD PTY LTD |
| Two Hundred and Seventy Third Respondent: | ROSSGLEN PTY LTD |
| Two Hundred and Seventy Fourth Respondent: | SARONBELL PTY LTD |
| Two Hundred and Seventy Fifth Respondent: | SCETTELS PTY LTD |
| Two Hundred and Seventy Sixth Respondent: | SECCA HOLDINGS PTY LTD |
| Two Hundred and Seventy Seventh Respondent: | SEDAH PTY LTD |
| Two Hundred and Seventy Eighth Respondent: | SESJ PTY LTD |
| Two Hundred and Seventy Ninth Respondent: | SHARLUMAH PTY LTD |
| Two Hundred and Eightieth Respondent: | SHERLEE PTY LTD |
| Two Hundred and Eighty First Respondent: | SHILLINGTON GROUP PTY LTD |
| Two Hundred and Eighty Second Respondent: | SINCRO (WA) HOLDINGS PTY LTD |
| Two Hundred and Eighty Third Respondent: | SMSM PTY LTD |
| Two Hundred and Eighty Fourth Respondent: | SNR ENTERPRISES PTY LTD |
| Two Hundred and Eighty Sixth Respondent: | STEEKIM PTY LTD |
| Two Hundred and Eighty Seventh Respondent: | STOCKFAM PTY LTD |
| Two Hundred and Eighty Eighth Respondent: | STRENSON PTY LTD |
| Two Hundred and Eighty Ninth Respondent: | SWANSTAR NOMINEES PTY LTD |
| Two Hundred and Ninetieth Respondent: | T & K BRYANT PTY LTD |
| Two Hundred and Ninety First Respondent: | TAMRATH PTY LTD |
| Two Hundred and Ninety Third Respondent: | TANDER PTY LTD |
| Two Hundred and Ninety Fourth Respondent: | TARL PTY LTD |
| Two Hundred and Ninety Fifth Respondent: | TAROWOOD PTY LTD |
| Two Hundred and Ninety Sixth Respondent: | TONDOL PTY LTD |
| Two Hundred and Ninety Seventh Respondent: | TORCOOMES PTY LTD |
| Two Hundred and Ninety Eighth Respondent: | TROIS AMIGOS PTY LTD |
| Two Hundred and Ninety Ninth Respondent: | TROPHI RESTAURANTS PTY LTD |
| Three Hundredth Respondent: | TWOCOOL PTY LTD |
| Three Hundred and First Respondent: | TYMAD INVESTMENTS PTY LTD |
| Three Hundred and Third Respondent: | TYRELL GROUP HOLDINGS PTY LTD |
| Three Hundred and Fourth Respondent: | UMELCO PTY LTD |
| Three Hundred and Fifth Respondent: | VANT MANAGEMENT PTY LTD |
| Three Hundred and Sixth Respondent: | VIDROL PTY LTD |
| Three Hundred and Seventh Respondent: | VOMDAY PTY LTD |
| Three Hundred and Eighth Respondent: | WAVEMAX PTY LTD |
| Three Hundred and Ninth Respondent: | WAX UP PTY LTD |
| Three Hundred and Tenth Respondent: | WEIGHTMAN GROUP PTY LTD |
| Three Hundred and Eleventh Respondent: | WESLIN CO PTY LTD |
| Three Hundred and Twelfth Respondent: | WESTSIDE QSR PTY LTD |
| Three Hundred and Thirteenth Respondent: | WHITAYLEE & SONS PTY LTD |
| Three Hundred and Fourteenth Respondent: | WILBRIDGE SECURITIES PTY LTD |
| Three Hundred and Fifteenth Respondent: | WILGEN PTY LTD |
| Three Hundred and Sixteenth Respondent: | WINDMAR PTY LTD |
| Three Hundred and Seventeenth Respondent: | YASINCO PTY LTD |
| Three Hundred and Eighteenth Respondent: | YIPPY TRI-SMITH PTY LTD |
| Three Hundred and Nineteenth Respondent: | YOUNGHOLMES PTY LTD |
| Three Hundred and Twentieth Respondent: | ZACALE PTY LTD |
| Three Hundred and Twenty First Respondent: | ZACALEKYE PTY LTD |
| Three Hundred and Twenty Fourth Respondent: | ZOHO PTY LTD |