IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST

BETWEEN

JAMES MCCOY Plaintiff

-and-

HINO MOTORS LTD First Defendant

HINO MOTOR SALES AUSTRALIA PTY LTD (ACN 064 989 724) Second Defendant

CONTRADICTORS' OUTLINE OF SUBMISSIONS

A. Introduction

1 On 15 December 2023, the Honourable Justice Osborne made a group costs order (the **GCO**) in this proceeding pursuant to s 33ZDA of the *Supreme Court Act 1986* (Vic) (the **Act**).[1] By orders made on 24 July 2025 (the **Orders**), we are appointed as Contradictors to assist the Court in relation to the question of whether the GCO should now be varied.

2 Paragraph 2 of the Orders defines our role as follows:

> The Contradictors' role is limited to making any submissions which the Contradictors consider might assist the Court in determining whether there should be a variation to the Group Costs Order made by the Honourable Justice Osborne on 15 December 2023, such that the Group Costs Order should be in a percentage less [than] 24.66%.

3 These submissions are filed pursuant to paragraph 6 of the Orders. In preparing these submissions, we have had regard to:

(a) the materials contained in the confidential version of the Court Book prepared for the settlement approval hearing held on 18 July 2025, in particular:

(i) the affidavit of Mr James Kendall McCoy affirmed 6 October 2023 (**McCoy Affidavit**);

(ii) the first affidavit of Ms Rebecca Gilsenan affirmed 6 October 2023 (**First Gilsenan Affidavit**);

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[1] Paragraph 2 of the orders dated 15 December 2023; *Maglio v Hino Motor Sales Australia Pty Ltd; McCoy v Hino Motors Ltd* [2023] VSC 757 (**GCO Ruling**).

(iii) the second affidavit of Ms Rebecca Gilsenan affirmed 6 October 2023 (**Second Gilsenan Affidavit**);

(iv) the second affidavit of Mr Lee Scott Taylor affirmed 27 June 2025;

(v) the third affidavit of Mr Lee Scott Taylor affirmed 27 June 2025 (**Third Taylor Affidavit**);

(vi) the fourth affidavit of Mr Lee Scott Taylor affirmed 27 June 2025 (**Fourth Taylor Affidavit**);

(vii) the plaintiff's submissions dated 27 June 2025 in support of the settlement approval application;

(viii) Maurice Blackburn's submissions as intervener dated 27 June 2025 (**MB Submissions**);

(ix) supplementary submissions filed by counsel for the plaintiff dated 15 July 2025 (**Supplementary Submissions**); and

(b) the affidavit of Ms Rebecca Gilsenan affirmed 1 August 2025 (**Third Gilsenan Affidavit**).

Background to our appointment

4 The background to our appointment can be summarised as follows.

5 The present proceeding is a group proceeding for the purpose of Part 4A of the Act. By summons dated 17 February 2025, the plaintiff sought orders for the Court's approval of a proposed settlement of the proceeding pursuant to s 33V(1) of the Act. The proposed settlement provided for the payment of legal costs to the plaintiff's solicitors, Maurice Blackburn Pty Ltd (**Maurice Blackburn**), pursuant to the GCO.

6 The GCO specifies the percentages of any settlement sum which are payable to Maurice Blackburn as follows:[2]

> Pursuant to s 33ZDA of the Act the legal costs payable to the solicitors for the plaintiff and group members, Maurice Blackburn Pty Ltd, be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, in accordance with the following table:

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2 Paragraph 2 of the orders dated 15 December 2023.

For each dollar of any award or settlement that is recovered:	The applicable percentage (including GST) is:
Between $0 to $75,000,000	25%
Between $75,000,001 to $150,000,000	22.5%
Between $150,000,001 to $225,000,000	20%
Over $225,000,000	17.5%

7 The overall effect of the application of these percentages to the settlement sum of $87M is that Maurice Blackburn is presently entitled to 24.66% of that sum (being $21,450,000).[3]

8 On 18 July 2025, the Court made orders approving the proposed settlement (**Settlement Approval Orders**).[4] Paragraph 9(b) of the Settlement Approval Orders approved, as a deduction from the settlement sum, "the Group Costs Order in an amount to be determined by the Court, which amount shall not be more than $21,450,000" (emphasis added). This order, in effect, provides for the possibility that the GCO percentage rate will be varied downwards. Osborne J contemplated this possibility at the time that the GCO was made. In the GCO Ruling, his Honour stated that "upon any settlement or award of damages, the appropriateness of the rate can be reviewed lest it give rise to a disproportionate return to the solicitors".[5]

9 In the Settlement Approval Reasons, the Honourable Justice Delany stated the following with respect to the question of whether the GCO should be varied:[6]

> The contentious issue arising on the approval application concerns whether or not there should be a variation to the GCO made pursuant to s 33ZDA of the Act on 15 December 2023…
>
> The GCO specified applicable percentages of the Settlement Sum payable to the solicitors for the plaintiff and group members, Maurice Blackburn Pty Ltd, on a sliding scale by reference to the dollar amount of any award or settlement recovered. Based on the amount of the Settlement Sum, unless reviewed, as Osborne J contemplated might occur when his Honour determined the applicable percentages in late 2023, and varied pursuant to s 33ZDA(3) of the Act, Maurice Blackburn is entitled to 24.66% of the Settlement Sum.
> …
>
> While not contending for a variation, in their reply submissions, counsel for the plaintiff highlighted a number of matters which might make it appropriate for the Court to consider variation of the GCO rate. Amongst the matters referred to in the submissions is the fact the proceeding has settled at a comparatively early stage. As acknowledged by Maurice Blackburn in its submissions, this has significant consequences for the scale of the costs that have been incurred compared to a law firm or litigation funder that has prosecuted a proceeding up to or beyond trial. While that is so, it is equally the case that early resolution of a group proceeding, as has occurred in this case, is to be encouraged.

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3 See Fourth Taylor Affidavit at [15].
4 See also *McCoy v Hino Motors Ltd* [2025] VSC 447 (**Settlement Approval Reasons**).
5 GCO Ruling at [111]. See also at [99(e)].
6 Settlement Approval Reasons at [8]-[9], [11]-[14].

> Although no person contended for a variation to the GCO percentage, as Watson J said in *Allen & Anor v G8 Education Ltd (No 4)*:[7]
>
> > The absence of any party or contradictor contending for an amendment of the rate does not relieve the Court of its burden in a settlement approval context to consider whether or not the GCO should be amended.
>
> Having regard to the matters identified in the reply submissions by counsel for the plaintiff it is appropriate to consider whether or not there should be any amendment to the GCO pursuant to s 33ZDA(3) of the Act. To aid the proper consideration of that question I have determined to appoint a contradictor.
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> As discussed during the hearing, the issue of whether there should be any amendment to the GCO can be determined later and need not hold up the hearing and determination of the approval application. Counsel for the parties confirmed that to order an approval on the basis that the percentage to be deducted from the Settlement Sum for legal costs is to be determined later but in any event is to be no more than 24.66% will not cut across the terms of the settlement deed…

The role of a contradictor

10 It is well-established that in a representative proceeding, the Court may, of its own motion, appoint a contradictor where it considers it appropriate to do so.[8] In ***Bolitho*** *v Banksia Securities Ltd (No 6)*, John Dixon J observed that "no legal dictionaries define a 'contradictor', despite frequent use in case law, particularly in the class action context, of that term".[9] However, contradictors are "generally appointed to ensure that there is a 'real conflict' in proceedings".[10]

11 His Honour further described the role of a contradictor in a group proceeding as follows:[11]

> The role of the Contradictor is to represent the interests of [group members] in order to assist the court, in the exercise of a protective jurisdiction in which the [group members] are beneficiaries whose rights are thereby determined, in seeking to satisfy itself of the fairness and reasonableness of the settlement, having regard to the claims being made against the settlement sum.

12 His Honour distinguished the role of contradictor from that of *amicus curiae*:[12]

> The contradictor's role is conceptually distinct from that of an amicus. The contradictor's role should be fundamentally understood as ensuring there is a real contest between conflicting interests where the outcome will be a res judicata. It is a role more closely aligned with that of an intervener than an amicus because the contradictor best assists the court when armed with the rights and powers of a party in the proceeding. The analogy to a party is to the position of group members whose rights will be determined by the approval of the settlement. Of course, the fundamental purpose of Part 4A [of the Act] is undermined if group members are joined into the proceeding as parties, making the literal application of

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7 [2024] VSC 487 [62].
8 See *Shimshon v MLC Nominees Pty Ltd* [2025] VSC 208 at [45] (Waller J).
9 (2019) 63 VR 291 at [81].
10 *Bolitho* (2019) 63 VR 291 at [78].
11 *Bolitho* (2019) 63 VR 291 at [73].
12 *Bolitho* (2019) 63 VR 291 at [110], [123].

> the concept of an intervener inapt. Equally and by contrast, the role of an amicus in providing assistance or independent information to the court that might not otherwise be provided by the parties fails to define the full role required by a court of a contradictor when discharging its functions under s 33V.
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> …
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> The court appoints a contradictor on a s 33V application in order to more effectively discharge its judicial function. In doing so, a court does no more than refine its process to the task.

13 In our view, the same considerations apply in the present case, notwithstanding that the settlement has been approved. That is because we have been appointed to assist the Court in determining an aspect of that settlement, being the precise amount of legal costs to be deducted from the settlement sum (see paragraph 9 above). Moreover, contradictors have also been appointed in the context of group costs order applications, including in a 33V context.[13]

14 In ***Gill*** *v Ethicon Sarl (No 10)*, Lee J stated that "[t]he role of a Court-appointed contradictor is to put forward all reasonably arguable competing positions on behalf of, and for the benefit of, group members".[14] His Honour observed that "there are considerable benefits to appointing a contradictor where there is a risk of a conflict".[15]

15 The "precise role" of a contradictor will be defined by the terms of their appointment by the Court.[16] Our role is defined in paragraph 2 of the Orders as being "limited to making any submissions which the Contradictors consider might assist the Court in determining whether there should be a variation to the [GCO]… such that the [GCO] should be in a percentage less [than] 24.66%" (see paragraph 2 above). Having regard to the terms of that order, and the case law principles referred to above, we consider that in providing our submissions to the Court, we are representing the interests of group members but do not act for them per se, either individually or as a group.

B. Relevant principles

16 In approving a settlement under s 33V of the Act, the Court must satisfy itself that the plaintiff's legal costs to be deducted from the settlement sum are reasonable in all the circumstances.[17] The Court's role in assessing costs is supervisory. In *Botsman*, the Court

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13 See ***Bogan*** *v The Estate of Peter John Smedley (Deceased)* [2022] VSC 201; *Allen v G8 Education Ltd (No 4)* [2024] VSC 487 at [65]-[66] (***Allen No 4***).

14 [2023] FCA 228 at [42].

15 *Gill* [2023] FCA 228 at [44].

16 *Luke v Aveo Group Ltd (No 3)* [2023] FCA 1665 at [30] (Murphy J)

17 ***Botsman*** *v Bolitho* (2018) 57 VR 68 at 115 [220].

of Appeal described this role as follows:[18]

> In *Earglow*,[19] Murphy J referred to the supervisory role of the court in relation to costs. His Honour stated that the court should satisfy itself that the arrangements meet any relevant legal requirements, contain reasonable and proportionate terms relative to the commercial context in which they were entered, and that the costs and disbursements are in accordance with relevant agreements and are otherwise reasonable.[20]

17 In the present proceeding, a group costs order has been made under s 33ZDA of the Act. That section relevantly provides:[21]

> **Group costs orders**
>
> (1) On application by the plaintiff in any group proceeding, the Court, if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding, may make an order –
>
> (a) that the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being the percentage set out in the order; and
>
> (b) that liability for payment of the legal costs must be shared among the plaintiff and all group members.
>
> …
>
> (3) The Court, by order during the course of the proceeding, may amend a group costs order, including, but not limited to, amendment of any percentage ordered under subsection (1)(a).

18 Where a group costs order has been made, different considerations arise in respect of the proposed deduction for legal costs. That is because the Court's task in considering a proposed deduction pursuant to a group costs order, and whether it should amend that order pursuant to s 33ZDA(3), involves considering not only the legal costs in fact incurred but also the "reward" component of the proposed deduction. This raises different considerations regarding proportionality.

19 In ***Fox*** *v Westpac Banking Corporation*, Nichols J stated the following with respect to

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18 (2018) 57 VR 68 at 115-16 [222]-[223].

19 [2016] FCA 1433.

20 Ibid [91], citing *Courtney v Medtel Pty Ltd [No 5]* (2004) 212 ALR 311, 322 [61]; *Modtech* [2013] FCA 626 [32]; *Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194 [14].

21 For the purpose of this section, s 33ZDA(5) provides that "group costs order" is defined as an order made under subsection (1) and "legal costs" has the same meaning as in the Legal Profession Uniform Law (Victoria) (**LPUL**), being Schedule 1 to the *Legal Profession Uniform Law Application Act 2014* (Vic). Section 6(1) of the LPUL relevantly provides that "legal costs" means "amounts that a person has or may be charged by, or is or may be liable to pay to, a law practice for the provision of legal services, including disbursements but not including interest".

proportionality in the context of a group costs order:[22]

> Proportionality is a measure of the relationship between things. Section 24 of the *Civil Procedure Act 2010* (Vic) directs attention to the relationship between costs and the issues and amount in dispute. Section 33ZDA, as noted earlier, engages with risk and reward, in that legal costs calculated as permitted under the section may reward the legal practice not only for the effort they contribute in legal work, but for the risk they accept in funding the proceedings and assuming obligations in respect of adverse costs. It therefore invites the question whether the reward proposed is (among other things) proportional to the risk to be undertaken.
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> The question whether the return to the law practice under a group costs order is or is likely to be reasonable and whether it bears a proportionate relationship to the assumption of risk or to any other relevant measure, may be considered prospectively, but with real limitations on the Court's ability to make an informed assessment. That is where sub-s 33ZDA(3) assumes significance. A review under that sub-section, of a percentage fixed at an earlier time, once information informing questions of proportionality is available, will facilitate the Court ensuring that the percentage to which the law practice is ultimately entitled, remains appropriate. Such a review might be informed by the Court having regard to the practitioners' obligations under s 24 of the Civil Procedure Act.

20 Section 24 of the *Civil Procedure Act* 2010 (Vic) provides for the overarching obligation to ensure that costs are reasonable and proportionate. In particular, it relevantly provides that any law practice acting for a party must use reasonable endeavours to ensure that legal costs incurred are reasonable and proportionate to the complexity or importance of the issues in dispute and the amount in dispute.[23]

21 Her Honour made similar statements in the subsequent case of *Allen v G8 Education Ltd*.[24]

22 Key integers that are relevant in assessing the proportionality of a group costs order rate – which integers will have crystallised at the time of settlement – include the settlement sum, costs incurred by the firm and the extent of the risk undertaken by the firm in funding the proceeding.[25] The duration of the proceeding might also be relevant.[26]

23 In *Allen No 4*, Watson J reviewed the group costs order previously made by Nichols J in *Allen No 2*.[27] *Allen No 4* was the first occasion on which this Court considered the exercise of the discretion under s 33ZDA(3) in the context of a settlement approval application.[28]

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22 (2021) 69 VR 487 at [147]-[148] (emphasis added). See also ***Gehrke*** *v Noumi Ltd* [2022] VSC 672 at [53](c)-(e) (Nichols J); ***Mumford*** *v EML Payments Ltd* [2022] VSC 750 at [94] (Delany J); *Warner v Ansell Ltd* [2024] VSC 491 at [62] (Garde J).

23 *Civil Procedure Act 2010* (Vic) s 24. See also s 10.

24 [2022] VSC 32 at [90]-[92] (***Allen No 2***). See also *Mumford* [2022] VSC 750 at [94].

25 See ***Fuller*** *v Allianz Australia Insurance Ltd* [2025] VSC 160 at [156], [161]; *Gehrke* [2022] VSC 672 at [53](c); *Allen No 4* [2024] VSC 487 at [65]-[66].

26 *Allen No 4* [2024] VSC 487 at [63](e), [66]. See also *DA Lynch v Star Entertainment Group* [2023] VSC 561 at [357(e)] (Nichols J).

27 *Allen No 4* [2024] VSC 487 at [52]ff.

28 [2024] VSC 487 at [58].

24 His Honour identified the following principles that apply in considering whether to exercise the power under s 33ZDA(3) to amend a group costs order:[29]

(a) The power to amend a group costs order only arises in circumstances where the court was satisfied that it was "appropriate or necessary to ensure that justice is done in the proceeding" to make the original order.

(b) The consideration of whether to exercise the power under s 33ZDA(3) is not an occasion for a hearing *de novo* regarding the appropriateness of the group costs order.

(c) Rather, the power to amend should only be exercised if the court is satisfied that circumstances now mean that an amendment is appropriate or necessary to ensure that justice is done in the proceeding. While the language of s 33ZDA(3) contains no express limitation, such a limitation arises by necessary implication from the structure of s 33ZDA and the conditions on the original exercise of power under s 33ZDA(1). Here, we also note Delany J's statement in *Mumford* that the original group costs order rate "creates a default position from which there will… at least be a practical onus upon those who urge departure… to displace".[30]

(d) Close attention should be paid to the reasons for the original group costs order.

(e) The Court should ensure that costs payable to the lawyer under the group costs order remain proportionate in that they continue to represent an appropriate reward in the context of the effort and investment of the legal practice, the duration of the proceedings and the risks which were undertaken under the group costs order.

25 His Honour also stated that the Court should avoid "hindsight bias".[31] As such, "the Court should not approach the crystallisation of a favourable outcome for the law practice as an occasion of itself to amend a group costs order".[32] His Honour also stated that "[w]here the outcome of a proceeding falls within the range of estimates relied upon by the legal practice in support of its application for the original group costs order or where the outcome falls outside those estimates but not substantially so, this will weigh against amending the group costs order percentage on account of a lack of proportionality".[33]

26 The absence of any submission or objection to the existing group costs order rate weighs

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29 *Allen No 4* [2024] VSC 487 at [63].
30 *Mumford* [2022] VSC 750 at [95].
31 *Allen No 4* [2024] VSC 487 at [67].
32 *Allen No 4* [2024] VSC 487 at [67].
33 *Allen No 4* [2024] VSC 487 at [67].

significantly in favour of leaving that percentage unamended.[34] However, this factor does not relieve the Court of its "burden" in a settlement approval context to consider whether an amendment is appropriate.[35]

27 With respect to the question of proportionality, his Honour considered that:

(a) In the present case, the firm's professional fees calculated on an hourly basis, together with disbursements, provided a "useful cross-check" in considering the reasonableness of the existing group costs order rate.[36] When added together, these amounts effectively represented the cost of the firm's provision of "litigation funding", which could be directly compared to funding commissions in the third party litigation funding market.[37]

(b) More generally, a firm's ROI (return on investment) and IRR (internal rate of return) provide a court with useful numerical calculations "which may assist in the task of assessing the ongoing proportionality of a group costs order".[38] In "good" settlements, the ROI and IRR will tend to be relatively high.[39] Importantly, a firm's overall portfolio of cases will include cases which lose (resulting in significant negative returns), those which settle unfavourably and those that settle favourably.[40] As such, comparison of the ROI or IRR in a "good" settlement "with an average portfolio metric should be approached with caution because it will inherently tend to be greater than the average".[41]

28 Having considered the evidence, his Honour concluded there was no reason to amend the group costs order in that case. This was for the following reasons:

(a) The plaintiff's solicitors had devoted appropriate resources and effort to the proceeding.[42]

(b) The risks associated with non-recovery of costs and disbursements and the possibility of an adverse costs order were real – had the trial been unsuccessful for the plaintiffs, the firm faced a potential costs order in excess of $5M.[43]

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34 *Allen No 4* [2024] VSC 487 at [62].
35 *Allen No 4* [2024] VSC 487 at [62].
36 *Allen No 4* [2024] VSC 487 at [75](f).
37 *Allen No 4* [2024] VSC 487 at [75](f).
38 *Allen No 4* [2024] VSC 487 at [77].
39 *Allen No 4* [2024] VSC 487 at [80].
40 *Allen No 4* [2024] VSC 487 at [82].
41 *Allen No 4* [2024] VSC 487 at [82].
42 *Allen No 4* [2024] VSC 487 at [86].
43 *Allen No 4* [2024] VSC 487 at [89].

(c) The firm would, in effect, receive approximately 7.9% of the settlement sum for the risks they undertook in the proceeding (calculated by deducting from the firm's portion of the settlement sum their hourly costs and disbursements), which amount was prima facie reasonable and not disproportionate.[44] This percentage "compares very favourably to rates of litigation funding commission from third party litigation funders",[45] being in the 23-24% range.[46] As such, group members "have had the benefit of litigation funding from [the firm] at about one third of the rate of a third party litigation funder".[47] His Honour considered this to be "a very strong factor militating against any exercise of the power of amendment".[48]

(d) Having regard to the evidence before the Court on the group costs order application, nothing in the level of actual costs incurred, the duration of the proceedings or the quantum of the settlement sum provided a basis for amending the group costs order rate.[49]

(e) The group costs order rate of 27.5% was above the median rate of 24.5% but could still be described as a "mid-range" percentage, which is less likely to call for amendment than a "higher end" percentage.[50]

(f) The interests of certainty and transparency did not support the exercise of the power of amendment.[51] His Honour stated that "it will not be appropriate or necessary to ensure that justice is done in the proceeding for group members to have had the benefit of transparency and certainty, merely to discard it at the end of a proceeding only because the lawyers would like more or because the plaintiffs and group members would prefer to pay their lawyers less".[52] However, we note that in *Nelson v Beach Energy*, Nichols J stated that "[t]he prospect that a percentage fixed upon the making of a GCO may be later amended *by the Court* does not detract from the relative certainty that is achieved by the making of a GCO".[53]

(g) Neither the plaintiffs nor the firm sought a variation of the group costs order percentage, nor did any group member or the contradictor contend for a variation.[54]

(h) The group costs order had been made on the basis of evidence that if it were not made, the proceeding would likely be funded and a group costs order rate of 27.5%

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44 *Allen No 4* [2024] VSC 487 at [90].
45 *Allen No 4* [2024] VSC 487 at [90].
46 *Allen No 4* [2024] VSC 487 at [101].
47 *Allen No 4* [2024] VSC 487 at [101].
48 *Allen No 4* [2024] VSC 487 at [101].
49 *Allen No 4* [2024] VSC 487 at [91].
50 *Allen No 4* [2024] VSC 487 at [92].
51 *Allen No 4* [2024] VSC 487 at [93]-[95].
52 *Allen No 4* [2024] VSC 487 at [95].
53 [2022] VSC 424 at [41] (emphasis in original).
54 *Allen No 4* [2024] VSC 487 at [96].

was likely to produce a greater return to group members than this alternative.[55] The evidence in this regard was even stronger on the settlement approval application.[56]

(i) The firm's calculated range for its ROI was reasonable and proportionate, having regard to the ROI that litigation funders generally seek and obtain.[57]

(j) The firm's IRR also represented a reasonable return for the resources it expended, the duration of that commitment and the risks undertaken by the firm under the group costs order.[58]

(k) The amount payable to the firm under the group costs order was 1.4 times the amount it would have received for costs calculated on an hourly rate basis (plus disbursements), which is at the bottom end of the median range for comparable cases in the United States.[59]

29 At the directions hearing on 24 July 2025 in this proceeding, the Court indicated that in the absence of any submissions to the contrary, it considered that the principles identified by Watson J in *Allen No 4* are applicable in the present case in the Court's review of the GCO.[60] We respectfully agree (subject to the minor matter identified at paragraph 28(f) above) and note the endorsement of those principles by this Court on four previous occasions:

(a) In *Fuller*, Matthews J stated: "I agree with and adopt [Watson J's] summary [in *Allen No 4*] of the relevant principles" in considering whether to exercise the power under s 33ZDA(3) of the Act to amend a group costs order;[61]

(b) in *Gehrke v Noumi Ltd*, Delany J also agreed with and adopted Watson J's summary in *Allen No 4* of the relevant principles in relation to the statutory power to amend a group costs order;[62]

(c) in ***O'Brien*** *v Australia and New Zealand Banking Group Ltd*, in considering whether to vary a group costs order rate, Harris J applied certain of the principles identified by Watson J in *Allen No 4* (and by Matthews J in *Fuller*);[63] and

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55 *Allen No 4* [2024] VSC 487 at [98].
56 *Allen No 4* [2024] VSC 487 at [99]-[100].
57 *Allen No 4* [2024] VSC 487 at [108]-[110].
58 *Allen No 4* [2024] VSC 487 at [111].
59 *Allen No 4* [2024] VSC 487 at [112]. See also at [75](b)-(d). We note that in the Fourth Taylor Affidavit, Mr Taylor refers to this as the "Lodestar Method".
60 T1:33-T2:12.
61 [2025] VSC 160 at [154].
62 [2025] VSC 373 at [190].
63 [2025] VSC 389. See, eg, at [93].

(d) most recently, in ***Anderson-Vaughan*** *v AAI Ltd*, Matthews J again agreed with and adopted the principles identified by Watson J in *Allen No 4*.[64]

30 While the principles in *Allen No 4* are not presently in dispute, we consider that two additional nuances in the case law concerning the review of a group costs order rate might be of assistance to the Court in the particular circumstances of this case.

31 **First**, as identified in *Allen No 4*, review of a group costs order rate will involve consideration of whether the costs payable to the firm are "proportionate" in the sense that they "continue to represent an appropriate reward in the context of the effort and investment of the legal practice, the duration of the proceedings and the risks which were undertaken under the group costs order".[65]

32 In this context, the Court has stated that s 33ZDA(3) protects against potential "windfall" gains by the solicitors. For example, in *Kilah v Medibank Private Ltd*, Attiwill J stated:[66]

> [A]s accepted by the plaintiffs, upon any settlement or judgment, if a windfall were to occur the Court may exercise the power under s 33ZDA(3) and revise down the rate. For example, the Court may exercise this power if the rate gives a disproportionate return to the solicitors for the plaintiffs.

33 Similarly, in *Anderson-Vaughan v AAI Ltd*, Stynes J stated: "I am satisfied that in relation to the potential for windfalls in favour of Maurice Blackburn, sub-s 33ZDA(3) provides adequate protection to group members".[67]

34 However, in *Fox*, Nichols J stated that a proposed group costs order rate should be assessed by reference to the concepts of reasonableness and proportionality rather than any concerns regarding potential "windfalls":[68]

> The plaintiffs and contradictor submitted that proportionality is a measure that should inform the fixing of the percentage rate for a group costs order. The defendants submitted that the prospect of 'windfall' returns to the law practice must be avoided. The profit return to a law practice under a group costs order does not appear on its face to be properly a matter affecting the interests of the defendants. That said, proportionality and reasonableness are more legally significant touchstones for assessing the appropriateness of a proposed percentage rate, and likely better express the concerns underlying objections to potential 'windfalls'. They are not, of course, substitutes for the statutory test, but will assist in answering the statutory question.

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64 [2025] VSC 469 at [69].
65 *Allen No 4* [2024] VSC 487 at [63](e). See also *DA Lynch v Star Entertainment Group* [2023] VSC 561 at [357(e)].
66 [2024] VSC 152 at [48].
67 [2023] VSC 465 at [51]. See also *Lieberman v Crown Resorts Ltd* [2022] VSC 787 at [70] (Stynes J).
68 (2021) 69 VR 487 at [145]-[148] (emphasis added).

35 We respectfully agree and submit that the same principle applies when reviewing a group costs order rate for the purpose of s 33ZDA(3). We also note Watson J's statement in *Allen No 4* that "the Court should not approach the crystallisation of a favourable outcome for the law practice as an occasion of itself to amend a group costs order".[69] His Honour also relevantly stated:[70]

> [P]arliament in enacting s 33ZDA has enacted a new method for calculation of costs. It is inherent in that choice that costs under s 33ZDA will sometimes be substantially more than those calculated on an hourly basis and sometimes substantially less…

36 **Second**, on an application for a group costs order at the outset, or at an early stage, of a proceeding, there might be insufficient evidence to establish that the proposed rate will result in a reasonable and proportionate deduction for legal costs. In *Bogan*, John Dixon J stated that "[t]he return being sought from group members should be based on some principled assessment that can be recorded and, if it be in the interests of justice to do so, later adjusted as factors in the assessment that were estimated become certain events".[71] However, any such "principled assessment" is not a necessary precondition for the granting of a group costs order. As Nichols J stated in *Gehrke*:[72]

> [S]ome conclusions might be drawn early in the life of a proceeding about the prospect of the proposed rate resulting in a reasonable and proportionate quantification of legal costs. Whether that can be sensibly achieved will depend in large measure on the quality of the evidence directed to that question. In *Bogan*, John Dixon J made some observations to the effect that principles employed in other contexts to analyse returns on investment might inform a principled approach to the fixing of a percentage rate for a Group Costs Order. Where evidence of that kind is available, provided it is formulated on sufficient relevant instructions and assumptions, it might indeed be significant, but the return on the Funder's investment is far from the only relevant consideration.

37 Where evidence of this kind is not available, the group costs order might be made based on the prima facie reasonableness of the rate, with reasonableness and proportionality to be later assessed at the "review" stage. For example, in *Fox v Westpac Banking Corporation (No 2)*, Nichols J stated:[73]

> … Mr Watson has modelled potential internal rates of return (**IRR**) to Maurice Blackburn that might be achieved in respect of these proceedings. The modelling addresses different scenarios positing settlement or judgment at points in time in the life of the proceeding and at assumed damages or settlement amounts. Those rates of return were compared with Maurice Blackburn's cost of capital, and the rates of return that Maurice Blackburn has achieved in funded and unfunded class actions over a five-year period. The modelled returns

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69 *Allen No 4* [2024] VSC 487 at [67].
70 *Allen No 4* [2024] VSC 487 at [75](a). See also at [82].
71 *Bogan* [2022] VSC 201 at [29].
72 [2022] VSC 672 at [53](f). See also at [53](a).
73 [2023] VSC 95 at [59]-[60] (footnote omitted, emphasis added).

> were described in the context of the rules that Maurice Blackburn applies to make investments by reference to internal rates of return, including on a portfolio basis (across the firm and across the class actions practice), addressing rates of return derived from class actions categorised according to a range of criteria. For each proceeding, on assumptions as to when and for what sum the proceeding would resolve, the return to the firm was compared with the average return for the firm's entire portfolio and for funded class actions. The recovered sum for each proceeding that would be required for the return to the solicitors to exceed the IRR for the portfolio and funded cases average, and where that recovered sum sat within the estimated range for each proceeding, were identified.
>
> That evidence was of assistance in placing a stake in the ground, as it were, setting out the relative anticipated returns from these proceedings, informing Maurice Blackburn's investment decision. Beyond that, it was not possible to draw much from that data at this juncture, on the question of the reasonableness and proportionality of the return that might be made on these proceedings, at the proposed GCO rate. Moreover, the prospective returns are modelled on a number of assumptions that are subject to considerable uncertainty at this time. The conclusion I have reached as to the prima facie reasonableness of the proposed rate, is informed more particularly by the evidence concerning historical recoveries in funded cases. The evidence as to Maurice Blackburn's prospective return on investment, if developed and further explained, is likely to inform any later re-assessment on the question of proportionality under s 33ZDA(3) when more is known about the returns in fact to be achieved and the extent of the work required to achieve the result, among other things.

38 This suggests that in reviewing the proportionality of a group costs order rate in the context of a settlement approval application, the question of whether "the outcome of a proceeding falls within the range of estimates relied upon by the legal practice in support of its application for the original group costs order"[74] can only be considered to the extent that such estimates were available on the original application.

39 Finally, we note that if the Court were to conclude that the GCO rate should be reduced, we are not aware of any case law principles which might guide the Court in calculating the appropriate amount of any such reduction. In our submission, this is necessarily a fact-specific exercise and will depend on the available evidence. We address this further in Part D below.

C. Basis on which the GCO was made

Evidence before the Court

40 In support of the GCO application, the plaintiff relied upon the McCoy Affidavit, the First Gilsenan Affidavit and the Second Gilsenan Affidavit. That evidence relevantly established that:

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74 *Allen No 4* [2024] VSC 487 at [67]. See also at [83].

(a) total legal costs were estimated at that time to be [redacted] (excluding GST);[75]

(b) if a group costs order were not made, Maurice Blackburn might have sought alternative funding arrangements, continued to conduct the proceeding on a no-win-no-fee basis (with an uplift in the event of success) or terminated its retainer;[76]

(c) [redacted]

(d) [redacted]

(e) Maurice Blackburn's IRR across its class actions portfolio that had settled in the last 5 years was [redacted]

(f) the interquartile IRR range [redacted]

(g) [redacted]

(h) [redacted] and

(i) [redacted]

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75 First Gilsenan Affidavit at [66]. The estimate inclusive of GST was [redacted]: see Fourth Taylor Affidavit at [18].

76 First Gilsenan Affidavit at [108](d), [110]. See also GCO Ruling at [103].

77 First Gilsenan Affidavit at [118].

78 First Gilsenan Affidavit at [119]. [redacted] Third Taylor Affidavit at [52].

79 Second Gilsenan Affidavit at [12](j).

80 Second Gilsenan Affidavit at [12](j).

81 Second Gilsenan Affidavit at [12](j).

82 First Gilsenan Affidavit at [122].

83 See Second Gilsenan Affidavit at [16]-[17].

84 Second Gilsenan Affidavit at [15].

85 Second Gilsenan Affidavit at [16]-[17].

[redacted]

Reasons for making the GCO

41 In the GCO Ruling, Osborne J concluded it was appropriate to make the GCO to ensure that justice is done in the proceeding and relevantly stated that:

(a) at the time that the GCO application was made, any assessment of the alternative funding model to a group costs order was inherently speculative (while third party funding was the most likely alternative funding model, the cost of this was uncertain);[87]

(b) Ms Gilsenan's evidence was to the effect that a group costs order was likely to provide a better outcome for group members than third party litigation funding at current prevailing rates;[88]

(c) the plaintiff was informed from the outset of Maurice Blackburn's intention to apply for a group costs order (in the amount of 25%);[89]

(d) the proposed group costs order rate (being the present, tiered GCO rate) was the result of a competitive tender process in the context of the carriage dispute, giving "comfort as to the lowest market price available to fund the proceedings";[90]

(e) having regard to the percentages ordered in 11 other proceedings, the proposed rate was prima facie reasonable;[91]

(f) having regard to the matters in (d) and (e) above, the proposed rate was prima facie

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86 Second Gilsenan Affidavit at [12].
87 GCO Ruling at [106].
88 GCO Ruling at [107].
89 GCO Ruling at [108].
90 GCO Ruling at [109].
91 GCO Ruling at [105], [110],

reasonable and proportionate;[92]

(g) the appropriateness of the rate could later be reviewed upon any settlement or award of damages, lest it give rise to a disproportionate return to the solicitors and the funder;[93] and

(h) the group costs order would provide certainty and transparency to the plaintiff and group members and fairly distribute the burden of legal costs across all group members.[94]

D. Whether the GCO should be amended

Intervener's evidence

42 In the context of the settlement approval application, the intervener filed the Fourth Taylor Affidavit in support of its proposal that the Court approve a deduction from the settlement sum for legal costs pursuant to the GCO. In the Fourth Taylor Affidavit, Mr Taylor relevantly deposed that:

(a) Maurice Blackburn's actual costs were approximately [redacted] (inclusive of GST), comprising [redacted] in professional fees and [redacted] in disbursements up to 31 May 2025 and an additional [redacted] in professional fees and [redacted] in disbursements between June 2025 and the settlement approval hearing;[95]

(b) neither the plaintiff nor Maurice Blackburn seeks any variation of the GCO;[96]

(c) [redacted]

(d) Maurice Blackburn's IRR at the current GCO rate is [redacted]

(e) [redacted]

92 GCO Ruling at [110].
93 GCO Ruling at [111].
94 GCO Ruling at [112](a)-(c).
95 Fourth Taylor Affidavit at [19]-[21].
96 Fourth Taylor Affidavit at [22].
97 Fourth Taylor Affidavit at [29]. See also Third Taylor Affidavit at [52], [54].
98 Fourth Taylor Affidavit at [33](a), [36](a).

[redacted]

(f) as at 17 June 2025, Maurice Blackburn's IRR across its class actions portfolio is [redacted] The next highest IRR is [redacted]

(g) as at 17 June 2025, the interquartile IRR range (from the 25th to the 75th percentile) is [redacted] to [redacted] and the upper-quartile range is [redacted] to [redacted], with [redacted] being the mid-point of that range;[102]

(h) having regard to the "Lodestar Method" (which calculates the return to the firm as a multiple of the firm's hourly rate fee, plus disbursements), Maurice Blackburn's multiple return under the GCO is [redacted] which remains within the range accepted by US courts in comparable cases;[103]

(i) Maurice Blackburn's ROI under the GCO is [redacted], which can be compared to ROI data published by Omni Bridgeway, an ASX-listed litigation funder.[104] In *Allen No 4*, Watson J stated that "Omni Bridgeway's ROI on all completed cases (including those on which it loses some or all of its capital) is 1.2 and approximately 1.9 on those cases which did not produce a negative return. Approximately 15% of its case have an ROI exceeding 4.0, with some cases having an ROI exceeding 9.0";[105] and

(j) Maurice Blackburn assumed a significant adverse costs risk, as costs could reasonably have been in excess of [redacted].[106] However, we note that this risk was shared with Vannin pursuant to a costs sharing agreement under which Vannin agreed to pay Maurice Blackburn 50% of any adverse costs or security for costs.[107] In our view, this is relevant given that the IRR of [redacted] is calculated by reference to the portion of the settlement sum which Maurice Blackburn itself will receive (and

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99 Fourth Taylor Affidavit at [33](b), [36](b).
100 Fourth Taylor Affidavit at [37]; Second Gilsenan Affidavit at [12](j).
101 Fourth Taylor Affidavit at [37].
102 Fourth Taylor Affidavit at [37].
103 [redacted]
104 Fourth Taylor Affidavit at [43]-[44].
105 [2024] VSC 487 at [110].
106 Fourth Taylor Affidavit at [45]-[46].
107 See First Gilsenan Affidavit at [75]-[80]; MB Submissions at [18].

does not include the portion to be paid to Vannin).[108] In other words, if Vannin's role is factored in when assessing the "reward" aspect of the GCO, it should also be factored into the "risk" aspect.[109]

43 At the directions hearing held on 24 July 2025, the Court indicated that Maurice Blackburn might wish (but was not required) to file further evidence addressing certain matters that might be relevant to the question of whether the GCO rate should be reduced. Pursuant to paragraph 5 of the Orders, Maurice Blackburn filed the Third Gilsenan Affidavit. In that affidavit, Ms Gilsenan relevantly deposes that:

[redacted]

Intervener's and counsel for the plaintiff's respective submissions

44 In Maurice Blackburn's submissions as intervener dated 27 June 2025, Maurice Blackburn submits that there is no occasion to amend the GCO rate under s 33ZDA(3) for the following reasons:

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108 [redacted]

109 See *O'Brien* [2025] VSC 389 at [111].

110 Third Gilsenan Affidavit at [20].

111 Third Gilsenan Affidavit at [26](a).

112 Third Gilsenan Affidavit at [26](c).

113 Third Gilsenan Affidavit at [27].

114 Third Gilsenan Affidavit at [29].

(a) Maurice Blackburn bore considerable risk under the GCO and the early settlement of the proceeding does not alter this.[115] The GCO rate was the reward (or price) for bearing that risk;[116]

(b) a group costs order necessarily results in a firm doing "well" in the case of a "good" settlement.[117] Group members also benefit from such a settlement. In the present proceeding, the early settlement provides certainty of outcome for group members and will result in earlier recovery (potentially by years) than if the proceeding had settled at the more typical time of shortly before trial (if it had settled at all);[118]

(c) since being awarded carriage of the dispute, Maurice Blackburn has prosecuted the case well, in accordance with its litigation budget.[119] This is not a case where the firm under-resourced or under-delivered, such that the settlement outcome is the product of blind luck;[120]

(d) the settlement sum falls within the range of outcomes that were anticipated at the time of the GCO application. In any event, there are limitations in the IRR and ROI metrics and those metrics in an individual case should be considered in the context of a firm's portfolio of cases more generally.[121] Here, the IRR is not outside the bounds of Maurice Blackburn's class actions portfolio and there was evidence of this before the Court at the time of the GCO application;[122]

(e) there has been no objection to the GCO rate;[123]

(f) the effective GCO rate is "mid-range" compared to group costs order rates in other cases;[124] and

(g) the structural benefits of the GCO remain undisturbed and group members benefitted from these, including certainty and transparency as to the percentage share of their recovery.[125]

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115 MB Submissions at [16]-[18].
116 MB Submissions at [19].
117 MB Submissions at [20].
118 MB Submissions at [20].
119 MB Submissions at [21].
120 MB Submissions at [21].
121 MB Submissions at [22].
122 MB Submissions at [22].
123 MB Submissions at [23].
124 MB Submissions at [24].
125 MB Submissions at [25].

45 In response to Maurice Blackburn's submissions, counsel for the plaintiff submits in supplementary submissions dated 15 July 2025 that:

(a) an assessment of the proportionality of the GCO rate must take into account not only the risks undertaken by the firm but also the costs incurred by the firm;[126]

(b) the early settlement of the proceeding has significant consequences for the scale of the costs incurred by Maurice Blackburn and has resulted in [redacted]

(c) the period in which Maurice Blackburn's sole focus was on prosecuting the substantive proceedings was only around 6 months in length;[128] and

(d) it is self-evidently in group members' interests that the GCO rate be reduced but even if no reduction is ordered, the outcome is still a very good result for group members.[129]

46 In the result, counsel for the plaintiff does not make any submission on behalf of group members that the GCO rate should be reduced.[130]

47 We note that certain of these submissions were put on the basis that counsel for the plaintiff owes fiduciary obligations to group members generally.[131] However, the nature of the duty owed by a representative plaintiff's lawyers to other group members remains unsettled. In *Dyczynski v Gibson*, Murphy and Colvin JJA stated: "The scheme of Part IVA is that the applicant has the conduct of proceedings on behalf of the class members and has fiduciary obligations to them… The applicant's lawyers also owe obligations to class members but how far those obligations extend is not settled".[132]

Contradictors' submissions

48 As outlined above, we are appointed to represent the interests of group members on the question of whether the GCO rate should be reduced. We therefore acknowledge at the outset that it is necessarily in group members' interest that the rate be reduced, as this will result in a greater portion of the settlement sum being available for distribution to them. Nevertheless, having regard to the case law principles outlined above and the evidence and

126 Supplementary Submissions at [11].
127 [redacted]
128 Supplementary Submissions at [12](a).
129 Supplementary Submissions at [12](c).
130 Supplementary Submissions at [13].
131 See Supplementary Submissions at [12].
132 (2020) 280 FCR 583 at [209].

submissions filed by Maurice Blackburn and counsel for the plaintiff, we respectfully submit that, on balance, the present case is not one in which a reduction of the GCO rate is necessary or appropriate.

49 In reaching our conclusion that the GCO rate should not be reduced, we have considered twelve factors identified by Watson J in *Allen No 4* as being relevant to assessing the proportionality of a group costs order rate at the settlement approval stage. In the following table, the first column lists each of the twelve factors. The second column identifies for each factor the relevant evidence in the present case and what we consider it establishes, and the third column provides a pinpoint reference to this evidence.

Factor in *Allen No 4*		Evidence in present proceeding	Pinpoint reference
1.	Firm's effort and investment in the proceeding (*Allen No 4* at [63](e))	The proceeding settled earlier than expected and so less time and fewer resources were expended than anticipated (see items 2 and 6 below). As set out at item 6 below, Maurice Blackburn has incurred approximately [redacted] of its total estimated budget. [redacted] In our view, this evidence supports Maurice Blackburn's submission that this is not a case where the firm under-resourced or under-delivered, such that the settlement outcome is the product of blind luck (MB Submissions at [21]). Rather, as was the case in *Allen No 4*, the firm has "devoted appropriate resources and effort to the proceeding": at [86]. This is notwithstanding the fact that the period in which Maurice Blackburn's sole focus was on prosecuting the substantive proceedings was only around 6 months in length: Supplementary Submissions at [12](a).	Third Gilsenan Affidavit at [26], [27], [29]

Factor in *Allen No 4*		Evidence in present proceeding	Pinpoint reference
2.	Duration of the proceeding (*Allen No 4* at [63](e), [91])	As stated above, the proceeding settled much earlier than anticipated. [redacted] The early settlement appears to be the key, and possibly only, factor contributing to the high IRR of [redacted]	Second Gilsenan Affidavit at [15] Third Taylor Affidavit at [29] Fourth Taylor Affidavit at [40], [51]

3.	Quantum of the settlement sum (*Allen No 4* at [91])	On the GCO application, Ms Gilsenan deposed in the First Gilsenan Affidavit: [redacted] The settlement outcome	First Gilsenan Affidavit at [119], [122] Second Gilsenan Affidavit at [16]-[17] Third Taylor Affidavit at [52]-[55] Counsel opinion at [108][133] Fourth Taylor Affidavit at [27]-[28]

[133] The counsel opinion is at page 20 of Exhibit LST-4 to the Third Taylor Affidavit.

Factor in *Allen No 4*		Evidence in present proceeding	Pinpoint reference
		therefore appears to be a "good" outcome for group members, particularly given the early timing of the settlement.	
4.	Risks undertaken by the firm under the group costs order: risk of non-recovery of costs and risk of adverse costs order (*Allen No 4* at [63](e) and [89])	In the First Gilsenan Affidavit, Ms Gilsenan deposed to the risks of the proceeding as at the time of the GCO application. [redacted] At the time of the GCO application, the evidence did not address Maurice Blackburn's adverse costs exposure. However, in the Fourth Taylor Affidavit, Mr Taylor deposed that in the event of an unsuccessful trial, the quantum of adverse costs could reasonably have been in excess of [redacted] on a party/party basis. It therefore appears that the risk of an adverse costs order was real at all stages of the proceeding, notwithstanding that pursuant to the cost sharing agreement with Vannin, Vannin agreed to pay Maurice Blackburn 50% of any adverse costs.[134] We note that the adverse costs exposure in *Allen No 4* was said to be "in excess of $5 million", based upon an estimate of the defendant's costs on a solicitor and client basis being likely between $10M and $12M at the time of settlement: at [89]. Settlement in *Allen* occurred less than a month before trial: see *Allen No 4* at [18] and [19]. Maurice Blackburn's potential adverse costs exposure was [redacted] on a party / party basis, and on the basis that the matter proceeded to trial. [redacted]	First Gilsenan Affidavit at [118] Fourth Taylor Affidavit at [29], [45]-[46] Counsel opinion at [103].

[134] See MB Submissions at [18] and cl 7(2) of the cost sharing agreement (at page 279 of Exhibit RG-1 to the First Gilsenan Affidavit).

Factor in *Allen No 4*		Evidence in present proceeding	Pinpoint reference
5.	How the group costs order rate compares with rates ordered in other proceedings (*Allen No 4* at [92])	In Annexure A to these submissions, we have set out all 24 group cost order rates ordered by this Court to date and separately identified the five group costs order rates which have been confirmed upon review in the context of settlement approval. In the present proceeding, the effective GCO rate of 24.66% is slightly below the median group costs order rate of 25% for both datasets and can therefore be described as a "mid-range" percentage. In *Allen No 4*, Watson J stated that mid-range percentage is less likely to call for amendment than a "higher end" percentage: at [92].[135] We also note that the GCO rate is below with the mean and mode group costs order rate of 26.19% and 27.5% respectively, for all 24 group costs orders ordered to date, and also below the mean and mode rate for the five group costs orders confirmed upon review (24.8% and 25% respectively).	See Annexure A to these submissions. See also Fourth Taylor Affidavit at [31].
6.	Legal costs actually incurred in the proceeding (calculated on an hourly rate basis, plus disbursements) (*Allen No 4* at [91])	The legal costs actually incurred in the proceeding total approximately [redacted] (inclusive of GST). In the Fourth Taylor Affidavit, Mr Taylor deposes that: • costs as at 31 May 2025 were approximately [redacted] (inclusive of GST); and • costs between June 2025 up to the settlement approval hearing were estimated at approximately [redacted] (inclusive of GST). At the time of the GCO application, estimated legal costs were [redacted] (inclusive of GST). Maurice Blackburn therefore incurred approximately [redacted] of its estimated budget.	Fourth Taylor Affidavit at [18]-[21]

[135] See also *O'Brien* [2025] VSC 389 at [112].

Factor in *Allen No 4*		Evidence in present proceeding	Pinpoint reference
7.	Percentage of the settlement sum received by the firm for the risk undertaken (calculated by deducting from the firm's portion of the settlement sum the amount at item 6 above) and how that compares with third party litigation funding commissions (*Allen No 4* at [90], [101])	At the present GCO rate, Maurice Blackburn would receive approximately [redacted] of the settlement sum for the risk it undertook under the GCO. This figure has been calculated by taking Maurice Blackburn's total costs incurred [redacted] inclusive of GST) and deducting this amount from the $21.45M that Maurice Blackburn is presently entitled to received pursuant to the GCO ([redacted]).[136] The latter figure is approximately [redacted] of $87M. [redacted] is significantly higher than the 7.9% that Slater and Gordon received for the risk undertaken in *Allen No 4* (see at [101]). However, in our view, the percentage in the present case still compares favourably to third party litigation funding commissions which Watson J stated are in the range of 23-24%. While it cannot be said that group members "have had the benefit of litigation funding from [the firm] at about one third of the rate of a third party litigation funder" (which Watson J considered to be "a very strong factor militating against any exercise of the power of amendment"[137]), it can be said that group members have achieved a favourable settlement outcome at a good "price", compared to what likely would be paid under a traditional funding arrangement.	Not addressed in evidence

136 We note that this calculation does not account for the fact that some of Maurice Blackburn's portion of the settlement sum is payable to Vannin pursuant to the cost sharing agreement. In our view, this agreement is not presently relevant because the purpose of the calculation is to compare the cost to group members of Maurice Blackburn funding the proceeding with the potential cost of a third party litigation funder doing so.

137 *Allen No 4* [2024] VSC 487 at [101].

Factor in *Allen No 4*		Evidence in present proceeding	Pinpoint reference
8.	Firm's ROI (*Allen No 4* at [77], [108]-[110])	At the present GCO rate, Maurice Blackburn's expected ROI is [redacted]. In *Allen No 4*, Watson J referred to the ROI data published by Omni Bridgeway, an ASX-listed litigation funder and stated that "Omni Bridgeway's ROI on all completed cases (including those on which it loses some or all of its capital) is 1.2 and approximately 1.9 on those cases which did not produce a negative return. Approximately 15% of its cases have an ROI exceeding 4.0, with some cases having an ROI exceeding 9.0": at [110]. This suggests that Maurice Blackburn's expected ROI is a good outcome for the firm, but not exceptionally so when compared to litigation funders' ROIs. This is especially so given that the data cited above is for ROI "on all completed cases (including those on which [Omni Bridgeway] loses some or all of its capital". As Watson J stated in *Allen No 4*, for "good" settlements, the ROI will tend to be relatively high but a firm's (and litigation funders') overall portfolio of cases will include cases which lose and result in significant negative returns, such that comparison of the ROI in a "good" settlement "with an average portfolio metric should be approached with caution".[138] However, we also note that a key limitation of the ROI calculation is that it does not factor in the time value of money and Maurice Blackburn's expected IRR is therefore likely to be a preferable metric: *Allen No 4* at [79].	Fourth Taylor Affidavit at [43]-[44]

[138] *Allen No 4* [2024] VSC 487 at [80], [82].

9.	Firm's IRR (*Allen No 4* at [77], [111])	At the present GCO rate, Maurice Blackburn's expected IRR is [redacted]. <u>Comparison with Maurice Blackburn's IRR in other class actions</u> As at 17 June 2025, Maurice Blackburn's IRR [redacted] <u>Comparison with Maurice Blackburn's expected IRR</u> [redacted]	Fourth Taylor Affidavit at [36], [37], [40] Second Gilsenan Affidavit at [12](j), [16]

Factor in *Allen No 4*		Evidence in present proceeding	Pinpoint reference
		[redacted] [redacted]. What is clear, irrespective of the different values of the IRRs from the different modelling, is that the early settlement of the proceeding is the key, and possibly only, factor (together with corresponding reduced expenditure) driving the high IRR. We address this factor further below.	
10.	Return to the firm based on the "Lodestar Method" (*Allen No 4* at [75](b)-(d), [112], noting that "Lodestar Method" is a descriptor used in the Fourth Taylor Affidavit and not by Watson J)	The Lodestar Method calculates the return to the firm as a multiple of the firm's hourly rate fee, plus disbursements. [redacted] Watson J stated in *Allen No 4* that in the US, Courts have accepted that "on occasion, a percentage fee will be several multiples (in some cases greater than 4) of the hourly rate fee, though the mean and median multiple is generally in the range of 1.4 to 1.8": at [75](b). [redacted] We consider that, in the present case, the Lodestar Method does not suggest that the return to Maurice Blackburn is unreasonable or disproportionate.	Fourth Taylor Affidavit at [41]-[42], [47]

Factor in *Allen No 4*		Evidence in present proceeding	Pinpoint reference
11.	Whether there is any objection to the rate by the plaintiff or group members (*Allen No 4* at [62])	No group member has objected to the proposed settlement on the basis of the GCO or the amount sought to be deducted for legal costs. As Watson J identified in *Allen No 4*, this "weighs significantly" in favour of leaving the percentage unamended.[139]	Fourth Taylor Affidavit at [17]
12.	Whether the rate produces a greater return to group members than any alternative funding option would have (*Allen No 4* at [98]-[100])	In the GCO Ruling, Osborne J stated that any assessment of the alternative funding model to a group costs order was inherently speculative.[140] While third party funding was the most likely alternative funding model, the cost of this was uncertain.[141] Osborne J also stated that Ms Gilsenan's evidence was to the effect that a group costs order was likely to provide a better outcome for group members than third party litigation funding at current prevailing rates.[142] In our view, the matters addressed at item 7 above confirm that the GCO (even without any reduction of the present rate) likely provided a better outcome for group members than any third party funding would have provided.	First Gilsenan Affidavit at [125]-[131]

139 *Allen No 4* [2024] VSC 487 at [62].
140 GCO Ruling at [106].
141 GCO Ruling at [106].
142 GCO Ruling at [107].

50 We submit that the following emerges from the table above:

(a) the early settlement of the proceeding (together with commensurate lower expenditure on legal costs than expected) is the key, and possibly only, factor giving rise to Maurice Blackburn's relatively high IRR of [redacted], and its relatively high ROI and multiple return under the Lodestar Method; and

(b) no other factor identified by Watson J in *Allen No 4* suggests that the expected to return to Maurice Blackburn is unreasonable or disproportionate.

51 With respect to (a), the early settlement of the proceeding has clearly resulted in a "good" outcome for Maurice Blackburn. However, this does not necessarily render the extant GCO rate unreasonable or disproportionate. As Watson J stated in *Allen No 4*, it must be borne in mind that a firm's overall portfolio of cases will include cases which lose (resulting in significant negative returns), those which settle unfavourably and those that settle favourably, such that comparison of the IRR in a "good" settlement with an average portfolio metric should be approached with caution.[143] Further, as outlined at paragraphs 31 to 35 above, the Court's inquiry in a s 33ZDA(3) review is not properly to be directed to the question of whether the rate results in a "windfall" for the firm.

52 The case law therefore establishes that something more than a "good" outcome for the firm is required to render the rate unreasonable or disproportionate. Conversely, a group costs order can result – and in two cases has resulted – in the firm failing to recover all costs incurred.[144] Where that has occurred, firms to date have not sought any increase in the GCO rate.[145] While that does not mean that an increase in a group costs order rate in such circumstances is categorically inappropriate or unnecessary, it suggests that as with a "good" outcome for a firm, a "bad" outcome is not a prima facie reason for amending the rate.

53 In the present proceeding, the settlement outcome is "good" not only for Maurice Blackburn but for all group members. In particular, a settlement sum has been secured in circumstances where there was significant uncertainty as to whether any better sum could be secured later in the proceeding, or that the plaintiff would succeed at trial, and where the result obtained is "good" in the sense that it is not dissimilar to settlements in other jurisdictions on a per vehicle basis. In achieving this outcome, group members had the

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143 *Allen No 4* [2024] VSC 487 at [82].

144 See *Gehrke v Noumi Ltd* [2025] VSC 373 at [205] and *Anderson-Vaughan* [2025] VSC 469 at [72], [76].

145 *Gehrke v Noumi Ltd* [2025] VSC 373 and *Anderson-Vaughan* [2025] VSC 469.

benefit of Maurice Blackburn funding the proceeding and assuming all financial risk associated with the proceeding. As detailed in items 1, 4 and 6 in the table above, that investment and the level of risk were significant. Further, group members will receive the settlement proceeds at a much earlier stage than anticipated and much earlier than is usually the case in a class action. That alone is of significant benefit to them. It therefore cannot be said that the good outcome for Maurice Blackburn is at the expense, or does not align with the interests, of group members. In our view, this strongly weighs against any conclusion that the extant rate is unreasonable or disproportionate.

54 We further submit that the following circumstances support the conclusion that it is not appropriate or necessary in the interests of justice to reduce the GCO rate:

(a) the extant GCO rate was the result of a competitive "quasi-tender" process and therefore represented the "lowest market price available to fund the proceedings";[146]

(b) [redacted]

(c) there was genuine uncertainty as to what funding model would apply in the event that a GCO was not ordered;[148]

(d) the most likely alternative was third-party litigation funding, with the GCO likely to deliver a better outcome to group members than this alternative.[149]

55 In those circumstances, any adjustment of the GCO rate downwards would be inconsistent with the economic reality prevailing at the time of the GCO application and deliver a better outcome to group members than was in contemplation at that time or even possible.

56 We note that it cannot be said that an IRR of [redacted] (or that only [redacted] of the estimated budget would be incurred) was within Maurice Blackburn or the Court's contemplation at the time that the GCO was made. [redacted]

146 GCO Ruling at [109].
147 Third Gilsenan Affidavit at [20].
148 See *Fuller* [2025] VSC 160 at [175].
149 GCO Ruling at [107].

57 We also note that the case law suggests that whether the return to the firm falls within the range of outcomes in contemplation at the time that the group costs order was made is a relevant factor in reviewing the proportionality of the group costs order rate at the time of settlement:

(a) In *Allen No 4*, Watson J stated: "[w]here the outcome of a proceeding falls within the range of estimates relied upon by the legal practice in support of its application for the original group costs order or where the outcome falls outside those estimates but not substantially so, this will weigh against amending the group costs order percentage on account of a lack of proportionality".[150]

(b) Similarly, in *Fuller*, Matthews J stated: "As far as I am concerned, the situation which has emerged in fact was within the range of outcomes contemplated at the time the GCO was made, and the assessment at that time was that it was in the interests of justice for the GCO to be made. The present circumstances are within those contemplated at that time, and there is no reason to amend the GCO percentage".[151]

(c) In *O'Brien*, Harris J stated: "I also take into account that in material respects, the outcome is as anticipated and intended by the group costs order. The settlement sum was… within the estimated range which was provided confidentially to the Court in the material in support of the group costs order."[152]

58 However, in our respectful submission, whether the actual return to the firm was squarely within its (and the Court's) contemplation at the time that the group costs order was made is not a necessary precondition for any finding, at the settlement approval stage, that the extant GCO rate is reasonable and proportionate. As outlined at paragraphs 36 to 38 above, on a group costs order application, it will not always be possible to estimate the return to a firm at the proposed rate and in those circumstances, the Court might order a rate that is prima facie reasonable and proportionate, including having regard to historical rates in other cases. That is what occurred in the present proceeding. It is therefore not possible to compare the actual return to Maurice Blackburn with any expected return at the time of the GCO application (see item 9 in the table above). That situation differs from a situation where there was an expected IRR range at the time of the GCO application and the actual

150 *Allen No 4* [2024] VSC 487 at [67].
151 [2025] VSC 160 at [181].
152 [2025] VSC 389 at [112].

IRR falls outside that range.

59 For the reasons outlined above, we do not consider that an amendment to the GCO rate is appropriate or necessary to ensure that justice is done in the proceeding.[153]

60 There is one further matter that we consider it appropriate for us to address. As outlined in the MB Submissions, under the present GCO rate, group members will receive a lesser amount of the settlement sum than what that rate suggests (72.11% v 75.34%).[154] This is because, in addition to a deduction pursuant to the GCO, administration costs and a reimbursement payment to the lead plaintiff are also to be deducted from the settlement sum before it is distributed to group members.[155] Maurice Blackburn submits that this is not a material difference, particularly given that this differential will be offset in part by accrued interest on the settlement sum.[156]

61 A similar issue arose in *O'Brien*.[157] Having regard to Harris J's reasoning in that case, we do not consider that the additional deductions from the settlement sum warrant any reduction of the GCO rate (such as to shift payment of these costs from group members to Maurice Blackburn). This is for the following reasons:

(a) In *O'Brien*, Harris J considered that requiring the firm to absorb settlement administration costs would not be "fair, or necessary to ensure that the interests of the group members are protected".[158] Settlement administration costs are "an essential cost to ensure the efficient and correct distribution of the settlement to group members" and her Honour therefore considered it fair that this cost be deducted from group members' portion of the settlement sum, rather than from the anticipated proportion of legal costs payable to the firm.[159]

(b) In the present case, Osborne J considered it appropriate to make the GCO for various reasons, including because "it provides certainty to the plaintiff and group members that they would be guaranteed to receive a percentage of any recovered sum".[160] This suggests that the GCO was made on the basis that no further deductions would be made from group members' portion of any recovered sum. However, although

153 *Allen No 4* [2024] VSC 487 at [63](c).
154 MB Submissions at [8](c).
155 MB Submissions at [8](c); paragraph 9 of the Settlement Approval Orders.
156 MB Submissions at [8](c).
157 *O'Brien* [2025] VSC 389 at [116]-[123].
158 *O'Brien* [2025] VSC 389 at [123].
159 *O'Brien* [2025] VSC 389 at [123].
160 GCO Ruling at [112](a) (emphasis added).

> Osborne J considered that any comparison with an alternative funding model was "inherently speculative", his Honour stated that third party funding was the most likely alternative and noted Ms Gilsenan's evidence "to the effect that she anticipates that a GCO is likely to provide a better outcome for group members than if third party litigation funding was secured at current prevailing rates".[161] In those circumstances, and having regard to the matters in item 7 in the table above (which suggest that the effective GCO rate compares favourably with third party litigation funding commissions), we consider it unlikely that his Honour would have declined to make the GCO had it been put to him that there would be further deductions for settlement administration and reimbursement to the lead plaintiff, such that the total amount available for distribution to group members would be less than what the ratcheted GCO rates would suggest.[162] As such, the additional deductions from the group members' portion of the settlement sum do not alter the basis on which the GCO was originally made, such as to warrant any reduction of the GCO rate.

62 Finally, and for completeness, we note that if the Court were to conclude that the GCO rate should be reduced, there is no clear metric for calculating the amount of this reduction. As Watson J stated in *Dawson v Insurance Australia Ltd (No 2)*:[163]

> [A]n assessment of an appropriate GCO percentage is not a purely mathematical exercise involving the input of known quantities, the application of a formula and the calculation of a percentage. It is a multi-factorial analysis requiring the application of judgement taking into account all relevant circumstances.

63 We respectfully submit that this equally applies to any review of a group costs order rate. As such, calculating the amount by which a group costs order rate should be reduced is necessarily a fact-specific exercise and involves the application of judgement, such that there is unlikely to be a single "correct" amount by which the rate should be reduced in any given case.

64 In the present case, if the Court concluded that the GCO rate should be reduced, the amount of that reduction could be determined by reference to different factors or integers, depending on the basis for the Court's conclusion that the extant rate is excessive. For example:

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161 GCO Ruling at [106]-[107].
162 See *O'Brien* [2025] VSC 389 at [118]-[120].
163 [2025] VSC 417 at [16](a).

(a) If the Court concluded that the GCO rate should be reduced because an IRR of [redacted] was not within Maurice Blackburn or the Court's contemplation at the time that the GCO application was made, the Court might consider that the GCO rate should be reduced to a rate that would result in Maurice Blackburn's IRR being [redacted]

We note that further evidence from Maurice Blackburn would be required to establish what that GCO rate would be.

(b) Alternatively, if the Court concluded that the GCO rate should be reduced because it was not in Maurice Blackburn or the Court's contemplation at the time that the GCO application was made that only [redacted] of the total legal budget would be expended to achieve a settlement outcome (see item 6 in the table above), the Court might consider that the GCO rate should be reduced to a rate that would result in Maurice Blackburn achieving an IRR which assumes the actual settlement sum of $87M, the actual timing of that settlement but that [redacted] of the estimated budget had be incurred rather than only [redacted]

E. Conclusion

65 In all the circumstances, and applying the principles and relevant factors identified by Watson J in *Allen No 4*, we respectfully submit that it is not necessary or appropriate to make an order pursuant to s 33ZDA(3) of the Act to reduce the effective GCO rate of 24.66%.

14 August 2025

Melanie Szydzik

Alexia Staker

ANNEXURE A

GROUP COSTS ORDER RATES ORDERED TO DATE

(a) Group costs order rates initially ordered

Date		Case	Group costs order percentage
1.	7 February 2022	*Allen v G8 Education Ltd* [2022] VSC 32	27.5%
2.	26 April 2022	*Bogan v The Estate of Peter John Smedley (deceased)* [2022] VSC 201	40%
3.	1 August 2022	*Nelson v Beach Energy; Sanders v Beach Energy* [2022] VSC 424	24.5%
4.	8 November 2022	*Gehrke v Noumi Ltd* [2022] VSC 672	22%
5.	6 December 2022	*Mumford v EML Payments Ltd* [2022] VSC 750	24.5%
6.	13 December 2022	Written reasons for the award of the group costs order appear on the Court file: *Fuller v Allianz; Wilkinson v Allianz* (Supreme Court of Victoria, Nichols J, 13 December 2022, written reasons provided to the parties 1 November 2024, first revision dated 28 February 2025)[164]	25%
7.	16 December 2022	*Lieberman v Crown Resorts* [2022] VSC 787	16.5 – 27.5%
8.	3 March 2023	*Fox v Westpac Banking Corporation (No 2)* [2023] VSC 95	24.5%
9.	3 March 2023	*Nathan v Macquarie Leasing Pty Ltd* [2023] VSC 95	24.5%

[164] See *Fuller* [2025] VSC 160, footnote 7.

Date		Case	Group costs order percentage
10.	8 August 2023	*Anderson-Vaughan v AAI Limited* [2023] VSC 465	25%
11.	19 September 2023	*DA Lynch v Star Entertainment Group* [2023] VSC 561	14%
12.	27 September 2023	*Lidgett v Downer EDI Ltd* [2023] VSC 574	21%
13.	23 November 2023	*5 Boroughs NY Pty Ltd v Victoria (No 5)* [2023] VSC 682	30%
14.	15 December 2023	*Maglio v Hino Motors Ltd* [2023] VSC 757	17.5% - 25%
15.	19 December 2023	*Thomas v The A2 Milk Company Ltd* [2023] VSC 768	24%
16.	29 February 2024	*Norris v Insurance Australia Group Ltd* [2024] VSC 76	30%
17.	28 March 2024	*Kilah v Medibank Private Ltd* [2024] VSC 152	27.5%
18.	11 April 2024	*Raeken Pty Ltd v James Hardie Industries plc* [2024] VSC 173	27.5%
19.	26 June 2024	*Gawler v Fleet Partners Group Ltd* [2024] VSC 365	39%
20.	22 August 2024	*Warner v Ansell Ltd* [2024] VSC 491	25% - 40%
21.	20 December 2024	*Dawson v Insurance Australia Ltd* [2024] VSC 808	27.5%
22.	23 May 2025	*Clarke v JB Hi-Fi Group Ltd* [2025] VSC 288	30%

Date		Case	Group costs order percentage
23.	18 July 2025	*Edwards v Hyundai Motor Company Australia Pty Ltd (No 3)* [2025] VSC 429	15% - 24.75%
24.	12 August 2025	*Laricchia v WiseTech Global Ltd* [2025] VSC 482	35%

MEAN, MEDIAN, MODE[165]

Mean	26.19%
Median	25%
Mode	27.5%

(b) Group costs order rates confirmed on review in the context of settlement approval

Date		Case	Group costs order percentage
1.	7 February 2022	*Allen v G8 Education Ltd* [2022] VSC 32	27.5%
2.	2 April 2025	*Fuller v Allianz Australia Insurance Ltd* [2025] VSC 160	25%
3.	25 June 2025	*Gehrke v Noumi Ltd* [2025] VSC 373	22%
4.	3 July 2025	*O'Brien v Australia and New Zealand Banking Group Ltd* [2025] VSC 389	24.5%
5.	4 August 2025	*Anderson-Vaughan v AAI Ltd* [2025] VSC 469	25%

MEAN, MEDIAN, MODE

Mean	24.8%
Median	25%
Mode	25%

[165] For the purposes of these calculations, where the Court has approved a stepped rate, we have adopted the mean of the range.