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

Not Restricted

S ECI 2023 01521

BETWEEN:

JAMES KENDALL MCCOY — Plaintiff

v

HINO MOTORS LTD — First Defendant

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

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JUDGE:	Delany J
WHERE HELD:	Melbourne
DATE OF HEARING:	22 August 2025
DATE OF RULING:	4 September 2025
CASE MAY BE CITED AS:	McCoy v Hino Motors Ltd (No 2)
MEDIUM NEUTRAL CITATION:	[2025] VSC 553

REPRESENTATIVE PROCEEDINGS – Part 4A Group proceeding – Settlement approved – Approval for payment of legal costs from settlement sum – Whether group costs order should be varied – Necessary or appropriate that group costs order should be varied – *Supreme Court Act 1986* (Vic) Part 4A, ss 33ZDA(1), (3) – *Allen v G8 Education Ltd (No 4)* [2024] VSC 487, applied.

APPEARANCES:	Counsel	Solicitors
For the Intervener	William Edwards KC with Dion Fahey	Maurice Blackburn
For the Contradictors	Melanie Szydzik SC with Alexia Staker	

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HIS HONOUR:

A The issue for determination

1 On 23 July 2025 I published my reasons for the approval of the settlement of this group proceeding ('approval reasons').[1] These reasons assume a familiarity with the approval reasons. Defined terms adopted in those reasons are adopted in these reasons.

2 The settlement sum was $87 million inclusive of costs. In addition to approving the settlement I approved the settlement distribution scheme ('SDS'). I deferred for further consideration whether there should be an amendment to the group costs order ('GCO') made pursuant to s 33ZDA(1) of the *Supreme Court Act 1986* (Vic) ('Act') on 15 December 2023 by Osborne J. These reasons concern that issue.

3 The GCO provided for a stepped percentage rate payable to Maurice Blackburn, the law practice given carriage of the proceeding following a contested carriage dispute, depending upon the amount of any settlement or damages awarded following a successful trial. The GCO specifies the following percentages, subject to later amendment pursuant to s 33ZDA(3) of the Act:

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%

4 Maurice Blackburn is currently entitled to 24.66% of the settlement sum, or $21,450,000. This percentage represents a blended rate due to the amount of the settlement sum.

5 In his reasons for making the GCO ('GCO reasons'), Osborne J said 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 …'.[2]

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1 *McCoy v Hino Motors Ltd* [2025] VSC 447 ('approval reasons').

2 *Maglio v Hino Motor Sales Australia Pty Ltd* [2023] VSC 757 ('GCO reasons') [111].

6 Maurice Blackburn filed written submissions in advance of the approval hearing in support of maintaining the blended percentage rate of 24.66%.

7 On 24 July 2025 I made an order appointing Contradictors:

> 1. Pursuant to s 33ZF of the *Supreme Court Act 1986* (Vic) ('the Act') and/or the Court's inherent jurisdiction, Melanie Szydzik SC and Alexia Staker be appointed as contradictors ('the Contradictors') in the settlement approval application made in this proceeding pursuant to s 33V of the Act.
>
> 2. 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 24.66%.

8 In *Bolitho v Banksia Securities Ltd (No 6)*, John Dixon J described the role of a contradictor in a group proceeding as follows:[3]

> 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.

9 In *Gill v Ethicon Sàrl (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'.[4]

10 The Contradictors have ably discharged their role in accordance with the authorities to which I have referred and in accordance with the terms of the order providing for their appointment. The Contradictors filed comprehensive written submissions. They appeared at the s 33ZDA(3) hearing. I have been very much assisted by their detailed and systematic analysis of the evidence and of the issues by reference to the applicable principles.

11 The Contradictors' submissions conclude 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%. They express the view that should the Court conclude the GCO rate

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3 (2019) 63 VR 291; [2019] VSC 653, 312 [73(c)].

4 [2023] FCA 228 [42].

should be reduced because the internal rate of return ('IRR') which would otherwise result from the 15 December 2023 order was not within Maurice Blackburn or the Court's contemplation at the time that the GCO 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 at the top of the range 'modelled' by Maurice Blackburn in support of the s 33ZDA(1) order.

12 For the reasons that follow, I consider that unless the GCO percentage is amended it will give rise to a disproportionate return to the law practice. It is appropriate or necessary to amend the GCO percentage in order to ensure that justice is done in the proceeding and that the costs payable to the law practice under s 33ZDA remain proportionate. Amendment will ensure the costs represent an appropriate reward in the context of the effort and investment of the legal practice, the duration of the proceeding, and the risks which were undertaken under the GCO. I will order amendment pursuant to s 33ZDA(3) from the otherwise effective rate of 24.66% of the settlement sum to an effective rate of 17.392% of the settlement sum.

B <u>The evidence, submissions and confidentiality</u>

13 Much of the evidence and also parts of the submissions relevant to the issue for determination are appropriately the subject of confidentiality orders. If such orders were not made, details of without prejudice communications leading to the settlement of the proceeding and the commercially sensitive metrics about which Maurice Blackburn has given evidence and about which there have been detailed submissions would be disclosed to the public and to competitors of Maurice Blackburn.

14 Having been satisfied in accordance with s 30(2) of the *Open Courts Act 2013* (Vic) ('*Open Courts Act*') that a closed Court order was necessary to prevent a real and substantial risk of prejudice to the proper administration of justice that could not be prevented by other reasonably available means, I made an order at the outset of the s 33ZDA(3) hearing closing the Court pursuant to s 30(1) of the *Open Courts Act*. That order relevantly provides:

> 1. Pursuant to s 30 of the *Open Courts Act 2013* (Vic), the hearing of the proceeding on 22 August 2025 is to take place in closed Court, with only

> the plaintiff, the intervenor, the intervenor's legal representatives and the Contradictors (appointed pursuant to the Order made on 25 July 2025) present.

15 To ensure appropriate confidentiality is maintained these reasons do not refer to confidential evidence or submissions. I have included references to confidential evidence and submissions in confidential Annexure B to these reasons. Annexure B has been provided at the time of publication of these reasons to the plaintiff, the Intervenor and to the Contradictors but is deliberately omitted from the published version of these reasons.

16 For the same reasons that I made the closed Court order, I will make an order pursuant to s 17 of the *Open Courts Act* prohibiting the disclosure by publication or otherwise of Annexure B to these reasons. The order pursuant to s 17 will be subject to the same restrictions provided for in the closed Court order set out above.

17 The relevant evidence and submissions fall into two categories: evidence that was before Osborne J in support of Maurice Blackburn being awarded carriage, and evidence and submissions before me on the approval hearing and on the s 33ZDA(3) hearing:

(a) Evidence in support of the original GCO which is confidential in whole or in part comprises:

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

(ii) the first affidavit of Ms Rebecca Gilsenan affirmed 6 October 2023 ('first Gilsenan affidavit'); and

(iii) the second affidavit of Ms Rebecca Gilsenan affirmed 6 October 2023 ('second Gilsenan affidavit').

(b) Evidence and submissions filed in support of the settlement approval and in relation to the s 33ZDA(3) hearing which is confidential in whole or in part comprises:

(i) the first Taylor affidavit;

(ii) the open second Taylor affidavit;

(iii) the confidential third Taylor affidavit;

(iv) the affidavit of Gregory John Williams (solicitor acting on behalf of the defendants) ('Williams affidavit') sworn 13 June 2025;

(v) the fourth Taylor affidavit;

(vi) the fourth affidavit of Ms Rebecca Gilsenan affirmed 1 August 2025 ('fourth Gilsenan affidavit');

(vii) supplementary submissions filed by counsel for the plaintiff dated 15 July 2025;

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

(ix) Contradictors' submissions dated 14 August 2025 ('Contradictors' submissions').

C The legislation and applicable principles

18 Section 33ZDA(1)–(3) of the Act provides:

> **Group costs order**
>
> (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.
>
> (2) If a group costs order is made—
>
> (a) the law practice representing the plaintiff and group members is liable to pay any costs payable to the defendant in the proceeding; and
>
> (b) the law practice representing the plaintiff and group members must give any security for the costs of the defendant in the proceeding that the Court may order the plaintiff to give.

> (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).

19 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. The Court's role in assessing costs is supervisory. In *Botsman v Bolitho*, the Court of Appeal referred to this description of the role:[5]

> In Earglow, 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 Section 24 of the *Civil Procedure Act 2010* (Vic) ('CPA') sets out the overarching obligation to ensure that costs are reasonable and proportionate. The section 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.

21 Pursuant to s 33ZDA of the Act, when determining whether costs orders are appropriate or necessary to ensure justice is done, it is necessary to consider the 'reward for risk'. That is, the risk borne by the law practice when undertaking the funding of the litigation and assuming the risk of having to meet any adverse costs orders that might be made.

22 In *Fox v Westpac Banking Corporation*, Nichols J discussed proportionality in the context of a GCO:[6]

> 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

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5 (2018) 57 VR 68; [2018] VSCA 278, 115 [222] (Tate, Whelan and Niall JJA) (citations omitted).

6 (2021) 69 VR 487; [2021] VSC 573, 529-30 [147]-[148] ('Fox'). See also *Gehrke v Noumi Ltd* [2022] VSC 672 [53](c)-(e) (Nichols J); *Mumford v EML Payments Ltd* [2022] VSC 750 [94] (Delany J); *Warner v Ansell Ltd* [2024] VSC 491 [62] (Garde J).

question whether the reward proposed is (among other things) proportional to the risk to be undertaken.

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.

23 In *Gawler v FleetPartners Group Ltd*, Waller J observed that s 33ZDA implicitly permits the linking of risk and reward in the calculation of fees:[7]

Specifically, the calculation of an appropriate or necessary percentage may properly take into account not only the value of the legal services performed, but the value of a reasonable return to the law practice for the financial risk assumed by it. Considerations of proportionality and reasonableness are not substitutes for the statutory test, but may assist in answering the statutory question when it comes to setting a percentage rate. Justice Nichols explained in Beach that:

> [T]he relationship between the assumption of financial risk and return on that investment is far from the only consideration that will inform the appropriateness of a percentage rate ultimately fixed, including by amendment under s 33ZDA . … [M]aking a Group Costs Order serves to fix the method of calculation of legal costs in which, among other things, consideration of the legal work that has been done will be a relevant integer. The assumption of risk by a law firm who conducts the proceeding is but one element of the equation. Investment analysis tools might assist to measure that element in a principled way. … How those considerations fall to be weighed in any given case remains to be seen, and can only be assessed meaningfully in the context of the facts of a particular case.

24 Earlier, when making a GCO in *Allen v G8 Education Ltd*, Nichols J said:[8]

As I said in *Fox/Crawford*, considerations of proportionality and reasonableness will assist in answering the statutory question raised by s 33ZDA, and because the statutory model engages with both risk and reward, it invites the question whether the costs allowed are, among other things, proportional to the risk undertaken by the law firm in funding the proceedings. That question is likely to assume significance on any review under s33DZA(3) [sic].

Although it is appropriate to fix the proposed rate it by reference to the presently available measures, the plaintiffs and their solicitors in particular,

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7 [2024] VSC 365 [24] (citations omitted).

8 [2022] VSC 32 [90]-[92] ('*Allen v G8*').

must be mindful of the need to assist the Court when the occasion arises for scrutinising the appropriateness of the rate now fixed, in the future. When that occasion arises, other measures and other paradigms beyond the general evidence of the kind led on this application (determined as it is at an early stage in the litigation), might well be informative. As I said in *Fox/Crawford* (by way of example) an insurance-based actuarial calculation might assist in assessing why a proposed return is likely to be reasonable for an investor with the particular funder's characteristics.

The plaintiffs' solicitors should be mindful of the need to facilitate any future assessment on questions concerning the appropriate reward for the assumption of risk, which is by its nature a forward-looking decision made now, but which might be later evaluated by reference to the facts and assessments that informed the decision to assume the risk, made at this point in time. There may well be other measures of reasonableness and proportionality which will require reference to what will be past events, at the time at which any s 33ZDA(3) question arises.

25 In *Allen v G8 Education Ltd (No 4)*,[9] Watson J reviewed the GCO made by Nichols J in *Allen v G8*. *Allen v G8 (No 4)* was the first occasion on which the Court considered the exercise of the discretion under s 33ZDA(3). In *Allen v G8 (No 4)*, Watson J identified the principles to be applied when considering whether to exercise the power under s 33ZDA(3):[10]

(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 [sic] 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. Whilst 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).

(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.

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9 [2024] VSC 487 ('*Allen v G8 (No 4)*').

10 [2024] VSC 487 [63].

26 His Honour then made some observations about the kind of evidence that will generally be of assistance when determining whether to amend the GCO:[11]

> (a) Information regarding the hours worked by the legal practice on the proceeding;
>
> (b) The actual costs incurred by the firm for labour, overheads, disbursements, financing costs and insurance (if any);
>
> (c) The costs which would have been charged by the firm on an hourly rate basis;
>
> (d) Appropriate financial metrics including the ROI and IRR;
>
> (e) Comparisons with other funded proceedings; and
>
> (f) How the settlement or judgment sum compares to any realistic settlement range estimated at the time of making the group costs order.

27 Referring to earlier decisions in the Federal Court of Australia regarding common fund orders in class actions Watson J cautioned that the Court should avoid 'hindsight bias', and that '[t]he 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'.[12] His Honour also said:[13]

> Where 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.

D <u>The GCO hearing and the carriage dispute</u>

28 This proceeding was commenced on 17 April 2023 following the issue of a separate but overlapping group proceeding by a different law practice, Gerard Malouf and Partners ('GMP'), on behalf of different lead plaintiffs, Dominic Maglio and Moledina Transport Pty Ltd ('the Maglio plaintiffs') on 30 September 2022.[14]

29 The carriage dispute and the related GCO applications were heard on 21 November 2023. The hearing followed a quasi-tender process in which the two law practices,

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11 [2024] VSC 487 [85].

12 [2024] VSC 487 [67]. See also *Fuller v Allianz Australia Insurance Ltd (Settlement Approval)* [2025] VSC 160 (Matthews J) ('*Fuller*').

13 [2024] VSC 487 [67].

14 *Maglio v Hino Motor Sales Australia Pty Ltd* [2023] VSC 757 [1].

Maurice Blackburn and GMP, engaged. On 15 December 2023 Osborne J published the GCO reasons dealing both with the carriage contest and the GCO rate. The carriage dispute was determined in favour of this proceeding.

30 On 29 January 2020 the Maglio plaintiffs filed an application for leave to appeal his Honour's ruling concerning carriage.

31 On 12 April 2024 Hino Japan and Hino Australia filed their joint defence in this proceeding. On 24 May 2024 the plaintiff in this proceeding filed his reply.

32 On 24 and 25 July 2024 the Maglio plaintiffs filed a notice of discontinuance of their application for leave to appeal, bringing an end to the carriage dispute with this proceeding continuing as the sole proceeding against Hino Japan and Hino Australia on behalf of the group members.

D.1 The evidence on the GCO application

33 When reviewing the GCO rate pursuant to s 33ZDA(3) an important starting point is the evidence that was before the Court on the hearing of the GCO application pursuant to s 33ZDA(1).

34 The first Gilsenan affidavit in support of carriage detailed the class action experience of Ms Gilsenan and of Maurice Blackburn.

35 Ms Gilsenan gave evidence that at the time of her first affidavit Maurice Blackburn had commenced 124 class actions representing almost 15% of all class action filings in Australia. Maurice Blackburn had settled 61 class actions for the total amount of approximately $4.2 billion. At that time the results achieved by Maurice Blackburn in class actions represented over half of the aggregate settlement amount of all class actions in Australia.

36 Included in the class actions that had been conducted by Maurice Blackburn and had settled in which Ms Gilsenan had been involved were the VW, Audi and Skoda class actions,[15] a series of class actions against vehicle manufacturers in relation to

[15] *Alister Dalton v Volkswagen AG* (NSD 1459 of 2015); *Robyn Tanya Richardson v Audi AG* (NSD 1472 of 2015); *Steven Roe v Skoda Auto a.s.* (NSD 1473 of 2015).

alleged devices designed to cheat diesel emission tests. Ms Gilsenan gave evidence that:[16]

> The VW, Audi and Skoda Class Actions were among the first Australian class actions to seek redress for alleged defects in a vehicle's diesel emission control system through causes of action founded upon consumer protection laws, including breaches of consumer guarantees and misleading or deceptive conduct.

37 Each of those actions were initiated in 2015. Each of those actions settled after four years, after a stage 1 hearing and 'shortly prior to the commencement of the Stage 2 hearing'.[17] The settlement of those actions was approved by the Federal Court on 1 April 2020.[18]

38 Ms Gilsenan gave evidence that the senior lawyers who conducted the VW, Audi and Skoda class actions were still employed by Maurice Blackburn at the time of the carriage dispute in this proceeding. Some of those lawyers had been advising on this proceeding and senior counsel in this proceeding was also senior counsel in the Maurice Blackburn-led VW, Audi and Skoda class actions.

39 Ms Gilsenan gave evidence that as at October 2023 Maurice Blackburn had accumulated considerable intellectual property relating to:

(a) a detailed understanding of the regulatory framework which underpins the alleged misconduct in this proceeding; and

(b) addressing evidentiary, logistical and strategic challenges that arose in the VW, Audi and Skoda class actions and which she considered likely to have application in this proceeding.

40 The matters to which Ms Gilsenan referred in this respect relevantly included managing a discovery process involving foreign languages.

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16 First Gilsenan affidavit, [28].

17 Ibid [41].

18 *Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 637. The Stage 1 hearing comprised a hearing of 12 important separate questions which arose in all proceedings. The Stage 2 hearing was to be a further joint hearing of common issues in the proceedings: see [18], [20], [22].

D.2 Initial cost estimates

41 Maurice Blackburn entered a retainer agreement with the lead plaintiff, Mr McCoy, on 13 April 2023.[19] Total estimated legal costs of the proceeding up to the conclusion of an initial trial ('the costs budget'), identified in clause 10 of the retainer agreement, were very substantial.[20]

42 The costs budget included estimates in respect of particular aspects of 'common benefit work'.[21]

43 Clause 6 of the retainer agreement stated that if there was a successful outcome an uplift fee would apply. The agreement referred to the intention of Maurice Blackburn to act on the basis of an uplift until such time as a GCO application that it proposed to make was determined by the Court. The retainer agreement included an estimate of the uplift fee that would be payable assuming all of the steps necessary to secure a successful outcome were first undertaken.[22]

D.3 Evidence concerning ROI and IRR

44 In the second Gilsenan affidavit in support of carriage Ms Gilsenan gave evidence concerning Maurice Blackburn's return on investment ('ROI') and its required minimum IRR in order that, absent exceptional circumstances, Maurice Blackburn would undertake an investment in a class action. This evidence included historic IRRs across Maurice Blackburn's portfolio of class action cases which had settled in the previous five years, the historic interquartile range of IRRs (being from the 25th to the 75th percentile), and of the next highest IRR above the 75th percentile achieved by Maurice Blackburn in class actions. The second Gilsenan affidavit also included evidence of outlier IRRs.[23]

45 It was Ms Gilsenan's evidence that in her experience, the resolution of a class action at mediation typically occurs at a late stage of a proceeding not long before trial, when a significant portion of Maurice Blackburn's legal budget has already been

19 First Gilsenan affidavit, [63].
20 See Confidential Annexure B.
21 See Confidential Annexure B.
22 See Confidential Annexure B.
23 See Confidential Annexure B.

expended. Ms Gilsenan gave evidence that she had caused IRR modelling to be undertaken assessed both at a point shortly prior to trial (when settlement typically occurs), and after trial when 100% of the costs budget was assumed to have been expended.[24]

46 Ms Gilsenan gave evidence about the settlement sums that would be required to be achieved in this proceeding, assuming settlement at mediation just prior to trial, in order to achieve an IRR variously equating to the Maurice Blackburn generally acceptable minimum IRR, the IRR at the 25th percentile, the IRR at approximately the 50th percentile and the IRR at the 75th percentile, in each case based on Maurice Blackburn's IRR historical performance in class actions over the previous five years.[25]

47 Ms Gilsenan gave evidence about the risks and complexities of the proceeding concerning both liability and quantum.

E The process and timing of the settlement

48 The unusual feature of this group proceeding is that it settled at a relatively early stage. The settlement was arrived at well before Ms Gilsenan anticipated, based on her own and on Maurice Blackburn's past experience that settlement was likely to occur shortly prior to trial.

49 Mr Taylor gave evidence in the first Taylor affidavit that:

> Almost immediately after the discontinuance of the appeals, the parties in this Proceeding proactively began to engage in a dispute resolution conferral process on a without prejudice basis, with a view to narrowing the issues in dispute and to explore whether a resolution could be reached.
>
> In aid of the conferral process, the Defendants also agreed to provide the Plaintiff with multiple tranches of documents pursuant to section 26 of the *Civil Procedure Act 2010* (Vic). Between 2 August 2024 and 5 December 2024, a total of 5,460 documents were produced by the Defendants pursuant to that agreement.

50 The defendants engaged in the dispute resolution conferral process with the plaintiff's legal advisers including participating in without prejudice meetings on

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24 See Confidential Annexure B.

25 See Confidential Annexure B.

8 August 2024 (less than one month after the Maglio plaintiffs discontinued their appeal), on 9 September 2024 and on 10 October 2024.

51 The parties reached an in-principle agreement to settle the proceeding at a mediation held on 10 and 11 December 2024 with the Hon Patricia Bergin AO SC as mediator.

52 The mediated settlement was arrived at after pleadings had closed but without discovery, including without the need for the translation of large tranches of documents from Japanese to English by the plaintiff's lawyers and without the filing and service of evidence including expert evidence.

53 The settlement at mediation was achieved by the parties without the time delays that are common in group proceedings. The settlement occurred before opt out. It occurred before class closure and in the absence of registration by group members. These steps were provided for after agreement in-principle had been reached at mediation and before the approval hearing.

54 The early settlement was arrived at because of the co-operative and proactive approach of Hino Japan and Hino Australia and their legal representatives, and due to the embrace by the lead plaintiff and his legal advisers, including those from Maurice Blackburn, of that approach. The settlement was the result of active engagement in meaningful without prejudice conferral from a very early stage in the proceeding after the GCO was made and immediately following the discontinuance of the appeal concerning carriage. As I said in the approval reasons:[26]

> The prompt compliance with the defendants with their s 26 disclosure obligation obviated the need for discovery, often a very costly and time-consuming process in class actions such as the present.
>
> The express warranties in clause 16.2 of the settlement deed, including that the defendants have disclosed by way of production of documents pursuant to s 26 or by communications or exchanges on a without prejudice basis all relevant information that they consider or ought reasonably consider critical to the settlement or resolution of the dispute between the parties underpins the settlement.

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26 *McCoy v Hino Motors Ltd* [2025] VSC 447 [17]-[19] (citations omitted).

> It is clear to me that the practitioners involved in the proceeding and their clients have acted through their engagement in the without prejudice conferral process that took place between August and December 2024 and in the mediation that followed in a manner consistent with their overarching obligations in ss 19, 20, 24 and 25 of the CPA to cooperate in the conduct of the proceeding, to take steps that are necessary to facilitate the resolution or determination of the proceeding and that they have done so in the lead up to the settlement of the proceeding acting promptly and in a manner that ensures that the costs of the proceeding are reasonable and proportionate.

F The approval application and the s 33ZDA(3) hearing

F.1 The evidence

55 Due to some confidential evidence relied on in the context of the settlement approval application I invited evidence and submissions at the s 33ZDA(3) hearing concerning the US$237.5 million settlement first made public on 27 October 2023 in the United States of a class action against Hino Japan and others arising out of the purchase or lease of approximately 104,000 Hino diesel trucks.[27] I invited evidence about whether the existence and settlement of that proceeding which alleged a scheme to cheat on diesel emissions was relevant to risk assessment in this proceeding.

56 As pointed out by evidence and in submissions, the successful resolution of a class action in the United States is not a reliable indicator of how the same or a related corporate defendant might approach a similar claim against it in Australia. The 'Roundup' litigation which settled in the United States for an amount exceeding US$10 billion and was unsuccessfully pursued at trial in Australia provides one practical example.[28] The Essure contraceptive group proceeding which was unsuccessful in Australia after a substantial settlement in the United States provides a second example.[29]

57 In this case the risks in relation to liability and quantum which were identified at the time of the hearing before Osborne J did not materially change between the time of his Honour's GCO reasons and the time the approval application was heard.[30]

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27 See Confidential Annexure B.
28 *McNickle v Hunstman Chemical Company Australia Pty Ltd* [2024] FCA 807.
29 *Turner v Bayer Australia Ltd* [2024] VSC 760.
30 See Confidential Annexure B.

That being the case, no adjustment to the GCO pursuant to s 33ZDA(3) on account of a material change to the risk in relation to liability or quantum is appropriate.

58 It is possible to compare the GCO rate resulting from the monetary settlement of this proceeding with GCO rates in group proceedings and with five GCO rates that have been confirmed upon review pursuant to s 33ZDA(3) in the context of settlement approval. Annexure A to these reasons is a schedule prepared by the Contradictors that details GCO rates ordered to date.[31] As identified by the Contradictors, the effective GCO rate of 24.66% in this case is slightly below the s 33ZDA(3) median GCO rate of 25%. It is also below the mean and mode GCO rates of 26.75% and 27.5% respectively for all GCOs ordered to date.

59 With the assistance of the Contradictors' submissions, it is possible to review the outcome for the law practice if the GCO remains undisturbed measured as a percentage of the settlement sum in terms of ROI and also calculated by reference to the 'Lodestar method'.[32]

60 Following settlement it is also possible to compare what eventuated in terms of the actual costs incurred by the law practice, and IRR achieved, compared to what had earlier been budgeted for and modelled by Maurice Blackburn.

61 The settlement sum being known with precision, the time that it took until the settlement was approved and the amount of the costs budget actually expended now being known, it is possible to calculate the precise IRR to the law practice represented by $21,450,000.

F.2 The MB submissions

62 In its submissions in support of maintaining the GCO percentage Maurice Blackburn noted that in the GCO reasons the Court emphasised:

(a) The rate of the GCO was the result of a competitive and quasi-tender process arising from a carriage dispute, giving comfort as to the lowest market price available to fund the proceedings.

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31 The table was handed up during the hearing.

32 See Confidential Annexure B.

(b) The rate was prima facie reasonable and proportionate having regard to rates imposed in other cases.

63 It was submitted the outcome of deductions from the settlement sum, including the specified GCO percentage and the costs of scheme administration, if remaining undisturbed, will result in group members recovering slightly less than the rates suggested by the GCO (72.11% compared to 75.34%), which is not a material difference. Further, because the SDS provides for the application of interest accrued from the settlement fund towards the payment of settlement administration costs, the accrued interest will offset part of those additional costs and reduce the differential from the GCO rate.

64 In its submissions Maurice Blackburn drew particular attention to the following principles:

(a) 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 GCO.

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

(c) The Court should not approach the crystallisation of a favourable outcome for the law practice as an occasion of itself to amend a GCO. In undertaking the task to assess whether the GCO, as made, remains proportionate in light of the actual risks taken and other known matters as at the time when the Court carries out this further assessment, it is important to avoid hindsight bias.

(d) Where the outcome of a proceeding falls within the range of estimates relied upon by the law practice in support of its application for the original GCO or where the outcome falls outside those estimates but not substantially so, this will weigh against amending the GCO percentage on account of a lack of proportionality.

65 Maurice Blackburn submitted the settlement sum falls within the range of outcomes that were anticipated at the time of the GCO application. It submitted that although the actual return can now be more accurately measured using IRR and ROI metrics, the Court in *Allen v G8 (No 4)* noted the limitations of such metrics. In particular, that in 'good' settlements the calculated IRR and ROI will tend to be relatively high, and that a class actions law practice will have a portfolio of cases, in respect of which the ROI or IRR will take into account those which lose and result in significant negative returns, those which settle on unfavourable terms and those which settle favourably.

66 It was submitted the IRR result applying the percentage specified in the s 33ZDA(1) order is not outside the bounds of Maurice Blackburn's previous experience across its class actions portfolio. Maurice Blackburn submitted there was no predictive modelling of the IRR concerning this proceeding at the time of the GCO hearing. What was modelled was past performance. It was submitted that positive IRR results such as in this case offset, over time, negative IRR results. Either way group members get the benefit of the GCO. The plaintiff sought to give them certainty; whether the outcome is 'good' or 'bad' for the law practice, group members get what they were promised.

67 Maurice Blackburn emphasised that, in the specifics of this case, an apparently high IRR is not of itself an indicator of unreasonableness or disproportionality. The relative significance of a high IRR should be properly contextualised and scrutinised in circumstances where the court is satisfied on the evidence that an appropriate level of legal work has been performed, a realistic budget was set and followed, and where a fair and reasonable settlement was obtained in a timely manner.

68 Referring to the evidence before Osborne J on the GCO application, Maurice Blackburn rejected the proposition that the outcome in this case was one which was not contemplated by the Court or the law practice. The evidence given was of the interquartile range, but the selection of that range means there were settled cases with higher IRRs which, assuming those cases had settled closer to trial, would have required a higher settlement sum to achieve the same IRR. In essence, it was

submitted, an early settlement was within the range of outcomes that was taken on 'in a risk sense' at the time the GCO was made.

F.3 The Contradictors' submissions

69 The submissions filed by the Contradictors helpfully identify and systematically consider the evidence now available against the matters identified by Watson J in *Allen v G8 (No 4)*.

70 It is convenient to refer specifically to certain of those matters.

F.3.1 The costs incurred and the duration of the proceeding

71 As at 31 May 2025 Maurice Blackburn's costs to date and estimated costs to approval, but not including scheme administration costs, were approximately one third of the very substantial costs budget to completion.[33]

72 The expenditure of approximately one third only of the costs budget is due to a combination of the time at which the settlement occurred, early in the expected life of a proceeding of this type, and the fact that discovery and the preparation of evidence including expert evidence for trial had not been undertaken.

73 The modelling undertaken at the time of the carriage dispute and referred to in the first and second Gilsenan affidavits did not include modelling on the basis of an assumed early settlement with less than 50% of the costs budget having been expended.

74 The expenditure of approximately one third only of the costs budget includes the costs of opt out and registration, even though those costs were incurred after agreement in-principle was reached at the mediation. The percentage of the costs budget that was expended also reflects the fact that in order to meaningfully and effectively participate in the conferral process on behalf of the lead plaintiff and group members the law practice accelerated some of the work which in the ordinary course would have been performed at a later time in the proceeding.

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[33] 35.7% referred to in the fourth Taylor affidavit in the confidential annexure.

F.3.2 The quantum of the settlement sum

75 The GCO specified a staggered percentage in favour of the law practice depending upon the amount of any settlement in four bands, ranging from $0 to $75,000,000 at the bottom of the range to over $225,000,000 at the top of the range.

76 What is now known is that the settlement sum is within and at the lower end of the second band referred to in the GCO.[34] That being the case, there is no basis to revisit the GCO percentage by reason of the settlement sum being outside the anticipated range of any settlement.[35]

F.3.3 The percentage for risk

77 As identified by the Contradictors, if the GCO rate remains undisturbed, Maurice Blackburn will receive in the range of between 10% and 25% of the settlement sum in addition to its costs recovery for the risk it undertook under the GCO. The actual rate which remains confidential and is within that range is significantly higher than the 7.9% that Slater and Gordon received for the risk undertaken by that law practice in *Allen v G8 (No 4)*.[36]

F.3.4 The ROI

78 ROI involves a simple calculation comparing the amount of funds invested, in this case invested on legal costs, compared to the return on that investment without factoring in the time value of money. Because ROI does not factor in the time value of money it is of limited utility when evaluating whether the ROI is proportionate to the risk.

79 In *Allen v G8 (No 4)* Watson J referred to ROI data published by an ASX-listed litigation funder, Omni Bridgeway. Omni Bridgeway reported that its ROI on all completed cases (including those in which it lost some or all of its capital) is 1.2 and is approximately 1.9 on those cases which did not produce a negative return.

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34 See Confidential Annexure B.
35 *Allen v G8 (No 4)* [2024] VSC 487 [67].
36 See Confidential Annexure B.

Approximately 15% of its cases have an ROI exceeding 4.0 with some cases having an ROI exceeding 9.0.[37]

80 While the Maurice Blackburn ROI is and must remain confidential, if the GCO is not disturbed, Maurice Blackburn's ROI will be materially higher than 1.9.[38]

F.3.5 The IRR

81 In *Allen v G8 (No 4)* Watson J said:[39]

> … The IRR (internal rate of return) is, in effect, the annual rate of return expressed as a percentage that an investment generates. More strictly it is the discount rate which makes the net present value of the project cashflows (outgoing cashflows in the form of expenses and incoming cashflows in the form of revenue) zero.

82 IRR takes into consideration the time value of money. The actual IRR is now able to be calculated in this case by reference to the actual legal costs which have been expended, the time at which those costs were expended and the date of settlement. This enables the Court to compare the actual IRR achieved with historic IRR data calculations relating to the law practice that were undertaken prior to the GCO and which are detailed in the second Gilsenan affidavit.

83 If the GCO percentage remains undisturbed at 24.66%, Maurice Blackburn's IRR will be significantly higher than the 75th percentile of the historic five year range of IRR for the law practice in group proceedings. It will also be higher than the next highest IRR immediately above the 75th percentile which is referred to in the second Gilsenan affidavit.[40]

84 If it is assumed that the proceeding had settled closer to trial, two years later than it in fact settled, and if by that time a significant percentage of the costs budget had been expended, as would most likely have been the case, Maurice Blackburn's IRR would have approximated the minimum acceptable IRR at which, absent exceptional circumstances, Maurice Blackburn would undertake to fund a group

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37 [2024] VSC 487 [110].
38 See Confidential Annexure B.
39 [2024] VSC 487 [78].
40 See Confidential Annexure B.

proceeding.[41] The percentage in that circumstance would have been materially below the 25th percentile for IRR in respect of group proceedings conducted by the law practice, measured by reference both to the analysis in the second Gilsenan affidavit and also by reference to the most recent Maurice Blackburn statistics as at June 2025.[42]

F.3.6 The Lodestar method

85 The Lodestar method, commonly used in the United States, calculates the return to the law practice as a multiple of the firm's hourly rate fee, plus disbursements.

86 In the United States law practices are not exposed to adverse costs orders as is the case under s 33ZDA of the Act.

87 In *Allen v G8 (No 4)* Watson J noted that courts in the United States 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'.[43]

88 To the extent it might be relevant, noting the very different risk profile in this jurisdiction due to the adverse costs exposure, if the GCO remains undisturbed, the multiple, applying the Lodestar method, will be beyond the mean and median multiple referred to by Watson J in *Allen v G8 (No 4)*.[44]

G Consideration

89 As I said at the approval hearing, when determining whether an amendment should be made under s 33ZDA(3), it is appropriate to apply the principles identified by Watson J in *Allen v G8 (No 4)*.[45] When reviewing the GCO rate I bear in mind his Honour's observation that 'the Court should not approach the

41 See Confidential Annexure B.
42 See Confidential Annexure B.
43 [2024] VSC 487 [75(b)].
44 See Confidential Annexure B.
45 [2024] VSC 487. His Honour's approach in that case has been followed on a number of occasions since: see, eg, *Fuller v Allianz Australia Insurance Ltd (Settlement Approval)* [2025] VSC 160, [155] (Matthews J); *Gehrke v Noumi Ltd* [2025] VSC 373, [191] (Delany J); *O'Brien v Australia and New Zealand Banking Group Ltd* [2025] VSC 389 [93] (Harris J); *Anderson-Vaughan v AAI Ltd (Settlement Approval)* [2025] VSC 469, [69] (Matthews J).

crystallisation of a favourable outcome for the law practice as an occasion of itself to amend a group costs order'.

90 The absence of any submission or objection to the existing GCO rate, including by the Contradictors, weighs significantly in favour of leaving the existing percentage unamended.[46] However, this factor does not relieve the Court of its 'burden' in a settlement approval context to consider whether an amendment is appropriate.

91 As was held in *Allen v G8 (No 4)*, a review of a GCO rate pursuant to s 33ZDA(3) involves a 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'.

92 In some of the cases reference has been made to the protection s 33ZDA(3) provides against potential 'windfall' gains by solicitors.[47] However, as Nichols J said in Fox, when determining the rate on an application under s 33ZDA(1), a proposed GCO rate should be assessed by reference to the concepts of reasonableness and proportionality rather than concerns regarding potential 'windfalls':[48]

> 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.

The same approach is appropriate when reviewing a GCO pursuant to s 33ZDA(3).

93 The question that must be addressed is whether the percentage of the settlement sum payable to the law practice in return both for undertaking the legal work, and assuming the burden of the risk, continues to be reasonable and proportionate.

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46 *Allen v G8 (No 4)* [2024] VSC 487 [62].

47 See, eg, *Kilah v Medibank Private Ltd* [2024] VSC 152 [48] (Attiwill J); *Anderson-Vaughan v AAI Ltd* [2023] VSC 465 [51] (Stynes J).

48 *Fox v Westpac* (2021) 69 VR 487; [2021] VSC 573, 529 [145].

94 Although potentially relevant to an amendment of a GCO pursuant to s 33ZDA(3), in this case the risk of establishing liability and quantum undertaken by the law practice may be put to one side. That is because there has been no material change to the risk on liability or quantum since the GCO.

95 I accept that the actual legal costs themselves incurred by the law practice that led to the settlement of the proceeding are reasonable and proportionate. Although the actual costs were only approximately one third of the costs budget, that is not because the law practice performed less work than anticipated. I agree with the Contradictors that this is not a case where the law practice under resourced or under delivered such that the settlement outcome was a product of 'blind luck'. I accept, as was the case in *Allen v G8 (No 4)* that the law practice 'devoted appropriate resources and effort to the proceeding'.[49]

96 No modelling was undertaken at the time of the GCO that assumed an expenditure on costs of less than 50% of the costs budget. The actual percentage of the costs budget expended is materially below all cost estimates used as the basis for modelling.

97 To the extent a settlement range was anticipated, the settlement was within the range. This is not a case where a settlement outside the anticipated range provides a basis to revisit the GCO percentage.

98 The rate of 24.66% is not outside the range of other GCOs ordered pursuant to s 33ZDA(1) or of the rates in the five cases where s 33ZDA(3) has been considered, that are summarised in Annexure A.

99 While that is the case and while there is information available about GCO percentages specified in earlier orders of this Court under s 33ZDA(1)[50] and on the approval of settlements pursuant to s 33V of the Act, as will be seen the percentage specified is not always an indicator of the risk/return ratio.

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49 [2024] VSC 487 [86].

50 See, eg, *Byrnes v Origin Energy Ltd* [2025] VSC 504 [36] (Waller J), citing Vince Morabito, 'Group Costs Orders, Funding Commissions, Volume of Class Action Litigation, Reimbursement Payments and Biggest Settlements' (Report, 4 February 2025) 22-28.

100 Although in *Fox* Nichols J referred to the possibility of actuarial-based evidence in relation to the risk assumed by law practices pursuant to a GCO, no such expert evidence has been adduced on this application. As far as I am aware no actuarial evidence has been adduced on other settlement approval applications or, if it has, it has remained confidential and has not been discussed in earlier decisions.

101 As was the approach adopted by Watson J in *Allen v G8 (No 4)*,[51] I consider that in this case it is appropriate to take into account the evidence of the costs on an hourly rate basis and each of the ROI and IRR metrics.

102 The IRR evidence shows the importance of the time value of money. The longer the law practice is out of its money prior to any settlement or successful trial of the proceeding, the longer its capital is at risk. The longer the proceeding takes, the greater the costs that are expended along the way and the greater the amount of capital at risk. While far from a perfect indicator, IRR brings into account the time value of money and the time during which the investment of the law practice in the litigation is at risk.

103 In some decisions pursuant to s 33ZDA(1) a confidential schedule has been annexed to the reasons summarising confidential evidence of anticipated and past IRRs achieved by the law practice. That information which is commercially sensitive remains confidential but is available to a judge later called upon to determine whether amendment is appropriate or necessary in the same case under s 33ZDA(3). Consideration of that evidence is confined to the individual case in which it has been adduced. The Court does not have a body of comparative IRR information derived from other cases to which regard may be had when reviewing whether the IRR is proportionate to the risk.

104 The position that applies concerning IRR for law practices where a GCO is made is unlike other fields of investment activity, of which seed capital funding and investment in listed securities provide examples. There is no published data or

51 [2024] VSC 487 [74].

research available about the required or expected rate of return for law practices undertaking the risk of funding group proceedings pursuant to s 33ZDA.[52]

105 In *Allen v G8 (No 4)*, Watson J said:[53]

> [77] I am satisfied that ROI and IRR calculations provide a court with useful numerical calculations which may assist in the task of assessing the ongoing proportionality of a group costs order. The advantage of a calculated ROI and IRR is that they provide quantitative metrics that can be used as a basis for comparison across cases.
>
> …
>
> [79] Like all metrics, the limitations of an ROI and IRR need to be taken into account. An ROI does not take account of the time over which an investment occurs and so an apparently high ROI might nonetheless represent a relatively poor investment outcome for a law practice if a case has run for many years. Conversely an apparently lower ROI might represent a windfall if the investment window is very short. Nonetheless, because of its widespread use by litigation funders in particular as a measure of their outcomes, it is of some utility in this context. Broadly speaking an IRR allows more meaningful comparisons across cases than an ROI because it factors in the time value of money.
>
> …
>
> [82] Secondly, a class actions law practice will have a portfolio of cases. The overall portfolio will inevitably have an ROI or IRR which takes into account cases which lose and result in significant negative returns, those which settle on unfavourable terms and those which settle favourably. A comparison of an 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.
>
> [83] Thirdly, the ROI and IRR in a 'good' settlement will tend to be higher than any probability weighted average at the outset of a proceeding which will have factored in the possibility of negative returns and settlements on unfavourable terms. However, where a range of ROI and IRR figures are provided at the time a group costs order is made it will be possible to assess the actual ROI and IRR by reference to those ranges.
>
> [84] Notwithstanding, the limitations which exist regarding their use, over time the comparison of the ROI and IRR for a particular proceeding with other comparable proceedings may provide a useful check on proportionality for the Court.

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52 See in this respect the submissions by Slater and Gordon referred to in *Allen v G8 (No 4)* [2024] VSC 487 [76].

53 [2024] VSC 487 [77]-[84].

106 To leave the GCO rate undisturbed in this case would be to provide for a return which was substantially outside the contemplation of the Court and outside the contemplation of Maurice Blackburn itself at the time the original GCO was made. Accepting both that the evidence of historic IRRs put before the Court in the second Gilsenan affidavit, whilst focussed on the historic interquartile range, included outliers above that to which the unamended GCO rate currently entitles Maurice Blackburn, and that the ranges were provided to show the historical performance of its portfolio, I take the modelled outcomes to reflect a genuine belief of the IRR range that might be expected in this proceeding based on past experience.

107 In *Allen v G8 (No 4)*, Watson J concluded that, having regard to the material before the Court when the GCO was made, 'nothing in the level of actual costs expended … the duration of the proceedings or the quantum of the settlement sum provides a basis to amend the GCO percentage'.[54] That is not the case here, most obviously in terms of actual costs expended and the duration of the proceedings.

108 The evidence establishes that if the GCO percentage were to remain undisturbed then, comparing each of the metrics to which reference has been made, in all cases the return to Maurice Blackburn will be higher than the range that is appropriate having regard to the risk:

(a) The percentage of the settlement sum in return for the risk, in addition to the actual legal costs, in the range of 10-25%, while of necessity remaining confidential, is significantly higher than the 7.9% that Slater and Gordon received for the risk undertaken in *Allen v G8 (No 4)*.

(b) The ROI to the law practice would be well above the Omni Bridgeway ROI range in completed cases. While ROI is somewhat of a blunt instrument because of its failure to take into account the time value of money, and accepting that Omni Bridgeway is not a law practice, because there is no available research or literature about required ROI by law practices engaged in the conduct of group proceedings the information about the Omni

54 [2024] VSC 487 [91].

Bridgeway ROI provides at least a reference point. Against that reference point the ROI in this case, unless amended, is high.

(c) The same is the case applying the Lodestar method. While I do not place weight on that method for the reasons earlier discussed, it is nevertheless the case that assessed against that method, the GCO percentage of 24.66% reflects a multiple that is outside and well above the mean and median multiple referred to in *Allen v G8 (No 4)*.

109 If the GCO percentage remains unamended it will result in an IRR to Maurice Blackburn which is above the 75th percentile of historical IRRs across its class actions portfolio. While different cases within the portfolio will have different risk profiles, in this case the modelling put before the Court at the time of the carriage dispute covered IRRs in the range from the minimum acceptable IRR to the firm unless in exceptional circumstances, to the historic 25th percentile, through to the top historic 75th percentile and above, including outliers. The existing GCO unless amended would result in an IRR that is not just materially but which is substantially above the IRR modelling at the level of the 75th percentile which was the subject of evidence at the time of the carriage contest.

110 In this respect I note that the New Zealand Law Commission has recommended that courts have the power, in opt-in class actions, to vary the funding commission that is to be deducted from any damages award to the extent that the funding commission is materially in excess of the estimated returns provided to the court as part of the court's approval of the litigation funding agreement.[55]

111 As identified by the Contradictors, the early settlement is the key contributor to the high IRR represented by the original GCO percentage. It is unusual for a settlement of this magnitude, one which results in a substantial payment to the plaintiff and group members, to be reached at such an early stage of the proceeding.[56] The early settlement has an impact both upon the legal costs actually incurred by the law

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55 New Zealand Law Commission, *Class actions and litigation funding* (Report No 147, May 2022), Recommendation 119, referred to in Vicki Waye et al, 'How to Address the Regulation of Third-Party Litigation Funding of Class Actions?' (2025) 141 (January) *Law Quarterly Review* 131, 144.

56 See Confidential Annexure B.

practice and also on the period of time during which the law practice was both out of its funds and during which those funds were at risk.

112 Because Maurice Blackburn has been a significant participant in this field of endeavour, and as at late 2023 accounted for approximately 50% of group proceeding settlements, Maurice Blackburn's own internal data has provided valuable assistance when determining whether the GCO percentage specified remains proportionate to the risk that was assumed. It is important that law practices provide risk/return data to assist the Court both at the time of the original GCO hearing pursuant to s 33ZDA(1) and on the hearing of any settlement approval or any s 33ZDA(3) hearing.

113 As I said in the approval reasons, it is also important to bear in mind and it is consistent with the overarching purpose in s 7(1) of the CPA that the early resolution of group proceedings, as has occurred in this case, be encouraged. It is important when reviewing the GCO percentage that the law practice is not penalised for the early resolution of the proceeding.

114 While that is the case, to permit the law practice to obtain the very high rate of return which would flow if the GCO percentage remains undisturbed, a rate of return that was well outside the range to which the modelling evidence was directed, would be contrary to the interests of justice. It would be contrary to the interests of justice to permit an IRR and an ROI which was well outside the contemplation of the Court and of the law practice when the GCO was made. To permit the GCO rate to remain would result in a rate of return to the law practice which reflects, not a change in the risk, but a change in the return resulting from the cooperative, expeditious and effective settlement conferral process that occurred in this case.

115 What is required pursuant to s 33ZDA(3) is to determine the percentage which represents an appropriate reward for the risk. There is no single criteria or formula by reference to which the appropriate percentage in the interests of justice in these circumstances is determined.

116 The Contradictors submitted that if there were to be an adjustment to the GCO rate then the appropriate percentage for that adjustment would be one which equates to the 75th percentile of the historic rates for group proceedings conducted by Maurice Blackburn.

117 At the conclusion of the s 33ZDA(3) hearing I asked Maurice Blackburn to provide me with calculations showing different rates of return and the corresponding percentages across a range beginning with a rate of return at the 75th percentile of its historic rates, up to the rate to which it would be entitled if there were to be no amendment to the GCO percentage.

118 By email dated 26 August 2025 sent to my chambers and copied to the Contradictors, the modelled IRR information which I requested was provided. For the avoidance of doubt, that email and its contents are commercially sensitive, are to remain confidential and are to be the subject of the order I will make pursuant to s 17 of the *Open Courts Act*.

119 I have had regard to the IRR modelling summarised in a table in the email dated 26 August 2025. A copy of that table is reproduced in confidential Annexure B to these reasons.[57] I have found the modelling to be helpful because it shows the impact of allowing an IRR modelled at various levels between that equivalent to the 75th percentile of Maurice Blackburn's historic returns up to the IRR that would result if the GCO remains unamended.

120 A balancing is required to ensure both that the percentage return following the settlement continues to be proportionate to the risk and that any adjustment made to the IRR does not act as a disincentive to law practices to engage proactively with early settlement negotiations and, where appropriate, early settlement.

121 In recognition of the importance of the early settlement of group proceedings to group members, with a view to ensuring that early settlements are not discouraged, and noting the overarching obligations in ss 23 and 25 of the CPA to narrow the issues in dispute and to minimise delay, I have determined to allow an IRR that is above that which was in the contemplation of Maurice Blackburn and the Court at

57 See Confidential Annexure B.

the time of the carriage dispute, as reflected in the modelling exhibited in the second Gilsenan affidavit.

122 Having regard to the IRR modelling results summarised in the table reproduced in confidential Annexure B I have determined to order that the GCO rate applicable to the settlement be 17.392% or $15,131,000, in lieu of 24.66% or $21,450,000 which would have been payable to Maurice Blackburn in accordance with the original GCO.

123 Although a GCO rate of 17.392% is well below the stepped percentage rate fixed at the outset of the proceeding for the settlement sum achieved, the rate is only marginally below the percentage rate applicable under the GCO had the settlement sum been or exceeded $225 million.

124 A rate of 17.392% results in an IRR that is materially above the IRR at the 75th percentile that was modelled at the time of the GCO, but it remains well shy of the return that the unamended GCO rate would have generated.

125 In terms of the other relevant metrics, the monetary sum to be ordered based on a rate of 17.392% provides for an outcome that is still above, but materially closer to, the Omni Bridgeway ROI and the Lodestar mean and median multiples, than would have been the case if no adjustment had been made.

126 Based on the information provided and for the reasons discussed an amended GCO rate that equates to 17.392% of the settlement sum or $15,131,000 is proportionate to the risk having regard to the fact that the risk concerning liability and quantum remained materially unchanged but taking into account: (a) the unanticipated early settlement of the proceeding where only approximately one third of the costs budget was expended, and (b) that the law practice was at risk for a much shorter time period than anticipated by either the law practice or by the Court.

127 I consider it appropriate and necessary and in the interests of justice to make an order amending the percentage rate specified in the GCO accordingly.

H Orders

128 I will order as follows:

(a) Pursuant to s 33ZDA(3) of the *Supreme Court Act 1986* (Vic) in lieu of the percentages specified in the group costs order made on 15 December 2023 the percentage of the settlement sum of $87 million payable to the law practice shall be 17.392%.

(b) Pursuant to s 17 of the *Open Courts Act* the disclosure by publication or otherwise of Annexure B to these reasons and of the email dated 26 August 2025 referred to in paragraph 119 of these reasons and the contents of those documents is restricted to the plaintiff, the intervenors, the intervenors' legal representatives and the Contradictors appointed pursuant to the Order made on 25 July 2025.

CERTIFICATE

I certify that this and the 31 preceding pages are a true copy of the reasons for ruling of Delany J of the Supreme Court of Victoria delivered on 4 September 2025.

DATED this fourth day of September 2025.

.....
Associate

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)[58]	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%
10.	8 August 2023	*Anderson-Vaughan v AAI Limited* [2023] VSC 465	25%

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

Date		Case	Group costs order percentage
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%
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%
25.	20 August 2025	*Byrnes v Origin Energy Ltd* [2025] VSC 504	30%

MEAN, MEDIAN, MODE[59]

Mean	26.75%
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%

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