IN THE SUPREME COURT OF VICTORIA
COMMERCIAL COURT
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2024 04990

BETWEEN:

JONATHAN WONG — First Plaintiff

CONSTANTINOS DAGLAS — Second Plaintiff

v

HARVEY NORMAN HOLDINGS LTD (ACN 003 237 545) — First Defendant

YOOGALU PTY LTD (ACN 002 269 132) — Second Defendant

JUDGE:	Harris J
WHERE HELD:	Melbourne
DATE OF HEARING:	6 March 2026; Further Amended Summons and Further Submissions filed 12 March 2026
DATE OF RULING:	20 May 2026
CASE MAY BE CITED AS:	Wong v Harvey Norman Holdings Ltd
MEDIUM NEUTRAL CITATION:	[2026] VSC 293

GROUP PROCEEDINGS – Costs – Application for a group costs order – Whether necessary or appropriate to make order – Appropriate percentage rate for order – Relevant considerations – *Supreme Court Act 1986 (Vic)*, s 33ZDA.

PRACTICE AND PROCEDURE – Claims to confidentiality over material filed in support of application for group costs order – Confidentiality orders – *Open Courts Act 2013* (Vic), ss 17, 18 – *Supreme Court (General Civil Procedure) Rules 2025* (Vic), rr 28.03.3, 28.05(4).

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr D Fahey with Mr J Page	Maurice Blackburn
For the Defendants	Ms M Salinger	Arnold Bloch Leibler

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HER HONOUR:

Introduction

1 This is an application for a group costs order (**GCO**) in a proceeding in which the plaintiffs, Jonathan Wong and Constantinos Daglas, bring proceedings against the defendants, **Harvey Norman** Holdings Ltd and **Yoogalu** Pty Ltd (a controlled entity of Harvey Norman), on their own behalf and on behalf of group members. Harvey Norman is a retailer of goods including electrical goods, computers and white goods.

2 The plaintiffs' claims relate to an extended warranty product designed by Yoogalu and sold through Harvey Norman in connection with the sale of goods, entitled 'Product Care'. In summary, the plaintiffs claim that because of contractual limitations on the extended warranty, it offered little, or no, protection to consumers in relation to purchases, and that its sale involved misleading or deceptive conduct or unconscionable conduct.[1] It is alleged that the Product Care remedies were less advantageous than the statutory guarantee applicable under the Australian Consumer Law.[2] The plaintiffs also claim that Product Care was sold unlawfully because it is a financial product, and neither Yoogalu nor any person responsible for its sale held an Australian Financial Services Licence.[3] The defendants deny these allegations.[4]

3 The group members are defined in the Statement of Claim[5] as persons who:

(a) between 18 September 2018 and 19 September 2024 acquired from a Harvey Norman retail entity:

(i) an item of electrical goods, an appliance, an item of white goods or a computer product; and

(ii) in connection with the acquisition of the above items, Product Care, on terms and conditions contained in brochures pleaded in Schedule A to the Statement of Claim;

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1 **Statement of Claim** filed 28 August 2025, [116]–[124]; [126]–[132].
2 Statement of Claim, [46]-[59].
3 Statement of Claim, [134].
4 Defence filed 16 October 2025.
5 Statement of Claim, [8]–[9].

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(b) were 'consumers' for the purposes of s 3 of Schedule 2 to the *Competition and Consumer Law Act 2010* (Cth) (the Australian Consumer Law), because the goods were of a kind ordinarily acquired for personal, domestic or household consumption, and were below relevant price limits;

(c) who suffered loss by reason of contravening conduct of Yoogalu, and

(d) were not related parties of Harvey Norman or members of other excluded categories.

4 The plaintiffs have applied for a GCO pursuant to s 33ZDA(1) of the ***Supreme Court Act*** *1986* (Vic).[6] The defendants do not consent to the order, nor do they oppose it.[7] No substantive submissions were made by the defendants on the application.

The orders sought

5 The orders sought by the plaintiffs, in summary, are that the legal costs payable to the solicitors for the plaintiffs and group members be 30% of any award of damages or settlement in the proceeding, and that if that order is made, Maurice Blackburn as solicitors for the plaintiffs will be liable for any costs payable to, or security for the costs of, the defendants. The orders sought are in the following terms:

1. Pursuant to section 33ZDA(1) of the *Supreme Court Act 1986* (Vic):

   a. the legal costs payable to the solicitors for the plaintiffs and group members, Maurice Blackburn, and Echo Law as agent of Maurice Blackburn, be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, and that percentage be 30% (subject to further order); and

   b. liability for payment of the legal costs pursuant to paragraph 1(a) be shared among the plaintiffs and all group members.

2. Pursuant to section 33ZDA(2) of the *Supreme Court Act 1986* (Vic), upon the making of orders pursuant to paragraph 1, the solicitors for the plaintiffs and group members, Maurice Blackburn:

   a. be liable to pay any costs payable to the defendants in the proceeding; and

6 Summons filed 14 November 2025.
7 Transcript 06/03/26, T37.20–28.

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b. be liable to give any security for the costs of the defendants in the proceeding that the Court may order be given by the plaintiffs.

6 The plaintiffs have each made an affidavit in support of the GCO application.[8] The plaintiffs also filed an affidavit of Rebecca Gilsenan, a principal lawyer and director of Maurice Blackburn who is the National Head of the Class Actions division of the firm;[9] and affidavits of Vavaa Mawuli, the principal lawyer at Maurice Blackburn who has the overall care and conduct of the proceeding on the firm's behalf.[10] Ms Mawuli gave evidence that she has 20 years' experience as a solicitor and has practiced exclusively in class actions since approximately 2011, and has been involved in proceedings of significant size in this Court, the Supreme Court of New South Wales and the Federal Court of Australia.[11]

7 All of the affidavits contained, or exhibited, certain material claimed by the plaintiffs to be confidential. The plaintiffs seek confidentiality orders for the protection of that material pursuant to the ***Supreme Court*** *(General Civil Procedure)* ***Rules*** *2025* (Vic) and/or the ***Open Courts Act*** *2013* (Vic) and/or the inherent jurisdiction of the Court. The inclusion of this material in the evidence was appropriate, having regard to the imperative of the Court being provided with candid and comprehensive disclosure of all matters relevant to the disposition of the application.[12] The issue of the scope of the appropriate orders to be made with respect to confidentiality is addressed further below.

The stage of the proceeding

8 This proceeding involves two lead plaintiffs, following a consolidation of two proceedings in this Court. Mr Daglas' proceeding had been transferred from the Federal Court of Australia.[13] Mr Daglas had initially been represented by Echo Law. The then plaintiff in the other proceeding, Papinder Singh, was represented by

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8 Affidavit of Jonathan Wong sworn 13 November 2025 (**Wong Affidavit**); Affidavit of Constantinos Daglas affirmed 13 November 2025 (**Daglas Affidavit**).

9 Affidavit of Rebecca Gilsenan affirmed 14 November 2025 (**Gilsenan Affidavit**).

10 Affidavit of Vavaa Mawuli affirmed 14 November 2025 (**Mawuli Affidavit**); Fifth Affidavit of Vavaa Mawuli affirmed 19 February 2026 (**Mawuli Confidentiality Affidavit**).

11 Mawuli Affidavit, [11].

12 See the observations in ***Collens*** *ATF the Collens Superannuation Fund v Mineral Resources Limited* [2025] VSC 690, [10]–[12] (Craig J).

13 Orders of Bennett J in *Daglas v Harvey Norman Holdings Limited* (Federal Court of Australia, VID943/2024, 12 March 2025).

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Maurice Blackburn. Pursuant to an agreement entered into between Maurice Blackburn and Echo Law, and consolidation orders made in this Court on 29 May 2025, Maurice Blackburn is the solicitor on record for the plaintiffs and Echo Law is the agent for Maurice Blackburn.[14] There is an agency agreement and cooperative litigation protocol between Maurice Blackburn and Echo Law, and a costs monitor has been appointed with the objective of ensuring there is no unnecessary or unreasonable incurring of costs by reason of the joint representation.[15]

9 On 26 August 2025, Mr Wong was substituted for Mr Singh as the first plaintiff[16]

10 The consolidated proceeding remains at an early stage, but pleadings have been filed which enable an appreciation of the scope of the claims and the defences. It is an appropriate time to consider the making of a GCO.

Statutory provisions and principles applicable to GCO applications

11 Part 4A of the *Supreme Court Act*, which relates to group proceedings, contains specific provisions applicable to costs in group proceedings, including with respect to GCOs. Section 33ZD states that in a group proceeding, the Court may order the plaintiff or the defendant to pay costs and may not, subject to specific exceptions, order group members to pay costs.[17] The prohibition on ordering group members to pay costs is subject to s 33ZDA, relating to 'group costs orders'.[18] Section 33ZDA provides, relevantly:

> **33ZDA Group costs orders**
>
> (1) On application by the plaintiff in a 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

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14 See the Affidavit of Vavaa Mawuli affirmed 10 April 2025, [35]–[41] filed in support of the Consolidation Application; Order 3 of Orders of Harris J in *Singh v Harvey Norman Holdings Ltd* (Supreme Court of Victoria, S ECI 2024 04990, 29 May 2025).

15 Orders 14 to 18 of Orders of Harris J in *Singh v Harvey Norman Holdings Ltd* (S ECI 2024 04990, 29 May 2025).

16 The procedural background to the proceeding is briefly referred to in the ruling on the substitution application: *Singh v Harvey Norman Holdings Ltd* [2025] VSC 508 (Harris J).

17 The exceptions are where it is authorised by s 33Q (where not all questions in the proceeding are common) and s 33R (where there are individual questions that relate only to an individual group member).

18 *Supreme Court Act*, s 33ZD(2).

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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).

…

12 The *Civil Procedure Act 2010* (Vic) is also relevant insofar as it deals with costs. Section 24 states:

> **24 Overarching obligation to ensure costs are reasonable and proportionate**
>
> A person to whom the overarching obligations apply must use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to —
>
> (a) the complexity or importance of the issues in dispute; and
>
> (b) the amount in dispute.

13 The overarching obligations apply to the parties in the proceeding and to their legal representatives as well as to the Court in determining the application.

14 There are two primary questions for determination:

(a) whether it is appropriate or necessary to make a GCO to ensure that justice is done in the proceeding; and if so,

(b) at what percentage rate should the GCO be made.

15 With respect to this second question, the fact that the application is made at an early stage of the proceeding means that evaluative assessments with respect to the appropriate rate may not be made with any certainty. The power of the Court under s 33ZDA(3) to amend the rate of any order provides a means of addressing this issue.

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16 The language of s 33ZDA, in referring to the Court's power to make an order 'if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding', confers a large measure of unguided discretion on the Court. The process of reaching this state of satisfaction involves a broad, evaluative assessment of the evidence before the Court,[19] and of the claim pleaded as at the time of the application. In ***Fox v Westpac*** *Banking Corporation*, Nichols J considered the effect of the phrase 'appropriate or necessary' on which the exercise of the broad power in s 33ZDA is conditioned. Her Honour concluded:[20]

> In the present context, it may be said that before making a group costs order the Court must be satisfied that doing so would be a suitable, fitting or proper way to ensure that justice is done in the proceeding. … [S]uch an order would be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding.

17 The interests of the group members must be a primary consideration in the Court's consideration.[21] The financial viability and potential impact on group members of existing and proposed funding arrangements are relevant considerations.[22] It is also relevant that GCOs inherently have certain substantive structural benefits in that, by fixing a specific percentage rate of return to a law firm on condition that the firm assumes the burden of meeting any security for costs or adverse costs orders, they promote certainty and transparency.[23]

18 With respect to the matters relevant to assessing the appropriate percentage for any GCO, the principles developed in earlier decisions establish the following:

(a) Considerations of reasonableness and proportionality in respect of legal costs can meaningfully inform the setting of an appropriate percentage under s 33ZDA.[24] The percentage should have a proportionate relationship to the degree of complexity of the proceeding, the costs likely to be incurred in

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19 ***Fox v Westpac*** *Banking Corporation* (2021) 69 VR 487, 491 [8(a)], 499 [33] (Nichols J).

20 *Fox v Westpac*, 499 [31] (Nichols J). See also *Gawler v FleetPartners Group Ltd* [2024] VSC 365, [23] (Waller J); and *Collens*, [21(c)] (Craig J).

21 *Fox v Westpac*, 491 [8(a)], 499 [34] (Nichols J).

22 See e.g., ***Bogan*** *v The Estate of Peter John Smedley (Deceased)* [2022] VSC 201, [14] (John Dixon J); ***Mumford*** *v EML Payments Limited* [2022] VSC 750, [76] (Delany J).

23 *Supreme Court Act*, s 33ZDA(2); *Clarke v* ***JB Hi-Fi*** *Group Pty Ltd* [2025] VSC 288, [6(a)] (Nichols J).

24 *JB Hi-Fi*, [6(b)] (Nichols J).

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conducting it, and the risk undertaken by the law firm in funding it, as well as the amount likely to be recovered in the proceeding.[25]

(b) Although the circumstances of the particular proceeding must be considered, a consideration of GCO rates in comparable proceedings can be informative.[26]

(c) Considerations of return on investment for a law firm may also be relevant.[27] In considering such matters, it will be important to keep in mind that they are relevant only insofar as they relate to the interests of the parties and group members in a proceeding and achieving justice in that proceeding.

(d) Section 33ZDA(3) provides a protective mechanism by which the rate of a GCO may be varied, on settlement or in light of further developments or information in the future.[28]

The evidence in support of the GCO application

19 The evidence in this application addressed the existing cost funding arrangements in place at the time of the application, and potential alternative arrangements as discussed in more detail below. The evidence also addressed the position of the plaintiffs with respect to the proposed orders. Both plaintiffs gave evidence that they considered it to be in their best interests, and in the best interests of group members, to have some certainty and simplicity as to way in which the proceeding would be funded, which would be offered by the GCO. They gave evidence of their view that third party funding would involve less certainty. The plaintiffs also gave evidence that they regarded it as desirable that a GCO be made, with the accompanying order that any adverse costs order be paid by Maurice Blackburn, as they were not willing or able to meet the potential risk of a substantial costs order of the kind that may be made in this case.[29]

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25 *JB Hi-Fi*, [6(b)] (Nichols J).
26 *JB Hi-Fi*, [6(c)] (Nichols J); ***Dawson*** *v Insurance Australia Ltd* [2024] VSC 808, [18] (Watson J).
27 *JB Hi-Fi*, [6(c)], [24] (Nichols J); *Dawson*, [18] (Watson J).
28 *JB Hi-Fi*, [27(j)] (Nichols J); ***Bergman*** *v Sportsbet Pty Ltd* [2025] VSC 521, [35] (Matthews J).
29 Wong Affidavit, [14]; Daglas Affidavit, [32]–[34].

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The current funding arrangement

20 The evidence establishes that the plaintiffs are party to conditional costs agreements with Maurice Blackburn. The features of the agreements and broader funding arrangements between the parties are as follows.

21 The conditional costs agreements expressly state that it is agreed that a GCO will be sought at an appropriate time. There is also evidence that before the plaintiffs entered into these costs agreements, Ms Mawuli informed them in writing of the key elements of the funding arrangements and the firm's intention to seek a GCO of 30% of any damages or settlement sum. The plaintiffs subsequently instructed Maurice Blackburn to apply for a GCO at that rate.[30]

22 Maurice Blackburn is conducting the proceeding on a conditional 'no win, no fee' basis, and is providing an indemnity to the plaintiffs, until a reasonable time after this GCO application is determined.[31] The conditional costs agreements provide that in signing the retainer, each plaintiff acknowledges and agrees, relevantly:

- in contemplation of a GCO being made MB [Maurice Blackburn] will act on a conditional basis, provide an indemnity to the Representative in relation to adverse costs and provide any security for costs (if ordered) until a GCO application is determined; and
- if a GCO is not made, MB will, subject to the instructions of the Representative, conduct the proceeding in accordance with a Third Party Funding Arrangement pursuant to clause 13.

23 Clause 13 states, relevantly:

> 13.1 MB agrees to act on a conditional basis, provide an indemnity to the Representative in relation to adverse costs and provide any security for costs (if ordered) until a reasonable time after a GCO application is determined in order to provide for the operation of the provisions in this clause 13.
>
> 13.2 If a GCO is not made, MB must, subject to the instructions of the Representative, procure and prosecute the Claims and Proceeding in accordance with a Third Party Funding Arrangement.
>
> …

30 Mawuli Affidavit, [33]–[34].

31 Mawuli Affidavit, [35]; Exhibit VM-1 (Conditional Legal Costs Agreement, clauses 1.3(f) and 13.1).

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13.5 In the event that a GCO is not made and a Third Party Funding Arrangement is not subsequently executed, MB may, in its sole discretion, elect either to:

(a) continue to prosecute the Claims and Proceedings on a conditional basis, in which case MB will give to the Claimant notice that this Agreement continues to be operative as a conditional costs agreement; or

(b) terminate this Agreement pursuant to clause 12.1.

24 Maurice Blackburn has entered into an agreement for the sharing of the costs of conducting the proceeding with CF FLA Australia Investments 4 Pty Ltd (**Fortress**).[32] Maurice Blackburn's evidence is that in the event a GCO is not made, Maurice Blackburn would not exercise its discretion under the conditional costs agreement to continue to act on a 'no win no fee' basis, and would seek to procure third party funding arrangements with Fortress.[33]

25 The third party funding arrangement that would be procured would likely be with Fortress, at a funding rate higher than that of the proposed GCO. Maurice Blackburn has certain pre-agreed third party funding terms with Fortress, whereby in exchange for funding, Fortress would seek a common fund order of 32.5% of the resolution sum, inclusive of legal costs and disbursements but excluding amounts relating to security for costs.[34] The entry into an agreement on those terms is subject to the plaintiffs' instructions and potential further negotiation. Having regard to all of the evidence, including confidential evidence, there is an expectation of the terms on which such third party funding could be procured, but not full certainty.[35]

26 The plaintiffs refer, in the context of the potential third party funding arrangements and the terms of third party funding, to a report published in May 2024 by the McKell Institute, titled 'A Model for the Nation? Four Years of Victoria's Section 33ZDA' (**McKell Report**). The McKell Report concluded that following the introduction of s 33ZDA and GCOs, the median litigation funding rate decreased from 24.9% to 22.7%, but also observed that this rate was typically charged in addition to legal fees billed on a time basis. The size of fees charged varies significantly, but the McKell

32 Mawuli Affidavit, [36]; Exhibit VM-1, Revised Costs Sharing Agreement.
33 Mawuli Affidavit, [47]; Gilsenan Affidavit, [13].
34 Mawuli Affidavit, [43].
35 **Plaintiffs'** Outline of **Submissions**, Group Costs Order Application, dated 6 February 2026, [26].

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Report identified, using data from 2013 to 2018, an average rate of 17% of resolution sums as legal fees, which would increase the deduction from a resolution sum to around 39.7%.[36]

Evidence as to estimated group size and estimated loss

27 Ms Mawuli gave evidence that at the time of the GCO application she did not know precisely how many group members were in the consolidated proceeding. Maurice Blackburn, on behalf of the plaintiffs, made a request from the defendants for data recording transactions in which Product Care was sold during the claim period. However, those requests were declined.[37]

28 Ms Mawuli gave evidence of the work which had been done to inform an informed estimate of the class size, from publicly available industry reports on sales in the domestic appliance and computer and software retailing markets in Australia, Harvey Norman annual reports, and analysis of the consumer organisation, Choice. The nature of the analysis, which involved internal methodologies, was in part confidential, but gave rise to an estimate in a range involving millions of group members.

29 In *Clarke v* ***JB Hi-Fi*** *Group Pty Ltd*, a proceeding in this Court relating to consumer warranties offered by JB Hi-Fi, Nichols J observed in her Honour's judgment on the GCO application that Maurice Blackburn had estimated that the class size was approximately 8.5 million members, and that the firm expected to communicate with up to about 3 million group members in relation to that proceeding.[38]

30 Having regard to the whole of the evidence, including as to the work done by Maurice Blackburn to estimate the size of the group, and the findings in *JB Hi-Fi*, I consider that the estimate of a class size in the range of several million is a reasonable estimate.

31 Evidence was also given on a confidential basis as to estimates of the loss which may be recoverable in the proceeding. At this early stage in the proceeding, the estimates necessarily were subject to some uncertainty and depended on estimated participation

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36 Mawuli Affidavit, [48]–[49]; Exhibit VM-1, 18 (McKell Report).
37 Mawuli Affidavit, [52]–[54].
38 *JB Hi-Fi*, [21(a)] (Nichols J).

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rates in the proceeding, which were themselves not necessarily certain. The loss estimates were of very significant total amounts. Ultimately, the significance of the uncertainty relating to the estimates is limited, given that a GCO based on a percentage will necessarily be proportionate to whatever is recovered in settlement or by way of damages.

Evidence of legal costs for the proceeding

32 Ms Mawuli gave evidence, on a confidential basis, as to the estimated legal costs for the consolidated proceeding in the event that it proceeds to trial. The total estimated legal costs and disbursements were substantial. The evidence provided a breakdown of the estimate, which included significant amounts with respect to discovery, evidence, interlocutory procedures and 'multi-party function', including group member communications. The estimates were described as having been reached based on Ms Mawuli's experience in conducting class action litigation. Although it is difficult to assess the accuracy of the estimates at this early stage and on available information, Ms Mawuli is an experienced practitioner and I accept the estimates as being broadly reasonable preliminary estimates in a case of this size, with a particularly large potential number of group members.

Assessment of risks

33 Evidence as to the assessment of risks in the proceeding was given by both Ms Mawuli and Ms Gilsenan. It largely involved legal analysis and was received confidentially. I have taken that evidence into account. As relevant to the consideration of the GCO, it is sufficient to say that I accept that there will be some complex and novel questions arising in the litigation, and aspects of the interlocutory phase of the proceeding, in particular discovery, that may involve significant work.

Internal rate of return

34 Ms Gilsenan gave clear and candid evidence about how Maurice Blackburn's funding strategy, its investment analysis with respect to this proceeding, its use of capital and considerations relating to the internal rate of return informed the determination of the proposed 30% GCO rate. Ms Gilsenan gave evidence about the firm's partial or complete funding of class actions and about the firm's subsidiary, Claims Funding

Australia Pty Ltd, which provides funding in matters in which lawyers, other than Maurice Blackburn, are acting. The detail of most of that evidence was confidential. Some of the evidence which was not confidential is referred to below and it is otherwise noted at a high level of generality.

The plaintiffs' submissions on appropriateness of a GCO

35 The plaintiffs submit that it is appropriate or necessary to make the proposed GCO because it is likely to produce the greatest returns to group members and offers more certainty to group members as to the manner in which the proceeding will be funded, compared to other alternatives involving third party funding.[39]

36 The plaintiffs also submitted that:

(a) A GCO provides a more favourable financial return to group members and the plaintiffs compared to the other likely alternative funding arrangements.

(b) A GCO will ensure that the legal costs in the proceeding will be proportionate to any settlement or award, given that costs will be calculated not by reference to the time and resources involved in running the proceeding, which involves some unpredictability, but by reference to a proportion of the final settlement sum or award. This will ensure that the majority of the resolution sum will be distributed to the plaintiffs and group members, and not be eroded by legal costs or funding related expenses.[40]

(c) A GCO will transfer the burden of meeting adverse costs to Maurice Blackburn on a permanent basis, rather than the current temporary indemnity arrangement.[41]

(d) A GCO has structural benefits of simplicity, equitable sharing of costs burden amongst group members, and alignment of interests of group members and the law practice.[42]

39 Plaintiffs' Submissions, [27]–[29].
40 Plaintiffs' Submissions, [31]–[32].
41 Plaintiffs' Submissions, [34].
42 Plaintiffs' Submissions, [35].

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(e) The Court's power under s 33ZDA(3) to amend the GCO at any time in the course of the proceeding provides a mechanism to ensure that the terms and rate of the GCO are appropriate or necessary and in the interests of the plaintiffs and group members.[43]

It is appropriate to make a GCO

37 I have concluded that it is appropriate or necessary to make a GCO in this proceeding, largely for the reasons submitted by the plaintiffs. One significant factor is the nature of what alternative funding agreements are likely in the event that no GCO is made. I have considered that factor closely and make some brief observations about it before turning to the question of the appropriate rate at which the GCO is to be made.

38 The funding arrangements currently in place are similar to those in a range of prior cases. In *Fox v Westpac* the conditional costs agreements involved Maurice Blackburn acting on a 'no win no fee' basis and anticipated the making of an application for a GCO, which if made, will supersede the relevant aspects of the agreements. They also involved costs sharing agreements with a third party funder. There is, however, what appears to be a relevant difference with respect to the position if no GCO is made. In *Fox v Westpac*, Nichols J observed that the contractual arrangements with the representative plaintiff were 'not in any sense interim or conditional'.[44] Her Honour observed:[45]

> There is no indication in the agreements that Maurice Blackburn will cease to act for the plaintiffs in the event that a group costs order application is not successful; rather, the NWNF [no win no fee] Agreements contemplate that Maurice Blackburn will continue to act.
>
> Further, the NWNF Agreements do not provide that, failing the grant of a group costs order, Maurice Blackburn may obtain third party funding that will 'supersede' the NWNF funding arrangements, or operate as a variation to which the plaintiff's consent is taken to have been given.

39 In the present case, the conditional costs agreements expressly contemplate in cl 13.5 that if a GCO is not made and no third party funding arrangement can be procured,

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43 Plaintiffs' Submissions, [36].

44 *Fox v Westpac*, 508 [60] (Nichols J).

45 *Fox v Westpac*, 508 [60]–[61] (Nichols J).

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Maurice Blackburn may, in its sole discretion, elect to continue to prosecute the claims on a conditional basis, or may terminate the agreement.[46]

40 That is a consideration which may tend in favour of the making of a GCO — that is, in the event that the GCO is not made, there are plans for the third party funding arrangement that would be sought by Maurice Blackburn, but such arrangements are not certain. If they cannot be put in place, Maurice Blackburn is not obliged to continue to represent the plaintiffs. The risk that there may be a lack of representation is plainly a matter relevant to whether a GCO would be in the interests of the plaintiffs and of group members.[47]

41 In the present case, there are pre-agreed third party funding terms with Fortress which (subject to plaintiff instructions) anticipate Fortress seeking 32.5% of the resolution sum as a common fund order, inclusive of legal costs.[48] Prima facie, that supports a conclusion that a GCO at the proposed 30% rate would be more financially favourable to the plaintiffs and group members than the likely alternative.

42 Costs arrangements of the kind demonstrated by the evidence in this proceeding do have potential to be self-reinforcing as a factor in favour of making a GCO. Where a law practice commences to act on a 'non win no fee' basis on the understanding that it will apply for a GCO, with liberty not to continue on that basis if the GCO is not granted or third party funding is not procured, it is readily open at the time of an application for a GCO to point to the uncertainty that may arise if a GCO is not granted. At the same time, the percentage posited for the GCO and terms proposed as the subject of alternative funding agreements between the law firm and the third party are, to some degree, in the law firm's control. There is a potential risk that setting a proposed GCO rate and the terms of third party funding arrangements could be

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46 Costs agreements involving these terms which do have some potential interim effect are also referred to in recent cases including *Bergman*, [18] (Matthews J); *Edwards v Hyundai Motor Company Australia Pty Ltd (Ruling No 3)* [2025] VSC 429, [109] (M Osborne J).

47 I do note, as observed by Delany J in *Mumford* at [74], that the entitlement to terminate is based on whether a GCO is made, rather than whether a GCO is made at a specific rate. His Honour noted that a critical consideration was that no matter the percentage fixed by the Court, provided a GCO is made, as a consequence of the costs agreement the plaintiffs' solicitors were obliged to continue to conduct the proceeding for the benefit of the lead plaintiffs and group members.

48 Mawuli Affidavit, [43].

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designed to involve a less attractive arrangement than the GCO to reinforce the prospects for the grant of the GCO.

43 In *JB Hi-Fi*, Nichols J referred to the potential for a comparison between the proposed GCO and the alternative arrangement (also with Fortress in that case) to be 'self-referential, meaning that it had been arrived at to serve as support for the Court granting the proposed GCO, being set at a slightly higher rate than the GCO sought'.[49] Her Honour raised that concern with senior counsel for the plaintiff and received further evidence which led to her Honour being satisfied that the third party funding agreement was what Maurice Blackburn and Fortress would agree to in the circumstances based on their individual assessments.

44 The evidence as a whole in the present proceeding is such that I accept that the proposed GCO rate, and the currently proposed terms of third party funding arrangements, have a rational basis and are not directed to enhancing the prospects of obtaining a GCO. The evidence from the McKell Report relating to third party funding generally (including that legal costs are frequently charged in addition to funding commission) and as to average funding rates in recent years supports the view that the current proposal as to third party funding is in the range of what could be expected to be procured.

45 I accept that the evidence supports the conclusion that it is appropriate to make a GCO, having regard to the fact that the likely alternative funding arrangements would be less certain, and less financially favourable to the plaintiffs and group members. This conclusion does involve, to some extent, an assumption that the GCO would be given at the rate sought by Maurice Blackburn, which is a question that it is necessary to consider separately.

46 I also take into account that the current retainer only gives Maurice Blackburn the discretion to cease acting if a GCO is not made and third party funding is not agreed (rather than permitting it to cease to act if a GCO is not made at a particular rate) so that the circumstances in which Maurice Blackburn could cease to act are thus limited.[50] As I have concluded below that the 30% rate is appropriate, it is an

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49 *JB Hi-Fi*, [13] (Nichols J).

50 See *Mumford*, [74] (Delany J).

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appropriate point of comparison with the proposed third party funding arrangement and it is unnecessary to consider those matters further.

47 I conclude more generally that it is appropriate to make a GCO as it:

(a) offers a certain and transparent funding mechanism which will result in costs being shared equitably amongst the plaintiffs and group members;

(b) offers a more favourable financial return to the plaintiffs and group members than other likely funding arrangements;

(c) is an approach to funding supported by both plaintiffs, based on cogent reasons; and

(d) engages a proportionate mechanism which involves an amount referable to the size of any resolution sum, which is desirable where it is difficult to estimate both a likely resolution sum and the amount of legal costs which will be incurred in conducting the proceeding on behalf of the plaintiffs and group members.

At what rate should the GCO be made?

The plaintiffs' submissions

48 The plaintiffs submit that the rate of 30% is a reasonable and appropriate rate for the GCO having regard to the following circumstances.

(a) Confidential considerations relating to the specific costs and risks of this proceeding.

(b) The investment return analysis, which has involved estimating the likely legal cost of proceeding to trial of the plaintiffs' claims and the common questions. The estimated costs (including professional fees and disbursements) and the basis on which they were estimated were provided in the confidential evidence. It suffices, for present purposes, to say that the costs are substantial, having regard to the scale of the matter and the legal and procedural complexity that it will involve. The evidence and submissions as to the investment return include evidence as to the internal rate of return on investment in a class action,

which Maurice Blackburn calculates as necessary, having regard to its costs of capital, risks associated with class actions informed by a historical assessment, and considerations relating to its portfolio of work.

(c) Publicly available information as to GCO rates in other proceedings, including GCO rates in decisions of this Court, which are set out in the Schedule attached to this ruling which was prepared by the plaintiffs and provided to the Court, and an analysis performed by Professor Vince Morabito, titled 'Group Costs Orders, Funding Commissions, Volume of Class Action Litigation, Reimbursement Payments and Biggest Settlements' (**Morabito Report**). [51]

Considerations of legal costs and risk in this proceeding

49 It is clear from the authorities that questions of the risk undertaken by a firm in the funding of a class action the subject of a GCO are directly relevant to the question of the appropriate percentage rate for the order.[52] To the extent possible, it is desirable to fix the GCO rate at a point which is proportionate to the risk that the firm undertakes in funding the proceedings, and to the appropriate reward for the legal work undertaken. In *Fox v Westpac*, Nichols J discussed proportionality in the context of a GCO, as follows:[53]

> 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.

50 To the extent that it is possible for the Court at this preliminary stage of the proceeding to consider the issues on the available evidence, I have considered the volume of work (and associated legal costs and disbursements) in the proceeding; the risk undertaken having regard to the claims made and the defences raised; the likelihood of interlocutory applications and procedural complexity, and the risks of adverse costs.

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51 Professor Vince Morabito, *Group Costs Orders, Funding Commissions, Volume of Class Action Litigation, Reimbursement Payments and Biggest Settlements* (Report, 4 February 2025).

52 *Bogan*, [14] (John Dixon J); *Fox v Westpac*, 501–02, [41]–[42]; 504 [50] (Nichols J); *JB Hi-Fi*, [24] (Nichols J).

53 *Fox v Westpac*, 529–30 [147]–[148]; *McCoy v Hino Motors Ltd (No 2)* [2025] VSC 553, [22] (Delany J).

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I consider that the rate and benefit to Maurice Blackburn bears a proportionate relationship to the risks presented by the proceeding. The significant size of the class and the novelty of the claims is relevant in that respect.

51 I take into account that it remains possible, pursuant to s 33ZDA(3), to amend the rate in the course of the proceeding or after settlement, if appropriate. At any such time, there is likely to be more developed evidence to enable assessment of risk exposure and potential reward.

Internal rate of return and sustainability of the law firm's practice in class actions

52 The plaintiffs submitted that it is appropriate to have taken into account calculations as to what percentage of return in a GCO would be 'sufficient to ensure that Maurice Blackburn can sustain its class actions practice, whilst also being fair and proportionate to group members.'[54]

53 This submission appeared to me to have the potential to raise a slightly different consideration to the consideration of the extent of the financial risk being assumed by a law practice in funding a particular proceeding, which has been clearly acknowledged in the authorities as relevant to the making of a GCO.[55] I raised with counsel for the plaintiffs the issue of whether sustainability of a firm's class actions practice was, of itself, a relevant matter and if so, how. I also raised a related question having regard to the confidential evidence, and I received separate confidential submissions from the plaintiffs after the hearing on those issues.

54 In *Fox v Westpac*, Nichols J considered the scope of the interests which are to be considered in the exercise of the discretion to make a GCO, and in setting the rate of any order. Her Honour observed with respect to the interests of a law practice: [56]

> I accept the contradictor's submissions that evidence of the nature and extent of the risk that the legal practice would be prepared to accept might inform the fixing of an appropriate percentage, but the interests of the law practice are not directly in issue.

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54 Plaintiffs' Submissions, [55].

55 See *Bogan v Estate of Smedley (Deceased)* (2023) 72 VR 394, 407–08 [53]–[54] (Ferguson CJ, Niall and Macaulay JJA) (**Bogan Appeal**); *Fox v Westpac*, 495–96 [20]–[21] (Nichols J).

56 *Fox v Westpac*, 500 [37] (Nichols J).

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55 I respectfully agree that the interests of the law practice are not directly in issue in an application under s 33ZDA. In particular, the sustainability of an aspect of a law firm's practice — if that does in some way involve a broader consideration than the economic viability of funding a particular class action – is not, in my view, a relevant consideration in an application under s 33ZDA.

56 It is appropriate to acknowledge that the objective of the introduction of the GCO power in s 33ZDA is to enhance justice by reducing potential barriers to commencing class actions.[57] In *Bogan v The Estate of Peter John Smedley (Deceased)*, John Dixon J explained that: [58]

> Enabling a law practice to charge [proportionate fees for class actions], can promote access to justice by removing the disincentive to representative plaintiffs of disproportionate exposure to financial risk compared to the value of their own claim, to reduce costs to group members by having a single fee, and to provide transparency and simplicity.

57 This access to justice consideration, as relevant to the Court's determination of a GCO application under s 33ZDA, remains one specific to 'the proceeding', in the language of the chapeau to that section. The consideration is whether the GCO at the proposed rate is appropriate or necessary to ensure that justice is done in that proceeding. It does not invite regard in a particular application to the more general objective of promoting the broader legal sector's continuing capability to provide access to justice, notwithstanding the desirability of that objective. The interests of group members in the proceeding remains a primary consideration. Their interests in a particular case may potentially not be served by a GCO rate which has been determined by taking into account in any decisive way the factor of the future *sustainability* of a law practice's practice in class actions.

58 That said, I acknowledge that there is clearly a relationship between the risk assessment of whether or not a law practice can invest in a particular piece of litigation, having regard to the need to finance its own operations and bear the financial risk presented by a particular group proceeding,[59] and broader considerations of its wider portfolio of cases and the sustainability of its practice. Ms

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57 Victoria, Parliamentary Debates, Legislative Assembly, 27 November 2019, 4586–4587; 4590 (Jill Hennessy, Attorney-General, Minister for Workplace Safety), See also *Fox v Westpac*, 496 [21].

58 *Bogan*, [93] (John Dixon J); See also *Bogan Appeal*, 397 [1] (Ferguson CJ, Niall and Macaulay JJA).

59 *Bogan*, [12(f)] (John Dixon J).

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Gilsenan's evidence in this proceeding indicates an appropriate regard to the firm's litigation portfolio and its overall operations, as well as the financial risks potentially presented by this specific proceeding, informed by historical experience as well as the circumstances of this case, in determining the 30% rate. The firm's portfolio has established categories of work which produce varied rates of return and it is appropriate for that to be taken into account in determining the terms on which it can act on a deferred return basis, taking into account risk exposure for adverse costs orders, in a particular class action. The GCO rate is not so high, having regard to the other evidence about GCO rates and third party funding rates, as to suggest, for example, that it involves any element of cross subsidising other work or sustaining a practice area in a way which could be regarded as contrary to group member interests in this case.

59 The confidential evidence of financial modelling, done for the purposes of identifying a range of potential financial scenarios in funding the proceeding, depending on a range of outcomes, also showed a rational basis on which the rate of 30% was identified.

GCO rates in comparable proceedings

60 The information as to GCO rates in proceedings in this Court since the introduction of s 33ZDA shows a broad range of rates from 14% to 40%, the differences explained by the specific circumstances of the individual proceedings. That information shows that the average and median rate has been the subject of a gradual increase over the years, which is also observed by the Morabito Report. Professor Morabito observes: [60]

> The median rate for commencement GCOs at the end of 2023 was 24.5%. At the end of 2024 it increased slightly to 24.75%. But this minor increase in the overall median rate for commencement GCOs does not fully capture the significant development that was witnessed in the GCO landscape in 2024. The median rate for the commencement GCOs that were issued in 2022 was equal to 24.5%. Same figure for the 2023 commencement GCOs. But with respect to the six commencement GCOs that were granted in 2024 the median rate was significantly higher: 28.75%.

[60] Morabito Report, 9–10.

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61 In a more recent article in the journal *Civil Justice Quarterly*, Professor Morabito analysed GCO awards and made the following observations as to the median commencement rates since 2022: [61]

> Commencement GCO rates have ranged from 14% to 40% with an overall median Commencement GCO rate of 25%. As shown below, an increasing trend in GCO rates is evident in 2024 and 2025.
>
> - median Commencement GCO rate of 24.5% in 2022;
> - median Commencement GCO rate of 24.5% in 2023;
> - median Commencement GCO rate of 28.75% in 2024; and
> - median Commencement GCO rate of 30% in 2025.

62 I am alert to the potential that having regard to GCO rates in other proceedings, where there has been a trend towards gradual increases in GCO rates, could have a tendency to reinforce an acceptance of increased rates as they develop over time, if close regard is not had to the circumstances of individual cases. There is no reason why median GCO rates should be increasing simply by reason of the passage of time; however there are likely to be reasons which explain the gradual increase such as a higher predominance of cases with large classes or significant complexity or novelty and thus higher costs and risks.

63 In the present proceeding, I have considered the evidence and publicly available information about GCO rates in other cases. I have had particularly close regard to the GCO rate of 30% set by Nichols J in *JB Hi-Fi*,[62] because of the relatively high degree of comparability of the cases in terms of claims and in group size with accompanying issues of costs and complexity.

64 It is also relevant that the evidence as to the terms of third party funding and the proposed third party funding arrangement establishes that the GCO rate is materially lower than the standard alternative funding options and the third party funding proposal in this case.

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61 Professor Vince Morabito, 'Has Victoria's Class Action Regime Secured Access to Justice for Victims of Mass Harm?' (2026) 45 *Civil Justice Quarterly* 18, 28 (Morabito Article).

62 *JB Hi-Fi*, [27] (Nichols J).

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65 I accept that the rate of 30% is the appropriate rate for the GCO on the present evidence.

66 I will, therefore, make the orders sought by the plaintiffs that there be a GCO at the rate of 30%.

Confidentiality Claims

67 As noted above, the plaintiffs seek orders pursuant to either r 28.05(4) of the *Supreme Court Rules*, ss 17(b) and 18(1)(a) of the *Open Courts Act*, or the inherent jurisdiction of the Court, that some of the information in the affidavits and exhibits, which is also referred to in submissions, be identified as confidential and, with narrow exceptions, not be disclosed to any party, including the defendants, without prior leave of the Court. On 19 February 2026, the plaintiffs filed an amended summons narrowing the scope of the confidentiality orders sought.[63] The reasons identified for the confidentiality orders sought in the affidavit were that:[64]

(a) the information is subject to legal professional privilege;

(b) the information, if disclosed, would confer an unfair tactical or forensic advantage on the defendants. This material relates to evidence of modelling of outcomes, estimates of legal costs, and assessments of the prospects and risks in the proceeding; and

(c) the information is commercially sensitive, and could prejudice Maurice Blackburn or Echo Law's commercial interests if disclosed to a competitor. It is said that '[i]f such materials were disclosed publicly, other law firms might, for instance, unfairly gain insight into MB's processes for evaluating and funding the cases it pursues, and the risks to which it is exposed across its 'portfolio' of cases.'[65]

63 The amended summons was supported by the Mawuli Confidentiality Affidavit.
64 Mawuli Confidentiality Affidavit, [8].
65 Mawuli Confidentiality Affidavit, [8(b)].

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68 The affidavit helpfully identified the basis for the confidentiality claim (legal professional privilege, tactical advantage and commercially sensitive) with respect to each aspect of the material over which confidentiality was sought.

Principles relevant to the making of confidentiality orders

69 The plaintiffs rely on r 28.05(4) of the *Supreme Court Rules*, ss 17(b) and 18(1)(a) of the *Open Courts Act* or the inherent jurisdiction of the Court as the source of power to make the confidentiality orders sought. Rule 28.05(4) provides that '[n]o person may inspect or obtain a copy of a document which the Court has ordered remain confidential'. However, that rule does not itself identify circumstances in which the Court would order that a document is confidential. Rule 28.03.3, which provides for the Court to make orders as to confidentiality and privacy, focuses on orders relating to the filing of documents rather than confidentiality generally.[66]

70 Sections 17(b) and 18(1)(a) of the *Open Courts Act* provide:

> **17 Court or tribunal may make proceeding suppression order**
>
> A court or tribunal on one or more of the grounds specified in section 18 may make a proceeding suppression order to prohibit the disclosure by publication or otherwise of—
>
> …
>
> (b) any information derived from a proceeding.
>
> **18 Grounds for proceeding suppression order**
>
> (1) A court or tribunal other than the Coroners Court may make a proceeding suppression order if satisfied as to one or more of the following grounds—
>
> (a) an order is necessary to prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means;
>
> …

[66] It provides: 'The Court may make any order it thinks fit as to confidentiality and privacy in relation to the filing of documents in RedCrest, including directing that particular documents or classes of documents be filed in RedCrest in a redacted form.'

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71 It is also relevant, in the context of the *Open Courts Act* powers, to refer to s 4 of that Act, which states:

> **4 Principle of open justice prevails unless circumstances require displacement**
>
> (1) A court or tribunal is to have regard to the primacy of the principle of open justice and the free communication and disclosure of information in determining whether to make a suppression order.
>
> (2) A court or tribunal is only to make a suppression order if satisfied that the specific circumstances of a case make it necessary to override or displace the principle of open justice and the free communication and disclosure of information.

72 This objective makes it important to consider carefully the scope of material over which confidentiality protections are ordered.

73 It is clear that applications for GCOs may entail having to put before the Court material which would not usually be made public, nor made available to other parties in a proceeding, and should be protected from disclosure because of the potential prejudice to the plaintiffs and group members.[67] This is recognised in this Court's Practice Note *Conduct of Group Proceedings (Class Actions)*.[68] The objective of non-disclosure of information is identified in the Practice Note as the protection of:[69]

> information that might reasonably be expected to confer a tactical advantage on another party to the proceeding including, without limitation, information:
>
> (a) as to the budget or estimate of costs for the litigation or the funds available to the plaintiff, in total or for any step or stage in the proceeding;
>
> (b) that might reasonably be expected to indicate an assessment of the risks or merits of the proceeding or any claim in, or aspect of, the proceeding.

74 The claim for confidentiality orders in this proceedings extends beyond material subject to legal professional privilege or which may expose the plaintiffs to forensic disadvantage, to information which is said to be commercially sensitive and could prejudice the commercial interests of the two law practices representing the plaintiffs if disclosed.

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67 See the observations of Craig J with respect to the importance of candid and comprehensive disclosure in *Collens* at [10]–[11], and of the corresponding appropriateness of confidentiality orders, at [17].

68 Supreme Court of Victoria, *Practice Note SC Gen 10*: *Conduct of Group Proceedings (Class Actions) (Second Revision)*, 13 October 2020, section 13. See also re GCO applications at section 14.2.

69 Supreme Court of Victoria, *Practice Note SC Gen 10: Conduct of Group Proceedings (Class Actions) (Second Revision)*, 13 October 2020, section 13.7.

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75 Commercially sensitive information is a category which has traditionally attracted the protection of non-publication or suppression orders if that protection is necessary to ensure that litigants are not deterred from bringing legal disputes to court by the possibility of disclosure of their commercially valuable information.[70] The Court will be particularly willing to grant suppression or non-publication orders with respect to a trade secret or commercially sensitive information which is the subject matter of the proceeding.[71] That may extend to information which is commercially sensitive because disclosure would result in loss of a competitive advantage.[72] Those established categories, relating as they do to the commercially sensitive information of *parties* to litigation, do in my view involve different interests than apply to commercially sensitive information of a law practice representing a litigant.

76 It is not, in my view, part of the role of this Court to protect the commercial interests of the law practices representing parties in proceedings before it, nor to ensure that law practices' conduct of the business of litigation is protected from competition. Indeed, the objective of promoting access to justice which materially underpins s 33ZDA and the group proceedings regime generally may be promoted if there is healthy competition amongst law firms for the cost-efficient and effective conduct of group proceedings.[73]

77 However, as observed above with respect to the relevance of portfolio and sustainability considerations to the making of a GCO,[74] the category of information relating to a law practice's commercial interest in protecting its 'processes for evaluating and funding the cases it pursues'[75] may be closely related to the category of information relating to the firm's evaluation of the risks and potential rewards of a specific proceeding. The latter category plainly entails potential forensic disadvantage

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70 ***Cargill*** *Australia Ltd v Viterra Malt Pty Ltd* ***(No 23)*** (2019) 58 VR 611, 624 [70] (Elliott J); *MCL 105 Pty Ltd v The Agency Group Australia Ltd* [2021] FCA 264, [13] (Colvin J).

71 *Cargill (No 23)*, 624 [70] (Elliott J); *Australian Competition and Consumer Commission v Mastercard Asia/Pacific Pte Ltd (Suppression No 1)* [2026] FCA 431 (***ACCC v Mastercard***), [24]–[29] (Wigney J).

72 *ACCC v Mastercard*, [25] (Wigney J).

73 See the observations of Delany J in *Mumford*, [67], [89]–[90]; Waller J in *Byrnes v Origin Energy Pty Ltd* [2025] VSC 504 at [4]; and Nichols J in *JB Hi-Fi* at [18] to the effect that GCO rates set at the commencement of a proceeding are lower if set in the context of a carriage dispute as to which of competing class actions should be allowed to proceed and which stayed. See also Professor Morabito's observations in the Morabito Article at 28 and 33–34.

74 See [58] above.

75 Mawuli Confidentiality Affidavit, [8(b)].

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to the detriment of the represented plaintiffs and group members if disclosed, thus warranting the protection of confidentiality. The former, in my view, will not necessarily do so. The difficulty is the dividing line between the two, particularly in the context of this unique statutory regime which invites consideration of risk from the perspective of a law practice proposing to fund a proceeding through a GCO.

78 It is reasonable and commercial common sense that a firm's processes for evaluating risk in a particular case and the appropriateness of funding that case will involve analysis of other funded proceedings in which it is involved. Disclosure of evidence as to that analysis may present a risk of forensic disadvantage to the parties and group members in those other proceedings. However, other categories of information relevant to the law practice's broad evaluation of whether to fund a proceeding may go to matters which are, although commercially sensitive to the law practice, unlikely to present any forensic disadvantage or other adverse impact on the plaintiff or group members in any proceeding.

Procedural issues relating to confidentiality orders

79 Prior to the hearing on 6 March 2026, I considered the material filed by the plaintiffs over which confidentiality was sought and formed the view that parts of the material would be relevant to my ruling on this application and may need to be referred to in my reasons. Having regard to the obligations in the *Open Courts Act* and relevant authority in this Court,[76] I considered that it may be insufficient to rely on the *Supreme Court Rules* in making the confidentiality orders and that it may instead be necessary to make such orders under the *Open Courts Act* with the attendant procedural requirements. I also considered that some of the plaintiffs' claims for confidentiality were not justified and merited further consideration. On 3 March 2026, my chambers emailed the parties to convey these views.[77]

80 On 4 March 2026, in response, the plaintiffs advised that they intended to file a Notice of Application for Suppression Order pursuant to s 10(1) of the *Open Courts Act* and r 82.02 of the *Supreme Court Rules*, and that upon considering the claims for

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76 *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 26)* [2021] VSC 242, [14]–[19]; [31]–[38] (Elliot J); *Mumford* at [18] (Delany J). See also the observations of O'Bryan J as to the appropriate scope of confidentiality orders in *Riverine Grazier Pty Ltd v Google LLC* [2025] FCA 895, [17]–[21].

77 Email from the Chambers of Justice Harris to the legal practitioners of the parties dated 3 March 2026.

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confidentiality over parts of the submissions they no longer pressed certain claims.[78] The Notice was formally filed later that afternoon, and on that same day, the Court provided the required notice to media organisations. This did not permit the full three business days' notice of the application required by s 10(1) of the *Open Courts Act*.

81 Section 10(3) of the *Open Courts Act* permits the Court to hear an application for a suppression order despite an applicant's failure to give notice according to s 10(1) if the Court is satisfied there was a good reason for the notice not being given, or not being given within the required time period, or it is in the interests of justice that the Court hear the application without notice being given. The issue in this proceeding was short notice rather than the absence of notice of the *Open Courts Act* application. No media organisation sought to be heard after notification. The potential necessity to engage the *Open Courts Act* powers was an issue raised by the Court at short notice. I considered that it was in the interests of justice to proceed under s 10(3) notwithstanding that the full notice period was not observed.[79]

82 At the hearing I informed counsel for the plaintiffs that there remained aspects of the material over which confidentiality was claimed that would not, in my view, properly be the subject of protection by Court orders. That information included material sought to be protected because of 'commercial sensitivity' which I considered did not warrant protection as it did not present any sufficient risk of prejudice to the proper administration of justice to justify an order under the *Open Courts Act* or in the Court's inherent jurisdiction. Accordingly, I invited the plaintiffs to consider further the scope of some of the orders sought.[80] I also ordered that the plaintiffs were to provide copies of the submissions and affidavits relied on in support of their application which identified the material over which confidentiality orders are sought by email to my chambers.

83 On 12 March 2026, the plaintiffs filed a further amended summons identifying revised confidentiality claims over the affidavits and submissions. On 8 May 2026, in the

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78 See Revised Schedules of Confidentiality Claims dated 4 March 2026.

79 I ruled to this effect during the hearing and the hearing continued. Transcript 06/03/2026, T7.09–21.

80 I made orders that same day which included an order that the plaintiffs were to file a further amended summons with a revised schedule identifying those parts of the materials relied upon in support of their application over which confidentiality orders are sought. Orders of Harris J, 6 March 2026; Transcript 06/03/2026, T40.14–20.

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course of preparing these reasons, I had concerns that there was an inadequate basis on which to claim confidentiality over some of that material and (as had been requested by solicitors for the plaintiffs in their correspondence of 12 March 2026) permitted a last opportunity to justify certain of the remaining confidentiality claims. A further submission was provided in which certain claims for confidentiality were identified as no longer being pressed, and brief submissions justifying the orders with respect to the remaining claims were made.

Conclusion — confidentiality orders made to protect legally privileged material, and information disclosure of which could cause forensic or tactical disadvantage in this or other proceedings

84 On considering the substantially narrowed claims for confidentiality now made, I have concluded that the remaining claims which were identified as being made on the basis that the information was commercially sensitive[81] involved information which was sufficiently related to the risk assessment and funding strategy in this proceeding that there remained a potential risk of tactical disadvantage to the plaintiffs and group members if disclosed. This includes evidence of financial modelling, and other elements of the risk analysis.

85 Having regard to the significant narrowing of the information over which non-publication or suppression orders are sought, I will make the orders sought.

86 I note for clarity that the application for confidentiality orders was no longer pressed with respect to certain references in evidence or submissions to the existence of legally privileged documents. As the references did not disclose the privileged subject matter of those documents, I take the view that reference to them does not of itself involve any waiver of privilege. This was also the basis on which the application was not further pressed with respect to those references.

87 It has also been possible to convey my reasons for granting the GCO without having to disclose in this Ruling any of that confidential material, so that it is not necessary to provide any reasons on a confidential basis.

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81 In the Mawuli Confidentiality Affidavit Schedules.

CERTIFICATE

I certify that this and the 28 preceding pages are a true copy of the reasons for ruling of the Honourable Justice Harris of the Supreme Court of Victoria delivered on 20 May 2026.

DATED this twentieth day of May 2026.

SCHEDULE OF GCO RATES

Case	GCO rate (%)
Allen v G8 Education Ltd [2022] VSC 32	27.5
Bogan v the Estate of Peter John Smedley (Deceased) [2022] VSC 201	40.0
Nelson v Beach Energy [2022] VSC 424	24.5
Gehrke v Noumi Ltd [2022] VSC 672	22.0
Mumford v EML Payments Ltd [2022] VSC 750	24.5
Fuller v Allianz Australia Insurance Ltd; Wilkinson v Allianz[82]	25.0
Lieberman v Crown Resorts Ltd [2022] VSC 787	16.5 – 27.5
Fox v Westpac Banking Corporation (No 2) [2023] VSC 95	24.5
O'Brien v Australia and New Zealand Banking Group Ltd [2025] VSC 389[83]	24.5
Nathan v Macquarie Leasing Pty Ltd [2024] VSC 794[84]	24.5
Anderson-Vaughan v AAI Ltd [2023] VSC 465	25.0
DA Lynch v Star Entertainment Group [2023] VSC 561	14.0
Lidgett v Downer EDI Ltd [2023] VSC 574	21.0
5 Boroughs NY Pty Ltd v Victoria (No 5) [2023] VSC 682	30.0
McCoy v Hino Motor Sales Australia Pty Ltd [2023] VSC 757	17.5 – 25.0
Thomas v The a2 Milk Company Ltd [2023] VSC 768	24.0
Kilah v Medibank Private Limited [2024] VSC 152	27.5
Norris v Insurance Australia Group Ltd [2024] VSC 76	30.0
Raeken Pty Ltd v James Hardie Industries PLC [2024] VSC 173	27.5
Gawler v FleetPartners Group Ltd [2024] VSC 365	39.0
Warner v Ansell Ltd [2024] VSC 491	25.0 – 40.0
Dawson v Insurance Australia Ltd [2024] VSC 808	27.5
Clarke v JB Hi-Fi Group Pty Ltd [2025] VSC 288	30.0

82 Pursuant to a ruling of Nichols J dated 1 November 2024 (revised reasons provided 28 February 2025) in S ECI 2020 02853.

83 The GCO application in this proceeding was made and granted by Nichols J in *Fox v Westpac Banking Corporation (No 2)* [2023] VSC 95.

84 The GCO application in this proceeding was made and granted by Nichols J in *Fox v Westpac Banking Corporation (No 2)* [2023] VSC 95.

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Edwards v Hyundai Motor Company Australia Pty Ltd (Ruling No 3) [2025] VSC 429	15.0 – 24.75
Laricchia v WiseTech Global Ltd [2025] VSC 482	35.0
Byrnes v Origin Energy Ltd [2025] VSC 504	30.0
Bergman v Sportsbet Pty Ltd [2025] VSC 521	33.0
Weatherlake v Paladin Energy Ltd [2025] VSC 669	27.5[85]
Collens ATF Collens Superannuation Fund v Mineral Resources Ltd (GCO Ruling) [2025] VSC 690	30.0
Mean (2025)	**30.03**
Median (2025)	**30.0**

[85] Based on a 'ratcheted' structure (see [18]).

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