

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

Not Restricted

S ECI 2025 00287

SCOTT BYRNES

Plaintiff

v

ORIGIN ENERGY LIMITED (ACN 000 051 696)

Defendant

JUDGE: Waller J
WHERE HELD: Melbourne
DATE OF HEARING: 29 July 2025
DATE OF RULING: 20 August 2025
CASE MAY BE CITED AS: Byrnes v Origin Energy Ltd
MEDIUM NEUTRAL CITATION: [2025] VSC 504

GROUP PROCEEDINGS – Costs – Application for a group costs order – Costs to be calculated as a percentage of the amount of any award or settlement recovered – Whether proposed rate of 35 per cent appropriate or necessary – Principles to be applied – GCO made at a rate of 30 per cent – *Supreme Court Act 1986* (Vic) s 33ZDA.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr WAD Edwards KC with Ms R Howe	Phi Finney McDonald
For the Defendant	Ms J Findlay	Herbert Smith Freehills Kramer

HIS HONOUR:

A. INTRODUCTION

- 1 This is an application for a group costs order in a group proceeding brought under Part 4A of the *Supreme Court Act 1986 (Vic)* (**Act**).
- 2 The representative plaintiff, Mr Scott Byrnes, brings his claim against Origin Energy Limited (ACN 000 051 696) (**Origin**), a large integrated energy company in Australia.
- 3 The group members in this proceeding are persons who acquired an interest in Origin shares or equity swaps between 20 October 2021 and 31 May 2022 (**claim period**).
- 4 The plaintiff alleges that Origin breached various statutory provisions by making misleading or deceptive representations and failed to comply with its continuous disclosure obligations as an Australian Stock Exchange-listed company in relation to the information Origin provided, or failed to provide, to investors during the claim period about its expected future earnings. The plaintiff claims that Origin's share price was inflated by the alleged contraventions and that the plaintiff and group members suffered loss and damage as a result. The defendant disputes the plaintiff's claims.
- 5 By summons filed on 17 June 2025, the plaintiff seeks a group costs order (**GCO**) pursuant to s 33ZDA(1) of the Act that the legal costs payable to the plaintiff's solicitors, Phi Finney McDonald Pty Ltd (**PFM**), be calculated as 35% of the amount of any award or settlement that may be recovered in the proceeding.
- 6 In support of his application, the plaintiff relies on:
- (a) the affidavit of Mr Byrnes affirmed on 10 June 2025 (**Byrnes Affidavit**);
 - (b) the affidavit of Mr Timothy Finney, a Director and Principal Lawyer of PFM, affirmed on 17 June 2025 (**First Finney Affidavit**);

(c) the affidavit of Mr Finney affirmed on 24 July 2025 (**Second Finney Affidavit**); and

(d) the plaintiff's submissions in support of his application for a GCO filed on 15 July 2025 (**Plaintiff's Submissions**).

7 The defendant neither consents nor opposes the plaintiff's GCO application, consistent with usual practice. The defendant initially opposed the plaintiff's application that the costs of the GCO application be costs in the cause. In response the plaintiff accepted that the appropriate costs order was that the plaintiff bear his own costs of the application and the defendant's costs of the application be reserved.

8 For the reasons set out below, I am not prepared to make a GCO at a rate of 35%. Having regard to all the relevant circumstances, I consider that a GCO at a rate of 30% is appropriate and necessary to ensure that justice is done in this proceeding.

B. CONFIDENTIALITY

9 On 31 March 2025, Watson J made orders granting leave for the plaintiff to redact any material over which he makes a claim for confidentiality. The plaintiff filed redacted versions of the materials listed in paragraph 6 and provided unredacted versions to chambers for the Court's use only. The question of whether the plaintiff is entitled to maintain confidentiality claims over any material on a permanent basis was reserved for determination at the hearing of the plaintiff's summons.

10 At the hearing, I made orders permanently preserving the confidentiality of that material on the basis that such orders were necessary to prevent PFM suffering a forensic disadvantage in this and other proceedings.

11 As considerable parts of the plaintiff's material remain confidential and redacted, these reasons avoid reference to such material. A confidential annexure, referring to confidential material relevant to the Court's reasoning, will be provided to the plaintiff.

C. APPLICABLE LAW AND PRINCIPLES

12 Section 33ZDA of the Act provides:

- (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).
- (4) This section has effect despite anything to the contrary in the Legal Profession Uniform Law (Victoria).
- (5) In this section –

group costs order means an order made under subsection (1);

legal costs has the same meaning as in the Legal Profession Uniform Law (Victoria).

13 Section 33ZDA is novel and unique to Victoria which is the only Australian jurisdiction where, with respect to group proceedings and subject to obtaining an order from the Supreme Court, the prohibition against contingency fees has been lifted.¹ It permits the legal costs payable to the law practice representing the plaintiff and group members to be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding.

¹ *Kain v R&B Investments Pty Ltd* [2025] HCA 28, [91] (Gordon, Steward, Gleeson and Beech-Jones JJ).

14 In *Bogan v Estate of Smedley (Deceased)*, the Court of Appeal explained that a GCO permits a law practice not only to fund the conduct of proceedings but also to derive a financial benefit beyond the recovery of ordinary professional fees.² Such an arrangement transfers the financial risk associated with the litigation from the group members to the law practice.³ The Court noted that s 33ZDA reflects a legislative intention to allow, in appropriate circumstances, proceedings to be funded by a law practice, subject to the supervision of the court, where this is consistent with the interests of justice:

Section 33ZDA(1) addresses the relationship between lawyer and client and also between lawyer and group members who may or may not be in a contractual relationship with the law practice. Through the mechanism of a GCO a law practice is in a position to both fund the litigation and benefit from it beyond recoupment of ordinary professional costs. The financial risk of conducting the litigation is able to be shifted from the group members to the law practice.

...

The court may only make a GCO if it is satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding. It must follow that, in regulating an aspect of the lawyer-client relationship, and the measure of the potential return to the law practice, the section expressly recognises that the order may be necessary to ensure justice is done in the proceeding. It may reasonably be inferred from the text and structure of s 33ZDA that a purpose of a GCO is to put in place a funding mechanism that allows the group members to be represented and for the matter to proceed and that whether the proceeding proceeds as a group proceeding may be a matter that may engage the interests of justice in the proceeding. In other words, s 33ZDA embodies a legislative judgment that, in some cases, it may be in the interests of justice for the matter to be funded by the law practice subject to the control of the court because without such an order the matter may not be able to proceed and the benefits of a group proceeding to the interests of justice would be unattainable.⁴

² [2023] VSCA 256, [51] (Ferguson CJ, Niall and Macaulay JJA) (*Bogan Appeal*).

³ *Bogan Appeal*, [51] (Ferguson CJ, Niall and Macaulay JJA).

⁴ *Bogan Appeal*, [51], [53] (Ferguson CJ, Niall and Macaulay JJA).

15 The principles applicable to s 33ZDA are well established and have been given extensive consideration by this Court.⁵ The following principles have been identified as relevant:

- (a) The purpose of s 33ZDA is to enhance justice by reducing potential barriers to commencing class actions in this Court.⁶
- (b) The ability of a law practice to charge contingency fees in group proceedings 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, by reducing costs to group members, by having a single fee, and by providing transparency and simplicity.⁷
- (c) The statutory criterion of the Court being *satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding* is open-textured and provides the Court with a large measure of significant, unguided discretion.⁸
- (d) Whether this criterion is satisfied will depend upon a broad, evaluative assessment of the relevant facts and evidence before the Court.⁹ In this assessment, the question of whether to make an order and the question of what the rate ought to be will be intertwined.¹⁰
- (e) The Court has the widest possible power to do what is appropriate to achieve justice in the circumstances, and it is inappropriate to read down the scope of

⁵ See, eg, *Fox v Westpac Banking Corporation*; *Crawford v Australia and New Zealand Banking Group Ltd* (2021) 69 VR 487 (Nichols J) (**Fox**); *Allen v G8 Education Ltd* [2022] VSC 32 (Nichols J) (**Allen**); *Bogan v Estate of Peter John Smedley (Deceased)* [2022] VSC 201 (John Dixon J) (**Bogan**); *Nelson v Beach Energy Ltd* [2022] VSC 424 (Nichols J); *Lay v Nuix Ltd* (2022) 167 ACSR 27 (Nichols J); *Gehrke v Noumi Ltd* [2022] VSC 672 (Nichols J) (**Noumi**); *Mumford v EML Payments Limited* [2022] VSC 750 (Delany J); *DA Lynch v Star Entertainment Group* [2023] VSC 561 (Nichols J); *Norris v Insurance Australia Group Ltd* [2024] VSC 76 (Nichols J); *Kilah v Medibank Private Limited* [2024] VSC 152 (Attiwill J); *Raeken Pty Ltd v James Hardie Industries PLC* [2024] VSC 173 (M Osborne J).

⁶ *Allen*, [23] (Nichols J). See also Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 2019, 4590 (Jill Hennessy, Attorney-General and Minister for Workplace Safety).

⁷ *Bogan*, [93] (John Dixon J). See also Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 2019, 4589 (Jill Hennessy, Attorney-General and Minister for Workplace Safety).

⁸ *Allen*, [18] (Nichols J) (emphasis in original).

⁹ *Fox*, 491 [8(a)] (Nichols J).

¹⁰ *Fox*, 499 [33] (Nichols J).

- this provision by making implications or limitations that are not expressly stated.¹¹
- (f) In making its assessment, the Court must give primacy to the interests of group members and must be astute to protect their interests.¹² The costs that group members are likely to pay is relevant, but not the only consideration.¹³ Additional relevant considerations include the financial viability of both the existing funding agreements and the proposed funding arrangement under a GCO.¹⁴
- (g) The Court must be satisfied that making a GCO would be a suitable, fitting or proper way to ensure that justice is done in the proceeding.¹⁵ Further, ensuring that justice is so done requires fairness and equity and must not unjustly affect a party to a proceeding.¹⁶
- (h) Section 33ZDA implicitly permits the linking of risk and reward in the calculation of fees, where the calculative process may properly take into account not only the value of legal services performed, but also the financial risk that the law practice assumed.¹⁷
- (i) Considerations of reasonableness and proportionality in respect of legal costs can provide meaningful guidance in the setting of an appropriate percentage under s 33ZDA.¹⁸
- (j) In interpreting the statutory criterion, a conjunctive construction of ‘appropriate or necessary’ is consistent with the context and purpose of

¹¹ *Bogan*, [12(b)] (John Dixon J).

¹² *Fox*, 491 [8(a)], 499 [34] (Nichols J).

¹³ *Fox*, 491 [8(a)] (Nichols J).

¹⁴ *Bogan*, [14] (John Dixon J).

¹⁵ *Fox*, 499 [31] (Nichols J).

¹⁶ *Fox*, 500 [36] (Nichols J).

¹⁷ *Allen*, [28] (Nichols J).

¹⁸ *Noumi*, [53(a)] (Nichols J).

s 33ZDA, where a GCO should be made only where the Court considers it is necessary *and* appropriate to ensure that justice is done in the proceeding.¹⁹

D. RELEVANT FACTS

16 On 4 December 2024, the plaintiff entered into a conditional legal costs agreement (CLCA) with PFM.²⁰ The CLCA relevantly provides that:

- (a) the plaintiff instructs PFM to apply for a GCO;
- (b) PFM acts in the proceeding on a ‘no win, no fee’ conditional basis (NWNF) until the determination of the GCO Application; and
- (c) if the GCO Application is not made, the CLCA terminates within seven days, unless PFM notifies the plaintiff of its intention to seek alternative funding arrangements for the conduct of the proceeding (which may include negotiating funding from a litigation funder for some or all of the legal costs or entering another CLCA with the plaintiff).²¹

17 The plaintiff instructed PFM to apply for a GCO in the present proceeding at a rate of 35%.²²

18 The CLCA also provides that the circumstances in which PFM may terminate the CLCA include, relevantly:

- (a) where PFM becomes reasonably satisfied that the proceeding does not enjoy sufficient Costs Support (that is, a GCO, a litigation funding agreement, and/or PFM’s decision that the litigation is economically viable); and

¹⁹ *Gawler v FleetPartners Group Ltd* [2024] VSC 365, [42] (Waller J) (*Gawler*).

²⁰ Byrnes Affidavit, [8]. The Conditional Legal Costs Agreement (CLCA) is exhibited to the Byrnes Affidavit: SB-1, 1-25.

²¹ CLCA, cl 4.1, 7.2.

²² Byrnes Affidavit, [18].

(b) where PFM forms the opinion that a Successful Outcome (for example, a judgment in favour of the plaintiff or a settlement) resulting in a substantial benefit to the plaintiff is not reasonably likely.²³

19 If a GCO is not made, the plaintiff deposes that he would instruct PFM to promptly seek suitable third-party finding on satisfactory terms for this proceeding.²⁴ The plaintiff further confirms that he is unable to afford PFM's professional fees or the estimated disbursements over the life of the proceeding, nor would he be willing to take on such a responsibility.²⁵

20 Mr Finney's evidence is that if a GCO is not made, PFM would not be prepared to fund this proceeding on an ongoing NWNF basis.²⁶

21 Further, if a GCO is made at a rate lower than 35%, Mr Finney's evidence is that, subject to a review of the order and accompanying reasons issued by the Court in order to understand the order's likely economic effect and how it differs from the GCO order sought, PFM would not agree to continue to conduct the proceeding.²⁷

E. PLAINTIFF'S SUBMISSIONS

22 The plaintiff submits that a GCO at the proposed rate of 35% is appropriate or necessary to ensure that justice is done in the proceeding for the following reasons:

(a) The making of the GCO at the proposed rate will ensure the proceeding continues without disruption, uncertainty or delay, which would occur if the GCO is not made at the proposed rate. It will also guard against the realistic prospect that the proceeding comes to an end. Justice cannot be done 'in' the proceeding if the plaintiff and group members are unable to pursue their claims through the proceeding and must abandon them.

²³ CLCA, cll 10.8, 15.1.

²⁴ Byrnes Affidavit, [38].

²⁵ Byrnes Affidavit, [36].

²⁶ First Finney Affidavit, [64].

²⁷ First Finney Affidavit, [67], [169].

- (b) This case is exceptionally complex involving intricate continuous disclosure and misleading conduct allegations requiring extensive investigation. Establishing causation and loss in shareholder class actions presents particular challenges, especially given recent jurisprudential developments that have created uncertainty in this area of law.
- (c) The proceeding will be expensive to conduct due to its complex nature and the substantial volume of evidence requiring analysis.
- (d) When complexity, risk, cost, and quantum are considered together, 35% represents a reasonable risk-reward ratio as contemplated by the legislation. The rate is consistent with the rate sought in other recent analogous cases commenced by PFM (*Gawler v FleetPartners Group Ltd*²⁸ (**Gawler**) at 39% and *Laricchia v WiseTech Global Ltd*²⁹ (**WiseTech**) at 35%), demonstrating a rational and detailed consideration in the rate-setting exercise.
- (e) While 35% is at the upper end of approved rates, contextual factors justify this positioning. Unlike cases with lower rates that involved competitive carriage disputes, this case faces no such competition. Recent developments in shareholder class action jurisprudence have increased litigation risks, supporting a general upward trend in GCO rates over time.
- (f) Detailed modelling shows that the proposed GCO delivers better outcomes than traditional third-party funding, where the funding commission and legal costs amount to 40–60% of resolution sums. Historical data shows median returns to group members in funded cases of only 50%, with median funding commissions alone being 24%. The 35% GCO ensures that 65% of the resolution sum flows directly to group members.
- (g) A GCO at the proposed rate will provide certainty, transparency and simplicity with respect to the calculation of legal costs, as the GCO guarantees

²⁸ [2024] VSC 365 (Waller J).

²⁹ [2025] VSC 482 (Croft J) (**WiseTech**).

that the plaintiff and group members will receive a fixed percentage of any award or settlement, subject to variation by an order of the Court. The Court has the power under s 33ZDA(3) of the Act to revise down the rate, taking into account updated circumstances.

F. DEFENDANT'S SUBMISSIONS

- 23 The defendant did not have access to the confidential material relied on by the plaintiff in support of the GCO application. Accordingly, its role in the application was limited.
- 24 While the defendant neither consents to nor opposes the plaintiff's application for a GCO rate of 35%, it notes that 35% is substantially higher than the median rate in shareholder class actions.
- 25 The defendant also disputes the plaintiff's contention that recent decisions adverse to plaintiffs in shareholder class actions have created increased risk and uncertainty in conducting such actions, warranting a higher GCO rate. More specifically, the defendant submits that the decision in *Crowley v Worley Ltd (No 2)*³⁰ does not represent a change in the law and that the requirements for proving causation and loss in such cases have been established since at least the decision in *TPT Patrol Pty Ltd v Myer Holdings Limited* in 2019.³¹

G. CONSIDERATION

- 26 The determination of whether to make a GCO and at what rate must be answered by reference to whether it is 'appropriate or necessary to ensure that justice is done in the proceeding'.³² This requires a broad evaluative assessment of the relevant facts and evidence, where the question of whether to make an order and the question of what the rate ought to be will be intertwined.

³⁰ (2023) 171 ACSR 410 (Jackman J).

³¹ (2019) 293 FCR 29 (Beach J).

³² *Supreme Court Act 1986* (Vic) s 33ZDA(1).

- 27 Having considered the evidence and submissions, I have formed the view that a GCO at a rate of 30% rather than 35% is appropriate and necessary to ensure that justice is done in this proceeding. My reasons are as follows.
- 28 First, having regard to the specific facts of this case, its complexity, the estimated value of the claim and the estimated legal costs and disbursements required to prosecute it, as well as the risks associated with it, I consider that a rate of 30% appropriately balances the risk and reward calculus contemplated by s 33ZDA of the Act. I have discussed this in more detail in the confidential annexure to these reasons.
- 29 Secondly, a GCO at a rate of 30% will provide certainty, transparency and simplicity with respect to the calculation of legal costs and will guarantee that the plaintiff and group members will receive 70% of any award or settlement. The GCO will promote equality of outcome as between the group members by virtue of s 33ZDA(1)(b) of the Act.
- 30 Thirdly, the GCO will have the effect of aligning PFM's interest in achieving a reasonable return for the investment and risk undertaken by them with the interests of the plaintiff and group members.
- 31 Fourthly, although I consider that a GCO at a rate of 30% is appropriate and necessary to ensure that justice is done in this proceeding, I am mindful that the Court has the power under s 33ZDA(3) of the Act to increase or decrease the percentage rate at any stage of the proceeding taking into account updated circumstances.
- 32 Fifthly, I do not consider it is likely that the proceeding will not continue if a GCO is made at a rate of 30% rather than 35% having regard to the likely economic effect of such an order. The decision in *Gawler*, where a GCO at a rate of 39% was approved, was relied on by the plaintiff as an 'analogous case'. However, that decision turned on its own facts and can be distinguished on several bases. Further, in *Gawler*, there was evidence that if the GCO was not made at the rate of 39% the proceeding would

likely not continue.³³ That is not the case here, where Mr Finney deposes that any decision not to continue to conduct the proceeding would be subject to a review of the Court's order and accompanying reasons in order to understand the order's likely economic effect and how it differs from the GCO order sought.³⁴ The circumstances that justified a GCO at a rate of 39% in *Gawler* are not present here. These matters are discussed further in the confidential annexure to these reasons.

33 Sixthly, I do not accept that recent decisions in shareholder class action litigation should lead to a GCO being made at a higher rate on the basis that such cases now involve greater risk than previously. As the defendant correctly submits, Jackman J's decision in *Crowley v Worley Ltd (No 2)*³⁵ does not represent a change in the law, nor a change in what is required by a plaintiff to prove causation and loss. The need to prove causation and loss (and in particular economic equivalence) must already have been taken into account in the approval of GCO rates reflected by the median rate approved in shareholder class actions.

34 Further, those shareholder class action cases that have proceeded to judgment provide guidance as to how causation and loss may be established in subsequent cases.³⁶ The jurisprudence in this area continues to develop in a manner that provides greater clarity for practitioners and parties.

35 In any event, the Court is entitled to assume that in commencing a shareholder class action the plaintiff's solicitors consider the claims to have merit. Indeed, they will have signed a proper basis certificate under s 42(1A) of the *Civil Procedure Act 2010* (Vic) confirming that on the factual and legal material available, each allegation of fact (including as to causation and loss) has a proper basis.

³³ *Gawler*, [45]–[46] (Waller J). The plaintiff also referred to its application in *WiseTech* as an analogous case. In that case a GCO of 35% was sought and an order was made to that effect: *WiseTech*, [45] (Croft J). This is discussed further in the confidential annexure to these reasons.

³⁴ First Finney Affidavit, [67], [169].

³⁵ (2023) 171 ACSR 410 (Jackman J).

³⁶ In this regard, see *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited* [2025] FCAFC 63 [587], [594]–[595], [597] (Murphy, Moshinsky and Button JJ).

36 Seventhly, I have also had regard to the range of approved rates at which GCOs have been made in other representative proceedings. Professor Vince Morabito's report dated 4 February 2025 (**Morabito 2025 Report**) records that as at 1 February 2025:

- (a) there were 22 GCOs issued by this Court;
- (b) the median GCO rate was 24.75%;
- (c) the mode or most common GCO rate was 24.5%;
- (d) ten out of 22 GCOs (45.4%) had GCO rates between 20% and 24.99%;
- (e) six out of 22 GCOs (27.2%) had GCO rates between 25% and 29.99%; and
- (f) the median GCO rate in shareholder class actions was 26%.³⁷

37 Since the publication of the Morabito 2025 Report, a further three GCOs have been made:

- (a) *Clarke v JB Hi-Fi Group Pty Ltd*, where the GCO rate was 30%;³⁸
- (b) *Edwards v Hyundai Motor Company Australia Pty Ltd; Sims v Kia Australia Pty Ltd (Ruling No 3) (Edwards)*, where the GCO rate was:
 - (i) 24.75% up to \$120 million;
 - (ii) 20% between \$120 million and \$150 million; and
 - (iii) 15% over \$150 million;³⁹ and
- (c) *WiseTech*, where the GCO rate was 35%.⁴⁰

³⁷ Vince Morabito, 'Group Costs Orders, Funding Commissions, Volume of Class Action Litigation, Reimbursement Payments and Biggest Settlements' (Report, 4 February 2025) 22–28 (**Morabito 2025 Report**).

³⁸ [2025] VSC 288, [2], [27] (Nichols J).

³⁹ [2025] VSC 429, [181] (M Osborne J).

⁴⁰ *WiseTech*, [45] (Croft J).

38 When the three recent GCOs are also taken into consideration and the methodology as employed by the Morabito 2025 Report is used to compute a median rate in respect of a tiered GCO rate as seen in *Edwards*, the new median GCO rate is 25% in all class actions and 27.5% in shareholder class actions.

39 The Morabito 2025 Report also sheds light on the interaction between GCO applications and carriage motions, where the latter term is used to describe the procedure to determine how the existence of competing class actions should be dealt with.⁴¹ The report revealed that in respect of the 22 GCOs considered:

- (a) where there were no competing class actions, the median GCO rate was 27.5%;
- (b) where there were competing class actions, but the GCO application was not part of a carriage motion, the median GCO rate was 24.5%; and
- (c) where the GCO application was considered as part of a carriage motion, the median GCO rate was 21.2%.⁴²

40 PFM was prepared to accept that a lower GCO rate was appropriate or necessary when it was involved in a carriage dispute.⁴³ While it might be said that where multiple class actions have been commenced against the same defendant that indicates that the plaintiff's case is strong and therefore the risks are lower, it equally indicates that the lawyers are prepared to accept a lower GCO rate as a commercial decision irrespective of the risks. Senior counsel for the plaintiff acknowledged that the phenomenon of GCO rates decreasing in carriage disputes is a function of risk and market forces, but accepted that it was mainly due to market forces.⁴⁴

⁴¹ Morabito 2025 Report, 28.

⁴² Morabito 2025 Report, 28–29.

⁴³ *Noumi*, [26], [42]–[45] (Nichols J). In *Noumi*, PFM had initially proposed to seek a GCO rate with a ratchet provision which ranged from 22.5% to 29.5%. However, in the context of a carriage dispute with Slater & Gordon, the two firms jointly proposed to seek a GCO fixed at 22%, which was accepted to be the product of competition between them.

⁴⁴ Transcript, 43.

41 A GCO rate of 30% is reasonable and proportionate having regard to the range of approved rates at which GCOs have been made in other class actions generally and shareholder class actions in particular.

H. CONCLUSION AND ORDERS

42 Balancing all relevant considerations including the complexity and risks of the proceeding, the estimated quantum, the costs of conducting the litigation, the range of rates previously approved and the need to ensure proportionality, I am satisfied that a GCO at a rate of 30% is appropriate and necessary to ensure that justice is done in this proceeding.

43 Accordingly, I will make the following orders:

- (a) The legal costs payable to the solicitors for the plaintiff and group members, Phi Finney McDonald Pty Ltd, be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding.
- (b) Subject to further order, the percentage referred to in paragraph 43(a) be 30%.
- (c) Liability for payment of the legal costs pursuant to paragraphs 43(a) and (b) be shared among the plaintiff and all group members.
- (d) The defendant's costs of the application be reserved.

CERTIFICATE

I certify that this and the 14 preceding pages are a true copy of the reasons for ruling of Justice Waller of the Supreme Court of Victoria delivered on 20 August 2025.

DATED this twentieth day of August 2025.

