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

Not Restricted

S ECI 2025 01673

PETER COLLENS AND GAI COLLENS ATF THE COLLENS SUPERANNUATION FUND	Plaintiffs
v	
MINERAL RESOURCES LIMITED (ACN 118 549 910)	First Defendant
CHRISTOPHER JAMES ELLISON	Second Defendant

JUDGE:	Craig J
WHERE HELD:	Melbourne
DATE OF HEARING:	5 November 2025
DATE OF JUDGMENT:	7 November 2025
CASE MAY BE CITED AS:	Collens ATF the Collens Superannuation Fund v Mineral Resources Limited & Anor (GCO Ruling)
MEDIUM NEUTRAL CITATION:	[2025] VSC 670

GROUP PROCEEDINGS — Costs — Application for a group costs order — Whether proposed tiered or ratcheted rate starting at 32.5 per cent is appropriate and necessary — Principles to be applied — Tiered or ratcheted rate not appropriate and necessary — GCO made at a flat rate of 30 per cent — *Supreme Court Act 1986* (Vic) s 33ZDA.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr Dion Fahey	Phi Finney McDonald
For the First Defendant	Ms Kasia Dziadosz-Findlay (solicitor appearing)	Gilbert + Tobin
For the Second Defendant	Mr James Sippe	Bennett Law

HIS HONOUR:

Introduction

1. Peter and Gai Collens are the trustees of the Collens Superannuation Fund and the lead plaintiffs in this proceeding commenced on 31 March 2025 under Part 4A of the *Supreme Court Act 1986* (Vic) (the '**Supreme Court Act**').

2. The proceeding is a shareholder class action.

3. The first defendant, Mineral Resources Ltd ('**Mineral Resources**'), is a mining company. The second defendant, **Mr Ellison**, was the managing director of Mineral Resources.

4. The group members are defined as persons who acquired ordinary shares and/or equity swaps in Mineral Resources in the period 31 March 2019 to 14 November 2024 inclusive ('**Relevant Period**') and suffered loss or damage resulting from the defendants' alleged conduct.

5. By summons dated 16 September 2025, the plaintiffs seek a group costs order ('**GCO**') pursuant to s 33ZDA(1) of the *Supreme Court Act.*

6. More specifically, the plaintiffs seek a GCO in the following terms:

   (a) the legal costs payable to Phi Finney McDonald ('**PFM**') in relation to this proceeding be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, being:

Resolution Sum (inclusive of GST)	**GCO Rate**
$50,000,000 or less	32.5% of entire Resolution Sum
$50,000,001 – $100,000,000	32.5% of first $50m of Resolution Sum 30% of each dollar over $50,000,001
$100,000,001 or more	32.5% of first $50m of Resolution Sum 30% of each dollar between $50,000,001 - $100,000,000 27.5% of each dollar above $100,000,001

(b) liability for payment of the legal costs referred to in paragraph (a) above is to be shared among the plaintiffs and all group members (other than those group members who opt out of the proceeding in accordance with s 33J of the *Supreme Court Act*).

7. In the conventional way and as the summons makes plain, the plaintiffs seek such further or other order as the Court considers appropriate. In oral argument, counsel for the plaintiffs clarified that such an order may include, as an alternative to the specific GCO sought in the summons, a GCO at a rate and in a structure that was appropriate or necessary to ensure that justice is done in the proceeding.

8. The proceeding is still at a relatively early stage. Pleadings have closed, discovery conferral orders have been made, and some production of critical documents[1] has occurred. It is appropriate for the Court to hear the application at this juncture.

9. Following the hearing and with the benefit of written and oral argument, I have determined that a flat GCO rate of 30% is appropriate and necessary to ensure that justice is done in the proceeding. My reasons for so determining are set out in these published reasons and in a confidential annexure provided to the plaintiffs contemporaneously with these published reasons.

Candid and Comprehensive Disclosure

10. The criterion for the exercise of power on an application of this type brings into sharp focus an unusual feature of these applications. Much of the information which is directly relevant to the disposition of the application is wholly or partly confidential to the plaintiffs and their legal advisors. Those matters include: the legal risks of the proceeding; the recovery risks of the proceeding; the likely costs and duration of the proceeding; the likely recoverable quantum; reasonable settlement ranges; alternative funding arrangements and returns on investment. The candid and fulsome disclosure of that information to the defendants and any other interested parties (such as insurers) would give rise to an obvious and undesirable forensic disadvantage which would be contrary to the interests of the plaintiffs and group members. Yet the candid and

[1] Within the meaning of s 26 of the *Civil Procedure Act 2010* (Vic).

fulsome disclosure of information of this type must be provided to the Court, to allow it to properly discharge its statutory responsibility. The accuracy and completeness of that information may never be fully tested in a contested *inter-partes* hearing.

11. These features reveal the heavy responsibility of the practitioners of the law practice and counsel acting for the plaintiffs. As the Court of Appeal has observed 'they have duties to both the court and their clients...[and] are not in the same position as an independent third party who purely funds the litigation'.[2] The nature of a GCO application and the corpus of confidential information required to determine it, necessitates that all relevant information to the disposition of the application is proactively and fulsomely advanced. Absent that occurrence, 'justice in the proceeding' is not achieved.

12. In the context of this specific application, I was assisted by the affidavits and submissions to which I have referred below. I also benefitted substantially from the supplementary affidavits and submissions filed in response to confidential questions[3] which arose as a result of my consideration of the confidential material. There is no reason to conclude that the disclosure of the matters relevant to the disposition of the application has not been candid and comprehensive.

Material Relied Upon and Confidentiality Orders

13. The plaintiffs rely on the following material in support of their summons:

    (a) affidavit of Mr Benjamin James Yang Phi affirmed 15 September 2025 ('**Phi Affidavit**');

    (b) affidavit of Mr Peter William Collens affirmed 12 September 2015 ('**Collens Affidavit**');

    (c) confidential affidavit of Mr Benjamin James Yang Phi affirmed 29 October 2025

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2 *Bogan v Estate of Smedley (Deceased*) (2023) 72 VR 394, [51] (Ferguson CJ, Niall and Macaulay JJA) ('***Bogan Appeal***').

3 The questions were provided by the Court to the plaintiffs' solicitors on 17 October 2025 and 24 October 2025. The defendants were immediately notified that questions had been issued to the plaintiffs but were not provided with the content of the questions as they raised, or were directed to, matters that had been the subject of the confidential evidence and submissions.

('**Second Phi Affidavit**')

(d) confidential affidavit of Mr Peter Collens affirmed 29 October 2025 ('**Second Collens Affidavit**')

(e) plaintiffs' outline of submissions dated 16 September 2025 ('**Plaintiffs' Submissions**');

(f) plaintiffs' supplementary submissions dated 22 October 2025 ('**Plaintiffs' Supplementary Submissions**');

(g) confidential affidavit of Mr Benjamin James Yang Phi affirmed 6 November 2025 ('**Third Phi Affidavit**')

14. Mineral Resources did not file submissions or seek to be heard on the application. Mr Ellison filed brief written submissions and neither consented to nor opposed the plaintiffs' application. By reference to the GCO rates awarded in other cases, Mr Ellison's representatives stated that 'it was difficult to see why such a high rate would be justified in this case'. However, Mr Ellison did not elaborate upon that submission by reference to the observable strengths or weaknesses of this case or by reference to the specific features of any other case.

15. Redacted versions of the following documents were filed and served:

a. the Phi Affidavit;

b. the Collens Affidavit;

c. the Second Phi Affidavit;

d. the Second Collens Affidavit;

e. the Plaintiffs' Submissions; and

f. the Third Phi Affidavit.

16. The plaintiffs seek orders to preserve confidentiality over the following materials:

a. certain parts of the Phi Affidavit;

b. certain parts of the Collens Affidavit;

c. the entirety of the Second Phi Affidavit

d. the entirety of the Second Collens Affidavit;

e. certain parts of the Plaintiffs' Submissions;

f. the entirety of the Third Phi Affidavit.

17. The plaintiffs justify the confidentiality orders sought on the basis that:

(a) The material over which confidentiality orders are sought reflect PFM's frank assessments of the risks in this proceeding (and in other proceedings conducted by the firm), early possible claims value estimates and methodologies, litigation budgets and expenditure, and the matters which PFM considered and weighed up in making the decision regarding the commencement and funding structure of this proceeding.

(b) The material is either legally privileged or commercially sensitive and has the requisite confidential character. The disclosure of such material would cause real and substantial prejudice to the plaintiffs and group members in this proceeding if the information were disclosed to the defendants.

(c) The material would also likely prejudice the plaintiffs and group members in other extant or future group proceedings in which PFM act. The public disclosure of the information, and particularly the views of the legal representatives, may present defendants in those extant or future proceedings with an unfair advantage during, among other things, mediation discussions and trials, which would prejudice the interests of the plaintiffs and group members in those proceedings. In this way, the disclosure of the information would prejudice the proper administration of justice.

18. Having considered the unredacted versions of the materials, I am satisfied that confidentiality orders pursuant to r 28.05(4) of the *Supreme Court (General Civil Procedure) Rules 2025* (Vic) should be made.

The Legal Framework

19. Section 33ZDA of the *Supreme Court Act* provides as follows:

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

20. The statutory requirement for the exercise of the power to make a GCO is that Court must be satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding. As the Court of Appeal stated in *Bogan v The Estate of Peter John Smedley (Deceased)*:[4]

> 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

[4] *Bogan Appeal*, [53].

> 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.

21. The applicable principles in an application of this type are now well established and have been given extensive consideration by this Court.[5] The core principles can be summarised as follows:[6]

    a. The purpose of s 33ZDA is to enhance justice by reducing potential barriers to commencing class actions in this Court.[7]

    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.[8] Traditional costs calculation methods present the risk of increasing erosion of group member recoveries. By fixing costs as a percentage of the recovered sum, the risk of further erosion of any recovered compensation is removed.[9]

    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

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5 See: *Bogan Appeal*; *Clarke v JB H-Fi Group Pty Ltd* [2025] VSC 288 (‘***Clarke***’); *Byrnes v Origin Energy Ltd* [2025] VSC 504, [15] (Waller J) (‘***Byrnes***’) citing *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) (‘***Nelson***’); *Lay v Nuix Ltd* (2022) 167 ACSR 27 (Nichols J) (‘***Lay***’); *Gehrke v Noumi Ltd* [2022] VSC 672 (Nichols J) (‘***Gehrke***’); *Mumford v EML Payments Limited* [2022] VSC 750 (Delany J) (‘***Mumford***’); *DA Lynch v Star Entertainment Group* [2023] VSC 561 (Nichols J) (‘***DA Lynch***’); *Norris v Insurance Australia Group Ltd* [2024] VSC 76 (Nichols J) (‘***IAG***’); *Kilah v Medibank Private Limited* [2024] VSC 152 (Attiwill J) (‘***Medibank***’); *Raeken Pty Ltd v James Hardie Industries PLC* [2024] VSC 173 (M Osborne J) (‘***Raeken***’).

6 *Byrnes* [15] (Waller J).

7 *Byrnes* [15] (Waller J) citing: *Allen* [23] (Nichols J). See also Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 2019, 4590 (Jill Hennessy, Attorney-General and Minister for Workplace Safety).

8 *Byrnes* [15] (Waller J) citing: *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).

9 *Clarke* [6(a)].

Court with a large measure of significant, unguided discretion.[10] As Waller J stated in *Gawler v Fleetpartners:*[11]

> Each of the words *appropriate* and *necessary* has separate work to do:[12] 'appropriate' means suitable, fitting or proper in the circumstances; 'necessary' depends on the context and identifies a connection between the GCO and the purpose of ensuring that justice is done in the proceeding;[13] and to 'ensure' means to make certain of something and also depends on context. The purpose of ensuring 'that justice is done in the proceeding' should be understood in the context of the provision. In particular, this includes that the purpose of s 33ZDA is to enhance justice by reducing potential barriers to advancing a class action, noting that s 33ZDA sits within Part 4A of the Act, the principal object of which is to enhance group members' access to justice.[14]

d. Whether the statutory criterion is satisfied will depend upon a broad, evaluative assessment of the relevant facts and evidence before the Court.[15] In this assessment, the question of whether to make an order and the question of what the rate ought to be will be intertwined.[16] One must be cognisant of the fact that the evaluation occurs at an early stage of the proceeding, when evaluative assessments are necessarily attended by uncertainty.[17]

e. Considerations of reasonableness and proportionality inform the setting of a GCO percentage. Determination of the reasonableness and proportionality of a proposed GCO may be evaluated against a number of measures including: whether it is proportional to the risk undertaken by the law firm in the proceeding; the likely amount to be recovered in the proceeding; and the legal costs and disbursements that are likely to be incurred in or as a consequence of the proceeding.[18]

f. 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

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10 *Byrnes* [15] (Waller J) citing: *Allen* [18] (Nichols J) (emphasis in original).
11 [2024] VSC 365,[23] (Waller J) ('***Gawler***').
12 *Gawler* [23] (Waller J) citing: *Bogan* [13(b)] (John Dixon J); *Allen* [19] (Nichols J); *Fox* 498–9 [29]–[30] (Nichols J); *Raeken* [11] (M Osborne J).
13 *Gawler* [23] (Waller J) citing: *Raeken* [11] (M Osborne J).
14 *Gawler* [23] (Waller J) citing: *Bogan* [12(j)] (John Dixon J); *Allen* [23] (Nichols J); *Fox* 496 [21]; *Raeken* [10], [15] (M Osborne J).
15 *Byrnes* [15] (Waller J) citing: *Fox* 491 [8(a)] (Nichols J).
16 *Byrnes* [15] (Waller J) citing: *Fox* 499 [33] (Nichols J).
17 *Clarke* [6(b)].
18 Ibid.

this provision by making implications or limitations that are not expressly stated.[19]

g. In making its assessment, the Court must give primacy to the interests of group members and must be astute to protect their interests.[20] The costs that group members are likely to pay is relevant, but are not the only consideration.[21] Additional relevant considerations include the financial viability of both the existing funding agreements and the proposed funding arrangement under a GCO.[22]

h. 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.[23] Further, ensuring that justice is so done requires fairness and equity and must not unjustly affect a party to a proceeding.[24]

i. 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.[25]

j. Considerations of reasonableness and proportionality in respect of legal costs can provide meaningful guidance in the setting of an appropriate percentage under s 33ZDA.[26]

k. In interpreting the statutory criterion, a conjunctive construction of 'appropriate or necessary' is consistent with the context and purpose of 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.[27]

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19 *Byrnes* [15] (Waller J) citing: *Bogan* [12(b)] (John Dixon J).
20 *Byrnes* [15] (Waller J) citing: *Fox* 491 [8(a)], 499 [34] (Nichols J).
21 *Byrnes* [15] (Waller J) citing: *Fox* 491 [8(a)] (Nichols J).
22 *Byrnes* [15] (Waller J) citing: *Bogan* [14] (John Dixon J).
23 *Byrnes* [15] (Waller J) citing: *Fox* 499 [31] (Nichols J).
24 *Byrnes* [15(g)] (Waller J) citing: *Fox* 500 [36] (Nichols J).
25 *Byrnes* [15(h)] (Waller J) citing: *Allen* [28] (Nichols J).
26 *Byrnes* [15(i)] (Waller J) citing: *Noumi* [53(a)] (Nichols J).
27 *Byrnes* [15(j)] (Waller J) citing: *Gawler* [42] (Waller J).

l. The appropriate rate must be determined with regard to the facts of the particular case but is nevertheless appropriate to compare what is sought with the rates that have been fixed in decided cases.[28]

m. As a GCO is ordinarily made at a time when the Court is engaged in a forward-looking exercise with limited information, s 33ZDA(3) provides an important safeguard which allows the Court to revisit the GCO rate in light of known facts.[29]

A Summary of the Allegations Made

22. The plaintiffs submit that the proceeding largely concerns the conduct of Mr Ellison. It is alleged that Mr Ellison:

a. caused Mineral Resources, or entities to controlled by Mineral Resources, to engage in a series of uncommercial transactions with, or make payments to, related parties; [30]

b. received, directly or indirectly, income, payments or benefits from those transactions which were not declared to the Australian Taxation Office ('**ATO**') or appropriately disclosed;

c. had emails concerning some of the transactions that were deleted;[31]

d. in May 2023, reached a settlement with the ATO in respect of his income and tax affairs;[32]

e. used Mineral Resources' resources for his personal benefit;[33]

f. was the subject of investigations by Mineral Resources;[34] and

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28 *Clarke* [6(c)].
29 *Clarke* [6(d)].
30 SOC, [64]–[69], [70]–[72], [76]–[79], [80]–[91].
31 SOC, [73]. I note that this plea only states that a number of Mineral Resources emails were deleted, not that they were held or deleted by Mr Ellison personally.
32 SOC, [74]–[75].
33 SOC, [92].
34 SOC, [93]–[98].

g. caused Mineral Resources to make investments in projects in which Mr Ellison had a controlling interest.[35]

23. The plaintiffs allege that Mineral Resources was aware of various categories of material information concerning:

a. the conduct summarised above (defined as the Tax Scheme Information, Far East Non-Disclosure Information, Destruction of Evidence Information, Personal Use of Company Resources Information, New Zealand Discounted Equipment Information, and Rental Benefits Information, and NGMT Information);[36] and

b. the consequence of that conduct (the Leadership Transition, Governance and Penalty Information).[37]

24. The plaintiffs allege that such information required immediate disclosure by rule 3.1 of the *ASX Listing Rules* and s 674(2) *Corporations Act 2001* (Cth) and, since 14 August 2021, s 674A(2) of the *Corporations Act 2001* (Cth).[38] Further, it is alleged that Mineral Resources' failure to do so was a contravention of those continuous disclosure obligations,[39] and that Mr Ellison was involved in those contraventions.[40]

25. In addition to the continuous disclosure allegations, the plaintiffs allege that in, or by reason of, various financial statements and documents that were published during the Relevant Period,[41] Mineral Resources made a series of representations. Those representations are alleged to be:

a. representations to the market that Mineral Resources (including through its managing director) was committed to upholding the highest standards of ethics and integrity in its business practices (**Ethical Business Representation**);[42]

35 SOC, [99]–[109].
36 SOC, [137]–[144], [145]–[152].
37 SOC, [141] and [149].
38 SOC, [20]–[21], [172]–[173].
39 SOC, [174]–[175].
40 SOC, [176].
41 SOC, [110]-[130].
42 SOC, [131].

b. representations to the market that Mineral Resources (including through its managing director) was committed to operating in accordance with the highest standards of corporate governance ('**Corporate Governance Standards Representation**');[43]

c. representations to the market that all related party transactions, including those connected to its managing director: (i) had been disclosed in financial statements for the applicable financial year(s) and (ii) were on terms no less favourable than terms generally available to an unaffiliated third party under the same or similar circumstances ('**Related Transactions Representation**').[44]

26. The plaintiffs allege that at all material times, Mineral Resources did not withdraw, qualify or contradict the representations.[45] Further, by reason of the defined information identified above, Mineral Resources' conduct in making the representations, and, alternatively, failing to withdraw, qualify or contradict them, was misleading or deceptive or likely to mislead or deceive, in contravention of s 1041H of the *Corporations Act 2001* (Cth), s 12DA(1) of the *Australian Securities and Investment Commission Act 2001* (Cth), and s 18 of the *Competition and Consumer Act 2010* (Cth) Schedule 2.[46] The plaintiffs also allege that Mr Ellison was involved in these alleged misleading or deceptive conduct contraventions.[47]

27. By reason of the pleaded continuous disclosure contraventions and the misleading conduct contraventions, the plaintiffs allege that they and group members have suffered loss and damage.[48]

28. The defendants generally deny these allegations.

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43 SOC, [132].
44 SOC, [133].
45 SOC, [134]-[136].
46 SOC, [168]–[170].
47 SOC, [171].
48 SOC, [177]–[183].

The Contractual Arrangements

29. The plaintiffs and PFM are party to a conditional legal costs agreement dated 30 January 2025 ('**CLCA**'),[49] and an indemnity arrangement outlined in a letter from PFM to the plaintiffs dated 14 January 2025 ('**Indemnity Arrangement**').[50]

30. The key features of the current funding arrangement can be summarised as follows.

31. First, there is an express agreement between the plaintiffs and PFM that a GCO will be sought. By clause 7.2 of the CLCA, PFM is instructed to apply for a GCO at a percentage to be agreed between the plaintiffs and PFM.

32. Second, the proceeding is presently being funded pursuant to what was described as 'transitionary funding arrangements'. PFM has agreed to fund the proceeding temporarily on a "No Win, No Fee" basis, and provide an indemnity to the plaintiff. In particular:

    a. Clause 4.2 of the CLCA provides that, PFM acts for the plaintiffs on a "No Win, No Fee" basis. Under this arrangement, PFM will charge for its work by the application of an hourly rate, but will be entitled to recover those fees only in the event that the plaintiffs are successful. In that event, PFM may charge an uplift of 25% of its professional fees carried on a "No Win, No Fee" basis. Further, the legal costs (including any uplift) can only be recovered out of the compensation or damages received in the event of a successful outcome.[51]

    b. Clause 4.1 of the CLCA provides that the terms of the CLCA apply 'only until the Court makes a determination in relation to a Group Costs Order application'. If a GCO is made, the CLCA will continue, subject to the terms of the GCO which will prevail over the terms of the CLCA to the extent of any inconsistency.[52] If a GCO is not made, the CLCA will terminate within 7 days, unless PFM notifies the plaintiffs of its intention to seek alternative funding

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49 Collens Affidavit, [18].
50 Collens Affidavit, [16(b)].
51 CLCA, cl 10.7.
52 CLCA, cl 4.1(a).

arrangements.[53] This is consistent with PFM's termination right in the event that the litigation does not enjoy sufficient costs support.[54]

A Flat GCO of 30% is Necessary and Appropriate

33. A flat GCO set at a rate of 30% is appropriate and necessary to ensure that justice is done in the proceeding. That is so for the reasons set out in the confidential annexure, together with the following matters.

34. First, a GCO will facilitate access to justice for group members. The plaintiffs do not have the capacity to fund the costs of the proceeding. I accept that PFM is not in a position to, and is not prepared to, continue to prosecute the case on a No Win, No Fee basis. The only potential alternative to funding the proceeding on a GCO basis is third party litigation funding. Where third party litigation funding is utilised, the combined amount of legal costs and funding commissions deducted from group members' awards or settlements has historically been higher than the GCO rate proposed by the plaintiffs (and significantly so).[55]

35. Mr Collens' evidence is that:

    a. it is important to him that the funding of the proceeding be placed on a stable footing;

    b. that he considers it to be in his best interests and the interests of group members that he is representing that there be certainty for how the proceeding will continue;

    c. he considers there to be an advantage in the proceeding continuing without any delays; and,

    d. it is his preference to remove the risk of the proceeding not continuing.

36. Granting a GCO in these circumstances is consistent with the legislative purpose of s 33ZDA of the *Supreme Court Act*. As the Court of Appeal has explained:[56]

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53 CLCA, cl 4.1(b).
54 See CLCA, cl 15.1(c) and the definition of 'costs support'.
55 *Gawler* [47] (Waller J).
56 *Bogan Appeal* [53] (Ferguson CJ, Niall and Macaulay JJA).

> 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.

37. Second, there is no evidence to suggest that in the seven months since the proceeding was commenced that there is any interest from a third-party litigation funder in supporting or facilitating a competing class action. I am conscious of, and have taken into account, the prejudice that would be caused to group members by the costs and delays of seeking alternative funding.[57] In this regard, I should add that like Waller J in *Byrnes*,[58] 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 thought. That is, of course, an objective assessment. However, in any given case, it may be relevant to take into account any properly proven effect of these recent decisions on the subjective willingness of litigation funders to fund shareholder class action litigation. Such evidence may properly bear upon an evaluation of whether a GCO is necessary to ensure that justice is done in any given proceeding.

38. Third, the making of a GCO will transfer the burden of meeting any adverse costs order from the plaintiffs to PFM.[59] Mr Collens' evidence is that the plaintiffs are not prepared to shoulder the exposure to the risk of meeting an adverse costs order or even a part of that risk and burden.[60] It is appropriate that the plaintiffs be provided with this degree of protection, having regard to the magnitude of the financial exposure, and necessary to ensure that the plaintiffs remain in their role as representatives.

39. Fourth, a consequence of the GCO is that it will ensure that the overwhelming majority of any settlement or judgment sum is distributed to the plaintiffs and group members and is not at risk of being eroded by legal costs and funding commissions. As has been

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57 *Gawler* [46] (Waller J).
58 *Byrnes* [33] (Waller J).
59 *Supreme Court Act 1986* (Vic) s 33ZDA(2)(a) ('***Supreme Court Act***').
60 Collens Affidavit, [35].

recognised by this Court, traditional costs calculation methods risk eroding recoveries. The benefit of protecting against such erosion is a real rather than illusory one, when the GCO is set at a level that is reasonable and proportionate.[61]

40. Fifth, there are other recognised structural benefits to a GCO:

    a. It engenders simplicity and transparency from the outset.[62] Under a GCO it is simpler to explain to group members the manner in which legal costs and funding costs are to be calculated and charged,[63] and there is no need to explain the mechanism of a common fund order. Although these inherent characteristics of a GCO do not of themselves establish the necessity of making a GCO, they are relevant to the overall evaluative assessment of the appropriateness of the order sought, to be considered in the context of all the other relevant considerations.[64]

    b. A beneficial feature of the GCO model is that it promotes the alignment of the interests of the lawyers and the interests of the plaintiff and group members in maximising recoveries and conducting the proceeding efficiently.[65]

41. Sixth, I am not presently satisfied that the proposed tiered or 'ratchet' structure is necessary and appropriate to ensure justice is done in the proceeding.[66] That is so because:

    a. Determination of the particular quantum at which a GCO should be ratcheted down is very difficult at this stage of this proceeding. Ratcheting invites an attempt at precision which is not readily achievable at this juncture. In the present case, the ratchet points of $50,000,001 and $100,000,001 are arbitrary. The submissions and affidavit material did not advance a basis upon which I can conclude otherwise.

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61 *Clarke* [6(a)] (Nichols J).

62 *Fox v Westpac Banking Corporation (No 2)* [2023] VSC 95, [50] (Nichols J) ('***Fox 2***'); *Allen* [41] (Nichols J); *Gehrke* [31] (Nichols J).

63 *DA Lynch* [31] (Nichols J).

64 *Allen* [93(c)] (Nichols J).

65 *Fox 2* [53] (Nichols J).

66 In addition to the matters explicitly set out, I am fortified in this conclusion by confidential paragraph 97 of the Second Phi Affidavit.

b. Treating quantum as being the sole driver of when a GCO rate is to be ratcheted risks oversimplifying the multi-factorial risk-reward calculus applicable to cases such as this. Allowing a law practice to recover the same GCO rate at higher quantum levels may in fact be necessary and appropriate to ensure that justice is done in the proceeding, having regard to, *inter alia*, the length of time the proceeding is likely to be prosecuted for and the risks attendant upon pursuing that higher quantum. To choose a hypothetical yet illustrative example, the risk of pursuing claims in a narrow relevant period proximate to a corrective disclosure date may be far lower than the risk of pursuing those claims in respect of alleged misrepresentations or non-disclosures at the commencement of a six year limitation period. Yet, it may be that only if the law practice takes the risk of pursuing the broader claim, with the attendant costs and time required, that a return for shareholders in that early part of the relevant period (and therefore a higher quantum) can be achieved.

c. A ratcheting arrangement is less simple and transparent.[67]

d. The object of ensuring justice is done in a proceeding is likely maximised if a law practice's incentive for taking risk in pursuit of reward is wholly and consistently aligned with the object of maximising returns for group members.

e. The intended object of a ratchet mechanism – which is a laudable one – is to avoid disproportion or a 'windfall' as the quantum of a settlement or judgment increases. However, s 33ZDA(3) provides a clear statutory mechanism by which any disproportionate or 'windfall' can be addressed if that disproportion or 'windfall' actually manifests itself.[68] In light of the points already made, it is preferable that amendment power is used to address actual disproportion at the specific point it occurs, rather than fixing a ratchet mechanism now.

42. In these circumstances, a flat GCO rate is appropriate.

43. Seventh, taking into account the facts of this case, the allegations made, the nature of the causes of action, the specific risks and strengths of the case, the estimated value of

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67 Ibid.

68 *Bergman v Sportsbet Pty Ltd (GCO Ruling)* [2025] VSC 521, [33].

the claim, and, the estimated legal costs and disbursements, I have determined that 30% appropriately balances the risk and reward calculus contemplated by s 33ZDA of the *Supreme Court Act*.[69]

44. It is well settled that the calculation of an appropriate or necessary percentage of a resolution sum to be allocated to legal costs pursuant to s 33ZDA, as conducted by Mr Phi, may properly take into account not only the value of legal services performed but the value of a reasonable return to the law practice for the financial risk assumed by it.[70] As John Dixon J explained in *Bogan:*[71]

> So much is evident from the contingent nature of the recovery of a resolution sum, the need for the law practice to finance its own operations, and the statutory obligation on the law practice to assume the plaintiff's risk of paying adverse costs orders and any requirement to give security for the defendant's costs.

45. It is both fair and reasonable for a law practice such as PFM to seek a risk premium.

46. Eighth, having regard to the evidence adduced on behalf of the plaintiffs and the economic effect of such an order, I am satisfied that making an order at a flat rate of 30% will not rationally affect the likelihood that PFM will continue to prosecute the action on behalf of the plaintiffs and group members.

47. Finally, it is appropriate to take into account some form of comparative analysis in determining whether the rate in a particular case is justified.[72] Of course, care must be taken as the approved GCO rates necessarily turn on the particular evaluation and balancing of specific risks, costs, complexity, and prevailing market conditions arising in each case.

48. At the Court's request, the plaintiffs identified the GCO rates ordered in shareholder class actions to date. Mineral Resources confirmed there were no material inaccuracies with the table. To date, the GCO rates ordered in shareholder class actions are as follows:

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69 In conducting the broad evaluative assessment of what that rate should be, I recognise that the facts of this particular case are paramount: *Clarke* [6(c)] (Nichols J).

70 *Bogan* [12(f)] (J Dixon J); *Fox* 2 [56] (Nichols J); *Lay* 48-49, [72] (Nichols J); *Nelson* [45] (Nichols J); *Allen* [28] (Nichols J); *Fox* 495 [20] (Nichols J).

71 *Bogan* [12(f)] (J Dixon J).

72 *Dawson v Insurance Australia Ltd* [2024] VSC 808, [42] (Watson J); *Clarke* [6(c)], [17] (Nichols J).

#	Case	GCO rate (%)
1.	*Allen v G8 Education Ltd* [2022] VSC 32	27.5%
2.	*Bogan v The Estate of Peter John Smedley (deceased)* [2022] VSC 201	40.0%
3.	*Nelson v Beach Energy; Sanders v Beach Energy* [2022] VSC 424	24.5%
4.	*Gehrke v Noumi Ltd* [2022] VSC 672	22.0%
5.	*Mumford v EML Payments Ltd* [2022] VSC 750	24.5%
6.	*Lieberman v Crown Resorts* [2022] VSC 787	16.5 – 27.5%
7.	*DA Lynch v Star Entertainment Group* [2023] VSC 561	14.0%
8.	*Lidgett v Downer EDI Ltd* [2023] VSC 574	21.0%
9.	*Thomas v The a2 Milk Company Ltd* [2023] VSC 768	24.0%
10.	*Kilah v Medibank Private Ltd* [2024] VSC 152	27.5%
11.	*Norris v Insurance Australia Group Ltd* [2024] VSC 76	30.0%
12.	*Raeken Pty Ltd v James Hardie Industries PLC* [2024] VSC 173	27.5%
13.	*Gawler v Fleet Partners Group Ltd* [2024] VSC 365	39.0%
14.	*Warner v Ansell Ltd* [2024] VSC 491	25% – 40%
15.	*Laricchia v WiseTech Global Limited* [2025] VSC 482	35.0%
16.	*Byrnes v Origin Energy Limited* [2025] VSC 504	30.0%
17.	*Weatherlake v Paladin Energy Ltd; Chaudhri v Paladin v Energy Ltd* [2025] VSC 669	14% – 27.5%

49. Focussing on shareholder class actions in this jurisdiction which have been the subject of GCO awards, reveals that a GCO rate of 30%:[73]

    a. is above the mean GCO rate of 27.16% for all shareholder class actions;

    b. is at or about the mean GCO rate of 30.28% for shareholder class actions from 2024 onwards.

[73] The mid-points in *Lieberman v Crown Resorts* [2022] VSC 787, *Warner v Ansell Ltd* [2024] VSC 491, *Weatherlake v Paladin Energy Ltd* and *Chaudhri v Paladin v Energy Ltd* [2025] VSC 669 were used for the purpose of the calculations set out herein.

50. I consider this to be appropriate having regard to the factors informing the risk-reward calculus and noting that the proposed GCO rate is within the range of other rates approved by the Court.

Conclusion and Orders

51. For the above reasons and those set out in the Confidential Annexure, I have determined that a flat GCO rate of 30% is appropriate and necessary to ensure that justice is done in the proceeding.

52. Accordingly, I will make the following orders:

    a. The legal costs payable to the solicitors for the plaintiffs and group members, Phi Finney MacDonald 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 a above be 30%;

    c. Liability for payment of the legal costs pursuant to paragraphs a and b above be shared among the plaintiffs and all group members.

    d. The defendants' costs of the application be reserved.

CERTIFICATE

I certify that this and the 20 preceding pages are a true copy of the reasons for judgment of the Honourable Justice Craig of the Supreme Court of Victoria delivered on 7 November 2025.

DATED this seventh day of November 2025.

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Associate