IN THE SUPREME COURT OF VICTORIA
COMMERCIAL COURT
GROUP PROCEEDINGS

Not Restricted

S ECI 2025 00287

BETWEEN:

SCOTT BYRNES — Plaintiff

v

ORIGIN ENERGY LIMITED (ACN 000 051 696) — Defendant

JUDGE:	Waller J
WHERE HELD:	Melbourne
DATE OF HEARING:	2 February 2026
DATE OF RULING:	11 March 2026
CASE MAY BE CITED AS:	Byrnes v Origin Energy Ltd (No 2)
MEDIUM NEUTRAL CITATION:	[2026] VSC 97

GROUP PROCEEDINGS — Costs — Application to vary a group costs order prior to settlement — Contradictor appointed — Standing to bring application — Relevant considerations for varying a group costs order prior to settlement of group proceeding — Whether variation of group costs order to a tiered rate is appropriate and necessary to ensure that justice is done in the proceeding — Confidentiality of reasons — *Supreme Court Act 1986* (Vic) Part 4A, s 33ZDA.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr W Edwards KC with Ms R Howe	Phi Finney McDonald
For the Contradictor	Dr O Bigos KC with Ms K J Browne	
For the Defendant	Ms J Findlay	Herbert Smith Freehills Kramer

HIS HONOUR:

A INTRODUCTION

1 By summons dated 17 June 2025, the plaintiff sought a group costs order (**GCO**) pursuant to s 33ZDA(1) of the *Supreme Court Act 1986* (Vic) (**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.

2 On 20 August 2025, I determined that the legal costs payable to PFM be calculated as 30% of the amount of any award or settlement that may be recovered in the proceeding (**Initial GCO**).[1]

3 The plaintiff has now brought an application to amend the Initial GCO pursuant to s 33ZDA(3) of the Act.

4 By summons dated 29 October 2025, the plaintiff applies to vary the Initial GCO in both rate and structure (**GCO Variation Application**). Under the proposed variation, legal costs would be calculated on a tiered basis: 35% for each dollar of any award or settlement up to $42.5 million, and 25% for each dollar of any award or settlement exceeding $42.5 million (**Proposed Varied GCO**).

5 The GCO Variation Application marks the first time a plaintiff has applied to amend a GCO pursuant to s 33ZDA(3) in the course of a proceeding. To date, an order to amend an existing GCO under that provision has only been considered by this Court in the context of applications to approve settlements of group proceedings pursuant to s 33V of the Act.[2]

6 In the circumstances, on 3 November 2025, I ordered that a contradictor be appointed in relation to the GCO Variation Application. The contradictor's role was to:

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1 *Byrnes v Origin Energy Limited* [2025] VSC 504 (Waller J) (***Byrnes***).

2 *Allen v G8 Education Ltd (No 4)* [2024] VSC 487 (Watson J) (***Allen (No 4)***); *Fuller & Anor v Allianz Australia Insurance Ltd & Anor* [2025] VSC 160 (Matthews J) (***Fuller***); *Gehrke & Anor v Noumi Ltd & Anor* [2025] VSC 373 (Delany J) (***Gehrke***); *O'Brien v Australia and New Zealand Banking Group Ltd & Anor* [2025] VSC 389 (Harris J); *Anderson–Vaughan v AAI Ltd & Ors* [2025] VSC 469 (Matthews J); *McCoy v Hino Motors Ltd (No 2)* [2025] VSC 553 (Delany J) (***McCoy***).

(a) consider the material served on it in support of the plaintiff's GCO Variation Application as well as the material before the Court in relation to the Initial GCO;

(b) file any evidence and submissions in relation to the GCO Variation Application; and

(c) appear and deliver oral submissions at the hearing of the GCO Variation Application listed before me.

7 In support of its GCO Variation Application, the plaintiff relied on:

(a) the affidavit of Mr Scott Byrnes affirmed on 11 November 2025;

(b) the affidavit of Mr Timothy Finney, a director and principal lawyer of PFM, affirmed on 11 November 2025;

(c) the affidavit of Mr Timothy Finney affirmed on 20 December 2025;

(d) the affidavit of Mr Timothy Finney affirmed on 30 January 2026;

(e) the plaintiff's submissions in support of the GCO Variation Application filed on 11 November 2025; and

(f) the plaintiff's submissions in reply to the contradictor's submissions filed on 20 December 2025.

8 The contradictor relied on submissions filed on 9 December 2025. In the course of preparing those submissions, the contradictor put a series of questions to PFM to which answers were provided.

9 When the Initial GCO was sought, Mr Finney's evidence was that PFM would consider the economic effect of conducting the proceeding if the Court made a GCO at a rate less than 35%.[3] The present application is brought because Mr Finney's evidence is that, for a number of reasons (some of which I will address in the

[3] Affidavit of Mr Timothy Finney affirmed on 11 November 2025, [11]–[12] (**Third Finney Affidavit**).

confidential annexure to these reasons), PFM will not continue to fund the proceeding based on the Initial GCO rate.

B THE LEGISLATIVE PROVISION

10 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);
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> ***legal costs*** has the same meaning as in the Legal Profession Uniform Law (Victoria).

C SUBMISSIONS

C.1 Plaintiff's submissions

11 The plaintiff submitted that he has standing to bring the GCO Variation Application. While s 33ZDA(3) is silent as to who may bring such an application, the plaintiff submitted that neither the statutory language nor the evident purpose

of sub-s (3) confines the power to one exercisable solely on the Court's own motion, for the following reasons:

(a) The authorities that have considered s 33ZDA(3) have implicitly accepted that the rate of a GCO may be amended on the application of a party.[4]

(b) It is implicit in the provision itself that the power under s 33ZDA(3) may be exercised on application by a party, since to hold otherwise would deprive the provision of practical efficacy. This is particularly so outside the settlement approval context, where the Court is unlikely to become aware of changed circumstances warranting variation of a GCO unless an interested person brings those circumstances to its attention by way of application.

(c) The absence of express statutory language specifying the circumstances in which a person may or must apply does not preclude a party from bringing an interlocutory application seeking the exercise of the power.

(d) Section 33ZDA(3) stands in contrast to sub-s (1), which is confined to an application by the plaintiff for a GCO. Subsection (3) is drafted more broadly, reflecting that a range of persons with a legitimate interest in the terms of a GCO may seek amendment of the rate during the course of the proceeding. Those persons may include group members who consider the GCO rate to be disproportionate; a law practice that has become exposed to a downside costs risk disproportionate to the likely reward; a plaintiff concerned about the ongoing viability of the proceeding; or a plaintiff and their lawyers where the law practice named in the GCO has ceased to act.

12 The plaintiff submitted that the principles governing the exercise of s 33ZDA(3), which developed largely in the settlement approval context and are concerned primarily with downward variation of the GCO rate, apply equally to the present application which arises outside that context. The plaintiff emphasised the following matters:

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4 *Lieberman v Crown Resorts Ltd* [2025] VSC 596, [46] (Nichols J); *Gehrke v Noumi Limited* [2022] VSC 672, [56]–[59] (Nichols J), cited in *Kilah & Anor v Medibank Private Limited* [2024] VSC 152, [46]–[47] (Attiwill J) (***Kilah***).

(a) Consideration of whether to exercise the power under s 33ZDA(3) is not an occasion for a hearing de novo regarding the appropriateness of the original GCO,[5] although close attention should be given to the reasons for the original GCO.

(b) The power to amend a GCO may arise at any time 'during the course of the proceeding'.[6]

(c) The power to amend a GCO arises in circumstances where the Court is satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding.[7]

(d) The power to amend a GCO should only be exercised by reference to any updated circumstances in the proceeding that mean that it is appropriate or necessary to ensure justice is done in the proceeding.[8] The plaintiff emphasised that because GCOs are often made early in proceedings, the Court is generally in a less informed position to make an assessment as to the appropriateness or necessity of the GCO, which is 'where sub-s 33ZDA(3) assumes significance'.[9]

(e) The costs payable to the law practice under a GCO should remain proportionate and continue to represent an appropriate reward as against the duration of the proceedings and the risks, effort and investment of the law practice.[10]

(f) The certainty afforded to group members by the original GCO is a relevant, though not determinative, consideration.[11]

(g) The counterfactual of third-party litigation funding as an alternative means of financing the proceeding may be a relevant comparator in assessing

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5 *Allen (No 4)* [2024] VSC 487, [63] (Watson J).

6 *Mumford v EML Payments Limited* [2022] VSC 750, [14] (Delany J) (***Mumford***), quoting *Gehrke v Noumi Ltd* [2022] VSC 672, [53(e)] (Nichols J).

7 *Allen (No 4)* [2024] VSC 487, [63] (Watson J).

8 Ibid; *Fuller* [2025] VSC 160, [161] (Matthews J).

9 *Fox & Anor v Westpac Banking Corporation; Crawford v Australia and New Zealand Banking Group Ltd & Ors* (2021) 69 VR 487, 529–30 [148] (Nichols J) (***Fox***).

10 *Allen (No 4)* [2024] VSC 487, [63] (Watson J).

11 Ibid [93]–[95] (Watson J).

whether an amendment is 'appropriate or necessary' and whether the fees charged are proportionate.[12]

(h) The onus of demonstrating that a GCO ought to be amended under s 33ZDA(3) lies with the person seeking the amendment.[13]

(i) The Court retains the power, in the exercise of its supervisory jurisdiction under Part 4A of the Act, to further amend the GCO to protect against a windfall (being a disproportionate or unreasonable return) to the plaintiff's solicitors.[14] In particular, the Court will consider exercising that discretion as a matter of course on any settlement approval application, as part of its assessment of the proportionality of the costs to be recovered.[15]

13 The plaintiff further submitted that the Court's decision to exercise the discretion to amend a GCO is guided by the same principles applicable to the discretion to make a GCO pursuant to s 33ZDA(1). The Court must be satisfied that it is 'appropriate or necessary to ensure that justice is done in the proceeding'.[16] In the pre-settlement context, the plaintiff emphasised the following matters:

(a) The statutory purpose for s 33ZDA is to enhance access to justice by reducing potential barriers and disincentives to commencing group proceedings in this Court, a GCO being a funding mechanism that enables group members to be represented and for the matter to proceed.[17]

(b) The assessment as to whether a proceeding will be able to proceed at all under a particular GCO rate is a relevant consideration in determining whether the particular GCO sought is 'appropriate or necessary'.[18]

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12 *Allen (No 4)* [2024] VSC 487, [98]–[101] (Watson J); *Fuller* [2025] VSC 160, [173]–[174] (Matthews J); *Gehrke* [2025] VSC 373, [194] (Delany J).

13 *Mumford* [2022] VSC 750, [95] (Delany J).

14 *Fox* (2021) 69 VR 487, [145] (Nichols J); *McCoy* [2025] VSC 553, [92] (Delany J).

15 *Allen (No 4)* [2024] VSC 487, [66] (Watson J).

16 Act, s 33ZDA(1).

17 *Fox* (2021) 69 VR 487, [21] (Nichols J); *Bogan & Anor v The Estate of Peter John Smedley (Deceased) & Ors* (2023) 72 VR 394, [53]–[54] (Ferguson CJ, Niall and Macaulay JJA) (***Bogan Appeal***).

18 *Bogan & Anor v The Estate of Peter John Smedley (Deceased) & Ors* [2022] VSC 201, [[105](e)] (John Dixon J) (***Bogan***); *Laricchia v WiseTech Global Ltd* [2025] VSC 482, [53] (Croft J) (***Laricchia***). See also *Gawler v FleetPartners Group Ltd* [2024] VSC 365, [37], [45]–[46] (Waller J) (***Gawler***).

(c) The delay, cost and uncertainty to a plaintiff or law practice trying to obtain alternative funding in the event that a GCO is not ordered (or not ordered at a rate considered to be economically viable by the law practice) are relevant factors in determining the appropriateness or necessity of the GCO (and GCO rate).[19]

(d) Section 33ZDA implicitly links risk and reward to the law practice by calculating the legal costs proposed to be charged under a GCO which reflects both the value of the legal services to be provided and the assumption of risk by the law practice.[20]

(e) Evidence relevant to the proportionality, reasonableness and price of the GCO rate may assist in answering whether the rate sought will be 'necessary or appropriate'.[21]

(f) The Court may adopt a 'sliding' or 'ratchet' rate which provides for different rates of return to the law practice depending on the final resolution sum, provided there is an evidentiary basis that such a tiered rate would serve a real purpose.[22]

(g) Section 33ZDA(3) affords supervisory jurisdiction over whether the GCO (and GCO rate) remains 'necessary or appropriate to ensure that justice is done in the proceeding'.

(h) At this early stage of the proceeding, the Court's focus ought to be on ensuring the proceeding does not stall and on protecting group members against the worst outcomes, namely that there is no proceeding at all, or that the plaintiff's lawyers lack the resources necessary to prosecute it in a manner that maximises group member returns. This is to be contrasted with the protective considerations that arise at the end of the proceeding such as

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19 *Gawler* [2024] VSC 36, [46] (Waller J).

20 *Fox* (2021) 69 VR 487, [20] (Nichols J); *Allen v G8 Education Ltd* [2022] VSC 32, [28] (Nichols J) (***Allen***); *Bogan* [2022] VSC 201, [[12](f)] (John Dixon J); *Lieberman v Crown Resorts Ltd* [2022] VSC 787, [71]–[82], [[83](e)] (Stynes J) (***Lieberman – GCO Application***).

21 *Gawler* [2024] VSC 36, [24] (Waller J).

22 *Nelson v Beach Energy; Sanders v Beach Energy* [2022] VSC 424, [87]–[102] (Nichols J) (***Nelson***); *Lieberman – GCO Application* [2022] VSC 787, [57]–[61] (Stynes J).

guarding against disproportionate costs or excessive returns to the plaintiff's lawyers which are better addressed at that later stage.[23]

C.2 Contradictor's submissions

14 The contradictor agreed that the plaintiff has standing to bring the GCO Variation Application.[24] It submitted that the issue of who else may apply under s 33ZDA(3) (whether it be another party, a group member or another interested person) does not arise for determination in this application.

15 The contradictor submitted that, given a GCO is a substantive interlocutory order, the principles governing the exercise of s 33ZDA(3) are derived from established principles governing the variation of substantive interlocutory orders. That is, an application to vary a GCO must be founded on: (a) a material change of circumstances, (b) the discovery of new material which could not reasonably have been put before the Court on the hearing of the original application, or (c) otherwise exceptional circumstances which warrant reconsideration of the matter.[25] This is intended to reflect an overriding consideration of what is 'appropriate or necessary to ensure that justice is done in the proceeding'.[26]

16 Building on these principles, the contradictor proposed a framework of eleven factors bearing on the Court's discretion under s 33ZDA(3), submitting that each factor should be assessed in turn.

C.2.1 Circumstances warranting reconsideration of GCO rate (Factor 1)

17 I will fully elaborate the circumstances of the plaintiff and PFM in the confidential annexure to these reasons. The contradictor submitted that the relevant, confidential circumstances are within PFM's control and are matters which PFM

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23 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 209 [79] (Murphy, Gleeson and Beach JJ).

24 Contradictor's Outline of Submissions filed on 9 December 2025, [11] (**Contradictor's Outline of Submissions**).

25 *Adam P Brown Male Fashions v Philip Morris* (1981) 148 CLR 170, 177–8 (Gibbs CJ, Aickin, Wilson and Brennan JJ); *Brimaud v Honeysett Instant Print Pty Ltd* (1988) 217 ALR 44, 46–7 (McLelland J); *P Dawson Nominees Pty Ltd & Anor v ASIC & Ors (No 2)* (2009) 255 ALR 466, [49] (Goldberg J); *Pivotel Satellite Pty Ltd v Optus Mobile Pty Ltd* [2010] FCA 121, [26] (Jagot J); *CIP Group Pty Ltd v So (No 5)* [2024] FCA 1373, [14]–[18] (Derrington J).

26 Act, s 33ZDA.

could have explored further at the time of the application for the Initial GCO. Accordingly, the contradictor submitted that the relevant circumstances do not constitute (1) the discovery of new materials which could not have been previously put before the Court, or (2) a material change of circumstances (as described above), to establish the necessary grounds for variation of a GCO.

18 However, the contradictor submitted that it was nonetheless open for the Court to find that there are exceptional circumstances in this case because this is the first case of an application by a party to vary a GCO prior to settlement of the group proceeding.

19 Accordingly, the contradictor submitted that Factor 1 weighs in favour of the Proposed Varied GCO.

C.2.2 Availability of third-party litigation funding (Factor 2)

20 I will elaborate on Factor 2 in the confidential annexure to these reasons. The contradictor submitted that Factor 2 weighs in favour of the Proposed Varied GCO.

C.2.3 Risk of abandonment of proceeding (access to justice) (Factor 3)

21 The contradictor accepted that if the absence of the Proposed Varied GCO would make it probable (rather than merely possible) that PFM would abandon the proceeding, this would weigh in favour of the GCO Variation Application.[27] The contradictor noted a divergence in the authorities on the applicable standard. In *Bogan & Anor v The Estate of Peter John Smedley (Deceased) & Ors* (***Bogan***)[28] John Dixon J applied a standard of probability,[29] whereas Croft J in *Laricchia v WiseTech Global Ltd* (***Laricchia***)[30] applied a standard of material risk.[31] The contradictor relied on *Bogan* as the correct standard for the counterfactual exercise before the Court.

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27 Transcript of Proceedings, *Byrnes v Origin Energy Ltd (No 2)* (Supreme Court of Victoria, Waller J, 2 February 2026) 118:28–119:2 (**Transcript**).
28 *Bogan* [2022] VSC 201 (John Dixon J).
29 Ibid [93], [105] (John Dixon J).
30 *Laricchia* [2025] VSC 482 (Croft J).
31 Ibid [26], [53] (Croft J).

22 Though noting Mr Finney's evidence that PFM will not continue to act if the Initial GCO is maintained,[32] the contradictor submitted that this evidence, read in context, does not establish that the absence of the Proposed Varied GCO would probably result in its abandonment of the proceeding. Accordingly, the contradictor submitted that Factor 3 weighs against the Proposed Varied GCO. I will elaborate on the relevant evidence in the confidential annexure to these reasons.

C.2.4 Prejudice in retaining the Initial GCO (Factor 4)

23 The contradictor submitted that any delay in the conduct of the proceeding, additional costs that may be incurred if a new law firm takes over the conduct of the litigation, and the benefits of retaining the existing law firm to conduct the litigation are all factors which ought to be weighed when considering the prejudice that would be caused to the plaintiff and group members if the Initial GCO was retained.

24 The contradictor made a number of observations on the counterfactual (if the GCO Variation Application is dismissed):

(a) The contradictor submitted that the plaintiff's submission that the failure of this GCO Variation Application may lead to a lengthy stay of the proceeding may be doubted given the defendant is likely to object to such a stay.

(b) The prospect of delay itself, while third-party litigation funding is sought, is not necessarily a factor in favour of the Proposed Varied GCO.[33]

(c) The plaintiff's evidence does not establish a probability (as opposed to a possibility)[34] that the proceeding will be abandoned.

25 However, at the hearing, the contradictor accepted the inevitable increase in time and costs associated with engaging a new law firm.[35] The contradictor also accepted

32 Third Finney Affidavit, [78].
33 *Allen* [2022] VSC 32, [66] (Nichols J).
34 Cf *Bogan* [2022] VSC 201, [[105](a)] (John Dixon J).
35 Transcript 122:18–25.

the plaintiff had adduced adequate evidence of PFM's expertise in shareholder class actions.[36]

26 Accordingly, the contradictor submitted that Factor 4 weighs in favour of the Proposed Varied GCO.[37]

C.2.5 Risks undertaken by PFM under the Proposed Varied GCO (Factor 5)

27 The contradictor submitted that PFM already bears certain risks under the Initial GCO and its (prospective) compensation for the assumption of those risks would change under the Proposed Varied GCO. I will address the balance of risks borne by PFM and the contradictor's submissions in the confidential annexure to these reasons.

28 In its unredacted written submissions, the contradictor noted that the evidence regarding the risks in the proceeding has not changed since the Initial GCO application.

29 The contradictor submitted that any adverse impact on the law firm must relate to whether the Proposed Varied GCO is appropriate or necessary to ensure justice is done in the proceeding. In reply to the plaintiff's submissions that 'there is a risk the lawyers are either not able to, or are insufficiently economically incentivised to, employ the resources necessary to prosecute the proceeding in the way it needs to be conducted to maximise group member returns', and that the Court should 'inquire and test whether in fact the lawyers have put forward the best rate they reasonably can',[38] the contradictor was initially critical of the scant objectively measurable evidence put forward by PFM as to what may be a sufficient economic incentive for PFM. At the hearing, the contradictor accepted that further evidence adduced from Mr Finney (which I will refer to in the confidential annexure to these reasons) provided sufficient evidence of the risks undertaken by PFM,[39] such that Factor 5 weighs in favour of the Proposed Varied GCO.

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36 Transcript 122:26–123:2.
37 Transcript 123:3–6.
38 Plaintiff's Submissions in Support of the GCO Variation Application filed on 11 November 2025, [35]–[36] (**Plaintiff's Submissions**).
39 Transcript 126:30–127:4.

C.2.6 Likely quantum of the claim (Factor 6)

30 The contradictor noted that the GCO Variation Application relies on revised assumptions made by Mr Finney regarding the estimated quantum of the claim.

31 I will address the revised assumptions in the confidential annexure to these reasons. However, the contradictor submitted that there is no reason to doubt the revised assumptions made by Mr Finney.[40]

32 Accordingly, the contradictor submitted that Factor 6 is a neutral factor.

C.2.7 Likely stage of settlement (Factor 7)

33 The contradictor submitted that the stage at which the proceeding is likely to settle is unchanged from the application for the Initial GCO and that Factor 7 is a neutral factor.

C.2.8 Likely costs (Factor 8)

34 The contradictor submitted that Factor 8 is a neutral factor because the costs estimate remains unchanged since the Initial GCO application.

35 I will address Factor 8 in the confidential annexure to these reasons.

C.2.9 Likely returns to group members and PFM (Factor 9)

36 The contradictor submitted that the Proposed Varied GCO and its effective rates are within the range, and are meaningfully below the highest rates, of GCOs made in other proceedings which favours the grant of the Proposed Varied GCO.[41]

37 Comparing the return to PFM with third-party litigation funding, the contradictor submitted that the Proposed Varied GCO is cheaper than third-party litigation funding having regard to the median funding rates reported in the McKell Institute Report[42] and Mr Finney's expectation of potential commission rates. The

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40 Contradictor's Outline of Submissions, [79].

41 Vince Morabito, 'Has Victoria's Class Action Regime Secured Access to Justice for Victims of Mass Harm?' (2026) 45(1) *Civil Justice Quarterly* 18, 28–9, Annexure A.

42 Max Douglass, *A Model for the Nation?: Four Years of Victoria's Section 33ZDA* (McKell Institute Report, May 2024) 18 (**McKell Institute Report**).

contradictor submitted that this weighs in favour of granting the Proposed Varied GCO.

38 The contradictor also made submissions on cross-checking the proportionality of PFM's actual returns (for its professional fees and disbursements) by expressing them as a percentage comparable to a third-party litigation funder's commission.[43] I will address this in the confidential annexure to these reasons.

39 The contradictor further submitted that return on investment (**ROI**) is a relevant metric for assessing the proportionality of the Proposed Varied GCO.[44] It noted that the plaintiff adduced no ROI evidence. The contradictor provided its own estimated ROI figures (addressed in the confidential annexure) and submitted that PFM's return would be proportionate under both the Initial GCO and the Proposed Varied GCO.

40 On this basis, the contradictor submitted that Factor 9 weighs in favour of the Proposed Varied GCO.

C.2.10 'Tiered' structure is explained and permissible (Factor 10)

41 The contradictor relied on the comments of Nichols J in *Nelson v Beach Energy; Sanders v Beach Energy* (***Nelson***)[45] in submitting that a 'tiered' GCO structure under which the order made will contain multiple percentages is permissible under s 33ZDA because the ultimate effect will be to produce a single, blended percentage which applies to the resolution sum.[46]

42 The contradictor agreed with the plaintiff that the issues identified by Craig J in *Collens ATF the Collens Superannuation Fund v Mineral Resources Limited & Anor (GCO Ruling)* (***Collens***),[47] namely when ratchet points are arbitrary and driven solely by quantum which would otherwise oversimplify the multi-factorial risk-reward

43 *Allen (No 4)* [2024] VSC 487, [69]–[74] (Watson J).
44 Ibid [69]–[74], [77]–[84] (Watson J).
45 *Nelson* [2022] VSC 424 (Nichols J).
46 Ibid [93]–[102] (Nichols J).
47 [2025] VSC 690 (Craig J) (***Collens***).

calculus,[48] are not barriers to the Proposed Varied GCO because the evidence submitted by PFM regarding the rationale of the ratchet points is adequate.

43 The contradictor submitted that Factor 10 weighs in favour of the Proposed Varied GCO.

C.2.11 Views of the plaintiff and group members (Factor 11)

44 The contradictor noted that group members have not been notified of the Initial GCO or this GCO Variation Application.[49]

45 The contradictor accepted Mr Byrnes' evidence that he considers the Proposed Varied GCO to be fair and in the best interest of group members.[50]

46 Accordingly, the contradictor submitted that Factor 11 weighs in favour of the Proposed Varied GCO.

C.3 Plaintiff's submissions in reply

47 The plaintiff submitted that the contradictor's proposed test, namely that variation of an interlocutory order requires a demonstrated change of circumstances (as elaborated above), imposes a higher bar than s 33ZDA(3) requires. The plaintiff further contended that, in any event, the authorities relied on by the contradictor have been superseded by later cases confirming that the correct approach to subsequent interlocutory applications is that '… the court should do whatever the interests of justice require in the particular circumstances of the case'.[51]

48 Noting this general test, the plaintiff submitted that the statutory drafting of s 33ZDA suggested that the requirement under sub-s (1) that a GCO be 'appropriate or necessary to ensure justice is done in the proceeding' is necessarily

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48 Ibid [[41](a)]–[41](b)] (Craig J).

49 Contradictor's Outline of Submissions, Annexure, PFM Response to Contradictors, 52.

50 Contradictor Outline of Submissions, [138], citing Affidavit of Mr Scott Byrnes affirmed on 11 November 2025, [9]–[14], [22].

51 *Tenth Vandy Pty Ltd v Natwest Markets Australia Pty Ltd* [2006] VSC 170, [41]–[46] (Hargrave J) (***Tenth Vandy***); *Racovalis v Rescom Mortgages Pty Ltd* (2010) 28 VR 250, [30] (Harper JA and Emerton AJA) (***Racovalis***); *Liu v The Age Company Ltd & Ors* (2016) 92 NSWLR 679, [13] (Beazley P), [168]–[199] (McColl JA), [292] (Ward JA); *East Gippsland Building Permits Pty Ltd & Anor v Singleton* [2025] VSC 572, [53]–[59] (Watson J) (***East Gippsland***).

embedded within sub-s (3).[52] On this basis, the plaintiff emphasised that the applicable test neither requires an applicant to demonstrate a material change of circumstances, nor imposes any express preconditions on the exercise of that power.

49 Nonetheless, the plaintiff accepted, in oral submissions, that the factor-by-factor approach advanced by the contradictor was a sensible analytical framework and agreed to engage with it.

50 Regarding Factor 2, I will address the plaintiff's reply submissions in the confidential annexure to these reasons.

51 Regarding Factor 3, the plaintiff submitted that the relevant question for the Court is not whether abandonment of the proceeding is likely, but rather whether the financial viability of the proceeding is at risk.[53] In this respect, the plaintiff submitted that Mr Finney's evidence is unequivocal that PFM will not continue to act under the Initial GCO or where any flat rate of less than 35% is ordered,[54] which weighs in favour of the Proposed Varied GCO.

52 Regarding Factor 4, the plaintiff submitted that a further matter for consideration is the uncertainty which has been injected into this proceeding by the making of the Initial GCO at the rate of 30%. The plaintiff further submitted that Mr Finney has given adequate evidence about the skill and expertise of PFM (which the contradictor acknowledged) which weighs in favour of the Proposed Varied GCO.

53 Regarding Factor 5, the plaintiff noted, in unredacted submissions, that there is little rationale in requiring certain aspects of risks to the law firm subject of a GCO, such as the likelihood of failure at trial and the likely duration of the proceeding, to be assessed at this stage of the proceeding because it would be a speculative exercise for no real purpose. I will address the balance of the plaintiff's reply in the

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52 Transcript 37:18–25.

53 *Bogan* [2022] VSC 201, [14] (John Dixon J); *Bogan Appeal* (2023) 72 VR 394, [57] (Ferguson CJ, Niall and Macaulay JJA).

54 Third Finney Affidavit, [78]–[79]; Contradictor's Outline of Submissions, Annexure, PFM Response to Contradictors, 58.

confidential annexure to these reasons. The plaintiff submitted that Factor 5 weighs in favour of the Proposed Varied GCO.

54 Regarding Factor 9, the plaintiff endorsed the contradictor's estimated ROI which, both parties agree, weighs in favour of the Proposed Varied GCO. The plaintiff further submitted that an internal rate of return (**IRR**) analysis lacks utility at this stage of the proceeding because of the number of hypotheticals and assumptions it would entail.[55]

D CONSIDERATION

D.1 Standing

55 I am satisfied that the plaintiff has standing to bring the GCO Variation Application for the following reasons.

56 First, s 33ZDA(3) does not expressly limit the power to amend a GCO to the Court acting on its own motion. The absence of such restrictive language, contrasted with the express limitation in sub-s (1) requiring an application by the plaintiff, indicates that sub-s (3) was intended to operate more broadly.

57 Secondly, practical efficacy requires that interested parties be able to bring applications under sub-s (3). The Court is unlikely to become aware of changed circumstances warranting variation unless an interested party applies.

58 Thirdly, the plaintiff, as representative party and the original applicant for the GCO under sub-s (1), has a sufficient interest in the terms of the GCO to bring an application for variation. The plaintiff bears ongoing responsibility for the conduct of the proceeding on behalf of group members and has a direct interest in ensuring that the funding arrangements are adequate to enable the proceeding to be prosecuted effectively.

59 While it is not necessary to determine the question definitively, I consider it appropriate to observe that the standing to bring an application under s 33ZDA(3)

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55 Affidavit of Mr Timothy Finney affirmed on 20 December 2025, [46]–[55] (**Fourth Finney Affidavit**).

is not, on the proper construction of the provision, confined to plaintiffs. Several reasons support this view.

(a) First, the text of sub-s (3) confers the power to amend a GCO on the Court without identifying who may apply in contrast to sub-s (1) which expressly limits the power to make a GCO to an application by the plaintiff. Where the legislature has chosen to restrict a power to a particular applicant, it has done so expressly. The absence of any equivalent restriction in sub-s (3) supports the inference that a broader class of persons may invoke the power.

(b) Secondly, the purpose of sub-s (3) supports broader standing. The provision exists to ensure the Court retains ongoing supervisory control over GCOs throughout the life of a proceeding. While the power will most commonly be engaged at the point of settlement, where the Court is best placed to assess whether the GCO rate produces a disproportionate return, the circumstances that may warrant amendment are various and may arise from different quarters: a group member who considers the GCO rate disproportionate; a substituted law practice; or a plaintiff concerned about the proceeding's ongoing viability. Limiting standing to the plaintiff alone would unnecessarily constrain a power that the legislature has expressed in broad and unqualified terms.

(c) Thirdly, the broader supervisory framework of Part 4A of the Act supports a construction that enables the Court to receive applications from a range of interested persons. The Court's supervisory function in group proceedings is not exercised solely at the behest of the plaintiff.

(d) Fourthly, practical considerations reinforce this conclusion. It would be anomalous if a substituted law practice could not apply to amend a GCO made in favour of its predecessor, or if group members whose net recovery is diminished by the GCO rate could not seek the Court's intervention without the plaintiff's cooperation.

60 Standing under sub-s (3) therefore extends to any person with a sufficient interest in the amendment of the GCO. What constitutes a sufficient interest will depend on

the circumstances, but the class is not confined to the plaintiff and should be assessed by reference to whether the applicant has a real and legitimate stake in whether the GCO should be amended.

D.2 The statutory scheme and its purpose

61 Section 33ZDA was enacted to enhance access to justice by providing a funding mechanism that enables group proceedings to be commenced and prosecuted where they might not otherwise be viable. The regime permits a law practice to accept the risk of an adverse outcome in exchange for the prospect of a percentage-based return if the proceeding succeeds. The percentage calculation in sub-s (1)(a) reflects both the value of legal services to be provided and the assumption of risk by the law practice.

62 When making a GCO under sub-s (1), the Court must be satisfied that the order is 'appropriate or necessary to ensure that justice is done in the proceeding'. As I explained in *Gawler v FleetPartners Group Ltd* (***Gawler***),[56] I consider the expression 'appropriate or necessary' to be conjunctive rather than disjunctive. A GCO will be made only where the Court is satisfied that such an order is both appropriate and necessary to ensure that justice is done.[57] This involves balancing multiple considerations: the need to ensure that group members have access to competent legal representation; the risks and burdens assumed by the law practice; the quantum of the likely recovery; and the proportionality of the legal costs to the benefit obtained by group members. These assessments must necessarily be made on the basis of imperfect information, often at an early stage of the proceeding before the strength of the case and the likely quantum of recovery can be assessed with any precision.

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56 *Gawler* [2024] VSC 365 (Waller J).

57 Ibid [23] (Waller J), citing *Allen* [2022] VSC 32, [18] (Nichols J); *Bogan* [2022] VSC 201, [13](a) (John Dixon J); *Raeken Pty Ltd v James Hardie Industries PLC* [2024] VSC 173, [7], [10] (M Osborne J); *Norris v Insurance Australia Group Ltd* [2024] VSC 76, [14] (Nichols J), citing *Fox* (2021) 69 VR 487, 499 [31] (Nichols J); *DA Lynch v Star Entertainment Group; Drake v Star Entertainment Group; Huang v Star Entertainment Group; Jowene v Star Entertainment Group* [2023] VSC 561, [27] (Nichols J); *Kilah* [2024] VSC 152, [11] (Attiwill J), citing *Gehrke v Noumi Ltd* [2022] VSC 672, [53] (Nichols J).

63 The ambit of sub-s (3) is a question of statutory interpretation, to be resolved by reference to the text of the provision read in its statutory context and in light of the purpose of the legislative scheme. Subsection (3) confers power to 'amend' a GCO 'during the course of the proceeding', including but not limited to amendment of the percentage ordered under sub-s (1)(a). On its face, that language is broad and unqualified, with no express limitation on the circumstances in which the power may be exercised. However, the text does not stand alone; it must be read in context.

64 The contextual significance of sub-s (1) is particularly important. Subsection (1) is the foundational provision. It empowers the Court to make a GCO, but only where the Court is satisfied that doing so is both appropriate and necessary to ensure that justice is done in the proceeding. Subsection (3) does not reproduce that criterion in terms, but it would be anomalous to read it as conferring a power unconstrained by the very criterion that governs the making of the original order. The better reading, consistent with context, is that the criterion carries through from sub-s (1) into the exercise of the power to amend under sub-s (3), such that an amended GCO must itself satisfy that criterion. It also means that an applicant under sub-s (3) must demonstrate not only that there is a basis for revisiting the existing order, but that the variation sought will itself satisfy the overarching statutory requirement of appropriateness and necessity in the interests of justice.

65 The purpose of sub-s (3) is illuminated by the structural logic of the provision and by the inherent limitations of the process by which GCOs are made. As sub-s (1) itself reflects, a GCO must be assessed prospectively, typically at an early stage of the proceeding, on the basis of assumptions and estimates about the nature and extent of the legal services to be provided, the risks to be borne by the law practice, and the likely quantum of any recovery. Those assumptions will not always prove accurate. The legislature plainly contemplated this possibility. It would otherwise have been unnecessary to confer any power of amendment at all. The power in sub-s (3) was therefore designed to enable the Court to revisit a GCO where circumstances during the course of the proceeding warrant it and, in particular, to ensure that the rate fixed at the outset does not, as the proceeding develops and the full facts emerge, produce a result that is disproportionate or that otherwise fails to satisfy the criterion of appropriateness and necessity in the interests of justice.

66 The point at which the disjunction between original assumptions and actual circumstances is likely to be most acute is when the proceeding is resolved and a settlement is brought before the Court for approval. At that stage, the Court is (for the first time) in a position to assess with precision the settlement sum, the actual costs incurred, and the return that the law practice will receive under the percentage specified in the GCO. If that return is disproportionate to the work performed, the risks undertaken, and the outcome achieved, the power under sub-s (3) enables the Court to reduce the percentage so that group members are not required to bear costs that are excessive relative to the benefit they have obtained. This function, which involves protecting group members against windfall returns to law practices at the point of resolution is, in my view, the principal purpose for which the amendment power was conferred. The breadth of the text accommodates the possibility that the power may need to be exercised at other points in the proceeding, but such exercises must be warranted by circumstances that genuinely engage the statutory criterion.

D.3 The applicable test

67 A threshold issue concerns the proper test to be applied when the Court considers an application under s 33ZDA(3). The contradictor submitted that, given a GCO is a substantive interlocutory order, the principles governing the exercise of s 33ZDA(3) are derived from established principles governing the variation of substantive interlocutory orders. According to the contradictor, an application to vary a GCO must be founded on: (a) a material change of circumstances; (b) the discovery of new material which could not reasonably have been put before the Court on the hearing of the original application; or (c) otherwise exceptional circumstances which warrant reconsideration of the matter.

68 The contradictor characterised this as reflecting the ordinary rule of practice that applies whenever a second or subsequent interlocutory application is brought after a failed first application. The purpose of this rule is to prevent the re-litigation of matters already determined and to preserve the finality of interlocutory orders, while recognising that, in certain circumstances, it may be necessary to revisit an

earlier order where material circumstances have changed or where it would otherwise be unjust to hold the parties to the terms of the original order.

69 The plaintiff, by contrast, submitted that this test sets too high a bar and is not mandated by the language of s 33ZDA(3). The plaintiff emphasised that the statutory provision requires only that the Court be satisfied that it is 'appropriate or necessary to ensure that justice is done in the proceeding' before exercising the power to amend a GCO. The plaintiff submitted that this statutory criterion does not import a requirement to demonstrate a material change of circumstances or the discovery of new material. Rather, the plaintiff contended, the applicable test is simply whether, having regard to all the circumstances as they now stand, it is appropriate or necessary to amend the GCO in the interests of justice.

70 The plaintiff further submitted that, even if the authorities dealing with second or subsequent interlocutory applications are relevant, more recent cases have confirmed that the correct approach is that the Court should do whatever the interests of justice require in the particular circumstances of the case rather than applying a rigid requirement for changed circumstances or new material.

71 In my view, the plaintiff's submission on this point is to be preferred, though with some qualifications. I accept that the language of s 33ZDA(3) does not expressly impose a requirement that there be a material change of circumstances or the discovery of new material before the power to amend may be exercised. The provision confers a broad discretion on the Court to amend a GCO 'during the course of the proceeding' and the only express limitation is that any GCO (whether original or amended) must be one that the Court is satisfied is 'appropriate or necessary to ensure that justice is done in the proceeding'.

72 Moreover, there is an important structural distinction between the present application and the paradigm case to which the contradictor's formulation is directed. The contradictor's test may be apt in circumstances where a party makes an interlocutory application, that application is refused, and the party then seeks to bring the same application again on a subsequent occasion. In those circumstances, the rules against re-litigation and abuse of process serve an important function. They prevent parties from having multiple opportunities to agitate the same issue

in the hope of obtaining a different outcome, they preserve the finality of the Court's earlier determination, and they prevent inconsistent decisions.

73 However, the present application is not, strictly speaking, a second or subsequent application after having brought the same application previously. When the plaintiff applied for the Initial GCO under s 33ZDA(1), the plaintiff sought an order at a particular rate. The Court made that order, albeit at a lower rate than the plaintiff had sought. The plaintiff did not fail in that application. Rather, the plaintiff succeeded in obtaining a GCO, though not at the rate originally requested.

74 The present application under s 33ZDA(3) is of a different character. It does not seek to re-agitate the question whether a GCO should be made at all. That question was determined in the affirmative when the Initial GCO was made, and it is not now in dispute. Instead, the present application seeks to amend the terms of the GCO that was made. This is the express purpose for which sub-s (3) was enacted. The power to 'amend a group costs order' contemplates that the Court may revisit the terms of an existing GCO and make adjustments to those terms if it is satisfied that such amendment is appropriate and necessary to ensure that justice is done.

75 It would be anomalous if the statutory power to amend a GCO were subject to the same constraints that apply to prevent re-litigation of failed applications. The very existence of sub-s (3) reflects a legislative recognition that the terms of a GCO may require adjustment during the course of the proceeding. If the power could only be exercised where there has been a material change of circumstances or the discovery of new material, that would impose a significant fetter on a power that the legislature has expressed in broad and unqualified terms.

76 That said, I do not accept that the statutory language permits applications to amend GCOs to be brought without any constraint whatsoever. While the statute does not expressly require proof of changed circumstances or new material, the overarching criterion that any GCO must be 'appropriate or necessary to ensure that justice is done in the proceeding' necessarily implies that there must be some proper basis for revisiting the Court's earlier determination. As I have noted above, the Court does not lightly disturb its own orders, and applications to vary GCOs ought not be treated as routine opportunities to re-argue matters that have been determined.

77 In practical terms, this means that while an applicant under s 33ZDA(3) need not demonstrate that the requirements for re-opening a substantive interlocutory order have been satisfied, the applicant must, nevertheless, satisfy the Court that circumstances warrant the variation sought. In many cases, this will involve pointing to developments since the making of the initial GCO that bear on whether the existing rate remains appropriate and necessary. In other cases, it may involve demonstrating that facts have emerged that could not reasonably have been put before the Court when the initial order was made or that assumptions underlying the initial order have proven to be incorrect.

78 The focus, however, is not on whether the applicant has satisfied a technical threshold for re-opening an earlier order, but rather on whether the Court is now satisfied, having regard to all relevant circumstances, including any developments since the initial order was made, that it is appropriate and necessary to amend the GCO in order to ensure that justice is done in the proceeding. This is a broader and more flexible inquiry than the contradictor's formulation would suggest, though it does not permit applications to be brought in the absence of any proper basis for reconsideration.

79 I also accept the plaintiff's submission that more recent authority supports a flexible approach to subsequent interlocutory applications, emphasising that the Court should do whatever the interests of justice require in the particular circumstances of the case rather than applying more rigid preconditions.[58] While the policy considerations that underlie the rule against re-litigation remain important, and I have given weight to those considerations in the analysis set out above, those considerations do not mandate the adoption of a strict test that would unduly circumscribe the broad discretion conferred by s 33ZDA(3).

80 For these reasons, I conclude that the applicable test is whether, having regard to all the circumstances, it is appropriate and necessary to amend the Initial GCO in order to ensure that justice is done in the proceeding. While proof of material changed circumstances or new material will often be relevant, and in many cases

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58 *East Gippsland* [2025] VSC 572, [52]–[60] (Watson J). See also *Racovalis* (2010) 28 VR 250, [30], [34] (Harper JA and Emerton AJA), citing *Tenth Vandy* [2006] VSC 170 (Hargrave J).

determinative, these are not rigid preconditions to the exercise of the power under sub-s (3). The Court must consider all relevant factors and determine whether the interests of justice require that the GCO be amended. This accords with the language and structure of the statutory provision and gives proper effect to the legislative intention.

D.4 The factor-based approach

81 The contradictor helpfully identified eleven factors which it submitted are relevant to the exercise of the Court's discretion under s 33ZDA(3). The contradictor analysed each factor in detail and indicated whether, in its submission, that factor weighs in favour of or against making the Proposed Varied GCO. Of the eleven factors identified, the contradictor submitted that seven weigh in favour of the variation, one weighs against, and three are neutral.

82 While disputing the contradictor's characterisation of the applicable test under sub-s (3), and rejecting the premise that any established principles governing the variation of substantive interlocutory orders should structure the analysis, the plaintiff nonetheless accepted in oral submissions that a factor-by-factor approach provides a sensible analytical framework and agreed to engage with it.

83 The factors identified by the contradictor are matters that are properly taken into account in determining whether a variation is appropriate and necessary, many of them reflecting considerations identified in the authorities dealing with GCOs. Whatever the precise formulation of the applicable test, organising the analysis by reference to those factors provides a useful and disciplined framework for working through the material considerations in an orderly way. I therefore adopt that approach here.

84 However, the approach should not be applied mechanistically as a checklist that produces an answer by tallying each factor in favour of, or against, variation. The exercise of the discretion under s 33ZDA(3) is not a counting exercise. Some factors may be more significant than others, and their weight will depend on the particular circumstances of the case. What is required is an evaluative judgement about which considerations are most significant and how they bear on the overarching statutory

criterion, namely whether it is appropriate and necessary to amend the GCO in order to ensure that justice is done in the proceeding.

85 With those observations in mind, I turn to consider the factors identified by the contradictor. I address certain of those factors below, insofar as they concern matters that are not confidential. Other factors, including those that involve commercially sensitive information or matters specific to the conduct and prospects of this proceeding, are addressed in the confidential annexure to these reasons.

D.4.1 Availability of third-party litigation funding (Factor 2)

86 The contradictor identified as Factor 2 the question of whether third-party litigation funding is available to the plaintiff and group members as an alternative to proceeding under a GCO. This factor is relevant because, if alternative funding is readily available on terms that would be more favourable to group members than the Proposed Varied GCO, that may weigh against granting the variation. Conversely, if alternative funding is not available, or is only available on terms that would be less favourable to group members, that may support the case for variation.

87 The evidence, which I address in greater detail in the confidential annexure, establishes that third-party litigation funding is not presently in place for this proceeding. The plaintiff proceeded on the basis of a GCO rather than third-party funding. The question is whether, if the Initial GCO is not varied, third-party funding could and would be obtained to enable the proceeding to continue.

88 The contradictor submitted, and I accept, that Factor 2 weighs in favour of the Proposed Varied GCO. While the details are addressed in the confidential annexure, I note that securing third-party litigation funding would involve delay, cost, and uncertainty. There is no evidence that such funding could be obtained on terms more favourable to group members than the Proposed Varied GCO.[59]

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59 Third Finney Affidavit, [48].

D.4.2 Prejudice in retaining the Initial GCO (Factor 4)

89 Factor 4 concerns the prejudice that would be suffered by the plaintiff and group members if the Initial GCO is retained and the variation is not granted. The contradictor accepted that this factor weighs in favour of the Proposed Varied GCO, and I agree.

90 If the GCO Variation Application is refused, one of several outcomes may follow. The plaintiff and PFM may seek to obtain third-party litigation funding to replace the GCO. Alternatively, PFM may seek to withdraw and the plaintiff may need to retain a different law firm. Or the proceeding may be stayed or delayed while alternative arrangements are explored. Each of these outcomes would involve prejudice to the plaintiff and group members.

91 As the contradictor accepted at the hearing, it is self-evident that time and costs will be lost engaging a new law firm. A change of solicitors at this stage of the proceeding would require the new firm to familiarise itself with the matter, potentially duplicating work already undertaken by PFM. This would involve cost and delay. The contradictor also accepted that the plaintiff had adduced adequate evidence of PFM's expertise in shareholder class actions, and the loss of that expertise would be to the detriment of group members.

92 Moreover, any delay in the conduct of the proceeding while alternative funding or alternative solicitors are sought is itself prejudicial. Group members have an interest in the timely resolution of their claims. Delay increases the risk that witnesses' memories will fade, that evidence will be lost, and that group members will suffer ongoing uncertainty about the outcome of their claims. Delay may also increase the costs of the proceeding, to the ultimate detriment of group members.

93 The contradictor submitted that the plaintiff's proposition that failure of the GCO Variation Application may lead to a lengthy stay of the proceeding may be doubted, given the defendant is likely to object to such a stay. While I accept that any application for a stay would be contested and its outcome uncertain, the mere prospect of contested interlocutory applications concerning the future conduct of the proceeding is itself a source of delay, cost, and uncertainty. It is in the interests

of group members that the proceeding progress to resolution as expeditiously as reasonably possible, rather than being derailed by disputes about funding arrangements.

94 For these reasons, I accept that Factor 4 weighs in favour of the Proposed Varied GCO. The prejudice that would flow from refusing the variation is a significant consideration supporting the exercise of the discretion to vary the Initial GCO.

D.4.3 Likely returns to group members and PFM (Factor 9)

95 Factor 9 concerns the likely returns to group members and to PFM under the Proposed Varied GCO, and whether those returns are proportionate and reasonable. The contradictor submitted that this factor weighs in favour of the Proposed Varied GCO, and I agree.

96 The contradictor has undertaken a detailed analysis comparing the rates and returns under the Proposed Varied GCO with: (a) GCO rates in other proceedings; (b) third-party funding commission rates; and (c) various metrics of proportionality including ROI. I address certain aspects of this analysis in the confidential annexure. However, I note certain matters here that support the conclusion that Factor 9 favours the variation.

97 First, the contradictor accepted that the effective rate under the Proposed Varied GCO is within the range of GCO rates that have been ordered in other group proceedings, and is meaningfully below the highest rates that have been approved. This suggests that the Proposed Varied GCO is not out of step with rates that have been considered appropriate in other cases.

98 Secondly, the contradictor accepted that the Proposed Varied GCO is cheaper than the median funding commission rates identified in the McKell Institute Report and cheaper than Mr Finney's evidence of the commission rates that might be expected from third-party funders. This comparison is relevant because it demonstrates that group members are likely to retain a greater share of any recovery under the Proposed Varied GCO than they would if the proceeding were funded by a third-party funder.

99 Thirdly, the contradictor has calculated an estimated ROI for PFM, which both parties agreed demonstrates that PFM's return would be proportionate under both the Initial GCO and the Proposed Varied GCO. I address the contradictor's ROI analysis in the confidential annexure. The fact that the contradictor, whose role is to scrutinise the application in the interests of group members, accepted that the return would be proportionate is a matter of considerable weight.

100 I note the plaintiff's submission that an IRR analysis lacks utility at this stage of the proceeding because of the number of hypotheticals and assumptions it would entail. I accept that submission. At this early stage, it is difficult to predict with precision when the matter will resolve, what the ultimate recovery will be, or what costs will be incurred along the way. An IRR analysis necessarily depends on assumptions about these matters, and at this stage, those assumptions would be highly speculative.

101 For these reasons, I accept that Factor 9 weighs in favour of the Proposed Varied GCO. The evidence supports the conclusion that the return to PFM under the Proposed Varied GCO would be reasonable and proportionate.

D.4.4 Tiered structure is explained and permissible (Factor 10)

102 Factor 10 concerns whether the tiered or ratcheted structure of the Proposed Varied GCO is permissible and appropriate. The Proposed Varied GCO provides that, for each dollar of any award or settlement up to $42.5 million, legal costs are calculated as 35% of that amount, and for each dollar above $42.5 million, legal costs are calculated as 25% of that amount. This contrasts with the Initial GCO, which provided for a flat rate of 30%.

103 The contradictor submitted, and I accept, that such a tiered structure is permissible under s 33ZDA. As Nichols J observed in *Nelson*, a GCO that contains multiple percentages is permissible provided its ultimate effect is 'a calculation of legal costs that is in substance a percentage of the recovered amount, but is calculated using more than one step (which is the effect of incorporating a sliding scale or ratchet provision of this kind)'.[60] That is the effect of the Proposed Varied GCO. Depending

60 *Nelson* [2022] VSC 424, [97] (Nichols J).

on the ultimate resolution sum, a blended percentage will apply that reflects the combination of the 35% rate on the first $42.5 million and the 25% rate on any amount above that threshold.

104 The contradictor also accepted that the concerns identified by Craig J in *Collens* regarding ratchet points that are arbitrary and driven solely by quantum are not present here. In that case, his Honour cautioned that ratchet structures should not oversimplify the multi-factorial risk-reward calculus by mechanistically reducing the percentage as quantum increases, without regard to whether the risks and effort involved in achieving higher recoveries genuinely warrant a lower percentage.[61]

105 In the present case, the contradictor accepted that Mr Finney has provided adequate evidence regarding the rationale for the ratchet point at $42.5 million. I address that evidence in the confidential annexure. It suffices to say here that the ratchet structure is not arbitrary, but reflects a considered judgment about the point at which the percentage return to PFM should decrease to ensure proportionality as the quantum of recovery increases.

106 Accordingly, I accept that Factor 10 weighs in favour of the Proposed Varied GCO. The tiered structure is permissible and, on the evidence, appropriate.

D.4.5 Views of the plaintiff and group members (Factor 11)

107 Factor 11 concerns the views of the plaintiff and group members. The contradictor noted that group members have not been notified of the Initial GCO or of this GCO Variation Application. This is unsurprising, given that the Initial GCO was made early in the proceeding and notification of group members has not yet occurred. In the absence of notification, it cannot be said that group members have expressed any view, whether in support of or in opposition to the variation.

108 However, the contradictor accepted the plaintiff's evidence that he considers the Proposed Varied GCO to be fair and in the best interests of group members. The plaintiff is, of course, the representative party and has a responsibility to act in the

61 *Collens* [2025] VSC 690, [[41](a)]–[41](b)] (Craig J).

interests of all group members. While the plaintiff's view is not determinative, it is a relevant consideration.

109 More significantly, the contradictor, whose role is specifically to scrutinise the application and to protect the interests of group members, has concluded that the majority of the relevant factors weigh in favour of the variation. While the contradictor does not formally consent to the GCO Variation Application, the fact that it has not opposed the variation and has acknowledged that most factors support it are matters of considerable weight. The contradictor has conducted a careful and independent analysis and has tested the evidence advanced by the plaintiff. Its conclusion that the factors, on balance, favour the variation provides substantial support for the granting of the GCO Variation Application.

110 Accordingly, I accept that Factor 11 weighs in favour of the Proposed Varied GCO.

D.5 Conclusion on the exercise of discretion

111 I am satisfied that the plaintiff has discharged the onus of demonstrating that the Proposed Varied GCO should be made. As I elaborate in the confidential annexure to these reasons, the evidence establishes that there are circumstances specific to this matter that warrant the exercise of the Court's discretion under sub-s (3).

112 Those circumstances are not merely a matter of the law practice reassessing the commercial attractiveness of the engagement or expressing dissatisfaction with the rate previously ordered. Rather, they involve material considerations bearing on the viability of the proceeding and the interests of group members.

113 That this is the first application of its kind to be brought in Victoria is not material to the outcome. What is decisive is the combination of circumstances, many of which are outlined in the confidential material, which together satisfy me that it is appropriate and necessary, in the interests of justice, to vary the Initial GCO in the manner proposed.

114 The contradictor, having conducted a careful review of the evidence and having tested the plaintiff's case through written and oral submissions, ultimately accepted that the majority of the factors it has identified weigh in favour of granting the GCO

Variation Application. While the contradictor advanced certain criticisms of aspects of the evidence, and while it appropriately performed its role in scrutinising the application on behalf of group members, the contradictor did not ultimately oppose the making of the Proposed Varied GCO. Having considered the contradictor's detailed analysis of the relevant factors, I am fortified in my conclusion that the application should be granted.

D.6 Cautionary observations

115 I would not wish it to be thought, however, that the granting of this application establishes a precedent for the routine variation of GCOs during the course of proceedings. For the reasons I have outlined, applications under s 33ZDA(3) to increase GCO rates prior to settlement should be regarded as exceptional and should be approached by the Court with considerable caution. The power exists and, in appropriate circumstances, it may and should be exercised. But the circumstances must truly warrant the variation, and applicants must discharge the onus of demonstrating that it is appropriate and necessary, in the interests of justice, to vary the existing GCO. Outside the settlement context this is a threshold that will not readily be met.

116 The Court will be vigilant to ensure that applications under sub-s (3) do not become a backdoor means by which plaintiffs or their lawyers may re-agitate issues that were properly determined when the initial GCO was made. The policy considerations I have outlined, including the need for certainty, the importance of finality, and the risk of strategic re-litigation, will inform the Court's approach to future applications. While each case must be assessed on its own facts, and while I do not foreclose the possibility that variation may be warranted in other cases where proper grounds are established, the threshold for granting such applications will remain high.

117 I also reiterate that the principal purpose of s 33ZDA(3), as I understand it, is to afford the Court an opportunity to revisit the GCO rate at settlement when all the facts are known relating to the settlement sum and the legal costs actually expended to date. It is at that point that the Court is best placed to assess whether the percentage ordered under sub-s (1)(a) has resulted in a proportionate and

reasonable return to the law practice. Applications brought during the course of proceedings, before those facts are known, necessarily involve greater uncertainty and should be reserved for cases where the circumstances genuinely warrant reconsideration of the initial order.

E CONFIDENTIALITY

118 The contradictor submitted that at least some aspects of the confidential evidence and submissions filed in support of this GCO Variation Application should be subject to a sunset date after which they may become public. In particular, the contradictor pointed to material that is specific to this class action and which may no longer warrant protection once the proceeding has concluded, on the basis that there would be no real risk of prejudice from disclosure at that point. The contradictor submitted that public disclosure would assist in the development of the jurisprudence in this evolving area of the law and would be consistent with the principles of open justice reflected in the *Open Courts Act 2013* (Vic).

119 The plaintiff submitted that the question of confidentiality is better deferred until the proceeding is finalised.

120 I accept that the principles of open justice, as reflected in the *Open Courts Act 2013* (Vic), are of real importance in this context. The jurisprudence on GCOs is still developing, and there is evident value in the public availability of reasons and materials that illuminate how the Court approaches applications of this kind. I also accept that some of the confidential material may, in time, lose the sensitivity that currently warrants its protection, particularly once the proceeding has concluded and the commercial circumstances giving rise to that sensitivity no longer prevail.

121 However, I accept the plaintiff's submission that the question of confidentiality is better deferred until the proceeding is finalised. The proceeding remains on foot, and the confidential material goes to matters that are central to the ongoing conduct of the litigation. That material includes commercially sensitive information relating to the financial position and internal assessments of PFM, and information bearing on the litigation strategy and prospects of the proceeding. Moreover, some of the confidential material may retain its sensitivity even after the proceeding has

concluded, insofar as it touches on PFM's approach to funding and resourcing class action litigation more generally. These are matters that PFM may have a legitimate and continuing interest in keeping confidential regardless of the outcome of this proceeding. Premature disclosure carries a real risk of prejudice both to the plaintiff and group members, whose prospects of a favourable outcome in the proceeding could be affected if sensitive information about the conduct of their case were made public, and to PFM, whose legitimate commercial interests in maintaining the confidentiality remain live while the proceeding continues.

122 In those circumstances, it would not be appropriate to impose a sunset date or otherwise vary the confidentiality regime at this stage. The contradictor's proposal, while made in good faith and animated by legitimate open justice concerns, proceeds on the premise that the case-specific sensitivity of the material can now be assessed with sufficient confidence to fix a future date for disclosure. In my view, that assessment is better made when the full picture is available, that is when the proceeding has been resolved and it can be determined which, if any, of the confidential material has ceased to be sensitive. I therefore make no order varying the existing confidentiality regime at this time.

F CONCLUSION

123 For the reasons set out above and in the confidential annexure, and subject to the cautionary observations I have made, I am satisfied that this is an appropriate case in which to exercise the discretion conferred by s 33ZDA(3) to vary the Initial GCO. In the circumstances, I am satisfied that the Proposed Varied GCO should be made.

CERTIFICATE

I certify that this and the 34 preceding pages are a true copy of the reasons for ruling of Justice Waller of the Supreme Court of Victoria delivered on 11 March 2026.

DATED this eleventh day of March 2026.

Associate