

**ARBITRATION VICTORIA
IN THE MATTER OF AN ARBITRATION
CASE NUMBER 14-07-2025**

BETWEEN

██████████ PTY LTD (ACN ██████████)

Claimant

- and -

██████████

Respondent

FINAL AWARD (COSTS)

Arbitrator: Mr Robert Heath KC
Owen Dixon West Chambers
Level 21, 525 Lonsdale Street
Melbourne, Victoria

Place of Arbitration: Melbourne, Australia

Date of award: 31 March 2026

1. This final award (costs) is in five parts, namely:

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I Introduction

2. I refer to the corrected award issued on 23 February 2026 (**Award no. 1**). The dispositive section of Award no. 1 appears in paragraph 131 of that document. That paragraph states relevantly as follows:

- (a) *I **DISMISS** the Claimant’s application for a decree of specific performance.*
- (b) *I **DISMISS** the Claimant’s application for a permanent mandatory injunction.*
- (c) *I **DIRECT** that:*
 - (i) *By 4.00pm on 27 February 2026, each party shall submit to the other party and the Tribunal the following:*
 - (A) *if the party is seeking an order for the payment of some or all of the costs of the arbitration, a document or documents identifying the relevant costs as incurred;*
 - (B) *written submissions on the question of costs, and such submissions shall not exceed five pages.*
 - (ii) *By 4.00pm on 5 March 2026, each party shall submit to the other party and the Tribunal written submissions in reply in relation to the question of costs, and any written submissions shall not exceed three pages*
- (d) *I **RESERVE** the question of costs.*

3. The direction recorded in paragraph 131(c) of Award no. 1 arose from the agreement of the parties, communicated to the Tribunal at the end of the substantive hearing in early December 2025, that the Tribunal should deal with the question of costs “on the papers” and having regard to written submissions only.

4. This award assumes familiarity with Award no. 1 – including the definitions and abbreviations used in that award. In this award, where relevant, I use those abbreviations and definitions.

II The relevant statutory and other provisions

5. I refer to section 33B of the *Commercial Arbitration Act 2011* (Vic) (**CAA**). There is no equivalent to this section in the Model Law.

6. In summary, this section provides relevantly as follows:

- (a) Unless otherwise agreed by the parties, the costs of an arbitration (including the fees and expenses of the arbitrator or arbitrators) are to be in the discretion of the arbitral tribunal.¹
- (b) Unless otherwise agreed by the parties, the arbitral tribunal may direct that the costs of an arbitration, or of any part of the arbitral proceedings, are to be limited to a specified amount.²
- (c) The arbitral tribunal may in making an award:
 - (i) direct to whom, by whom, and in what manner, the whole or any part of the costs that it awards are to be paid;
 - (ii) tax or settle the amount of costs to be paid or any part of those costs;
 - (iii) award costs to be taxed or settled as between party and party or as between legal practitioner and client.³

7. In this case, the parties agreed that the ArbVic Rules are the applicable procedural rules governing this arbitration.⁴

8. Rule 70 of the ArbVic Rules deals with the question of costs. This provision provides as follows:

70. In making any Award under these Rules, the Arbitrator must, at their discretion, which must be exercised judicially, order by whom and in what proportion the parties are to pay the costs of the arbitration, including the Arbitrator's fees. Provided that, where money is in dispute, costs awarded shall, unless the arbitrator otherwise orders, not exceed 25% of the amount of money in dispute (claim plus counterclaim), including disbursements but excluding the Arbitrator's fees.

9. In the balance of this award, I refer to the cap in this rule as "the 25% cap".

¹ Section 33B(1) of the CAA.

² Section 33B(2) of the CAA.

³ Section 33B(4) of the CAA.

⁴ See paragraphs 2, 11, 12 and 13(b) of Award no. 1.

III Submissions on costs

10. On 27 February 2026, in accordance with the direction recorded in paragraph 131(c)(i) of Award no. 1, the Claimant provided a four page submission on the question of costs (**CCS1**). The claimant did not seek an order for the payment of some or all of its costs of the arbitration and, accordingly, it provided no other documents.
11. By way of summary only, in relation to the question of costs, the Claimant contended as follows:
- (a) **First**, each party should bear their own costs because: (1) the Respondent breached the Contract; (2) at the time of this breach, and prior to 17 May 2024, the Respondent was the registered owner of Unit 2 and one of two registered owners of Unit 1; and (3) in the circumstances, she could have accepted the Claimant's offer dated 2 May 2024, in which case the parties would have avoided this arbitration (and its associated costs).⁵
 - (b) **Second**, if the arbitral tribunal were minded to make a costs order in the Respondent's favour, it should apply rule 70 of the ArbVic Rules on the basis that the money in dispute ranged from \$20,000.00 to \$25,000.00. According to the Claimant, had the Respondent accepted the offer identified in the preceding subparagraph, she would have had to pay \$20,000.00 to \$25,000.00 to replace the Unit 1 balustrade with a balustrade that matched the new Balustrade.⁶
 - (c) **Third**, if the arbitral tribunal rejected the above submissions, it should make an order that the Claimant should pay 25% of the Respondent's costs. This was put on the following grounds: (1) it was unreasonable for the Respondent to have rejected the offer dated 2 May 2024; (2) the arbitral tribunal rejected the Claimant's arguments in respect of two questions raised for determination at the substantive hearing; (3) the arbitral tribunal rejected the Respondent's serious allegations to the effect that the Claimant had bullied her; and (4) "the low-costs intention of this Arbitration process", which I take to mean the "low-costs intention" behind the ArbVic Rules.
12. On 27 February 2026, in accordance with the direction recorded in paragraph 131(c)(i)(B) of Award no. 1, the Respondent provided the following documents: (1) a five page submission on the question of costs (**RCS1**); and (2) a paginated bundle of documents,

⁵ As to this offer, I refer to paragraph 51(l) of Award no. 1. By an email to the Respondent's son-in-law dated 2 May 2024, the Claimant's building manager said relevantly that: (1) the new Balustrade had been erected without the prior written consent of the Claimant; and (2) the Claimant would give retrospective consent if the Respondent promised to replace the Unit 1 balustrade with a balustrade matching the new Balustrade.

⁶ This range was based on the arbitral tribunal's finding that the Respondent paid around \$20,000.00 to \$25,000.00 to install the new Balustrade in place of the old Balustrade: see paragraph 91(b) of Award no. 1

including documents identifying the relevant costs the subject of the Respondent's application for costs (**RCSB**).

13. According to the seven invoices provided as part of RCSB, and taking into account her payment of half of the arbitral tribunal's fees, the Respondent's total costs are \$39,578.57 inclusive of GST.⁷ I have studied each invoice, and I accept the Respondent's submission that these costs are reasonable.
14. By way of summary only, in relation to the question of costs, the Respondent contended as follows:
 - (a) **First**, if the arbitral tribunal determines that the 25% cap should apply, the Claimant should pay her costs in the total sum of \$9,695.00.⁸
 - (b) **Second**, for various reasons, the arbitral tribunal should not apply the 25% cap. These reasons include the following: (1) the flawed nature of the Breach rectification notice; (2) the Claimant had put a without-prejudice settlement offer on the basis that the 25% cap did not apply; (3) the Claimant rejected the Respondent's settlement offer (and did so, in part, on the basis that the Claimant would ultimately recover its costs on an indemnity basis); and (4) the Respondent's costs were discounted and reasonable.
 - (c) **Third**, the Claimant should pay the Respondent's costs in the sum of \$38,702.94.⁹
 - (d) **Fourth**, the Claimant should pay the Respondent's costs in a sum in the range from \$9,965.00 to \$38,702.94, and the selection of the amount is a matter for the arbitral tribunal.
15. On 5 March 2026, in accordance with the direction recorded in paragraph 131(c)(ii) of Award no. 1, the Claimant provided reply submissions (**CRS**). In essence, by reference to CS1 and CRS, the Claimant contended that: (1) the arbitral tribunal should make no order as to costs; (2) if the arbitral tribunal were minded to make a costs order in the Respondent's favour, and if it were minded to apply the 25% cap, it should award the sum of \$6,375.00 to the Respondent;¹⁰ or (3) if the arbitral tribunal were minded to reject (1) and (2), in making an

⁷ The sums invoiced by the Respondent's solicitors were as follows (inc. GST): (1) inv. no. 1027312, \$770.00; (2) inv. no. 1027782, \$550.00; (3) inv. no. 1028258, \$1,320.00; (4) inv. no. 1028442, \$9,941.30; (5) inv. no. 1029041, \$16,547.27; (6) inv. no. 1029173, \$4,400.00; and (7) inv. no. 1029820, \$4,400.00.

⁸ This figure is based on two amounts: (1) \$8,195.00, being 25% of \$32,780.00; and (2) \$1,500.00, being her half share of the arbitral tribunal's fees (ex. GST). As to the sum of \$32,780.00 (ex. GST), this is the current cost to remove the new Balustrade. See the [REDACTED] quotation dated 26 February 2026 (see pp. 1 to 3 of RCSB). The Respondent says, therefore, that \$32,780.00 is "the money in dispute" for the purpose of rule 70 of the ArbVic Rules.

⁹ See paragraph 38 of RCSB. This amount is exclusive of GST.

¹⁰ The Claimant calculated this figure using \$22,500.00 as "the money in dispute" for the purpose of rule 70 (this figure is the mid-point of the range identified in paragraph 91(b) of Award no. 1). Further, the Claimant excluded the GST amounts appearing in all relevant invoices, including the arbitral tribunal's invoice. The Claimant also applied a 25% cap to amount paid to the arbitral tribunal.

award of costs in the Respondent's favour, it should apply a 40% discount to the costs that she incurred (ex. GST).

16. By email to Mr Lane and the Tribunal dated 4 March 2026, Mr Kenny advised as follows:

Whilst my client [the Respondent] takes issue with the claimant's submissions in respect of costs, I will not otherwise be replying to those submissions.

IV Analysis

17. The Respondent was successful in this arbitration. Costs should follow that event. Accordingly, I will make a costs order in her favour.
18. The next issue is the amount of the costs to be awarded in the Respondent's favour.
19. The parties put arguments on the basis that the 25% cap applies. I will proceed on the same basis. This is the correct analysis, in my view, given the following matters: (1) the width of the words "money in dispute" in rule 70; and (2) the existence of the dispute concerning the new Balustrade, the removal of which would have involved the expenditure of money. Further, this analysis is consistent with the obvious intent of rule 70.
20. The next question is the amount to which the 25% cap should apply. The Claimant says that the amount is \$22,500.00;¹¹ and the Respondent says that the amount is \$32,780.00.¹² I prefer the Respondent's figure. Unlike the Claimant's figure, which relates to the installation of the new Balustrade, the Respondent's figure relates to the cost of removing the new Balustrade, noting that the Claimant sought an order for the removal of this balustrade. In the circumstances, if the arbitral tribunal were to apply the 25% cap, the capped figure would amount to \$8,195.00 (ex. GST).
21. Against this background, I refer to the Respondent's argument that the arbitral tribunal should depart from the 25% cap position for which rule 70 provides. In this regard, the Respondent relies upon the matters summarised in paragraph 14(b) above. Having regard to these matters, in my view, such a departure is appropriate in this case. Accordingly, the arbitral tribunal shall exercise its discretion to depart from the 25% cap rule.
22. Assuming that a departure from rule 70 was warranted, the Respondent asked the arbitral tribunal to award costs in the sum of \$38,702.94 (ex. GST), noting that the tribunal could award a lower sum. By way of contrast, the Claimant has asked the arbitral tribunal to impose a 40% discount on the Respondent's costs (ex. GST). This submission is based, in

¹¹ This figure is the mid-point of the range recorded in paragraph 91(b) of Award no. 1. The finding recorded in that paragraph relates to the likely cost to install the new Balustrade in place of the old Balustrade. It does not relate to the cost of removing the new Balustrade.

¹² This figure is based on the sum quoted by MPW to remove the new Balustrade (ex. GST) – see the quotation identified in footnote 7 above.

part, on the fact that the Respondent failed in respect of two of the five questions raised for determination at the substantive hearing.

23. The mere fact that the successful party was not successful on every issue does not, of itself, justify an issue-based cost order. In any proceeding, curial or arbitral, there are likely to be issues which involve reviewing the same, or overlapping, sets of facts, and where it is therefore difficult to disentangle the costs of one issue from another. The mere fact that the successful party has lost on one or more issues does not by itself normally make it appropriate to deprive them of their costs
24. However, an issue-based order may be appropriate (1) if there were a discrete or distinct issue, the raising of which caused additional costs to be incurred and/or (2) the discrete or distinct issue was manifestly hopeless and ought never to have been pursued.
25. In relation to the five questions that arose for determination at the substantive hearing, the arbitral tribunal determined two of those questions in the Claimant's favour. The Respondent raised these two questions; and the determination of each one required time and attention. In the circumstances, it is appropriate to make an issue-based costs order, one that reflects the Respondent's failure in respect of these two questions. In relation to each of these questions, for the reasons disclosed in Award no. 1, the Respondent's arguments were manifestly hopeless. The argument in respect of the first question ignored clause 54 of the Articles; and the argument in respect of the second question was wholly speculative and without any real foundation.
26. In my view, an issue-based costs order should reflect the extent to which the costs were increased by the raising of the (flawed) issues; and, in my view, costs which would have been incurred even if the issue had not been raised should be paid by the unsuccessful party.
27. In light of the above, subject to the point raised below, I am minded to reduce the Respondent's costs order by 20% in total (which allocates a reduction for each question in respect of which the Respondent advanced flawed arguments, and which factors in the pressing of the bullying contention for which there was no real foundation). However, the Claimant's suggested reduction of 40% would go too far, in my view. The Respondent's arguments in respect of the two questions did not occupy so much time as to warrant a reduction of that magnitude.
28. Before making an issue-based costs order, it is important to stand back and ask whether, acting judicially, this proposed reduction is in all the circumstances the right result. The aim must always be to make an order that reflects the overall justice of the case. In this case, for the reasons outlined above, and for the reasons advanced in CCS1 and CRS, the proposed reduction does reflect the overall justice of the case.
29. The last question relates to GST. The particular question is whether the Claimant should pay the Respondent's costs inclusive or exclusive of this supply-based tax. In this case, the Respondent paid amounts that were inclusive of GST. I see no reason why the Respondent

should not receive costs that include the GST element of the amounts paid to her solicitors and the arbitral tribunal. Accordingly, I shall calculate the costs payable on the basis that they include her GST-related payments.

30. In light of the foregoing, I refer to paragraph 13 above. This paragraph refers to the Respondent's payment of costs in the total sum of \$39,578.57 inclusive of GST. This is the figure to which I shall apply the 20% reduction. The reduced figure is \$31,662.86. This is the sum that the Claimant must pay to the Respondent. I will order that the Claimant must pay this sum to the Respondent by 4.00pm on **30 April 2026**.
31. As required under rule 63 of the ArbVic Rules, and as the parties have paid the fees of the arbitral tribunal, I will deliver this final award (costs) to the parties as well as the Secretariat of Arbitration Victoria.

V Disposition

32. Having taken upon myself the burden of this reference, having carefully and conscientiously read and considered the documents, evidence and written submissions placed before me, having given due weight to these things, for the reasons now given, I do hereby make and publish this my final award (costs), and I **ORDER** as follows:
- (a) By 4.00pm on **30 April 2026**, the Claimant must pay the Respondent the sum of \$31,662.86.
- (b) Pursuant to section 32(1) of the CAA, these arbitral proceedings are terminated.

Place of Arbitration: Melbourne, Australia

Signed:



Robert Heath

31 March 2026