

## NOTICE OF FILING

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### Details of Filing

Document Lodged:	Affidavit - Form 59 - Rule 29.02(1)
File Number:	NSD213/2011
File Title:	Tammy Maree Stanford & Anor v DePuy International Limited & Anor
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "Warwick Soden".

Dated: 9/06/2017 8:40:09 AM AEST

Registrar

### Important Information

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Form 59  
Rule 29.02(1)

## Affidavit

No. NSD 213 of 2011

Federal Court of Australia  
District Registry: New South Wales  
Division: General

**Tammy Stanford** and Another  
Applicants

**DePuy International Limited** and Another  
Respondents

Affidavit of: **Janice Mary Saddler**  
Address: Level 14, 160 Ann Street, Brisbane QLD 4000  
Occupation: Australian Legal Practitioner  
Date: 8 June 2017

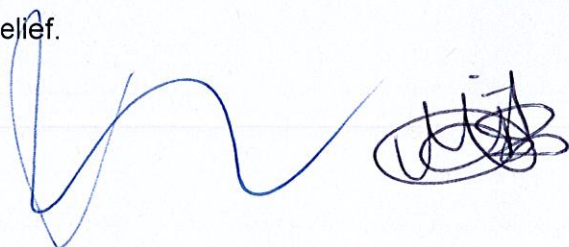
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I, Janice Mary Saddler, Australian legal practitioner, of Level 14, 160 Ann Street, Brisbane, in the State of Queensland, affirm:

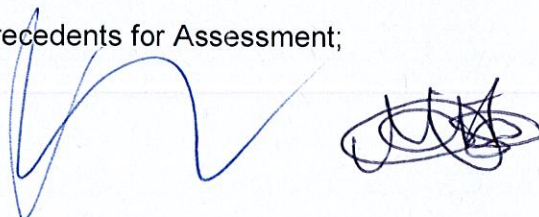
1. I am a National Principal employed by Shine Lawyers Pty Ltd (**Shine**).
2. I was admitted to practice as a solicitor in July 1990 and have been employed by Shine since 2011.

3. On 29 June 2016 the Court made orders pursuant to sections 33V and 33ZF of the *Federal Court of Australia Act 1976* (Cth) approving the settlement of this proceeding (**Settlement Orders**). By order 1 of the Settlement Orders, the settlement of this proceeding was approved on the terms set out in:
  - (a) the settlement deed dated 31 March 2016 (**Settlement Deed**), which is Annexure **JKS-92** to an affidavit affirmed by Julian Schimmel and filed in these proceedings on 17 June 2016; and
  - (b) an amended settlement scheme dated 17 June 2016 (**Amended Settlement Scheme**), which is Annexure **JKS-93** to Mr Schimmel's affidavit of 17 June 2016 (a copy of which is annexed to this affidavit and marked "JMS1" (the **Amended Settlement Scheme**)).
4. In this affidavit I use terms that are defined in the Settlement Deed and Amended Settlement Scheme.
5. By order 3(c) of the Settlement Orders, Maurice Blackburn and Shine were jointly appointed as Administrators of the Amended Settlement Scheme.
6. Before Shine's appointment as joint Administrator, Rebecca Jancauskas, Principal of Shine, had conduct of this proceeding on behalf of the Second Applicant.
7. Upon Shine being appointed joint Administrator, Ms Jancauskas and I shared the responsibility for the Administration of the Amended Settlement Scheme on behalf of Shine. We have jointly supervised Shine's staff in administering the Amended Settlement Scheme. In early 2017, Ms Jancauskas commenced parental leave. Since that time I have had sole responsibility for the Administration of the Amended Settlement Scheme on behalf of Shine.
8. As a principal of Shine, and with the agreement of Julian Schimmel, a Principal of Maurice Blackburn, I am authorised to make this affidavit on behalf of the Administrators.
9. Except where otherwise indicated, I make this affidavit from my own knowledge. Where I give evidence based on information provided to me by other people or on my review of documents, that evidence is true to the best of my knowledge, information and belief.



**Affidavit of Julian Schimmel affirmed on 8 June 2017**

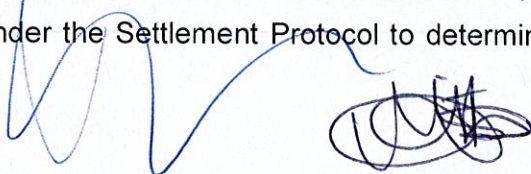
10. I have reviewed in draft an affidavit of Julian Schimmel that is also made on behalf of the Administrators in support of this application. I anticipate that Mr Schimmel's affidavit will be affirmed on 8 June 2017 (**Mr Schimmel's affidavit**). I have informed Mr Schimmel that Shine agrees with and supports him filing his affidavit in support of an application for orders:
- (a) amending the scheme by which settlement of these proceedings is effected; and
  - (b) approving payment of fees for work performed to date by the Administrators in implementing the settlement.
11. Mr Schimmel's affidavit largely applies to work performed and opinions formed by Maurice Blackburn and Shine in their capacity as joint Administrators of the Amended Settlement Scheme.
12. I confirm I have reviewed and from my own knowledge and observations of the work of the Administrators I agree with the information contained in Mr Schimmel's affidavit generally, save in respect of those matters relating to the internal workings of Maurice Blackburn in respect of which I am not able to express an opinion. Specifically, I agree with the matters set out in Mr Schimmel's Affidavit under the following headings:
- (a) Background to this Application;
  - (b) Compliance with Settlement Orders;
  - (c) Progress of Claim Processing;
  - (d) The Settlement Protocol;
  - (e) Composition, operation and functions of the Committee;
  - (f) Online registration facility and website;
  - (g) Creation of the database;
  - (h) Allocation of claims for administration;
  - (i) Precedents for Assessment;

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- (j) Auditing of the work performed across the firms and Document Sharing;
  - (k) Registration;
  - (l) Allocation to one of the four firms;
  - (m) Individual Assessment;
  - (n) Other Amendments to the Amended Settlement Scheme; and
  - (o) Administration Costs.
13. The purpose of this affidavit is to report upon the matters that are specific to the work that Shine has performed in the Administration.

**Supervision of Claim Preparation work by Lempriere Abbott McLeod**

14. Clause 2.3 of the Amended Settlement Scheme sets out functions the Administrators may delegate to Duncan Basheer Hannon (**DBH**) and Lempriere Abbott McLeod (**LAM**), being the preparation of Eligibility Books, the preparation of Claim Books and the resolution of Liens, pursuant to clauses 5.6, 7.4 and 8 of the Amended Settlement Scheme.
15. In order to prevent duplication of claims Administration work, Maurice Blackburn has assumed responsibility to act as Administrator for claims allocated to DBH, and Shine has assumed responsibility to act as Administrator for claims allocated to LAM. This is formalised in clauses 7.2(c) and 7.5 of a Settlement Protocol agreed by Shine and Maurice Blackburn, dated 5 September 2016, a copy of which is annexed to this affidavit and marked "JMS2" (the **Settlement Protocol**).
16. LAM is itself a long-established, highly regarded firm whose practitioners are experienced in matters of this kind. Accordingly, in respect of the work LAM has done on claims for which Shine is responsible to act as Administrator, the approach that Shine has taken has been to provide assistance and co-operation as and when required, mindful to avoid unnecessary duplication of work LAM has already performed. Senior lawyers at Shine have liaised with LAM in that regard. The work that Shine has performed in connection with work performed by LAM is as follows:
- (a) Shine receives and reviews Eligibility Books from LAM, checking that the books contains and reflects the information required by the Committee established under the Settlement Protocol to determine eligibility. In instances where an



Eligibility Book is in some way deficient, Shine works with LAM to amend and rectify (where possible) the Eligibility Book rather than simply 'reject' the eligibility claim;

- (b) Certain of the claimants have requested, through LAM, that an interim payment be made to them under the Amended Settlement Scheme. When interim payments are requested through LAM, Shine liaises with LAM to ensure that information is collated to meet the needs of the Committee in considering those requests;
  - (c) Clarification has been needed from time to time on the Liens resolution process. One matter in particular has been complex and time consuming as it has involved liens arising in connection with a workers compensation claim which itself is litigious.
17. In my opinion, based on my experience as a Principal of a large firm and having had responsibility for managing large teams of lawyers over many years, the teams at Shine and LAM have worked efficiently, professionally and collaboratively, and the work performed by LAM in connection with the Administration has been performed in accordance with the Amended Settlement Scheme and consistent with the work undertaken by the Administrators.
18. As at the date of this affidavit, of the 138 claims allocated to LAM, 92 (71%) have now proceeded to eligibility determination stage.

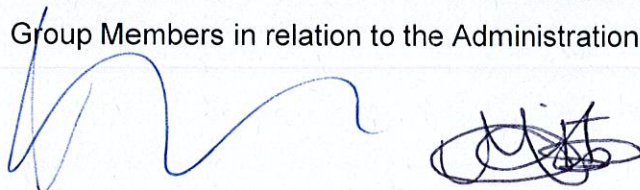
**Relationship with Norton Rose Fulbright Australia**

19. Also it is my observation that, Shine has maintained a professional and cooperative relationship with the Respondent's solicitors, Norton Rose Fulbright Australia (**NRFA**). Regular email and telephone correspondence is maintained between the firms in order to fulfil respective obligations under the Amended Settlement Scheme, including checks required for eligibility and resolution of Liens on behalf of Eligible Group Members.



**Records Management and Costs****General Administration Work**


20. Shine has an electronic file for General Administration Work (i.e. work performed in accordance with clause 13.1 of the Amended Settlement Scheme and 10.1 of the Settlement Administration Protocol).
21. All documents in relation to the general Administration of the Settlement is saved on this electronic file (including, for example, letters, emails, file notes, procedures, templates, Court documents and so on).
22. Shine records and bills Administration Costs pursuant to clause 13.1 of the Amended Settlement Scheme to this file. Work billed on this file will be performed by both lawyers and paralegals where appropriate. The rates that are applied to the work performed are those prescribed under clause 13.1(d) of the Amended Settlement Scheme. The type of work that is billed to this file includes:
  - (a) developing, implementing and monitoring internal processes for the assessment of claims;
  - (b) dealing with changes required to refine and improve the assessment process;
  - (c) recruiting, training and supervising the Administration team;
  - (d) trialing the assessment process;
  - (e) engaging independent experts as required (such as occupational therapists, physiotherapists, forensic accountants);
  - (f) developing of a series of precedent assessment documents;
  - (g) development, production and distribution of assessment information for Group Members;
  - (h) managing processes and correspondence in respect of Group Members under a legal incapacity and estate claims;
  - (i) managing Group Members' expectations and concerns regarding the Administration process and timeframes and communicating generally with Group Members in relation to the Administration process;



- (j) communications with Maurice Blackburn and other firms;
- (k) preparation for and attending Committee meetings;
- (l) processing and considering applications for interim payments or late registration;
- (m) drafting and coordinating bulk communications with Group Members;
- (n) communication with Group Members regarding the outcome of the eligibility and individual assessment;
- (o) co-ordinating and processing payments; and
- (p) preparation for this application.

Claim Preparation Work

- 23. Shine has a separate electronic file for each Group Member as well as a physical file for documents received in hard copy.
- 24. When hard copy documents are received a paralegal or administration assistant if available scans the documents to the Group Member's electronic file and then puts the documents on the physical file.
- 25. Shine records work performed in relation to the matters set out in clause 13.2 of the Amended Settlement Scheme to each Group Member's electronic file. Work billed under these files will be performed by both lawyers and paralegals where appropriate. The following types of work are recorded to the individual files:
  - (a) requesting and chasing medical records for Eligibility determination;
  - (b) collating and administratively processing (for example scanning) medical records for Eligibility determination;
  - (c) preparing Eligibility Books;
  - (d) co-ordinating and monitoring elections;
  - (e) resolving Group Member liens (i.e. contacting relevant third parties, identifying and quantifying Assumed and Residual Liens);

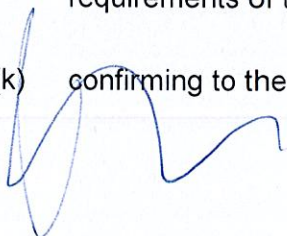
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- (f) responding to individual group member enquiries about their assessment. For example in order to obtain information relevant to the assessment or in order to respond to queries raised by group members in relation to the information and materials that were requested by the Administrators.

**Administration of claims allocated to Shine**

26. Set out below are the steps that Shine undertakes after a person has registered and been allocated to Shine. These steps include:

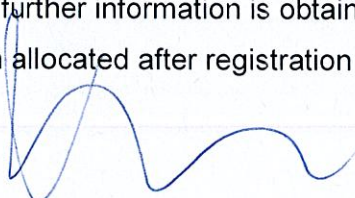

- (a) confirming registration of the Group Member in accordance with clause 4.3 of the Amended Settlement Scheme;
- (b) corresponding with the Group Member seeking particular information;
- (c) confirming the position of the Group Member in relation to whether they had opted out of these proceedings;
- (d) confirming whether the Group Member has entered into a deed of release with the Respondents or any of their related entities;
- (e) requesting information from third parties (such as hospital and surgeon records);
- (f) obtaining and checking medical records to determine whether the Group Member has or had an ASR implant;
- (g) checking medical records to determine whether the Group Member has undergone revision of their ASR implant;
- (h) if relevant, undertaking investigations to determine whether the Group Member meets the requirements of a Deemed ASR Revision under clause 5.2(b) of the Amended Settlement Scheme;
- (i) preparing the Group Member's Eligibility Book (including the preparation of an Eligibility Book Coversheet);
- (j) determining whether the Group Member is Eligible (in accordance with the requirements of the Amended Settlement Scheme);
- (k) confirming to the Group Members the Eligibility outcome;




- (l) where the Eligible Group Member elects Fast Track Resolution, speaking with the Group Member about their election and sending the Group Member a formal Notice of Fast Track Resolution;
  - (m) where the Eligible Group Member elects individual assessment, sending the Group Member a brochure explaining the next steps in that process;
  - (n) compiling and processing applications for Interim Payments;
  - (o) identifying and resolving the Eligible Group Member's Assumed Liens and Residual Liens; and
  - (p) all necessary steps associated with processing the Group Member's compensation and/or interim payment.
27. Wherever possible, Shine utilises the precedents and processes that have been developed in conjunction with Maurice Blackburn in order to ensure that this work is performed as efficiently and consistently as possible across the firms.
28. Further information regarding the steps taken for each Group Member's individual claim is set out below.

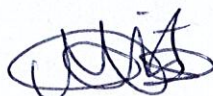
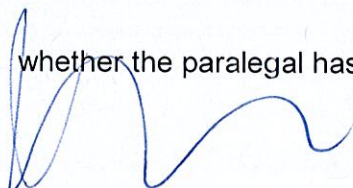
Preliminary information

29. The preliminary information required from a Group Member to begin and then undertake the work to be done in accordance with the Amended Settlement Scheme is obtained by Shine in the following way and from the following sources:
- (a) the answers provided by the Group Member when they register through the Settlement Website (further information about the Online Registration Form is set out in Mr Schimmel's affidavit);
  - (b) information which has previously been provided as a result of the investigations undertaken when preparing for trial; and/or
  - (c) further information as necessary from the Group Member either via email correspondence or from verbal instructions.
30. This further information is obtained by the paralegal to whom the Group Member has been allocated after registration and allocated to Shine.

Monitoring the settlement Administration process

31. Shine updates the Online Database when key milestones are reached (e.g. type of compensation elected (Fast Track Resolution or Individual Assessment)). The Online Database is hosted by Maurice Blackburn and made accessible to Shine via an online portal. Detailed information about the Online Database is provided in Mr Schimmel's affidavit.
32. Shine also uses an Excel spreadsheet to monitor the claims of its Group Members.
33. Each Group Member allocated to Shine is added to the spreadsheet. The paralegal responsible for processing that Group Member's claim updates the spreadsheet to track the progress of the Group Member's claim (eg. whether medical records have been requested and received and when the eligibility book has been provided to an assessor for determination).
34. The spreadsheet contains the following information for each Group Member:
  - (a) whether the Group Member has registered to participate in the Amended Settlement Scheme;
  - (b) whether the paralegal has sent the Group Member a letter confirming their registration and asking them to complete an authority (to request information from third parties);
  - (c) whether the Group Member has returned the authority;
  - (d) whether the paralegal has written to the Respondents to confirm whether the Group Member has entered into a Deed of Release with the Respondents or any of their third parties;
  - (e) whether the Group Member has entered into a Deed of Release;
  - (f) whether the Group Member has opted out;
  - (g) whether Shine has received the Group Members medical records;
  - (h) whether the Group Member has or had an ASR Implant;
  - (i) whether the Group Member has had revision of their ASR Implant;
  - (j) whether the paralegal has finalised the Eligibility Book;



- (k) whether the Group Member's name has been added to the list of finalised Eligibility Books;
  - (l) whether the Assessor has determined if the Group Member is eligible;
  - (m) whether the Group Member is Eligible or Ineligible and whether notice has been given to the group member as to the outcome of that assessment;
  - (n) whether the Group Member has selected Fast Track Resolution or Individual Assessment;
  - (o) where relevant, whether the Group Member has elected Fast Track Resolution for one hip or both hips; and
  - (p) the date the Notice of Fast Track Assessment was sent.
35. Where a claim is made on behalf of an estate or a person under a legal incapacity, these people are highlighted in different colours so this can be discerned easily.
36. The spreadsheet allows Shine to:
- (a) ensure claims are progressing in a timely manner; and
  - (b) generate data, such as: the number of claims that have reached the eligibility determination stage; the number of Group Members who have elected a Fast Track Resolution; and the number of Group Members who have elected Individual Assessment.
37. I regularly speak to the solicitors and the paralegals responsible for the group members allocated to them to ensure that claims are progressing and that there has not been any undue delay in progressing any Group Member's claim.
38. Shine has also developed a checklist for the paralegals to follow when undertaking the steps set out below. A checklist is completed from each Group Member's claim that is processed by Shine. The paralegal follows the checklist and records relevant information as they process the claim for each Group Member.
- Late registration check
39. According to clause 4.3 of the Amended Settlement Scheme:


- (a) Group Members who underwent an ASR Revision before 30 April 2016, must register by 31 October 2016 (**Initial Registration Deadline**); and
  - (b) Group Members who underwent ASR Revision after 1 May 2016 must register within 6 months of the date of their revision (**Individual Registration Deadline**).
40. Shine follows the same steps as Maurice Blackburn when checking whether a claim was registered within the above timeframes and when processing claims which have been registered after the deadlines. These steps are set out in Mr Schimmel's affidavit.

#### Estates and Legal Incapacity

41. If a claim is made on behalf of the estate of a Group Member, the executor, administrator or next-of-kin is asked to provide a certified copy of their identification and a certified copy of the deceased Group Member's death certificate.
42. Executors are also asked to provide a certified copy of the will; grant of probate (if the grant has been made), and a certified copy of the letters of administration.
43. If a claim is being made on behalf of a Group Member with a Legal Incapacity and an Enduring Power of Attorney is in place, the attorney is prompted to provide a certified copy of the Enduring Power of Attorney.

#### Authorities

44. A paralegal sends the Group Member a letter confirming their registration and requesting they return a General Authority. The General Authority is used to request information from various entities, such as: healthcare providers, private health insurers and the Department of Veterans' Affairs.
45. When a Group Member's authority is received, it is checked by a paralegal to ensure it has been completed correctly.
46. If the authority or documents are considered to be deficient, the paralegal contacts the Group Member to resolve any issues.
47. To date, 578 (81%) of Group Members allocated to Shine have returned completed authorities.

Opt out

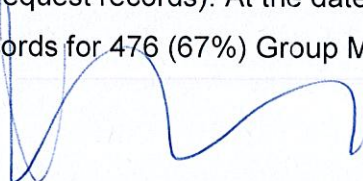
48. A paralegal checks whether the Group Member has previously opted out of the class action. To do this the paralegal checks a list of Opt Out Notices lodged with the Court.
49. As at the date of this affidavit, none of the Group Members whose claims are being administered by Shine have been found to have opted out. However, a process is in place whereby Group Members who have opted out are sent a letter of withdrawal to avoid the time and costs of processing their claim.

Released claims

50. Shine undertakes the same steps as Maurice Blackburn when checking whether a Group Member has entered into a deed of release with the Respondents or any of their related entities. These steps are set out in Mr Schimmel's affidavit.

Medical Record Requests

51. In some cases, Shine already has the Group Member's hospital(s) and/or surgeon(s) records for their ASR Implant and ASR Revision surgeries. This is because of the investigations Shine undertook when preparing for trial.
52. When records need to be obtained, a paralegal requests the Group Member provide details of the relevant hospital(s) and orthopaedic surgeon(s).
53. Often the records of the hospital are sufficient to determine whether the person meets the eligibility requirements under the Amended Settlement Scheme. If the hospital records do not contain the necessary information, then the surgeon's records are requested. Record requests are prepared by a paralegal.
54. Healthcare providers vary as to the time they take to respond to record requests. While they are asked to provide records urgently, they generally take one to four months to do so. A paralegal calls the healthcare provider periodically to follow up on the request and attempts to resolve any issues causing the delay.
55. As at the date of this affidavit, medical records have been requested on behalf of 577 (81%) of the Group Members whose claims are being administered by Shine (this number correlates with the number of Group Members who have provided authorities to request records). At the date of this affidavit, Shine has received sufficient medical records for 476 (67%) Group Members to enable their claims to be progressed.



Non ASR hip implant

56. A person who has not been implanted with an ASR implant is ineligible to participate in the Amended Settlement Scheme (sub-clause 5.1(a) of the Amended Settlement Scheme).
57. Where a potential claimant is unsure whether they had or have an ASR hip implant a paralegal requests the relevant hospital and/or surgeon records to determine whether the potential claimant has or had an ASR implant.
58. If it is found that a person does not have, and never did have, an ASR implant then this information is put into the claimant's Eligibility Book and the Eligibility Book is provided to an Assessor for determination.

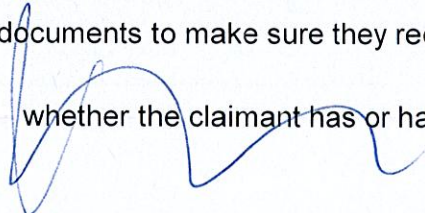
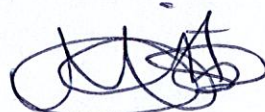
Deemed ASR Revision

59. A Group Member who has not had revision of their ASR implant is ineligible to receive compensation (sub-clause 5.1(b) of the Amended Settlement Scheme), unless they meet the requirements of a Deemed ASR Revision under clause 5.2(b) of the Settlement Scheme.
60. When determining whether a Group Member meets the requirements of a Deemed ASR Revision, Shine follows the same steps as Maurice Blackburn. These steps are set out in Mr Schimmel's affidavit.

Preparing Eligibility Books

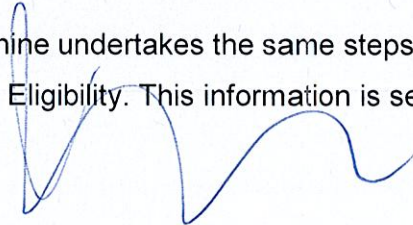
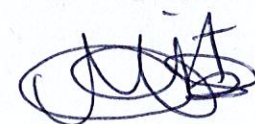
61. Upon receipt of the necessary medical records and any other relevant information that has been obtained, a paralegal prepares an Eligibility Book.
62. The paralegal or administrative assistant (if available) scans the medical records (and any other relevant material) to the Group Member's electronic file. The paralegal then puts the hard copy documents on to the Group Member's physical file. This is sometimes done by an administrative assistant where there is capacity to do so.
63. The paralegal reviews the medical records and any other relevant material to make sure the documents contain the information the assessor needs to determine whether the claimant is eligible under the Amended Settlement Scheme. The paralegal checks the documents to make sure they record and contain evidence of:

- (a) whether the claimant has or had an ASR implant;

- (b) if so, whether the Group Member has had revision surgery;
  - (c) if the Group Member has not had revision surgery, whether the Group Member meets the requirements of a Deemed Revision; and
  - (d) whether the Group Member suffered from any Infection(s), Trauma(s) or other complications.
64. The paralegal updates the checklist with this information and any other information that might be relevant to the assessment of eligibility (eg. other medical conditions or surgeries). In the checklist the paralegal references where the relevant information can be found in the documents (eg. the paralegal might note that on page 200 of the hospital records there is reference to the Group Member being implanted with an ASR implant).
65. The paralegal transfers all of the relevant documentation (including the checklist) to an electronic Eligibility Book which is saved within the claimant's electronic file.
66. Shine has a list of claimants whose Eligibility Books are finalised and ready for determination. Once an Eligibility Book is complete, the paralegal adds the claimant's name to this list.
67. This list is provided to the Assessor (a Senior Lawyer from Shine).
68. The Assessor reviews the claimant's electronic Eligibility Book and completes an Eligibility Coversheet. The Eligibility Coversheet sets out information relevant to each of the eligibility criteria (according to clause 5 of the Amended Settlement Scheme) and refers to supporting documentary evidence indicating that a claimant does or does not meet each individual criterion. The Assessor then records their determination on the Eligibility Coversheet.
69. Once a tranche of Eligibility Determinations are made, Maurice Blackburn is notified and selects one in ten determinations for audit (in accordance with clause 7.4 of the Settlement Protocol).
70. Shine audits Eligibility Determinations made by Maurice Blackburn in the same way.

#### Notices of Eligibility

71. Shine undertakes the same steps as Maurice Blackburn in relation to issuing Notices of Eligibility. This information is set out in Mr Schimmel's affidavit.
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Elections

72. Group Members who elect Fast Track Resolution are sent a formal Notice of Fast Track Assessment.
73. Group Members who do not elect Fast Track Resolution are sent a brochure detailing the next steps in that process. Further information about the brochure is provided in Mr Schimmel's affidavit.

Interim payments

74. Shine undertakes the same steps as Maurice Blackburn in relation to processing applications for interim payments. These steps are set out in Mr Schimmel's affidavit.

Identification of Liens

75. Once a Group Member has elected the Fast Track Resolution or their Individual Assessment has been finalised, Shine begins the process of resolving their Liens.
76. Mr Schimmel's affidavit provides detailed information about the terms of the Amended Settlement Scheme concerning the Liens.
77. Shine reviews the Group Member's file and speaks to the Group Member to identify potential lienholders.

*Private health insurance and Department of Veterans' Affairs Liens*

78. If the information on file indicates, or the Group Member says, they have or had private health insurance, a paralegal requests a statement of past benefits (**Health Benefits Statement**) from the private health insurer(s).
79. A paralegal cross-checks the Health Benefits Statement(s) with the Group Member's medical records to identify any treatment expenses that may be related to the ASR Implant failure and revision surgery.
80. The paralegal then annotates the Health Benefits Statement(s) to mark the relevant treatment expenses.
81. The Health Benefits Statement(s) is then provided to the Group Member to identify any other expenses that may be related to his or her injury, or otherwise to confirm the annotations on the statement. If the Group Member identifies any additional

expenses, the Health Benefits Statement(s) is amended. Once completed, the statement is confirmed by the Group Member and returned to Shine.

82. Shine emails the annotated Health Benefits Statement(s) to the private health insurer and requests they provide a Notice of Charge.
83. If the Group Member advises they received benefits from the Department of Veterans' Affairs, a corresponding process occurs with that Department.

*Other compensation*

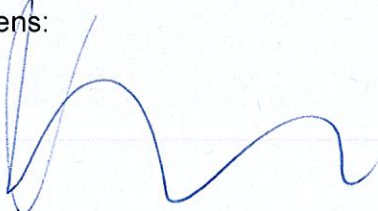
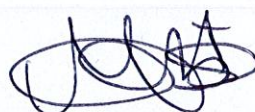
84. Shine follows the same process as Maurice Blackburn when identifying Liens for any other compensation the Group Member has received in relation to their ASR Implant (eg. workers' compensation). This process is set out Mr Schimmel's affidavit.

Resolution of Assumed Liens

85. Liens are asserted by a notice of charge from the lienholder (**Notice of Charge**).
86. For each Group Member, Shine sends an email to **NRFA** attaching the Notice(s) of Charge and supporting material (eg. medical records).
87. NRFA reviews the Notice(s) of Charge and identifies any items it does not accept as Assumed Liens. If Shine disagrees with NRFA on the status of a Lien, Shine negotiates with NRFA until an agreement is reached. NRFA is then responsible for resolving the Assumed Liens.
88. Clause 8.9 of the Amended Settlement Scheme provides a process for resolving Lien Disputes, including over whether an item is an Assumed Liens and the amount of an Assumed Lien. To date, there has been no need to use that process.

*Medicare*

89. Pursuant to clause 8.5 of the Amended Settlement Scheme, NRFA's Bulk Payment Agreement applies to any Lien asserted by Medicare in relation to compensation paid to Group Members under both Fast Track Resolution and Individual Assessment.
90. In order to give effect to the Bulk Payment Agreement and thereby resolve Medicare Liens:

- (a) for the Group Members that have no Assumed Liens, Shine periodically sends a list of these Group Members to NRFA and requests they pay Medicare in accordance with the Bulk Payment Agreement; or
- (b) where a Group Member has Assumed Liens, the paralegal requests NRFA pay Medicare at the same time as asking them to pay the Assumed Liens.

#### Resolution of Residual Liens

- 91. So far all of the Liens identified by Shine have been Assumed Liens.
- 92. However, the process in place to resolve Residual Liens is for a paralegal to send a copy of the Group Member's Notice(s) of Charge to Maurice Blackburn for payment.

#### Final Payment

- 93. Once all of the Group Member's Liens are resolved their claim proceeds to the compensation payment stage.
- 94. A paralegal sends the Group Member a letter requesting their bank details and requesting they sign a payment authority.
- 95. Details of payments to be made are compiled into a schedule (**Payment Schedule**), including:
  - (a) Compensation payments to Group Members; and
  - (b) Interim Payments.
- 96. The Payment Schedule is sent to me and a principal of Maurice Blackburn (currently Mr Schimmel) for approval. Maurice Blackburn does not affect the payments listed on the Payment Schedule until written approval to do so is received from both Mr Schimmel and me, pursuant to clause 8.6 of the Settlement Protocol.

#### Enquiries

- 97. Shine has received a significant volume of enquires since the announcement of the Settlement.
- 98. Similarly to Maurice Blackburn, the volume of telephone enquiries received by Shine per day ranges from approximately 5 to 30 enquiries.

99. The nature of the enquiries is similar for Shine as for Maurice Blackburn. This information is provided in Mr Schimmel's affidavit.

Future work to be performed in the Administration

100. To date, there has been a significant amount of work performed by the Administrators in establishing systems and protocols for the consistent and efficient administration of the Amended Settlement Scheme. In my opinion, that work has been extremely productive and has put the Administrators in the position of being able to process a large volume of claims in a manner that does justice to Group Member's claims, is fair and cost effective.
101. I have every reason to expect that the systems and processes developed to date will be utilised and modified as appropriate for the remainder of the Administration and that claims processing will continue to be undertaken in a timely fashion. I am of the opinion that it is likely that the Administration Costs are likely to reduce over time as the structure that is now in place can be utilised and modified for the remainder of the Administration.

**Proposed amendments to the Amended Settlement Scheme**

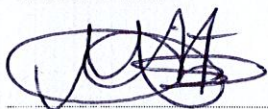
102. I have reviewed Mr Schimmel's comments concerning proposed amendments to the Amended Settlement Scheme. I concur with Mr Schimmel's views and confirm that it is my opinion that it is in the interests of Group Members that the proposed amendments be permitted. A copy of the draft Further Amended Settlement Scheme is annexed to Mr Schimmel's affidavit and marked "JKS-144".

Affirmed by the deponent  
at Brisbane  
in Queensland  
on 8 June 2017

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)  
)  
)

Signature of deponent

Before me:



Signature of witness

Melissa Obrist

An Australian legal practitioner within the meaning  
of the *Legal Profession Act* (QLD)

Name of witness:

Melissa Obrist

Address of witness:

Level 13, 160 Ann Street, Brisbane QLD 4000

Federal Court of Australia  
District Registry: New South Wales  
Division: General

No. NSD 213 of 2011

**Tammy Stanford and Another**

Applicants

**DePuy International Limited and Another**

Respondents

Affidavit of: **Janice Mary Saddler**

Address: Level 13, 160 Ann Street, Brisbane QLD 4000

Occupation: Solicitor

Date: 8 June 2017

**CERTIFICATE IDENTIFYING ANNEXURE**

This is the annexure marked "**JMS-1**" referred to in the Affidavit of Janice Mary Saddler affirmed 8 June 2017.

Before me:

  
\_\_\_\_\_

**Melissa Maureen Deborah Obrist**

Solicitor

## **Settlement Scheme – ASR Class Action**

Version 2  
Dated 17 June 2016

*Stanford and Dunsmore v DePuy International Ltd and Johnson & Johnson Medical Pty Ltd*  
Federal Court of Australia, Proceeding NSD 213 of 2011

## Overview and summary

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- A. This Settlement Scheme has been prepared in accordance with clause 6.3(a) of the Settlement Deed dated 31 March 2016.
- B. The Settlement Scheme creates the procedures and substantive requirements for the distribution of the Settlement Sum, including the payment of compensation to Group Members who are assessed as eligible to receive compensation.
- C. The Settlement Scheme will not be operative unless and until the Court makes the Approval Order.
- D. The Settlement Scheme has the following major elements:

Stage	Clause	Procedure
Registration	Clause 4	A Group Member who wishes to make a claim must register his or her intention to do so within prescribed timeframes
Eligibility determination	Clause 5	The Administrators will assess and determine the eligibility of Group Members to receive compensation under the Settlement Scheme
Fast Track Resolution	Clause 6	Eligible Group Members may elect to receive a Fast Track Resolution
Assessment of compensation	Clause 7	Where eligible Group Members do not elect to receive a Fast Track Resolution, the Administrators will assess and determine the amount of compensation to be paid to the Group Member
Liens	Clause 8	After Group Members are found to be eligible to receive compensation, the Administrators will take steps to resolve any Liens
Review rights	Clause 9	A Review may be sought by a Group Member who is dissatisfied with a determination that they are not eligible to receive compensation, or by an eligible Group Member who is dissatisfied with a determination regarding the amount of compensation that has been assessed

## **1. Definitions and interpretation**

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### **1.1 Definitions**

In this Settlement Scheme, the terms in the Dictionary in the Schedule to this Settlement Scheme have the meanings defined in that Dictionary.

### **1.2 Interpretation**

In this Settlement Scheme:

- (a) Headings may be used in interpreting the meaning of provisions of this Settlement Scheme.
- (b) Where the context permits, the singular includes the plural, and the plural includes the singular.
- (c) If a word or phrase is defined in this Settlement Scheme, its other grammatical forms have a corresponding meaning.
- (d) Specifying anything in this Scheme after the words "include", "including" or "for example" or similar expressions, does not limit what else might be included.
- (e) A reference to a clause is a reference to a clause of this Settlement Scheme.
- (f) A reference to an agreement or document (including a reference to this Settlement Scheme) is to the agreement or document as amended, supplemented, novated or replaced.

## **2. Appointment and functions of the Administrators**

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### **2.1 Appointment of Maurice Blackburn and Shine as Administrators**

Subject to the Court's approval, Maurice Blackburn and Shine will jointly perform the role of Administrators and, in doing so, Maurice Blackburn and Shine will each:

- (a) administer and implement the Settlement Scheme fairly and reasonably according to its terms, and with Maurice Blackburn's and Shine's duties to the Court to take priority over any obligations to individual Group Members;
- (b) cease to act for any individual Group Members who had retained either Maurice Blackburn or Shine before the Approval Order was made;
- (c) have the same immunities from suit as attach to the office of a judge of the Supreme Court of NSW.

### **2.2 Arrangements between the Administrators**

If appointed by the Court to perform the role of Administrators, Maurice Blackburn and Shine will:

- (a) work together cooperatively in order to jointly perform the role of Administrators; and
- (b) establish the procedures, arrangements, work practices and financial controls and approvals that are reasonably necessary in order to implement and administer the Settlement in accordance with this Settlement Scheme, and to do so as efficiently and inexpensively as is practicable.

### **2.3 Delegation of functions to DBH and LAM**

Subject to clause 2.4, the Administrators may in their absolute discretion delegate the following functions to DBH or LAM in respect of a subset of Group Members who were formerly clients of those firms:

- (a) preparation of Eligibility Books pursuant to clause 5.6;
- (b) preparation of Claim Books pursuant to clause 7.4; and
- (c) resolution of Liens pursuant to clause 8,

and for the avoidance of doubt, the following functions must not be delegated by the Administrators:

- (d) exercising any of the discretions in clauses 2.4(e), 4.6, 6.5, 9.4, 10.8 or 11.4;
- (e) making a determination regarding eligibility pursuant to clause 5.6(f);
- (f) sending a Notice of Eligibility to a Group Member pursuant to clause 5.8;
- (g) sending a Notice of Fast Track Assessment to a Group Member pursuant to clause 6.7(a); and
- (h) sending a Notice of Assessment to a Group Member pursuant to clause 7.3(g).

### **2.4 Responsibilities of DBH and LAM in their delegated functions**

If the Administrators delegate any functions pursuant to clause 2.3, DBH and LAM:

- (a) are subject to the same obligations, requirements and limitations that would apply pursuant to this Settlement Scheme to the Administrators if the relevant functions had not been delegated, including:
  - (i) the obligations in clauses 2.1(a) and 2.1(b);
  - (ii) any requirements arising from the implementation of clause 2.2(b); and
  - (iii) the restrictions in clauses 5.6(c), 7.5 and 7.6;
- (b) must work cooperatively with the Administrators in the performance of their delegated functions;
- (c) must promptly notify the Administrators if a Group Member purports to give DBH or LAM notice of:
  - (i) an election to receive a Fast Track Resolution pursuant to clause 6.3; or

- (ii) a request for a Review pursuant to clause 9.2;
- (d) are to be paid for professional fees in accordance with clause 13.2 and (subject to clauses 2.4(e)-(g)) are to be paid their reasonable disbursements, with such costs to be treated as Administration Costs for the purpose of clause 13.1; and
- (e) must consult with and seek approval from the Administrators before invoking or relying on clauses 5.6(d)(ii), 5.6(d)(iii) or 7.5, and if DBH or LAM fail to do so the Administrators may in their absolute discretion decline to reimburse DBH or LAM for the costs of any report obtained pursuant to those clauses;
- (f) must consult with and seek approval from the Administrators before incurring a disbursement that is more than \$1,500, and if DBH or LAM fail to do so the Administrators may in their absolute discretion decline to reimburse DBH or LAM for such disbursements;
- (g) must take steps to minimise disbursements wherever possible.

## **2.5 Correction of errors**

The Administrators may at any time correct any error, slip or omission that occurred in the administration or implementation of the Settlement Scheme.

## **3. Implementation of the Settlement**

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### **3.1 Payment of the Reimbursement Payments and Applicants' Costs**

As soon as practicable after the Approval Order is made and the Respondents have paid the Settlement Sum into the Settlement Account pursuant to clause 3.1 of the Deed, the Administrators will:

- (a) pay to Stanford, Dunsmore, Webb and Beentjes the respective Reimbursement Payments that are approved by the Court in the Approval Order;
- (b) pay to Maurice Blackburn its share of the Applicants' Costs that are approved by the Court in the Approval Order;
- (c) pay to Shine its share of the Applicants' Costs that are approved by the Court in the Approval Order;
- (d) pay to DBH its share of the Applicants' Costs that are approved by the Court in the Approval Order;
- (e) pay to LAM its share of the Applicants' Costs that are approved by the Court in the Approval Order.

### **3.2 Application of the balance of the Settlement Sum**

The balance of the Settlement Sum (including any interest earned on the Settlement Sum after it is paid by the Respondents pursuant to clause 3.1 of the Deed) will be applied and distributed as follows:

- (a) to Group Members in accordance with the remaining provisions of this Settlement Scheme; and
- (b) to the payment of Administration Costs in accordance with clause 13.

## **4. Registration of Group Members**

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### **4.1 Registration of claims**

If a Group Member wishes to make a claim for compensation under this Settlement Scheme, the Group Member must register her or his claim by completing an online registration form at the following website: [www.depuyclassaction.com.au](http://www.depuyclassaction.com.au).

### **4.2 Alternative methods of registration**

If a Group Member does not have internet access or does not have the technological nous to complete an online registration form, the Administrators may permit the Group Member's registration to be effected by means other than online registration.

### **4.3 Deadlines for registration of claims**

Depending on the date on which a Group Member underwent ASR Revision, the Group Member must register his or her claim in accordance with the applicable deadline:

<u>Timing of ASR Revision</u>	<u>Deadline</u>
30 April 2016 or earlier	31 October 2016
1 May 2016 or later	No later than six (6) months after the ASR Revision

### **4.4 Timing of Deemed ASR Revisions**

For the purpose of clause 4.3:

- (a) Group Members who had a Deemed ASR Revision (as defined in clause 5.2(b)) will be taken to have undergone the ASR Revision at the time when the Required Revision (as defined in clause 5.2(b)(i)) was identified; and
- (b) in the event of uncertainty or confusion about the applicable registration date, the Administrators may exercise the discretion in clause 4.6, provided that the Group Member registered within a reasonable period of time after the circumstances of the Deemed ASR Revision were identified.

#### **4.5 Failure to register by the relevant deadline**

Subject to clause 4.6, if a Group Member registers his or her claim after the applicable deadline in clause 4.3, the Group Member is not entitled to receive compensation pursuant to the Settlement.

#### **4.6 Discretion to waive late registrations**

In their discretion the Administrators may accept a late registration (that is, a registration effected after the deadline in clause 4.3) if the Group Member has a reasonable excuse, including for the following reasons:

- (a) illness or incapacity; or
  - (b) a prolonged absence from their usual place of residence,
- except that the Administrators must not accept a late registration:
- (c) if it is received by the Administrators more than 12 months after the date on which it was required to be effected pursuant to clause 4.3; and
  - (d) regardless of clause (c), if it is received by the Administrators after 30 June 2023.

### **5. Assessment and determination of eligibility**

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#### **5.1 Eligibility Criteria**

A Group Member is eligible to receive compensation pursuant to this Settlement Scheme if she or he satisfies the following **"Eligibility Criteria"**:

- (a) the Group Member was implanted with one or more ASR Implants in Australia; and
- (b) the Group Member underwent ASR Revision as defined in clause 5.2; and
- (c) the ASR Revision was carried out earlier than thirteen (13) years after the Group Member was implanted with the ASR Implant that was the subject of the ASR Revision; and
- (d) the ASR Revision was not an Ineligible Revision as defined in clause 5.3; and
- (e) the Group Member has not:
  - (i) opted out of the ASR Class Action; and/or
  - (ii) entered into a deed of release with the Respondents or any of their related entities in respect of an ASR Claim (whether in Australia or elsewhere).

## 5.2 ASR Revision

An “**ASR Revision**” means either:

- (a) an “**Actual ASR Revision**” in which one or more components of an ASR Implant were surgically removed; or
- (b) a “**Deemed ASR Revision**” in which ASR Revision is deemed to have occurred in the following circumstances, despite the fact that no components of an ASR Implant were surgically removed:
  - (i) the surgical removal of one or more components of an ASR Implant is reasonably necessary in order to alleviate the Group Member's symptoms and/or reasonably necessary due to abnormal diagnostic test results (**Required Revision**); and
  - (ii) the Group Member is suffering medical comorbidities and:
    - A. as a result of those comorbidities, the performance of the Required Revision poses an unacceptable risk of death or an unacceptable risk of a substantial deterioration of the Group Member's health; and
    - B. in the absence of that risk, it is highly likely that the Required Revision would have been performed;
  - (iii) the circumstances in sub-clause 5.2(b)(ii) are unlikely to change before the thirteenth (13<sup>th</sup>) anniversary of the Group Member being implanted with their ASR Implant,

and the following additional provisions apply if a Group Member had a Deemed ASR Revision:

- (c) for the purpose of clauses 5.1(c), a Deemed ASR Revision will be treated as having been carried out earlier than thirteen (13) years after the Group Member was implanted with their ASR Implant if:
  - (i) the Required Revision was identified as a result of medical investigations and/or examinations; and
  - (ii) those investigations and/or examinations were initiated by the Group Member's surgeon earlier than thirteen (13) years after the Group Member was implanted with their ASR Implant;
- (d) for the purpose of clauses 5.1(d) and 5.3, the provisions regarding Ineligible Revisions apply to the circumstances that gave rise to the Required Revision; in other words, a Deemed ASR Revision will be an Ineligible Revision if the surgical removal of one or more components of an ASR Implant was necessary (albeit not in fact carried out) as a result of:
  - (i) Fracture of the femoral neck; or
  - (ii) Post-Operative Infection; or
  - (iii) Unrelated Trauma.

### 5.3 Ineligible Revisions

An ASR Revision is an “**Ineligible Revision**” if it was performed in any of the following circumstances:

#### Fracture of the femoral neck

The ASR Revision:

- (a) was performed in respect of an ASR Resurfacing; and
- (b) occurred earlier than six months after the ASR Implant was implanted; and
- (c) was carried out as a result of a fracture of the Group Member's natural femoral neck, unless there is evidence that the fracture was caused by an adverse reaction to metal debris.

#### Post-Operative Infection

The ASR Revision:

- (a) occurred earlier than 547 days after the ASR Implant was implanted; and
- (b) was necessitated by Infection, unless the Group Member would have required ASR Revision in the near term regardless of the periprosthetic joint infection.

#### Unrelated Trauma

The ASR Revision:

- (a) was carried out as a result of a change in the alignment or fixation of one or more components of the ASR Implant due to the application of a high velocity external force in a sudden or unexpected manner; and
- (b) the Group Member otherwise would not have needed to undergo ASR Revision in the near term.

For the purpose of this clause, Unrelated Trauma is deemed to have occurred if:

- (c) radiological studies verify that there was a change in the position of any component or ancillary parts of the ASR Implant, or in its alignment or fixation; and
- (d) the Group Member's treating surgeon attributes the immediate cause of revision to a traumatic event which resulted in that change in position, alignment or fixation,

unless the Group Member would have required revision in the near term regardless of the traumatic event.

### 5.4 Clarification regarding future ASR Revisions

For the avoidance of doubt:

- (a) the Settlement is intended to compensate Group Members who undergo ASR Revision in the future, provided that those Group Members satisfy the Eligibility Criteria; and
- (b) in clauses 5.1 and 5.3, the use of the present or past tense (in words such as "is eligible", "underwent" or "was carried out") applies equally to ASR Revisions that occur in the future.

#### **5.5 Clarification regarding bilateral ASR Implants**

If a Group Member was implanted with bilateral ASR Implants (that is, an ASR Implant was implanted in both the left hip and the right hip):

- (a) the Group Member is eligible to receive compensation if she or he underwent ASR Revision in respect of either or both of the ASR Implants, provided that the Eligibility Criteria are satisfied in relation to at least one of the ASR Implants;
  - (b) if a Group Member has undergone bilateral ASR Revision:
    - (i) the Group Member may elect to receive two Fast Track Resolutions; that is, one Fast Track Resolution for each of his or her hips; or
    - (ii) the Group Member may proceed to an assessment under clause 7 in relation to both hips, in which case the fact of bilateral ASR Revision must be taken into account for the purpose of assessing the Group Member's compensation;
    - (iii) unless clause 5.5(c)(ii) applies, the Group Member may not elect to receive a Fast Track Resolution in relation to one of his or her hips, and proceed to an assessment under clause 7 in relation to the other hip;
  - (c) if a Group Member with bilateral ASR Implants has undergone unilateral ASR Revision and is determined to be eligible to receive compensation in respect of that ASR Revision:
    - (i) the Group Member in consultation with the Administrators may elect to defer the assessment of their compensation pursuant to clauses 6 or 7 for a reasonable period of time in order to assess whether ASR Revision may be needed in respect of his or her other hip, and clause 5.5(b) will apply if the Group Member undergoes a second ASR Revision before his or her compensation is assessed; and
    - (ii) if the Group Member:
      - A. does not defer their compensation assessment for his or her first ASR Revision; and
      - B. after having been paid compensation for the first ASR Revision, undergoes a second ASR Revision in respect of his or her other hip; and
      - C. is later found to be eligible in respect of the second ASR Revision;
- then:

- D. in relation to the second ASR Revision, the Group Member may either elect to receive a Fast Track Resolution or proceed to an assessment of compensation under clause 7, regardless of how the Group Member's compensation was assessed for the first ASR Revision; and
- E. if the Group Member proceeds to an assessment of compensation under clause 7 for the second ASR Revision, the Group Member's compensation for the second ASR Revision must take into account the compensation already paid to the Group Member for the first ASR Revision.

## 5.6 Process for determining eligibility

The Administrators will assess and determine the eligibility of a Group Member pursuant to clause 5.1 in accordance with the following provisions:

- (a) the Administrators will check whether or not the Group Member has filed an opt out notice and, if so, will obtain a copy of the opt out notice;
- (b) the Administrators will provide to the Respondents an authority signed by the Group Member and the Respondents will within 14 days provide confirmation as to whether or not clause 5.1(e)(ii) applies to the Group Member;
- (c) the Administrators will obtain copies of the Group Member's contemporaneous medical records that are relevant to an assessment of the Eligibility Criteria;
- (d) in order to minimise Administration Costs associated with the requirements of this clause, the Administrators:
  - (i) will seek to rely only on contemporaneous medical records for the purpose of assessing the Eligibility Criteria that relate to a Group Member's medical history; and
  - (ii) may only seek clarification from the Group Member's treating doctor/s if the contemporaneous medical records are ambiguous as to the applicability of any of the Eligibility Criteria; for example it is unclear whether or not a Group Member would have needed ASR Revision in the near term regardless of Unrelated Trauma or Post-Operative Infection;
  - (iii) must not obtain a report or other evidence from a doctor who is not a Group Member's treating doctor, unless the Group Member's treating doctor is deceased or unwilling to provide clarification in accordance with clause (ii);
- (e) the Administrators will prepare an "**Eligibility Book**" which consists of the materials and information obtained pursuant to this clause for the purpose of assessing whether or not the Group Member satisfies the Eligibility Criteria;
- (f) a Senior Lawyer employed by one of the Administrators will review the Group Member's Eligibility Book and will make a determination as to whether or not the Group Member satisfies the Eligibility Criteria.

### **5.7 Additional provisions regarding the process for determining eligibility of Deemed ASR Revisions**

If a Group Member claims to have had a Deemed ASR Revision, the Administrators may do either or both of the following at any time before assessing and determining the eligibility of the Group Member:

- (a) request the Group Member, at her or his own expense, to provide copies of relevant contemporaneous medical records to the Administrators so that they can ascertain whether there are reasonable prospects that the Group Member will satisfy the Eligibility Criteria for the definition of a Deemed ASR Revision; and/or
- (b) request the Group Member to pay to the Administrators a bond for the costs of the Administrators obtaining contemporaneous medical records and/or a report from a doctor or doctors, with such bond to be returned to the Group Member if she or he is assessed as eligible to receive compensation,

and where the Administrators make a request pursuant to this clause:

- (c) if the Group Member fails to comply with the request, the Administrators may decline to assess and determine the eligibility of the Group Member until such time as the Group Member complies with the Administrators' request; or
- (d) if the Group Member fails to comply with repeated requests by the Administrators, the Administrators may exercise their discretion in clause 11.4(b).

### **5.8 Notification of Group Members regarding their eligibility or otherwise**

After a determination is made as to whether or not a Group Member is eligible to receive compensation, the Administrators will promptly send to the Group Member a "**Notice of Eligibility**" in which the Administrators:

- (a) state whether or not the Group Member has been assessed as eligible to receive compensation under the Settlement Scheme;
- (b) if the Group Member was assessed as eligible to receive compensation, provide information to the Group Member in relation to their rights to receive a Fast Track Resolution under clause 6 or alternatively proceed to an assessment of compensation under clause 7, including information that will assist the Group Member to make a decision as to whether or not to accept the Fast Track Resolution; and
- (c) if the Group Member was assessed as ineligible to receive compensation, provide information to the Group Member in relation to their rights to seek a Review under clause 9 below.

### **5.9 Clarification regarding steps required to be taken where a Group Member opted out or has otherwise resolved their claim**

For the avoidance of doubt, if and when the Administrators obtain information pursuant to clauses 5.6(a) and/or 5.6(b) which demonstrates that a Group Member is not eligible on the basis of clause 5.1(e), the Administrators:

- (a) are not obligated to obtain any further information or materials for the purpose of assessing and determining whether the Group Member satisfies the other Eligibility Criteria; and
- (b) may proceed to make a determination pursuant to clause 5.6(f) on the basis of the limited information obtained pursuant to clauses 5.6(a) and/or 5.6(b).

## **6. Fast Track Resolution**

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### **6.1 Application of this clause**

This clause 6 applies only to those Group Members who have been assessed as eligible pursuant to clause 5.

### **6.2 Fast Track Resolution**

A “**Fast Track Resolution**” is a single, standardised, lump sum payment of \$55,000.

The payment of the Fast Track Resolution does not affect the Group Member’s rights to have their Residual Liens paid from the Settlement Sum in accordance with clause 8, in addition to the Fast Track Resolution. Otherwise, the Fast Track Resolution is paid in full and final satisfaction of the Group Member’s claim.

*Note:* The intent of the Fast Track Resolution is that the standardised sum is available on an expedited basis. It includes no allowance for economic loss. It may not be suitable for Group Members whose ASR Revision caused a serious permanent disability or any significant loss of wages or income.

### **6.3 Election to receive a Fast Track Resolution**

Within 42 days after the Administrator sends a Notice of Eligibility to a Group Member, an eligible Group Member may elect to receive a Fast Track Resolution by giving written notice to the Administrators.

### **6.4 Failure to make an election to receive a Fast Track Resolution**

If a Group Member does not give written notice to the Administrators within 42 days as required by clause 6.3, the Group Member will be deemed to have declined the Fast Track Resolution.

### **6.5 Discretion to accept late notification of an election to receive a Fast Track Resolution**

The Administrators may in their absolute discretion accept late notification of an election by a Group Member to receive a Fast Track Resolution, subject to the following:

- (a) a late election must not be accepted by the Administrators after a Group Member’s Claim Book has been referred to an Assessor; and
- (b) if a late election is accepted by the Administrators after they (or their delegates) have commenced preparing a Group Member’s Claim Book, the Administrators may in their absolute discretion reduce the Group Member’s

Fast Track Resolution in order to take into account any Administration Costs that have been incurred in preparing the Claim Book, including:

- (i) professional fees in an amount no more than \$5,000; and
- (ii) disbursements.

#### **6.6 Claims by the estates of deceased Group Members**

The following provisions apply to claims by the estates of deceased Group Members:

- (a) a claim may be made by the estate of a deceased Group Member;
- (b) the estate must elect to receive a Fast Track Resolution, discounted to \$40,000 in full and final satisfaction of the estate's claim for all heads of damages (subject to the resolution of Liens pursuant to clause 8; and
- (c) the estate is not entitled to proceed to an assessment under clause 7;

#### **6.7 Consequences of electing to receive a Fast Track Resolution**

If a Group Member elects to receive a Fast Track Resolution:

- (a) as soon as practicable after receiving notice from the Group Member, the Administrators will:
  - (i) send to the Group Member a "**Notice of Fast Track Assessment**" confirming the Group Member's entitlement to receive the Fast Track Resolution;
  - (ii) take steps to determine and resolve the Group Member's Liens in accordance with clause 8;
- (b) the Group Member will be paid as soon as possible after the resolution of his or her Liens pursuant to clause 8;
- (c) the Group Member will be:
  - (i) entitled to the benefit of their claim being proportionately grossed up in the event that there are surplus funds, as described in clause 10.7(a); and
  - (ii) immune from any proportionate reduction of their claim, as described in clause 10.7(b).

#### **6.8 Consequences of declining to receive a Fast Track Resolution**

If a Group Member declines to receive a Fast Track Resolution:

- (a) the Group Member's compensation entitlements will be assessed and determined in accordance with clause 7;
- (b) subject to clause 7.2(c), the Group Member faces a risk of receiving less compensation than the Fast Track Resolution;

- (c) the Group Member faces a risk of a proportionate reduction of their Assessed Compensation Amount pursuant to clause 10.7(b); and
- (d) payment is likely to take longer than if the Group Member elected to receive a Fast Track Resolution.

## **7. Assessment of compensation**

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### **7.1 Application of this clause**

This clause 7 applies only to those Group Members who:

- (a) have been assessed as eligible pursuant to clause 5; and
- (b) declined to receive a Fast Track Resolution pursuant to clause 6.

### **7.2 Legal principles for the assessment of claims**

Group Members' claims will be assessed and determined:

- (a) according to the provisions and principles in Part VIB of the CAC Act, as in force at 1 May 2016; and
- (b) on the basis that the Group Member is only entitled to compensation for loss or damage that was caused by their ASR Revision or the circumstances requiring ASR Revision,

except that:

- (c) subject to the overriding operation of clause 10.7(b), a Group Member's non-economic loss must be assessed as no less than \$40,000.

### **7.3 Process for determining Group Members' claims**

The Administrators will assess and determine Group Members' claims according to the following procedure:

- (a) the Administrators will appoint a number of Assessors to a "Panel" for the purpose of assessing and determining Group Members' claims;
- (b) the Administrators will prepare "Claim Books" in accordance with clause 7.4;
- (c) the Administrators will allocate a Group Member's Claim Book to an Assessor who is randomly selected from the Panel;
- (d) if, after reviewing the Group Member's Claim Book, the Assessor considers that additional information or materials are needed in order to complete the assessment, the Assessor will inform the Administrators, who will:
  - (i) work cooperatively with the Assessor in order to address the issues raised by the Assessor; and
  - (ii) to the extent that it is necessary, supplement the Group Member's Claim Book;

- (e) the Assessor may also choose to confer with the Group Member or their personal or other representative;
- (f) the Assessor will then:
  - (i) make a determination as to the amount of compensation that the Group Member is assessed as being entitled to receive pursuant to this Settlement Scheme; and
  - (ii) prepare and provide to the Administrators a brief statement of reasons for the Assessor's determination, including details of the amounts assessed under all heads of damages;
- (g) after receiving an Assessor's determination and statement of reasons, the Administrators will promptly send to the Group Member a **"Notice of Assessment"** in which the Administrators:
  - (i) provide information to the Group Member about the determination of their entitlements under this Settlement Scheme;
  - (ii) enclose a copy of the Assessor's statement of reasons; and
  - (iii) provide information to the Group Member in relation to their right to seek a Review under clause 9.

#### **7.4 Preparation of Claim Book**

For each eligible Group Member, the Administrators will prepare a **"Claim Book"** comprising information and materials that will enable an assessment of the Group Member's compensable loss or damage, and for the purpose of preparing the Claim Book the Administrators will obtain the following insofar as it is relevant and applicable to the Group Member's losses:

- (a) instructions and information from the Group Member;
- (b) information from any other person such as a family member or friend of the Group Member;
- (c) contemporaneous medical records, to the extent that those records have not already been obtained pursuant to clause 5.6(c);
- (d) tax returns and other tax, accounting or financial documents;
- (e) employment records or other information from the Group Member's employer/s;
- (f) invoices regarding any treatment or other expenses incurred by the Group Member;
- (g) subject to clause 7.7, information or records held by the Respondents as to the details of any payments made to the Group Member pursuant to the ASR Reimbursement Programme;
- (h) subject to clauses 7.5 and 7.6, reports from:
  - (i) a treating doctor;

- (ii) an “**Independent Expert**”, being a medical expert (such as an orthopaedic surgeon or rehabilitation physician) or allied health expert (such as an occupational therapist or physiotherapist); or
- (iii) a forensic accounting expert.

#### **7.5 Restrictions on reports to be obtained for a Group Member’s Claim Book**

In order to minimise Administration Costs associated with the requirements of this clause:

- (a) the Administrators must only obtain a report from a treating doctor or Independent Expert if it would otherwise be impossible to reliably assess the Group Member’s losses under any particular head of damages;
- (b) where possible, the Administrators must seek to obtain a report from a treating doctor rather than an Independent Expert; for example, a report may be obtained from an Independent Expert if the Group Member’s treating doctor is deceased or unwilling to provide a report, or the treating doctor does not have the relevant expertise to provide a report that addresses the issues raised by the Administrators;
- (c) unless it is required in exceptional circumstances, the Administrators must not obtain more than one medical report (whether from a treating doctor or Independent Expert) in relation to a Group Member;
- (d) the Administrators will only obtain a report from a forensic accounting expert if it would otherwise be impossible to reliably assess the Group Member’s economic loss,

however the restrictions in this clause do not apply to the Applicants to the extent that reports or other evidence from treating doctors, Independent Experts or forensic accountants have already been prepared for the purpose of the ASR Class Action.

#### **7.6 Engagement of Independent Experts and forensic accounting experts**

For the purpose of clauses 7.4(h) and to the extent that it is necessary and appropriate to obtain a report from an Independent Expert or a forensic accounting expert:

- (a) the Administrators may establish a list of one or more approved experts in one or more areas of expertise;
- (b) to the extent that the Administrators have established such a list of approved experts, those approved experts must be engaged in preference to other experts, except in exceptional circumstances.

#### **7.7 Cooperation of the Respondents**

In order to enable the Administrators to give effect to clause 7.4(g), upon receipt of an authority signed by a Group Member the Respondents will provide (or will instruct Crawford to provide) details held by the Respondents or Crawford of any payments made to the Group Member pursuant to the ASR Reimbursement Programme.

### **7.8 Constitution of the Panel**

For the purpose of ensuring the efficient and expeditious processing and resolution of claims, the Administrators may at any time:

- (a) appoint additional Assessors to the Panel for the purpose of clause 7.3(a); or
- (b) remove an Assessor from the Panel if he or she becomes unavailable or otherwise fails to carry out assessments pursuant to clause 7.3(f) in a reasonably timely manner.

### **7.9 Role of Assessors**

Assessors appointed to the Panel:

- (a) will act as independent arbitrators and not as counsel briefed to act for any individual Group Members or the Administrators;
- (b) have the same immunities from suit as attach to the office of a judge of the Supreme Court of NSW.

## **8. Liens**

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### **8.1 Application of this clause**

This clause 8 applies only to those Group Members who have been assessed as eligible pursuant to clause 5.

### **8.2 Responsibility for and resolution of Assumed Liens**

The Respondents will be responsible for the negotiation and resolution of Assumed Liens asserted by Qualified Lienholders that are identified by the Group Member in accordance with clause 8.4, and in doing so the Respondents will take all reasonable steps to ensure that there is no reasonably avoidable delay and that Assumed Liens are resolved expeditiously.

### **8.3 Responsibility for and resolution of Residual Liens**

All Residual Liens which are not the responsibility of the Respondents under clause 8.2 will be the responsibility of the respective Group Members affected by any such Residual Liens and (subject to the other requirements of this clause 8) will be paid from the Settlement Sum.

### **8.4 Identification and notification of Liens and cooperation of Group Members**

As soon as is practicable and appropriate after a Group Member has elected to receive a Fast Track Resolution or the time specified in clause 6.3 for making such an election has lapsed, the Administrators will assist the Group Member:

- (a) to identify all Qualified Lienholders that have paid for or asserted an Assumed Lien and the Administrator and Group Member will:

- (i) provide to the Respondents as soon as reasonably practicable relevant documents and/or information concerning Assumed Liens, including but not limited to any documents required for the Respondents to consider their position on payment of a Lien relating to the Group Member;
  - (ii) provide all reasonable co-operation to the Respondents in resolving Assumed Liens;
  - (iii) notify the Respondents of proposed payments to a Group Member which may trigger payment of a Lien; and
- (b) to identify:
- (i) all Other Lienholders that have paid for or asserted a Residual Lien; and/or
  - (ii) whether any repayment may need to be made to Centrelink pursuant to the *Social Security Act 1991* (Cth).

### **8.5 Application of the BPA**

If a Lien is asserted by Medicare:

- (a) the BPA will be applicable to the payment to each Group Member under the Settlement Scheme;
- (b) the Administrators and Respondents will cooperate in relation to any necessary amendments or transition of the BPA for the BPA to apply to the Settlement Scheme.

### **8.6 Cooperation of the Respondents**

The Respondents will provide all reasonable co-operation to Group Members and/or the Administrators where the Respondents' negotiation and resolution of Assumed Liens is likely to:

- (a) impact on a Group Member's ongoing rights or entitlements under a statutory or other scheme;
- (b) give rise to Residual Liens which a Group Member is obligated to pay.

### **8.7 Final payment to Group Members**

No final payment is to be made to a Group Member under the Settlement Scheme until the earlier of the following:

- (a) 28 days after the amount of the Group Member's Assumed Liens have been determined and notified to the Respondents; or
- (b) the Group Member's Assumed Liens have been resolved,

and further, no final payment is to be made to a Group Member under the Settlement Scheme until after the following:

- (c) any necessary statutory clearances (for example under the *Social Security Act 1991* (Cth)) have been obtained; and

- (d) to the extent that it is required by statute or contract, Residual Liens have been resolved and paid.

### **8.8 Other provisions regarding Assumed Liens**

For the purpose of this clause 8:

- (a) nothing in this Settlement Scheme is intended to create a right of reimbursement where none would otherwise exist under applicable law;
- (b) the amount of compensation payable to a Group Member is not controlling on the amount to be paid for any Assumed Lien for which the Respondents are responsible under this Settlement Scheme.

### **8.9 Lien Disputes**

If:

- (a) the Respondents and a Group Member (or the Administrators on behalf of a Group Member) are unable to resolve a Lien Dispute relating to that Group Member; or
- (b) the Administrators, the Applicants, a Group Member or the Respondents unreasonably delay the resolution of an Assumed Lien,

then:

- (c) within ten (10) Business Days of an impasse being reached or there being unreasonable delay, the Administrators or the Respondents will refer the Lien Dispute for determination by an independent barrister who is appointed by agreement between the Respondents and the Administrators;
- (d) a determination by an independent barrister is final and binding on the Respondents, the Group Member and the Administrators except as to an error of law;
- (e) the independent barrister's costs will be paid by either the Respondents or the Administrators, depending on whether the determination is, on balance, against the interests of the Respondents or the Group Member.

### **8.10 Group Members indemnify the Respondents for Residual Liens**

Each Group Member indemnifies and holds harmless the Released Parties (as defined in clause 1.1 of the Deed) from and against any and all damages, losses, costs (including, but not limited to, court costs), expenses (including legal fees and expenses), fines, penalties or liabilities incurred or suffered by, or imposed on, any Released Party in connection with, arising out of or resulting from:

- (a) any claim made or asserted at any time against the Respondents, or any other Released Party with respect to any payment made to such Group Member (or the right to receive any such payment under the Settlement Scheme) by any person at any time holding or asserting any Residual Liens, and/or
- (b) the failure to properly provide notifications or information in relation to Liens as required by this Deed.

### **8.11 Group Members indemnify the Administrators**

If a Group Member has a legal obligation by reason of receiving compensation pursuant to this Settlement Scheme, whether under statute or contract or otherwise to any agency, compensation payer or insurer, to pay or repay a sum from their compensation payment, the Group Member indemnifies and holds harmless the Administrators (and/or their delegates) from and against any claim associated with that legal obligation.

## **9. Review of determinations**

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### **9.1 Right to seek a Review**

A Group Member has the right to seek a "Review" of any of the following determinations:

- (a) a determination under clause 5 that the Group Member is not eligible to receive compensation (**Eligibility Review**);
- (b) a determination under clause 7 regarding the amount of compensation (**Compensation Review**).

### **9.2 Process for seeking a Review**

If a Group Member wishes to seek a Review, she or he must do so:

- (a) by giving written notice to the Administrators no later than 28 days after the Administrators sent a Notice of Eligibility or Notice of Assessment (as applicable) to the Group Member; and
- (b) such notice must state with precision the components of the assessment which the Group Member disputes and the reasons why the Group Member disputes those components of the assessment.

### **9.3 Failure to seek a Review**

If a Group Member does not give written notice to the Administrators within 28 days as required by clause 9.2, the Group Member will be deemed to have accepted their Notice of Eligibility or Notice of Assessment (as the case may be).

### **9.4 Payment of a bond for Reviews**

Subject to clause 13.3, where a Group Member seeks a Review, the Administrators may, in their absolute discretion:

- (a) require that the Group Member pay to the Administrators a bond not exceeding \$1,000 for the costs of the Review; and
- (b) if the Group Member fails to pay the bond within 14 days of receiving such a request from the Administrators, treat the Group Member's request for a Review as void and as having no effect.

## 9.5 Process for Reviews

The Administrators will assess and determine Reviews according to the following procedure:

- (a) the Administrators will engage a Review Assessor;
- (b) the Administrators will provide the following materials to the Review Assessor:
  - (i) the Group Member's written notice by which he or she requested the Review; and
  - (ii) either of the following, depending on the nature of the Review that is sought by a Group Member:
    - A. Eligibility Book and Notice of Eligibility; or
    - B. Claim Book and Notice of Assessment (including the Reviewer's statement of reasons);
- (c) save in exceptional circumstances, the Review Assessors must not consider any new evidence or additional materials that are not already included in the materials referred to in clause 9.5(b);
- (d) the Review Assessor will then:
  - (i) in an Eligibility Review, make a determination as to whether the Administrators made an error in applying the Eligibility Criteria;
  - (ii) in a Compensation Review, make a determination as to the amount of compensation that the Group Member is assessed as being entitled receive pursuant to this Settlement Scheme, and in doing so the Review Assessor must only:
    - A. consider the issues in relation to which the Group Member seeks a Review; and
    - B. determine whether the Assessor made an error in applying the principles in clause 7.2; and
  - (iii) in relation to either type of Review, prepare and provide to the Administrators a brief statement of reasons for the Review Assessor's determination and, if relevant, include details of the amounts assessed under all relevant heads of damages;
- (e) in carrying out a Compensation Review, a Review Assessor may determine that:
  - (i) the Group Member is entitled to more compensation than was initially assessed; or
  - (ii) the Group Member is entitled to less compensation than was initially assessed (subject to clause 7.2(c));

- (f) after receiving a Review Assessor's determination and statement of reasons, the Administrators will promptly send to the Group Member a "**Notice of Review**" in which the Administrators:
  - (i) provide information to the Group Member about the determination of their Review and the impact of that determination on the Group Member's entitlements under this Settlement Scheme; and
  - (ii) enclose a copy of the Review Assessor's statement of reasons.

#### **9.6 Determinations of Review Assessors are final and binding**

A determination of a Review Assessor is final and binding on the Administrators and the Group Member who sought the Review, and neither the Administrators nor the Group Member is entitled to appeal to the Court or any other court or tribunal in relation to any asserted error of jurisdiction, fact or law arising from the Review Assessor's determination.

#### **9.7 Role of Review Assessors**

Review Assessors engaged by the Administrators:

- (a) will act as independent arbitrators and not as counsel briefed to act for any individual Group Members or the Administrators;
- (b) have the same immunities from suit as attach to the office of a judge of the Supreme Court of NSW.

### **10. Management of the Settlement Sum and payments to Group Members**

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#### **10.1 Settlement Sum is held by the Administrators on trust**

Upon the Approval Order being made and the Respondents paying the Settlement Sum into the Settlement Account pursuant to clause 3.1 of the Deed, and subject to the terms of the Deed and any applicable statutory requirements, the Administrator will hold the money standing from time to time in the Settlement Account on trust for Group Members.

#### **10.2 Investment of the Settlement Sum**

Pending the distribution of the Settlement Sum, the Administrators are to hold the Settlement Sum in one or more interest bearing bank accounts or term deposit accounts unless:

- (a) it would be in the interests of Group Members to hold some or all the extant balance of the Settlement Sum in one or more non-interest bearing bank accounts; or
- (b) for the purpose of facilitating and implementing this Settlement Scheme, it is otherwise appropriate to hold some or all the extant balance of the Settlement Sum in one or more non-interest bearing bank accounts.

### 10.3 Management of the Settlement Sum

Subject to clauses 10.4 and 10.7, the Administrators will take all reasonable steps to ensure that the Settlement Sum and payments to Group Members are managed in such a way that:

- (a) there are sufficient funds to make compensation payments to all Group Members who are assessed as being eligible to receive compensation;
- (b) other than Group Members who elect to receive the Fast Track Resolution, all Group Members receive approximately the same proportion or percentage of their Assessed Compensation Amounts.

### 10.4 Payments to Group Members

In order enable compliance with clause 10.3, the Administrators may:

- (a) make payments of Fast Track Resolutions at any time, subject to clause 8;
- (b) subject to clause 8, make payments to individual Group Members in instalments, with a portion of Assessed Compensation Amounts to be withheld pending the assessment of additional Group Members, and those Assessed Compensation Amounts liable to be adjusted in light of such additional assessments; and
- (c) make payments to tranches of Group Members over time, provided that at least 300 Group Members have had their compensation assessed before the first tranche may be paid,

and for the purpose of this clause the Administrators will take advice from actuarial experts in determining the appropriate level of compensation to be paid to Group Members at various times during the administration of the Settlement Scheme, taking into account:

- (d) the number of Fast Track Resolutions that have been paid as at the relevant time;
- (e) the number of Group Members for whom assessments have been completed as at the relevant time and the aggregate of Assessed Compensation Amounts for those Group Members; and
- (f) any other matters that the actuarial experts consider to be relevant.

### 10.5 Payments to the Applicants

Clause 10.4(c) does not apply to the Applicants, to whom the Administrators may pay an initial instalment not exceeding one third of their Assessed Compensation Amounts as soon as is practicable after their claims have been assessed, subject to clause 8.

*Note:* The intent of this clause is to enable expeditious partial payment to the Applicants. The rationale for this clause is that the Applicants' Claim Books may, as a result of the preparation of evidence for trial, be finalised earlier than the Claim Books of any Group Members and, as a result, there is no utility in deferring partial payment to the Applicants until at least 300 Group Members have had their compensation assessed.

## **10.6 Final compensation payments**

The Administrators may make final compensation payments to one or more tranches of Group Members even if not all Group Members' claims have been finally determined, provided that the Administrators:

- (a) take advice from actuarial experts regarding the following:
  - (i) whether a sufficient number of Group Members' claims has been assessed so as to enable a reasonably reliable final payment percentage to be determined;
  - (ii) the final payment percentage that is reasonable and appropriate in the circumstances;
  - (iii) the amount of funds that should be retained in the Settlement Account so that sufficient funds are available to pay compensation to Group Members whose claims have not yet been finalised; and
- (b) obtain the Court's approval of the proposed final payments to the tranche of Group Members.

## **10.7 Adjustments to compensation payments**

The following adjustments may be made by the Administrators to the Assessed Compensation Amounts and Fast Track Resolutions:

- (a) if the aggregate of Assessed Compensation Amounts and Fast Track Payments is (or is anticipated to be) less than the net amount available for distribution to Group Members, the Assessed Compensation Amounts and Fast Track Payments may be proportionately grossed up and if necessary additional payments may be made to Group Members;
- (b) if the aggregate of Assessed Compensation Amounts is (or is anticipated to be) greater than the net amount available for distribution to Group Members (after excluding the aggregate of Fast Track Payments), the Assessed Compensation Amounts (but not Fast Track Resolutions) may be proportionately reduced.

## **10.8 Interim payments**

The Administrators may in their absolute discretion make an interim payment to a Group Member, provided that the payment:

- (a) must not exceed \$20,000;
- (b) may only be made after the Group Member has been assessed as eligible to receive compensation and either:
  - (i) the Group Member is suffering financial hardship pending finalisation of their claim; or
  - (ii) more than 12 months have passed since a Notice of Eligibility was sent to the Group Member.

## **11. Rights and obligations of Group Members**

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### **11.1 Election not to recover**

Within 21 days after receiving a Notice of Assessment or a Notice of Review Assessment, a Group Member may by written notice inform the Administrators that he or she elects not to receive compensation under one or more heads of damages, and if the Group Member makes such an election their Assessed Compensation Amount will be reduced accordingly.

### **11.2 Cooperation of Group Members**

Each Group Member must cooperate with the Administrators and take all steps that she or he is required to take pursuant to this Settlement Scheme and/or that are reasonably requested or directed by the Administrators, including:

- (a) providing instructions, information, documents or other materials;
- (b) providing authorities or permissions;
- (c) attending and participating in meetings or telephone conferences with the Administrators or any other person (such as an Independent Expert, Assessor or Review Assessor);
- (d) promptly informing the Administrators of any change in their contact details;
- (e) executing documents,

and each Group Member must do so:

- (f) complying to the best of the Group Member's ability with the substance and not merely the form of the requirement, request or direction; and
- (g) by the date or within the timeframe specified in the requirement, request or direction.

### **11.3 Obligation regarding honesty**

In fulfilling the obligation in clause 11.2, each Group Member must act honestly and must take all reasonable steps to ensure that any of her or his agents or representatives likewise act honestly.

### **11.4 Failure to comply**

If a Group Member fails to comply with their obligations in clauses 11.2 or 11.3, the Administrators may, in their absolute discretion:

- (a) decline to accept the Group Member's registration or claim;
- (b) determine that the Group Member is not eligible to receive compensation pursuant to this Settlement Scheme;
- (c) apply a discount to the amount of compensation that the Group Member would otherwise be entitled to receive; or

(d) determine that the Group Member's compensation is nil (\$0),

and if the Administrators exercise their discretion pursuant to this clause, the Administrators will promptly notify the Group Member.

#### **11.5 Application to the Court**

If the Administrators exercise their discretion in clause 11.4 adversely to the interests of a Group Member, the Group Member may (at their own cost) apply to the Court for relief.

#### **11.6 Disclosure to agencies and other organisations**

Group Members acknowledge and agree that the Administrators may, if required by statute or contract, disclose their personal information, details of their claim or other documents and materials to an agency or other organisation including Centrelink, Medicare, a private health insurer, a worker's compensation authority or the Australian Taxation Office.

### **12. Persons under a disability**

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#### **12.1 Application of this clause**

This clause applies if a Group Member is a "person under a legal incapacity" within the meaning of the *Federal Court Rules 2011*.

#### **12.2 Process for claims requiring approval by the Court**

The following procedure applies where a Group Member's claim requires approval by the Court:

- (a) if any entitlement to compensation is subject to approval by the Court pursuant to rules 7.11 or 9.70 of the *Federal Court Rules 2011*, the Administrators will at the earliest opportunity join in supporting the Group Member's "litigation representative" or "interested person" to seek appropriate orders for approval of the relevant compensation payment;
- (b) if the Court does not approve the payment to the Group Member, the claim will be referred back to the Administrators for further assessment and determination, and the Administrators will again join in seeking appropriate orders for approval at the earliest opportunity after the claim has been reassessed.

### **13. Costs**

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#### **13.1 Payment of Administration Costs**

Subject to the other provisions of this clause 13, Administration Costs are to be paid:

- (a) to the Administrators on a "solicitor and own client" basis;

- (b) from the Settlement Sum, including any interest earned on the Settlement Sum after it is paid by the Respondents pursuant to clause 3.1 of the Deed;
- (c) in such amounts as are approved by the Court from time to time during the implementation of this Settlement Scheme; and
- (d) at the following rates or at such other rates as are approved by the Court from time to time:

<u>Role</u>	<u>Hourly rate (excluding GST)</u>
Principal or Partner	\$790
Special Counsel	\$720
Senior Associate	\$610
Associate	\$540
Lawyer	\$440
Graduate Lawyer / Trainee Lawyer / Articled Clerk	\$350
Paralegal / Legal Clerk / Law Clerk	\$320
Litigation Technology Consultant	\$240

### **13.2 Costs of preparing Eligibility Books and Claim Books**

The following work by the Administrators (or their delegates) must only be paid at the following fixed amounts for professional fees (not including disbursements), regardless of the amount of work that was actually done, or at such other fixed amounts as are approved by the Court from time to time during the implementation of this Settlement Scheme:

<u>Work</u>	<u>Amount (excluding GST)</u>
Preparation of an Eligibility Book for a Group Member pursuant to clause 5.6	\$1,000
If a Group Member elects to accept a Fast Track Resolution, consulting with the Group Member regarding their decision whether to accept the Fast Track Resolution	\$500
Preparation of a Claim Book for a Group Member pursuant to clause 7.4	\$5,000
Resolution of Liens pursuant to clause 8	\$1,000

### **13.3 Fees charged by Assessors and Review Assessors**

Subject to clause 13.4 in the case of a Review Assessor, the reasonable fees that are negotiated or agreed between the Administrators and an Assessor or Review Assessor are Administration Costs.

### **13.4 Costs of Reviews**

The following provisions apply in relation to the costs of a Review:

#### Eligibility Review

- (a) if a Group Member succeeds in an Eligibility Review:
  - (i) the costs of the Review will be Administration Costs; and
  - (ii) any bond paid by the Group Member will be returned to the Group Member;
- (b) if a Group Member fails in an Eligibility Review:
  - (i) the Group Member is liable to pay costs up to \$1,500 and the balance (if any) of the costs of the Review will be Administration Costs; and
  - (ii) the Administrators will apply any bond paid by the Group Member to the part-payment of the Review costs payable by the Group Member.

#### Compensation Review

- (c) if a Group Member succeeds in a Compensation Review and the amount assessed by the Review Assessor is greater than 110% of the amount initially assessed by the Assessor:
  - (i) the costs of the Review will be Administration Costs; and
  - (ii) any bond paid by the Group Member will be returned to the Group Member;
- (d) if a Group Member fails in a Compensation Review or the Group Member succeeds in circumstances where the amount assessed by the Review Assessor is less than 110% of the amount initially assessed by the Assessor:
  - (i) the Group Member is liable to pay costs up to \$3,000 and the balance (if any) of the costs of the Review will be Administration Costs; and
  - (ii) the Administrators will first apply any bond paid by the Group Member to the part-payment of the Review costs payable by the Group Member, and will then deduct the balance from the compensation payable to the Group Member.

### **13.5 Costs of lawyers other than the Administrators (or their delegates)**

Nothing in this Settlement Scheme prevents a Group Member from retaining or seeking advice from a lawyer who is not performing the role of Administrators (which for the purpose of this clause includes DBH and LAM), except that:

- (a) the Group Member does so at his or her own cost; and
- (b) the Group Member's lawyer is not entitled to recover any legal costs from the Administrators and any such legal costs must not be treated as Administration Costs unless the Administrators made a written request that the Group Member's lawyer carry out the legal work in question.

## **14. Supervision by the Court**

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### **14.1 Supervision by the Court**

Where the Administrators consider that:

- (a) the procedures to be followed in implementing this Settlement Scheme are in doubt or uncertain; or
- (b) it is appropriate for the Court to give directions regarding an issue concerning the implementation or administration of this Settlement Scheme,

the Administrators may approach the Court for directions, and in doing so the Administrators are not obligated to notify any of the Group Members.

## Schedule – Dictionary

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<u>Term</u>	<u>Meaning</u>
<b>Act</b>	The <i>Federal Court of Australia Act 1976</i> (Cth)
<b>Administration Costs</b>	The legal costs and disbursements incurred by the Applicants, Maurice Blackburn and/or Shine (or their delegates or agents) in drafting, preparing, negotiating, implementing, facilitating, giving effect to, or applying for the Approval Order, this Deed, the Settlement Scheme or the Settlement generally, and calculated on a “solicitor and own client” basis
<b>Administrators</b>	The administrators of this Settlement Scheme appointed pursuant to clause 2.1
<b>Applicants</b>	Stanford and Dunsmore, together and severally as the context permits
<b>Approval Order</b>	An order by the Court approving the Settlement pursuant to section 33V of the Act, as described in clause 6.2(b) of the Deed
<b>ASR Claim</b>	Any claim, demand, action, suit, proceeding or liability of any kind for damages, debt, restitution, account, equitable compensation, injunctive relief, specific performance, costs, interest or any other remedy in connection with, arising from or related to the ASR Class Action or the matters, circumstances or allegations which are or were the subject of the ASR Class Action
<b>ASR Class Action</b>	Proceeding NSD 213 of 2011 in the Court ( <i>Tammy Maree Stanford and Jamie Dunsmore v DePuy International Ltd and Johnson &amp; Johnson Medical Pty Ltd</i> )
<b>ASR Compensation Programme</b>	A program established by DePuy, on a “without admissions” basis, for claims brought by eligible Australian patients for compensation, administered by Crawford
<b>ASR Implants</b>	The ASR Hip Resurfacing System ( <b>ASR Resurfacing</b> ) and the ASR XL Acetabular System ( <b>ASR XL</b> ) (and any and all component and ancillary parts) which were designed and manufactured to be used in hip replacement surgery
<b>ASR Reimbursement Programme</b>	The program established by DePuy on a “without admissions” basis to reimburse patients for reasonable and customary costs resulting from the product recall of the ASR Implants, administered in Australia by Crawford
<b>ASR Revision</b>	ASR Revision has the meaning given in clause 5.2

<b><u>Term</u></b>	<b><u>Meaning</u></b>
<b>Assessed Compensation Amount</b>	<p>The amount of compensation that was determined for a Group Member under clause 7.3 or, if applicable, clause 9.5, subject to any election made by the Group Member pursuant to clause 11.1</p> <p>For the avoidance of doubt, Assessed Compensation Amount does not encompass or refer to a Fast Track Resolution</p>
<b>Assessor</b>	A member of the Bar or a Senior Lawyer with substantial experience in personal injury litigation, and may include one or more Senior Lawyers who are employed by the Administrators or either of them
<b>Assumed Liens</b>	<p>Liens asserted by a Qualified Lienholder with respect to an Eligible Claimant's payment under the Settlement Scheme established by this Deed for the reimbursement or payment of:</p> <ul style="list-style-type: none"> <li>(a) medical expenses associated with Covered Revisions and Covered Re-Revisions, provided: <ul style="list-style-type: none"> <li>(i) the Covered Revision or Covered Re-Revision was performed as a result of advice or a recommendation of an orthopaedic surgeon; and</li> <li>(ii) the medical expenses relate to either: <ul style="list-style-type: none"> <li>A. radiological investigations (including x-rays, ultrasound scans, MRI scans or other radiological investigations), pathology tests (including metal ion testing) or consultations with an orthopaedic surgeon in order to determine whether revision surgery was advisable; or</li> <li>B. treatment (for the avoidance of doubt including removal of an antibiotic spacer or open reduction of a dislocation) that was provided no later than one hundred and eighty (180) days after the Covered Revision; and</li> </ul> </li> </ul> </li> <li>(b) medical expenses directly associated with an ASR Implant that were incurred between 24 August 2010 and the date of a Covered Revision.</li> </ul>

Assumed Liens are deemed to include any amounts payable to Medicare pursuant to the BPA.

Assumed Liens do not include Liens arising from medical care provided to an Eligible Claimant after any determination that payment will be made to the Eligible Claimant under the Settlement Scheme.

<u>Term</u>	<u>Meaning</u>
<b>BPA</b>	The "Bulk Payment Agreement" which commenced on 30 March 2014 between the Commonwealth of Australia (as represented by the Chief Executive Medicare of the Department of Human Services) and JJM and DePuy, and includes any transition of the agreement in accordance with clauses 1.2(g), 4.6(a) and 4.6(b) of the Deed
<b>Business Day</b>	A day on which banks are open for business in Sydney, excluding a Saturday, Sunday or public holiday
<b>CAC Act</b>	The <i>Competition and Consumer Act 2010</i> (Cth)
<b>Claim Book</b>	Claim Book has the meaning given in clause 7.4
<b>Compensation Review</b>	Compensation Review has the meaning given in clause 9.1
<b>Court</b>	The Federal Court of Australia
<b>Covered Revision</b>	<p>A surgery subsequent to the Index Surgery to remove the cup of an ASR XL or ASR Resurfacing and in which the following criteria are met:</p> <ul style="list-style-type: none"> <li>(a) the revision surgery must have occurred more than 180 days following the Index Surgery but less than ten (10) years after the Index Surgery; and</li> <li>(b) the revision surgery is not an Excluded Revision.</li> </ul>
<b>Covered Re-Revision</b>	<p>A surgery involving removal of the cup of a hip implant that was implanted during either:</p> <ul style="list-style-type: none"> <li>(a) a Covered Revision; or</li> <li>(b) an earlier Covered Re-Revision that was performed after a Covered Revision,</li> </ul> <p>provided that the surgery:</p> <ul style="list-style-type: none"> <li>(c) was not caused by Trauma;</li> <li>(d) was directly associated with an ASR Implant; and</li> <li>(e) occurred: <ul style="list-style-type: none"> <li>(i) within 547 days of a Covered Revision or an earlier Covered Re-Revision; and</li> <li>(ii) prior to the date of the Approval Order.</li> </ul> </li> </ul>
<b>Crawford</b>	Crawford & Company (Australia) Pty Ltd
<b>DBH</b>	Duncan Basheer Hannon

<b><u>Term</u></b>	<b><u>Meaning</u></b>
<b>Deed</b>	The settlement deed dated 31 March 2016 and executed by the Applicants, Respondents, Maurice Blackburn, Shine, Duncan Basheer Hannon and Lempriere Abbott McLeod
<b>DePuy</b>	DePuy International Ltd
<b>Eligibility Book</b>	Eligibility Book has the meaning given in clause 5.6(e)
<b>Eligibility Criteria</b>	Eligibility Criteria has the meaning given in clause 5.1
<b>Eligibility Review</b>	Eligibility Review has the meaning given in clause 9.1
<b>Excluded Revision</b>	<p>A revision of an ASR Implant in any of the following circumstances:</p> <ul style="list-style-type: none"> <li>(a) a surgery on the femoral side without revision of the cup of the ASR XL or ASR Resurfacing;</li> <li>(b) a revision that was caused by Trauma;</li> <li>(c) a revision that: <ul style="list-style-type: none"> <li>(i) was necessitated by Infection; and</li> <li>(ii) involved removal of the cup of an ASR Implant; and</li> <li>(iii) took place between 181 and 547 days after an ASR Index Surgery.</li> </ul> </li> </ul>
<b>Fast Track Resolution</b>	Fast Track Resolution has the meaning given in clause 6.1
<b>Group Members</b>	<p>Persons who had surgery performed on them in Australia in order to implant one or both of the ASR Implants and, where the context permits, includes Stanford and Dunsmore, but does not include any Group Member who has opted out of the ASR Class Action or is given leave to opt out of the ASR Class Action</p> <p>For the avoidance of doubt, Group Members include the Sub-Group Members as defined in the Third Further Amended Statement of Claim</p>
<b>Independent Expert</b>	Independent Expert has the meaning given in clause 7.4(h)(ii)
<b>Index Surgery</b>	The surgical implantation of the ASR XL or ASR Resurfacing.
<b>Ineligible Revisions</b>	Ineligible Revisions has the meaning given in clause 5.3

<b><u>Term</u></b>	<b><u>Meaning</u></b>
<b>Infection</b>	<p>A periprosthetic joint infection evidenced by the contemporaneous medical records reflecting either:</p> <ul style="list-style-type: none"> <li>(a) a sinus tract communicating with the prosthesis; or</li> <li>(b) a pathogen is isolated by culture from two or more separate tissue or fluid samples obtained from the affected prosthetic joint prior to or during the Covered Revision hospitalisation.</li> </ul>
<b>JJM</b>	Johnson & Johnson Medical Pty Ltd
<b>LAM</b>	Lempriere Abbott McLeod
<b>Lien Disputes</b>	<p>A dispute as to any of the following:</p> <ul style="list-style-type: none"> <li>(a) whether a Lien is an Assumed Lien;</li> <li>(b) the amount of an Assumed Lien; or</li> <li>(c) whether a person or entity is a Qualified Lienholder.</li> </ul>
<b>Liens</b>	Any lien, charge, security interest, subrogation right, third-party interest or adverse claim of any nature whatsoever, in each case whether statutory or otherwise
<b>Maurice Blackburn</b>	Maurice Blackburn Pty Ltd
<b>Notice of Eligibility</b>	Notice of Eligibility has the meaning given in clause 5.8
<b>Notice of Fast Track Assessment</b>	Notice of Fast Track Assessment has the meaning given in clause 6.7(a)(i)
<b>Notice of Assessment</b>	Notice of Assessment has the meaning given in clause 7.3(g)
<b>Notice of Review</b>	Notice of Review Assessment has the meaning given in clause 9.5(f)
<b>Other Lienholders</b>	Any person or entity asserting a Residual Lien
<b>Panel</b>	Panel has the meaning given in clause 7.3(a)

<b><u>Term</u></b>	<b><u>Meaning</u></b>
<b>Qualified Lienholders</b>	<p>Any of the following:</p> <ul style="list-style-type: none"> <li>(a) a private health insurer (as defined in the <i>Private Health Insurance Act 1987</i> (Cth)) in respect of amounts claimed pursuant to an insurance policy or the rules of a health fund;</li> <li>(b) Medicare Australia in respect of amounts claimed under the <i>Health and Other Services (Compensation) Act 1995</i> (Cth); and/or</li> <li>(c) the Department of Veteran's Affairs in respect of amounts claimed under the <i>Veteran's Entitlements Act 1986</i> (Cth).</li> </ul> <p>For the avoidance of doubt, "Qualified Lienholders" does not include:</p> <ul style="list-style-type: none"> <li>(d) any person or entity holding a Lien because of the purchase or acquisition of debt, receivables, or the right to collect accounts from a health care provider; or</li> <li>(e) healthcare providers, workers compensation authorities or insurers, or any other third party not specified in the definition.</li> </ul>
<b>Reimbursement Payments</b>	Proposed payments to Stanford and Dunsmore for reimbursement of time and expenses that were expended by them in prosecuting the ASR Class Action
<b>Released Parties</b>	Released Parties has the meaning given in clause 1.1 of the Deed
<b>Residual Liens</b>	In relation to any individual Eligible Claimant, the amount of Liens asserted by Qualified Lienholders or other lienholders, less the amount of Assumed Liens, if any.
<b>Respondents</b>	DePuy and JJM (respectively the first and second respondents in the ASR Class Action), together and severally as the context permits
<b>Review</b>	Review has the meaning given in clause 9.1
<b>Review Assessor</b>	A member of the Bar with more than 7 years' experience as a barrister in personal injury litigation who is appointed by the Administrators pursuant to clause 9.5(a)
<b>Senior Lawyer</b>	A solicitor with more than seven (7) years post-admission experience
<b>Settlement</b>	Settlement of the ASR Class Action in accordance with the terms of this Deed, the Settlement Scheme and subject to any Approval Order

<b><u>Term</u></b>	<b><u>Meaning</u></b>
<b>Settlement Account</b>	A bank account established by Maurice Blackburn for the purpose of holding the Settlement Sum (or part of it) pending or during the implementation of the Settlement Scheme and the Approval Order
<b>Settlement Scheme</b>	This settlement scheme, including the rights and obligations created by this scheme
<b>Settlement Sum</b>	Two hundred and fifty million dollars (\$250,000,000.00) plus the Settlement Sum Interest
<b>Settlement Sum Interest</b>	An amount representing simple interest that would have accrued at an interest rate of 2.3% per annum on a sum of one hundred million dollars (\$100,000,000.00) for the period from the date of execution of this Deed until the day before the Settlement Sum is paid into the Settlement Account in accordance with clause 3.1 of this Deed, but in any event for no longer than a period of 150 days from the date of execution of this Deed
<b>Shine</b>	Shine Lawyers Pty Ltd
<b>Trauma</b>	<p>A change in the alignment or fixation of an ASR Implant caused by the application of an external force in a sudden or unexpected manner.</p> <p>Trauma affecting an ASR Implant will be deemed to have occurred if the contemporaneous medical records describe or refer to the following:</p> <ul style="list-style-type: none"> <li>(a) a change in the position of any component and ancillary parts of the ASR Implant, or in its alignment or fixation, is verified by radiological studies; and</li> <li>(b) such change is described by the treating physician who attributes the immediate medical cause for revision to be due to that traumatic event,</li> </ul> <p>unless preoperative medical records show that it is more likely than not that the Eligible Claimant would have required revision in the near term regardless of the Trauma.</p>
<b>\$ or dollar</b>	The lawful currency of the Commonwealth of Australia

[End]

Federal Court of Australia

No. NSD 213 of 2011

District Registry: New South Wales

Division: General

**Tammy Stanford and Another**

Applicants

**DePuy International Limited and Another**

Respondents

Affidavit of: **Janice Mary Saddler**

Address: Level 13, 160 Ann Street, Brisbane QLD 4000

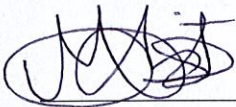
Occupation: Solicitor

Date: 8 June 2017

#### **CERTIFICATE IDENTIFYING ANNEXURE**

This is the annexure marked "**JMS-2**" referred to in the Affidavit of Janice Mary Saddler affirmed 8 June 2017.

Before me:



**Melissa Maureen Deborah Obrist**

Solicitor

# **Settlement Administration Protocol – ASR Class Action**

Version 1  
Dated 5 September 2016

*Stanford and Dunsmore v DePuy International Ltd and Johnson & Johnson Medical Pty Ltd*  
Federal Court of Australia, Proceeding NSD 213 of 2011

## Background

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- A. On 29 June 2016, the Court made the Approval Order and in doing so approved the Settlement of the ASR Class Action pursuant to section 33V of the Act.
- B. In making the Approval Order, the Court approved the Settlement on the terms set out in the Amended Settlement Scheme dated 17 June 2016 and the Deed.<sup>1</sup>
- C. In addition, Maurice Blackburn and Shine were jointly appointed as Administrators of the Amended Settlement Scheme.<sup>2</sup>
- D. Clause 2.2(a) of the Amended Settlement Scheme requires that Maurice Blackburn and Shine work together cooperatively in order to jointly perform the role of Administrators.
- E. Clause 2.2(b) of the Amended Settlement Scheme requires that Maurice Blackburn and Shine establish the procedures, arrangements, work practices and financial controls and approvals that are reasonably necessary in order to implement and administer the Settlement in accordance with the Amended Settlement Scheme, and to do so as efficiently and inexpensively as is practicable.
- F. This Settlement Administration Protocol (**Protocol**) has been prepared in accordance with clause 2.2(b) of the Amended Settlement Scheme and is intended to establish the procedures, arrangements, work practices and financial controls and approvals that are referred to in clause 2.2(b).

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<sup>1</sup> Order 1 made on 29 June 2016.

<sup>2</sup> Order 3(c) made on 29 June 2016.

## 1. Interpretation

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### 1.1 Definitions

Terms that are defined in the Deed or the Amended Settlement Scheme have the same meaning when used in this Protocol, and the following additional terms are defined as follows:

<u>Term</u>	<u>Meaning</u>
<b>Administration</b>	The administration of the Settlement in accordance with the Approval Order
<b>Administration Work</b>	The legal, administrative and other work by the Administrators and their delegates during and for the purpose of the Administration
<b>Claim Preparation Work</b>	The preparation of an Eligibility Book, preparation of a Claim Book and resolution of Liens for an individual Group Member
<b>Committee</b>	Committee has the meaning given in clause 3.1
<b>Consolidated List</b>	Consolidated List has the meaning given in clause 5.2
<b>General Administration Work</b>	Administration Work other than Claim Preparation Work
<b>Invoice</b>	Invoice has the meaning given in clause 10.3(a)
<b>Significant Decision</b>	Significant Decision has the meaning given in clause 4.2

### 1.2 Interpretation

In this Protocol:

- (a) if a word or phrase is defined in this Protocol, its other grammatical forms have a corresponding meaning;
- (b) specifying anything in this Protocol after the words "include", "including", "such as" or "for example" or similar expressions, does not limit what else might be included;
- (c) unless otherwise specified, a reference to a clause is a reference to a clause of this Protocol; and
- (d) a reference to a document (such as the Amended Settlement Scheme) is to the document as amended, supplemented, novated or replaced.

## **2. Operation of this Protocol**

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### **2.1 Commencement of this Protocol**

This Protocol commences on the date agreed between Maurice Blackburn and Shine, and the agreed date is to be noted on the cover page of the Protocol.

### **2.2 The Protocol is binding on the Administrators**

In their capacity as Administrators, Maurice Blackburn and Shine each adopt and agree to be bound by and adhere to the requirements of this Protocol.

### **2.3 Amendment of this Protocol**

This Protocol may be amended by agreement between Maurice Blackburn and Shine.

### **2.4 Duration of this Protocol**

Unless it is amended and replaced by a revised version, this Protocol will continue until the Administration has been completed and all funds in the Settlement Account have been finally distributed and paid in accordance with the Amended Settlement Scheme.

## **3. Committee**

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### **3.1 Establishment of the Committee**

Maurice Blackburn and Shine will establish a "**Committee**" for the purpose of:

- (a) making decisions and exercising functions under the Amended Settlement Scheme; and
  - (b) managing and having oversight of the Administration,
- as set out in this Protocol.

### **3.2 Composition of the Committee**

The Committee will be constituted by one senior solicitor from each of Maurice Blackburn and Shine, and in the first instance the solicitors will be:

- (a) Julian Schimmel, Principal of Maurice Blackburn; and
- (b) Rebecca Jancauskas, Partner of Shine.

### **3.3 Committee meetings and processes**

The Committee:

- (a) will confer periodically as required and as arranged between its members; and

- (b) where appropriate or expedient to do so, may also make decisions or exercise functions by email between its members.

### **3.4 Record keeping**

The Administrators will maintain adequate records of Committee decisions, determinations and functions and for this purpose the Committee members may arrange for additional staff of Maurice Blackburn and/or Shine to be present at Committee meetings.

### **3.5 Substitution of members of the Committee**

In view of the likely duration of the Administration:

- (a) Maurice Blackburn may at any stage substitute another senior solicitor in place of Mr Schimmel; and
- (b) Shine may at any stage substitute another senior solicitor in place of Ms Jancauskas,

and where such a substitution is intended to be made:

- (c) it is to be notified to the other firm; and
- (d) in order to ensure an orderly and efficient transition, the new solicitor may initially participate in Committee meetings as an observer.

### **3.6 Resolution of disputes between members of the Committee**

In the unlikely event that the Committee members are not able to reach agreement in relation to an issue:

- (a) the dispute will be referred to counsel for resolution;
- (b) in the first instance, counsel will be Zoe Hillman;
- (c) if Ms Hillman is not available or is unable to resolve the dispute, the Committee will refer the dispute to Nicholas Bender of counsel;
- (d) if Mr Bender is not available or is unable to resolve the dispute, the Committee will refer the dispute to alternative counsel selected by agreement between the Committee members;
- (e) the decision of counsel will be final and binding on the Committee members.

## **4. Decision making by the Administrators**

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### **4.1 Only the Committee can make Significant Decisions or exercise discretions**

Where the Amended Settlement Scheme requires, enables or empowers the Administrators to:

- (a) make a "Significant Decision" as defined in clause 4.2; or

(b) exercise one of the discretions mentioned in clause 4.3,  
it must be done by the Committee.

#### **4.2 Meaning of Significant Decision**

A Significant Decision is a decision or determination as to any of the following under the Amended Settlement Scheme:

<u>Clause</u>	<u>Decision</u>
5.6(d)	Whether additional materials are needed in order to assess the eligibility of those Group Members who claim to have had a Deemed ASR Revision or where there is any suggestion that a Group Member might have had an Ineligible Revision
5.7	Whether to request that a Group Member obtain materials or pay a bond in relation to a claim for a Deemed ASR Revision
7.3(a)	Whether to appoint a barrister or Senior Lawyer to the Panel of Assessors
7.5	Whether to obtain one or more medical reports (whether from a treating surgeon and/or an Independent Expert) for a Group Member's Claim Book
7.5(d)	Whether to obtain a report from a forensic accounting expert
7.6	Whether to add one or more experts to a list of approved experts
7.8(a)	Whether to appoint an additional barrister or Senior Lawyer to the Panel of Assessors
7.8(b)	Whether to remove a barrister or Senior Lawyer from the Panel of Assessors
8.9	Whether and when to refer a Lien Dispute to an independent barrister
9.5(a)	Whether to engage a barrister as a Review Assessor
10.2	In which bank account/s the Settlement Sum is to be held
10.4	Whether to make instalment payments to a tranche of Group Members
10.4	Whether and when to take advice from an actuarial expert
10.4	When to make payments to Group Members who elected to receive Fast Track Resolutions
10.6	Whether to seek Court approval to make final payments to some Group Members
12.2	When to seek orders for a person under a legal incapacity
13.1(c)	When to seek approval of Administration Costs
13.5(b)	Whether to request another lawyer to carry out legal work

14.1 Whether to seek directions from the Court

#### 4.3 Discretions that may be exercised

The Amended Settlement Scheme includes the following discretions that may be exercised by the Administrators:

<u>Clause</u>	<u>Discretion</u>
2.3	Delegate functions to DBH or LAM
2.4(e)	Decline to reimburse certain costs to DBH or LAM
4.6	Waive late registrations
6.5	Accept a late election to receive a Fast Track Resolution
9.4	Require that a Group Member pay a bond for a Review
10.8	Make an interim payment to a Group Member
11.4	Take steps where a Group Member fails to cooperate

## 5. Allocation of Administration Work

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### 5.1 Pre-existing relationships with Group Members

Maurice Blackburn and Shine note that:

- (a) before the Approval Order was made, many Group Members had retained or registered with Maurice Blackburn, Shine, DBH or LAM;
- (b) upon the Approval Order being made, clauses 2.1(b) and 2.4(a)(i) of the Amended Settlement Scheme require each of Maurice Blackburn, Shine, DBH or LAM to cease acting for any individual Group Members.

### 5.2 Allocation of Claim Preparation Work

Despite ceasing to act as solicitors for individual Group Members, it is expedient and efficient for Claim Preparation Work to be done by Maurice Blackburn, Shine, DBH and LAM for those Group Members who were formerly their clients or registrants, and for this purpose:

- (a) Maurice Blackburn will create a "**Consolidated List**" containing the names of the Group Members to whom Maurice Blackburn, Shine, DBH and LAM each sent the Settlement Notice (as defined in clause 1.1 of the Deed);
- (b) the Consolidated List is to contain a notation as to which of the four firms sent the Settlement Notice to each Group Member on the Consolidated List;
- (c) the Administrators will use the Consolidated List in order to allocate Claim Preparation Work to the four firms.

### **5.3 Finalisation of the Consolidated List**

If a Group Member was sent the Settlement Notice by more than one firm, the Committee will agree on the firm to whom the Group Member's Claim Preparation Work should be allocated, and Maurice Blackburn will amend the Consolidated List accordingly.

### **5.4 Claim Preparation Work for Group Members who are not on the Consolidated List**

Where a Group Member's name does not appear on the Consolidated List, the Committee will allocate the Claim Preparation Work for that Group Member to Maurice Blackburn, Shine, DBH or LAM based on:

- (a) the Group Member's preference (if any);
- (b) the capacity of Maurice Blackburn, Shine, DBH or LAM to carry out the Claim Preparation Work at the time that the allocation is being considered, and the extent of any backlog of existing Claim Preparation Work being carried out by Maurice Blackburn, Shine, DBH or LAM; and
- (c) other considerations that may be relevant,

and to the extent that it is appropriate and feasible in light of the above, the Committee will seek to allocate an approximately equal number of such Group Members to Maurice Blackburn and Shine.

### **5.5 Reallocation of Claim Preparation Work**

Despite the provisions above, the Committee may at any time agree to reallocate Claim Preparation Work for Group Members.

### **5.6 General Administration Work**

General Administration Work will be carried out by Maurice Blackburn and Shine:

- (a) as necessary and appropriate;
- (b) subject to general oversight by the Committee; and
- (c) in such a manner that avoids duplication of work and minimises Administration Costs where reasonably possible.

## **6. Registration facility and maintenance of a database**

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### **6.1 Online registration facility**

Maurice Blackburn:

- (a) created an online registration facility in April 2016 for the purpose of giving effect to clause 4.1 of the Amended Settlement Scheme; and

- (b) will maintain the registration facility as long as it is required for the purpose of the Administration.

## **6.2 Hard copy registration forms**

If a Group Member submits a hard copy registration form, its details are to be promptly entered on the online registration facility:

- (a) by Maurice Blackburn in respect of registration forms submitted to Maurice Blackburn or DBH; and
- (b) by Shine in respect of registration forms submitted to Shine or LAM,

and:

- (c) for the purpose of sub-clause (a), Maurice Blackburn and Shine are to make arrangements for hard copy registration forms received by DBH or LAM to be provided promptly to Maurice Blackburn or Shine respectively; and
- (d) Maurice Blackburn and Shine are to:
  - (i) ensure that any such hard copy registration form contains a notation of the date on which the hard copy form was received; and
  - (ii) maintain a register of hard copy registration forms received by each firm.

## **6.3 Creation of a database**

Maurice Blackburn:

- (a) created a database in April 2016 for the purpose of capturing registrations effected by means of the online registration facility or by submission of hard copy registration forms; and
- (b) during the Administration and in consultation with Shine, will develop the database in order to manage the Administration (for example, by adding additional fields so as to enable the progress of individual claims to be tracked, and so as to record Assessed Compensation Amounts as well as the amounts of any instalment, interim and final payments to Group Members).

## **6.4 Access to the database**

Maurice Blackburn has provided and will continue to provide access to the database to Shine by means of an online portal at the following URL (or such other URL as may be notified by Maurice Blackburn to Shine), and Shine is able to amend or add to a Group Member's database record by means of this portal:

<https://business.mauriceblackburn.com.au/DepuyHipsDataShare/>

## **6.5 Responsibility for updating the database**

Maurice Blackburn and Shine will be responsible for updating Group Members' database records as follows:

- (a) Maurice Blackburn will be responsible for updating the database for Group Members whose Claim Preparation Work is allocated to Maurice Blackburn or DBH;
- (b) Shine will be responsible for updating the database for Group Members whose Claim Preparation Work is allocated to Shine or LAM,

and each firm will ensure that the database is updated in a timely manner.

## **7. Eligibility determinations**

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### **7.1 Senior Lawyers who may make eligibility determinations**

For the purpose of clause 5.6(f) of the Amended Settlement Scheme, the Senior Lawyer must be a member of the Committee or a person nominated by the Committee, provided that at any given time there are to be no more than four people carrying out eligibility determinations.

### **7.2 Process for determining eligibility**

Subject to clause 7.3, the following process will apply to eligibility determinations:

- (a) Eligibility Books will be prepared by Maurice Blackburn, Shine, DBH or LAM in accordance with the allocations described in clause 4;
- (b) in each case the Eligibility Books will include a standardised coversheet that will be developed by the Administrators and is intended to function as a checklist addressing each of the Eligibility Criteria in clauses 5.1 to 5.3 of the Amended Settlement Scheme, with supporting documentation contained in the Eligibility Books;
- (c) a determination will be made and noted on the coversheet for the Group Member's Eligibility Book:
  - (i) by Maurice Blackburn in respect of Eligibility Books prepared by Maurice Blackburn in their capacity as Administrators;
  - (ii) by Shine in respect of Eligibility Books prepared by Shine in their capacity as Administrators;
  - (iii) by Maurice Blackburn in respect of Eligibility Books prepared by DBH in their capacity as delegates of the Administrators;
  - (iv) by Shine in respect of Eligibility Books prepared by LAM in their capacity as delegates of the Administrators.

### **7.3 Referral of eligibility determinations to the Committee**

If:

- (a) a Group Member claims to have had a Deemed ASR Revision as defined in clause 5.2(b); or

- (b) there is any suggestion arising from a Group Member's medical records that their ASR Revision may be an Ineligible Revision as defined in clause 5.3; or
- (c) a Senior Lawyer for any other reason considers that it is appropriate to do so, the Group Member's eligibility determination (made pursuant to clause 7.2(c)) will be referred to the Committee, in which case:
- (d) the Committee will either verify the Senior Lawyer's determination or substitute its own determination;
- (e) for the purpose of clause 5.6(f) of the Amended Settlement Scheme, a determination of eligibility will be taken to have been made on the date the Committee verifies the Senior Lawyer's determination or substitutes its own determination.

#### **7.4 Audit of eligibility determinations by the Committee**

In order to ensure consistency of approach and fairness among all Group Members:

- (a) the Committee will audit one in every ten eligibility determinations made by each of Maurice Blackburn and Shine (not including the eligibility determinations that are dealt with pursuant to clause 7.3);
- (b) any such audit must be done before a Notice of Eligibility is sent to a Group Member whose eligibility determination is being audited;
- (c) the Committee will either verify the Senior Lawyer's determination or substitute its own determination and, for the purpose of clause 5.6(f) of the Amended Settlement Scheme, a determination of eligibility will be taken to have been made on the date the Committee verifies the Senior Lawyer's determination or substitutes its own determination;
- (d) if the audit process reveals any errors in an individual case and/or consistent discrepancies in approach between Maurice Blackburn and Shine, the Committee will take such steps as are necessary to resolve the issue that was identified as a result of the audit process.

#### **7.5 Sending of Notices of Eligibility**

Notices of Eligibility will be sent in accordance with clause 5.8 of the Amended Settlement Scheme:

- (a) by Maurice Blackburn in respect of Group Members whose Eligibility Books were prepared by Maurice Blackburn or DBH;
- (b) by Shine in respect of Group Members whose Eligibility Books were prepared by Shine or LAM.

#### **7.6 Additional provisions for Deemed ASR Revisions**

The Administrators or their delegates must not commence preparation of an Eligibility Book for a Group Member who claims to have had a Deemed ASR Revision unless and until the Committee has considered whether to issue a request to the Group Member pursuant to clause 5.7 of the Amended Settlement Scheme.

## **8. Settlement Account**

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### **8.1 Interpretation of this clause**

For the avoidance of doubt, in this clause 8 a reference to the Settlement Account includes any interest bearing bank account, term deposit account or other bank account in which some or all of the extant balance of the Settlement Sum is held in accordance with clause 10.2 of the Amended Settlement Scheme.

### **8.2 Establishment of the Settlement Account**

In accordance with clause 6.3(b) of the Deed, Maurice Blackburn established the initial Settlement Account and provided its details to HSF and NRFA in advance of the application for the Approval Order.

### **8.3 Signatories to the Settlement Account**

In light of the requirements of legal profession laws and regulations, only one firm's personnel can be signatories to the Settlement Account and in this case the signatories are principals of Maurice Blackburn.

### **8.4 Operation of the Settlement Account**

The Settlement Account will be operated by Maurice Blackburn on behalf of Shine and Maurice Blackburn in their joint capacity as Administrators of the Settlement.

### **8.5 Authority to make payments**

Any payments from the Settlement Account must first be authorised in writing by a partner of Shine and a principal of Maurice Blackburn.

### **8.6 Undertaking by Maurice Blackburn**

Maurice Blackburn undertakes that it will not make or effect any payment from the Settlement Account without first obtaining written authorisation from a partner of Shine.

## **9. General provisions**

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### **9.1 Consistency of approach**

To the extent that it is practicable, Maurice Blackburn and Shine will adopt consistent procedures, systems and practices for Claim Preparation Work, subject to supervision and oversight by the Committee.

## **10. Administration Costs**

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### **10.1 Administration Costs for Claim Preparation Work**

In relation to Administration Costs for Claim Preparation Work, Maurice Blackburn and Shine will:

- (a) charge for professional fees in accordance with the fixed amounts in clause 13.2 of the Amended Settlement Scheme, with such fees to include legal or other work done by Maurice Blackburn or Shine in relation to:
  - (i) conferences or telephone conferences with a Group Member for the purpose of providing or receiving information in relation to preparation of the Group Member's Eligibility Book or Claim Book;
  - (ii) requesting or reviewing medical or other evidence or materials in relation to a Group Member's claim;
  - (iii) preparing materials for and finalising a Group Member's Eligibility Book or Claim Book, including:
    - A. preparing a statement of the Group Member or other person;
    - B. obtaining expert reports relating to the Group Member;
    - C. obtaining documents , including in relation to economic loss;
    - D. preparing loss schedules or other overview documents;
  - (iv) corresponding with a Group Member in relation to their claim;
  - (v) dealings with third parties (including Lienholders and the Respondents' solicitors) and any other work for the purpose of resolving and paying a Group Member's Liens;
  - (vi) preparing standard form documents (such as coversheets) that are developed and used by the Administrators for the purpose of preparing Group Members' claims;
  - (vii) administrative tasks including processing (such as scanning or filing) a Group Member's authorities, medical records, financial documents or other documents relating to a Group Member's claim;
- (b) each be responsible for the payment of disbursements associated with Claim Preparation Work being done by the respective firms, and seek recovery of those disbursements at cost.

## **10.2 Administration Costs for General Administration Work**

In relation to Administration Costs for General Administration Work, Maurice Blackburn and Shine will:

- (a) charge for professional fees in accordance with the rates in clause 13.1(d) of the Amended Settlement Scheme, with such fees to cover legal or other work done in relation to:
  - (i) functions of the Committee;

- (ii) establishment of information technology or other systems for use in the Administration, including the creation and maintenance of the database referred to in clause 6;
  - (iii) preparation of precedents or templates for use in the Administration;
  - (iv) eligibility determinations (including the initial determination by a Senior Lawyer and the verification by the Committee, but not including the preparation of the Group Member's Eligibility Book);
  - (v) sending notices to Group Members as required by clauses 5.8, 6.7, 7.3(g), 9.5(f) or 11.4 of the Amended Settlement Scheme;
  - (vi) Reviews sought by Group Members;
  - (vii) management of the Settlement Account;
  - (viii) determination of amounts that should be paid to Group Members at different times in accordance with clause 10 of the Amended Settlement Scheme;
  - (ix) liaising with DBH or LAM in relation to their functions as delegates of the Administrators;
  - (x) other General Administration Work,
- (b) each be responsible for the payment of disbursements associated with General Administration Work being done by the respective firms, and seek recovery of those disbursements at cost,

and for the avoidance of doubt, Administration Costs for General Administration Work as described in this clause 10.2 must not include any legal or other costs associated with Claim Preparation Work.

### **10.3 Review of Administration Costs**

The following provisions apply in relation to General Administration Work:

- (a) by the fourteenth (14<sup>th</sup>) day of each month, Maurice Blackburn and Shine will each provide to the other firm a draft itemised tax invoice (**Invoice**) for Administration Costs incurred in relation to General Administration Work (but not Claim Preparation Work) done during the previous calendar month, and with the first such Invoice or Invoices to include all General Administration Work that was done:
  - (i) in the case of Maurice Blackburn, from 1 June 2016;<sup>3</sup>
  - (ii) in the case of Shine, from 10 May 2016;<sup>4</sup>

<sup>3</sup> The rationale for this date is that the expert report of Ross Nicholas dated 15 June 2016 assessed the reasonableness of Maurice Blackburn's costs as reflected in tax invoices covering the period up to 31 May 2016.

<sup>4</sup> The rationale for this date is that the expert report of Ross Nicholas dated 15 June 2016 assessed the reasonableness of Shine's costs as reflected in tax invoices covering the period up to 9 May 2016.

- (b) if one firm (the **first firm**) has any concerns in relation to an Invoice of the other firm (the **second firm**), the first firm must raise those concerns within 14 days of receiving the second firm's Invoice;
- (c) if the second firm is not willing to amend its Invoice:
  - (i) the issue will be drawn to the attention of an independent costs expert (who in the first instance will be Ross Nicholas);
  - (ii) the Administrators will request the independent costs expert to make a recommendation in the next report prepared by the expert for the purpose of the Administrators seeking approval of Administration Costs.

#### 10.4 Approval of Administration Costs

At such times that are determined by the Committee, Maurice Blackburn and Shine will make an application to the Court for approval of Administration Costs, subject to the following:

- (a) approval of Administration Costs for Claim Preparation Work for any individual Group Member will only be sought after the later of the following:
  - (i) the Group Member's Liens have been resolved in accordance with clause 8 of the Amended Settlement Scheme;
  - (ii) in the case of a Group Member who elected to receive a Fast Track Resolution: the Fast Track Resolution has been paid to the Group Member;
  - (iii) in the case of a Group Member who did not elect to receive a Fast Track Resolution: the Group Member's Assessed Compensation Amount has been determined;
- (b) approval of Administration Costs will be sought for all General Administration Work done since the most recent Invoices that were the subject of any previous application for approval of Administration Costs;
- (c) this protocol is to be provided to the independent costs expert for the purpose of preparing any report for approval of Administration Costs;
- (d) Maurice Blackburn will liaise with DBH and LAM with a view to their Administration Costs being approved consistently with the principles and approach set out in this clause and in the Amended Settlement Scheme.

Note: the intent of sub-clause (a) is that Administration Costs for Claim Preparation Work relating to an individual Group Member's claims are only to be paid to Maurice Blackburn and Shine (and DBH and LAM) once all aspects of the claim have been finalised (except payment of compensation in accordance with clause 10.4 of the Amended Settlement Scheme for Group Members who decline to receive the Fast Track Resolution).

[End]