

Supreme Court of New South Wales

*Dr Amireh Fakhouri v Secretary for the NSW Ministry of Health and Anor (2020/00356588)*

**SETTLEMENT SCHEME**

[insert date] July 2024

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## 1. OVERVIEW AND SUMMARY

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- 1.1. On 23 April 2024, the Parties to Supreme Court of New South Wales (the Court) proceeding 2020/00356588, Dr Amireh Fakhouri v Secretary for the NSW Ministry of Health and Anor (the Proceeding), executed a Deed of Settlement (the Deed).
- 1.2. The Deed sets out the terms of a proposed settlement of the Proceeding subject to Court approval. The Deed provides for the Defendants to pay a total settlement sum of \$229.8 million, inclusive of costs and interest (the Settlement Sum).
- 1.3. On **[insert]** the Court approved the settlement of the Proceeding on the terms set out in the Deed.
- 1.4. This Settlement Scheme establishes a procedure for distributing the Settlement Sum and is operative from the date of the Approval Orders.
- 1.5. The Settlement Scheme has the following key elements:

<b>Stage</b>	<b>Clause</b>	<b>Procedure</b>
Notice of Claim Data and Eligibility	Clause 5	The Scheme Administrator will issue each Registrant a notice containing its determination of their eligibility to receive a Distribution pursuant to this Settlement Scheme and, if eligible, the Claim Data to be used to assess their claim.
Assessment of claims	Clause 6	Participating Group Members will have their claims assessed under this Settlement Scheme by the Scheme Administrator. The Scheme Administrator will notify Participating Group Members of the outcome of their claim assessment.
Review rights	Clause 7	A Review may be sought by a Registrant who disputes the determination that they are not a Participating Group Member, or by a Participating Group Member who disputes the accuracy of the calculation of their claim assessment.

Distributions	Clause 8	Once Participating Group Members' assessments (including any Review/s) are complete, or substantially complete, the Scheme Administrator will make Distributions.
Scheme finalisation	Clause 14 - 17	Once all Distributions are made, the Scheme Administrator will attend to finalisation of the Settlement Scheme.

## 2. DEFINITIONS AND INTERPRETATION

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### 2.1. Definitions

In this Settlement Scheme, the following terms have the meanings defined below, unless the context otherwise requires:

**Administration Costs** mean any costs and disbursements incurred by the Scheme Administrator and approved by the Court in implementing, facilitating, and giving effect to this Settlement Scheme and/or the settlement generally and including any taxes, levies, duties, charges, fees, or other imposts or obligations arising in connection with the administration of the Settlement Scheme.

**Approval Orders** mean the orders of the Court dated [insert] approving the settlement of the Proceeding on the terms set out in the Deed and this Settlement Scheme pursuant to section 173 of the *Civil Procedure Act 2005* (NSW).

**Assess, Assessment or Assessed**, as appropriate, means the process by which each Participating Group Member's claim is assessed by the Scheme Administrator in accordance with this Settlement Scheme.

**Business Day** means a day on which banks are open for business in Sydney, New South Wales, Australia, excluding a Saturday, Sunday, or public holiday in that city.

**Claim Data** means the following information for each Participating Group Member: name, address, email address, telephone number, Stafflink number, date of birth, period/s of employment when employed by the Defendants as a Junior Medical Officer during the Claim Period, classification during each such period of employment (where each classification corresponds to a rate of pay pursuant to the relevant award), and full-time equivalent load during each such period of employment.

**Claim Data Amendment Period** has the meaning given in clause 5.11.

**Claims Database** means a database constructed by or on behalf of the Scheme Administrator to contain the Claim Data for each Registrant and Participating Group Member.

**Contingency Fund** has the meaning given in clause 8.9(b).

**Claim Period** means the period referred to in [1b.] of the Third Further Amended Statement of Claim being 16 December 2014 to 21 March 2024.

**Deed** means the Deed of Settlement dated 23 April 2024 and executed by the Parties to the Proceeding.

**Defendants** mean the Secretary for the NSW Ministry of Health and the State of New South Wales.

**Distribution** means the payment of an Interim Distribution Amount and/or a Distribution Amount made to a Participating Group Member in accordance with clause 8.

**Distribution Amount** means the amount which the Scheme Administrator determines is payable to a Participating Group Member in accordance with clauses 8.4 and/or 8.9 and is to be paid by the Scheme Administrator in accordance with clause 8.10.

**Eligibility Criteria** has the meaning given in clause 5.5.

**Final Distribution Amount** has the meaning given in clause 8.4.

**Group Member** means a person referred to in [1b.] of the Third Further Amended Statement of Claim who has not filed and served an opt out notice that has not been withdrawn.

**Group Member Contact Information** means the information that was provided by the Defendants to the Solicitors on 16 May 2024 in accordance with clause 14.1 of the Deed.

**Interest** means any interest earned on the monies held in the Settlement Distribution Fund and any other interest-bearing account established by the Scheme Administrator in accordance with this Settlement Scheme, including any interest which accrues on the Settlement Sum while it is held in the Settlement Reserve Fund prior to the Approval Orders and any interest which accrues between the Approval Orders and the transfer of funds to the Scheme Administrator in accordance with clause 4.4.

**Interim Distribution** means the payment of any Interim Distribution Amount made to a Participating Group Member in accordance with clause 8.6.

**Interim Distribution Amount** means any interim amount that the Scheme Administrator may assess is payable to Participating Group Members in accordance with clause 8.5

and is to be paid by the Scheme Administrator as an Interim Distribution.

**Junior Medical Officer** means intern, resident, registrar and/ or senior registrar.

**Loss Assessment Formula** means the formula by which Participating Group Members' claims are calculated as contained in Annexure A to this Settlement Scheme.

**Non-Responsive Group Member** means a Registrant or Participating Group Member who:

- (a) has failed to adequately respond to a notice from the Scheme Administrator that they need to take a certain step or steps by a date or within a timeframe specified by the Scheme Administrator, provided that any such date or timeframe specified by the Scheme Administrator must not be less than 14 days from the date of any such notice, and the Scheme Administrator has issued a reminder notice to the Registrant or Participating Group Member; or
- (b) the Scheme Administrator determines has received a notice or communication under clause 16.2(b).

**Notice of Assessment** has the meaning given in clause 6.5.

**Notice of Assessment Review** has the meaning given in clause 7.5.

**Notice of Claim Data and Eligibility** means a notice sent by the Scheme Administrator to a Registrant containing its determination of their eligibility to receive a Distribution pursuant to this Settlement Scheme and, if eligible, the Claim Data to be used to assess their claim.

**Notice of Claim Data Amendment** has the meaning given in clause 5.13.

**Notice of Eligibility Review** has the meaning given in clause 7.4.

**Notice of Review Assessment** has the meaning given in clause 7.9.

**Participating Group Member** means a Registrant who meets the Eligibility Criteria.

**Plaintiff** means Dr Amireh Fakhouri.

**Plaintiff's Costs** mean the Plaintiff's fees and disbursements (calculated in accordance with the Plaintiff's retainer of the Solicitors), including any uplift, incurred (including in connection with obtaining the Approval Orders).

**Plaintiff's Reimbursement** means a payment of an amount approved by the Court to Dr Fakhouri as reimbursement for the time and effort spent by her in fulfilling the role of Plaintiff.

**Preliminary Distribution Amount** has the meaning given in clause 6.2.

**Proceeding** means *Dr Amireh Fakhouri v The Secretary of the NSW Ministry of Health and Anor* (2020/00356588).

**Registrant** means a Group Member who registered their claim with the Solicitors by 12 July 2024 in accordance with order 11 of the orders made by Garling J on 16 May 2024 in the Proceeding.

**Registration Deadline** means 12 July 2024.

**Remaining Balance** means the amount remaining in the Residual Settlement Distribution Fund, including following the cancellation by the Scheme Administrator of part or all of the Distributions to those Participating Group Members whose:

- (a) distributions have been forfeited pursuant to clauses 5.15, 9.3, or 12.5; or
- (b) payments have been unsuccessful or rejected as at the date Final Distributions are made.

**Residual Settlement Distribution Fund Sum** has the meaning given in clause 8.2.

**Review** means a review of a Notice of Claim Data and Eligibility or a Notice of Assessment in accordance with clause 7.

**Review Assessor** means a member of an Australian State or Territory Bar or a solicitor who is not employed by or a principal of the Solicitors and who has more than 5 years' post admission experience, and who is appointed by the Scheme Administrator pursuant to clause 7.9.

**Review Material** means:

- (a) in relation to a Registrant, any documentation or other information to be provided by a Registrant which the Registrant considers relevant to their Notice of Eligibility Review; and
- (b) in relation to a Participating Group Member, any documentation or other information to be provided by a Participating Group Member which the Participating Group Member considers relevant to their Notice of Claim Data Amendment or Notice of Claim Assessment Review.

**Scheme Administrator** means the Solicitors, or such other person as appointed by the Court, as the Court-appointed administrator responsible for implementing this Settlement Scheme. Prior to the appointment of the Scheme Administrator, the Solicitors will execute the functions of the Scheme Administrator in accordance with this Settlement Scheme and subject to Court approval.

**Settlement Distribution Fund** means an interest-bearing account opened and

operated by the Scheme Administrator to hold monies on trust in accordance with this Settlement Scheme.

**Settlement Reserve Fund** the interest-bearing account opened by the Solicitors in accordance with clause 4.1 of the Deed.

**Settlement Scheme** means this Settlement Scheme, including the rights and obligations created by this Settlement Scheme. For the avoidance of doubt, the Settlement Scheme may be amended by the Court as it deems fit.

**Settlement Sum** means the sum of \$229.8 million inclusive of costs and interest.

**Solicitors** means Maurice Blackburn Pty Ltd (ACN 105 657 949) as solicitors for the Plaintiff.

**Withdrawn Group Member** means any Registrant or Participating Group Member who notifies the Scheme Administrator that they withdraw their claim.

## 2.2. Interpretation

In this Settlement Scheme:

- (a) headings are for convenience only and do not affect interpretation;
- (b) where the context permits, the singular includes the plural, and the plural includes the singular;
- (c) a gender includes all genders;
- (d) if a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (e) a reference to a person includes a corporation, trust, partnership, unincorporated body or other entity, whether or not it comprises a separate legal entity;
- (f) a reference to any thing done by any person includes a reference to the thing as done by a director, officer, servant, agent, personal representative, or legal representative if permitted to be so done by law or by any provision of the Deed or Settlement Scheme;
- (g) a reference to money (including 'dollars', 'AUD', and '\$') is to Australian currency;
- (h) specifying anything in this Settlement Scheme after the words "include", "including" or "for example" or similar expressions, does not limit what else might be included;
- (i) unless otherwise specified, a reference to a clause is a reference to a clause of

this Settlement Scheme;

- (j) 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; and
- (k) a reference to a day is to a calendar day and not to a business day, unless the context requires otherwise.

### **3. SCHEME ADMINISTRATOR**

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#### **Appointment of Scheme Administrator**

3.1. The Scheme Administrator (including any incidental functions):

- (a) subject to any orders of the Court, must not act as the solicitor for the Plaintiff or any Group Member, Registrant, or Participating Group Member in relation to the Settlement Scheme;
- (b) will administer the Settlement Scheme fairly, efficiently, and reasonably according to its terms, as a duty owed to the Court in priority to any obligation owed to any other person, including the Plaintiff, Group Members, Registrants, and Participating Group Members;
- (c) appoints its employees and agents to perform the functions necessary or convenient for the efficient implementation of this Settlement Scheme;
- (d) together with its employees and agents:
  - (i) will be indemnified from the Settlement Sum against all liabilities (including any Administration Costs) arising from or in connection with the administration of this Settlement Scheme subject to obtaining any necessary approval from the Court; and
  - (ii) will have the same immunities from suit as attach to the office of a judge of the Court.

#### **Administration of the Settlement Scheme**

3.2. The Settlement Scheme will be administered and applied by the Scheme Administrator.

3.3. Notwithstanding anything else contained in the Settlement Scheme, the Scheme Administrator may:

- (a) implement processes and procedures necessary to ensure the efficient and effective operation of the Settlement Scheme;



- (b) seek expert advice as it considers necessary;
  - (c) correct any error, slip, or omission in the Settlement Scheme necessary to facilitate the administration of it;
  - (d) apply to the Court to amend this Settlement Scheme if it considers it desirable or appropriate to do so; and
  - (e) extend time for compliance with any deadline fixed by this Settlement Scheme or by the Scheme Administrator in the course of administering this Settlement Scheme.
- 3.4. If the Scheme Administrator considers it efficient to do so, it may engage a third party to assist in performing function/s under the Settlement Scheme (subject to the third party meeting reasonable data security requirements). For the avoidance of doubt, the costs of any third party engaged to perform any function under the Settlement Scheme will be treated as Administration Costs and subject to Court approval.
- 3.5. In discharging any function or exercising any power or discretion conferred by this Settlement Scheme, the Scheme Administrator will not be liable for any loss to Group Members, Registrants, Participating Group Members, or any third party arising by reason of any mistake or omission made in good faith or of any other matter or thing except wilful and individual fraud or wrongdoing on the part of the Scheme Administrator.

#### **4. MANAGEMENT OF SETTLEMENT RESERVE FUND, SETTLEMENT DISTRIBUTION FUND AND SETTLEMENT SUM**

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##### **Settlement Reserve Fund**

- 4.1. Pursuant to clause 4.1(a) of the Deed, the Solicitors opened the Settlement Reserve Fund on 29 April 2024.
- 4.2. Pending the transfer of the Settlement Sum to the Settlement Distribution Fund, the Solicitors will hold the Settlement Sum in the Settlement Reserve Fund.

##### **Transfer of the Settlement Sum to the Scheme Administrator**

- 4.3. Pursuant to clause 7.1 of the Deed, the Scheme Administrator has or will open the Settlement Distribution Fund.
- 4.4. In accordance with clause 4.3 of the Deed, the Solicitors will transfer the Settlement Sum (together with interest accrued at that date less account fees and any tax payable) from the Settlement Reserve Fund into the Settlement Distribution Fund.

4.5. The Scheme Administrator will be responsible for the management of the Settlement Distribution Fund in accordance with this Settlement Scheme.

### **Management of the Settlement Distribution Fund**

4.6. The Scheme Administrator will, subject to and in accordance with the terms of the Deed, this Settlement Scheme, and any applicable statutory requirements, hold the money standing from time to time in the Settlement Distribution Fund on trust for the:

- (a) Participating Group Members; and
- (b) Scheme Administrator, to the extent of its entitlement to receive Administration Costs in accordance with the terms of this Settlement Scheme.

4.7. The Scheme Administrator may pay all or a proportion of the Settlement Distribution Fund into an interest-bearing, fixed term, deposit account or accounts for varying terms.

4.8. The Scheme Administrator is required to comply with the taxation obligations of any trust created for the benefit of Participating Group Members in the course of the settlement administration and may seek expert advice to enable this. Any taxation obligations payable in respect of any trust(s) created by the establishment of the Settlement Distribution Fund will be deducted from the Settlement Distribution Fund.

## **5. CONFIRMATION OF CLAIM DATA**

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### **Claim Database**

5.1. At all times, the Scheme Administrator must use reasonable endeavours to ensure the accuracy of the Claims Database, including, to the extent necessary, updating the Claims Database with any amended or corrected Claim Data provided under this clause, or requesting further information or documents from a Registrant, Participating Group Member, or third party.

5.2. Notwithstanding any other clause in this Settlement Distribution Scheme, if in the opinion of the Scheme Administrator, at any stage a Registrant or Participating Group Member's Claim Data contains insufficient information or does not otherwise substantiate a Registrant's or Participating Group Member's claim, the Scheme Administrator may, by written notice, require the Registrant or Participating Group Member to provide and verify by a statutory declaration or other means that the Scheme Administrator deems appropriate and within a time that the Scheme Administrator deems reasonable, such further information as the Scheme

Administrator may require.

### **Claim Data Exchange**

5.3. In accordance with clause 14.2 of the Deed, the Scheme Administrator will provide the Defendants with a list of Registrants, as soon as practicable after the Approval Orders become final as defined in clause 2.2 of the Deed.

5.4. In accordance with clause 14.3 of the Deed, the Defendants will provide the Claim Data, and available Stafflink and HealthRoster data required for the:

- (a) eligibility assessment in accordance with clause 5.6; and
- (b) application of the Loss Assessment Formula in accordance with clauses 6.2 – 6.4,

for each Registrant, in the format reasonably required by the Scheme Administrator.

### **Eligibility Criteria**

5.5. A Registrant becomes a Participating Group Member and is eligible to receive a Distribution pursuant to this Settlement Scheme if the following Eligibility Criteria are satisfied:

- (a) they are a Group Member; and
- (b) they do not become a Withdrawn Group Member or a Non-Responsive Group Member prior to the determination of their Distribution Amount.

### **Process for determining eligibility**

5.6. The Scheme Administrator will assess and determine whether a Registrant meets the Eligibility Criteria pursuant to clause 5.5 by:

- (a) reviewing the Claim Data for that Registrant to determine if they are a Group Member pursuant to clause 5.5(a);
- (b) determining whether the Registrant has filed an opt out notice with the Court that was not withdrawn.

### **Notice of Claim Data and Eligibility**

5.7. As soon as practicable after receiving the Claim Data described in clause 5.4, the Scheme Administrator will send a Notice of Claim Data and Eligibility to the Registrant to notify them of:

- (a) the Claim Data held by the Scheme Administrator for that Registrant; and
- (b) whether the Scheme Administrator has determined that the Registrant is a Participating Group Member.

- 5.8. Where the Scheme Administrator has determined that the Registrant meets the Eligibility Criteria and is a Participating Group Member, the notice will:
- (a) include the Claim Data to be relied upon by the Scheme Administrator to assess the Participating Group Member's claim; and
  - (b) advise of the process for assessment of claims in accordance with clause 6.
- 5.9. The Scheme Administrator may request a Registrant or Participating Group Member to provide it with supporting material or make a statutory declaration that the Scheme Administrator deems appropriate to confirm the Claim Data.
- 5.10. Where the Scheme Administrator has determined that the Registrant does not meet the Eligibility Criteria, the notice will:
- (a) provide a short statement of the basis on which the Registrant has been determined not to meet the Eligibility Criteria; and
  - (b) provide information in relation to the Registrant's right to seek an Eligibility Review under clause 7.1(a).
- 5.11. Within 28 days of sending a Notice of Claim Data and Eligibility to a Registrant, the Registrant will be permitted to confirm their Claim Data or notify the Scheme Administrator of any error, slip, or omission in the Claim Data held by the Scheme Administrator (**Claim Data Amendment Period**).
- 5.12. If, within the Claim Data Amendment Period, a Registrant notifies the Scheme Administrator of any error, slip, or omission in their Notice of Claim Data and Eligibility, the Administrator may, in its absolute discretion:
- (a) request the Registrant to provide such information or documentation as is necessary to verify the error, slip, or omission;
  - (b) correct the Claims Database; and/or
  - (c) send to that Registrant an amended Notice of Claim Data and Eligibility.
- 5.13. The accuracy of a Notice of Claim Data and Eligibility will be deemed to be accepted by a Registrant unless the Registrant, by the conclusion of the Claim Data Amendment Period, delivers to the Scheme Administrator a **Notice of Claim Data Amendment**, together with copies of all documents on which the Registrant relies for the purpose of the amendment, including any statement of reasons for seeking the amendment. For the avoidance of doubt, if a Registrant does not deliver a Notice of Claim Data Amendment within 28 days of provision of their Notice of Claim Data and Eligibility, the Scheme Administrator may rely upon the Claim Data for that Registrant contained in their Notice of Claim Data and Eligibility as true and

correct for the purposes of this Settlement Scheme.

- 5.14. After the conclusion of the period set out at clause 5.13, a Registrant's Claim Data cannot be amended, unless necessary as a result of an error, slip, or omission on the part of the Scheme Administrator, or where a Registrant or Participating Group Member has notified the Scheme Administrator of a change in contact details pursuant to clause 12.1(d).
- 5.15. For the avoidance of doubt, if:
- (a) following a request made to a Registrant by the Scheme Administrator pursuant to clause 5.12(a); or
  - (b) after the Scheme Administrator's reasonable attempts to contact a Registrant to make a request pursuant to clause 5.12(a),
- that Registrant's Claim Data continues to contain insufficient information or does not otherwise substantiate the Registrant's claim, such as to render the Scheme Administrator unable to determine whether the Registrant is a Participating Group Member, the Registrant will forfeit any right to receive a Distribution from the Settlement Distribution Fund.
- 5.16. If a Registrant notifies the Scheme Administrator of any error, slip or omission in the Claim Data pursuant to clause 5.11, the Scheme Administrator may request further and better information from the Defendants, and the Defendants will use their best endeavours to provide the information sought within 10 days, in accordance with clauses 14.4 – 14.6 of the Deed.

## 6. CLAIMS ASSESSMENT

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- 6.1. Claims by Participating Group Members will be assessed:
- (a) based on the Claim Data, which was confirmed, amended, or updated pursuant to clauses 5.11 to 5.13; and
  - (b) in accordance with clause 6.2 – 6.4 below.
- 6.2. As soon as practicable after the Claim Data Amendment Period, each Participating Group Members' Preliminary Distribution Amount will be calculated in accordance with the **Loss Assessment Formula** contained in Annexure A to this Settlement Scheme.
- 6.3. If, in the process of calculating Participating Group Members' Preliminary Distribution Amounts, any issues are identified concerning the sufficiency of a Participating Group Members' Claim Data, the Scheme Administrator may request

further and better information from the Defendants, and the Defendants will use their best endeavours to provide the information sought within 10 days, in accordance with clauses 14.4 – 14.6 of the Deed.

- 6.4. Where the Defendants are unable to provide the information sought pursuant to clause 6.3, the Scheme Administrator may apply assumptions, based on an average of Participating Group Members' preliminary entitlements to unrostered overtime, meal breaks, and/or rostered overtime, as calculated in accordance with the Loss Assessment Formula, to the Participating Group Member's Preliminary Distribution Amount.

#### **Notice of Assessment**

- 6.5. Following the Assessment of a Participating Group Member's claim in accordance with this clause, the Scheme Administrator will send the Participating Group Member a Notice of Assessment, which may include but is not limited to:
- (a) the Participating Group Member's Preliminary Distribution Amount calculated in accordance with clauses 6.1 – 6.4;
  - (b) the Claim Data on which the Scheme Administrator's Assessment was made; and
  - (c) information regarding the right of the Participating Group Member to seek an Assessment Review and the process for doing so in accordance with clause 7.

#### **General matters relating to Assessments**

- 6.6. Participating Group Members are only eligible to claim for those losses provided for under this Settlement Scheme and are not eligible to claim for any other losses associated with the claims advanced in the Proceeding.
- 6.7. For the avoidance of doubt, any Distributions made by the Scheme Administrator to a Participating Group Member pursuant to this Settlement Scheme will satisfy all claims for the Participating Group Member in the Proceeding.

### **7. REVIEWS**

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#### **Right to seek a review**

- 7.1. A person has the right to seek a review of any of the following determinations:
- (a) in the case of a Registrant, a determination that the Registrant is not a Participating Group Member (**Eligibility Review**) under clause 5; and
  - (b) in the case of a Participating Group Member, a determination of the

Participating Group Member's Preliminary Distribution Amount  
(**Assessment Review**) under clause 6.

- 7.2. A Withdrawn Group Member or a Non-Responsive Group Member does not have a right to an Eligibility Review or Assessment Review. The Scheme Administrator may, however, in its absolute discretion, correct or withdraw any such notice if it considers that such a correction or withdrawal is unlikely to cause delay to the payment of Interim Distribution Amounts or Distribution Amounts being made under the Settlement Scheme.
- 7.3. An Assessment Review shall be limited to the accuracy of the Participating Group Member's data underpinning the calculation performed in accordance with the Loss Assessment Formula. A Participating Group Member cannot seek a review of the Loss Assessment Formula itself.

#### **Process for seeking an Eligibility Review**

- 7.4. A Registrant that wishes to seek an Eligibility Review must:
- (a) give written notice to the Scheme Administrator (**Notice of Eligibility Review**) no later than 28 days after the Scheme Administrator has sent a Notice of Claim Data and Eligibility to the Registrant; and
  - (b) ensure that the Notice of Eligibility Review:
    - (i) identifies the components of the assessment which the Registrant disputes;
    - (ii) contains the reasons why the Registrant disputes those components of the assessment; and
    - (iii) attaches Review Materials to support the Eligibility Review.

#### **Process for seeking an Assessment Review**

- 7.5. A Participating Group Member who wishes to seek an Assessment Review must:
- (a) do so by giving written notice to the Scheme Administrator (**Notice of Assessment Review**) no later than 28 days after the Scheme Administrator has sent a Notice of Assessment to the Participating Group Member; and
  - (b) ensure that the Notice of Assessment Review:
    - (i) identifies the components of the assessment which the Participating Group Member disputes;
    - (ii) contains the reasons why the Participating Group Member disputes those components of the assessment; and

(iii) attaches Review Materials to support the Assessment Review.

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

7.6. If a Registrant or Participating Group Member does not give a Notice of Eligibility Review or Notice of Assessment Review respectively to the Scheme Administrator within 28 days as required by 7.4 and 7.5, the Registrant or Participating Group Member will be deemed to have accepted their Notice of Claim Data and Eligibility or Notice of Assessment (as the case may be).

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

7.7. Where a Registrant or Participating Group Member seeks either an Eligibility Review or an Assessment Review, the Scheme Administrator may, in their absolute discretion:

- (a) require that the Registrant or Participating Group Member pay to the Scheme Administrator a bond not exceeding \$2,000 for the cost of the Eligibility Review or Assessment Review; and
- (b) if the Registrant or Participating Group Member fails to pay the bond within 14 days of receiving such a request from the Scheme Administrator, treat the Registrant's request for an Eligibility Review or the Participating Group Member's request for an Assessment Review as void and of no effect.

### **Process for determination of Reviews**

7.8. Following receipt of a Notice of Eligibility Review or Notice of Assessment Review, the Scheme Administrator will review the request and documents on which the Registrant or Participating Group Member relies for the purposes of the Review and;

- (a) if satisfied that they disclose an error, slip, or omission by the Scheme Administrator, or any other administrative or clerical error, correct the notice to which the request relates; and
- (b) if not so satisfied, refer the matter to a Review Assessor.

7.9. In cases where a referral to a Review Assessor is required in accordance with clause 7.8(b), upon payment of any bond required in accordance with clause 7.7:

- (a) the Scheme Administrator will engage a Review Assessor;
- (b) the Scheme Administrator will provide the following materials to the Review Assessor:
  - i. Review Material provided by the Registrant or Participating Group



Member;

- ii. the Registrant's or Participating Group Member's written notice by which they requested the Review; and
- iii. either of the following, depending on the nature of the Review that is sought by a Registrant or Participating Group Member:
  - A. Notice of Claim Data and Eligibility; or
  - B. Notice of Assessment,

including the Scheme Administrator's reasons;

(b) unless the Review Assessor considers it reasonably necessary to do so, the Review Assessor will not consider any new evidence or additional materials that are not already included in the materials referred to in clause 7.9(b). Where a Review Assessor considers it reasonably necessary to do so, they can request that the Registrant or Participating Group Member obtain additional evidence;

(c) the Review Assessor will then:

- i. in an Eligibility Review, make a determination as to whether the Scheme Administrator made an error in applying the Eligibility Criteria; or
- ii. in an Assessment Review, make a determination as to the Distribution Amount that the Participating Group Member is assessed as being entitled to receive pursuant to this Settlement Scheme, and in doing so the Review Assessor must only consider the components of the assessment in relation to which the Participating Group Member seeks a Review;
- iii. in relation to either type of Review, prepare and provide to the Scheme Administrator a brief statement of reasons for the Review Assessor's determination and, if relevant, include details of the amounts assessed;

(d) in carrying out an Assessment Review, a Review Assessor may determine that the:

- i. Participating Group Member's Distribution Amount as initially assessed is correct;
- ii. Participating Group Member is entitled to a higher Distribution Amount than was initially assessed; or
- iii. Participating Group Member is entitled to a lower Distribution Amount

than was initially assessed;

- (e) after receiving a Review Assessor's determination and statement of reasons, the Scheme Administrator will promptly send to the Registrant or Participating Group Member a **Notice of Review Assessment** in which the Scheme Administrator provides:
  - i. information to the Registrant or Participating Group Member about the determination of their Review and the impact of that determination on the Registrant's or Participating Group Member's entitlements (if any) under this Settlement Scheme; and
  - ii. a copy of the Review Assessor's statement of reasons.

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

- 7.10. A determination of a Review Assessor is final and binding on the Scheme Administrator and the Registrant or Participating Group Member who sought the Review, and neither the Scheme Administrator nor the Registrant or Participating 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.
- 7.11. Following an Assessment Review, the Review Assessor's determination will be deemed to be the Participating Group Member's Distribution Amount under this Settlement Scheme.

### **Cost of Reviews**

- 7.12. Subject to clause 7.13, a Registrant or Participating Group Member requesting a Review will pay the costs of the Review Assessor calculated at \$800, exclusive of GST, for the first two hours' attendance by the Review Assessor (or any part thereof) and \$450 per hour, exclusive of GST, for each subsequent hour (or any part thereof).
- 7.13. The Scheme Administrator may waive the requirements in clause 7.12 where the Scheme Administrator considers that, even compared to the typical circumstances of a Registrant or Participating Group Member, the circumstances of the Registrant or Participating Group Member disclose special compassionate grounds for the waiver.

### **Eligibility Review**

- 7.14. If a Review Assessor upholds an Eligibility Review and determines that a Registrant is a Participating Group Member, any bond paid by the Registrant pursuant to

clause 7.7(a) will be refunded to the Registrant.

- 7.15. If a Review Assessor determines that a Registrant is not a Participating Group Member, any bond paid by the Registrant pursuant to clause 7.7(a) will be used to pay the costs outlined in clause 7.12 and any residual will be refunded to the Registrant.

### **Assessment Review**

- 7.16. If a Review Assessor determines a Participating Group Member's Preliminary Distribution Amount is less than 110% of the Preliminary Distribution Amount set out in their Notice of Assessment, the Participating Group Member will pay the Review Assessor's costs, as outlined in clause 7.12.
- 7.17. Any costs payable to the Review Assessor pursuant to clause 7.12 will be deducted from any bond paid pursuant to clause 7.7 and thereafter from any amount otherwise payable to the Participating Group Member pursuant to this Settlement Scheme.
- 7.18. If a Review Assessor determines that a Participating Group Member's Preliminary Distribution Amount is more than 110% of the Preliminary Distribution Amount set out in their Notice of Assessment, any bond paid pursuant to clause 7.7 will be refunded to the Participating Group Member.

### **No reimbursement**

- 7.19. For the avoidance of doubt, Registrants and Participating Group Members will not be entitled to reimbursement for any costs incurred by the Registrant or Participating Group Member in respect of the Review Assessment.

### **Role of Review Assessors**

- 7.20. Review Assessors engaged by the Scheme Administrator:
- (a) will act as independent arbitrators and not as counsel or solicitor acting for any individual Registrants, Participating Group Members, or the Scheme Administrator; and
  - (b) in the discharge of any office under this Settlement Scheme, shall have the same immunities from suit as attach to the office of a judge of the Court.

## **8. DISTRIBUTION**

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### **Settlement Distribution Fund**

- 8.1. As soon as practicable after the transfer of the Settlement Sum (together with interest accrued at the date of transfer, less account fees and any tax payable) from

the Settlement Reserve Fund to the Settlement Distribution Fund, and consistently with the terms of the Deed and the Approval Orders, the Scheme Administrator will pay the following amounts from the Settlement Distribution Fund, as approved by the Court, an amount to the:

- (a) Plaintiff for the Plaintiff's Reimbursement Payment; and
- (b) Solicitors for the Plaintiff's Costs.

8.2. The balance of the Settlement Sum (the **Residual Settlement Distribution Fund Sum**) will be applied as follows:

- (a) to pay any pre-approved Administration Costs which have been incurred in accordance with clause 13 as they are incurred;
- (b) an amount to be determined by the Scheme Administrator as a prudent contingency fund (**Contingency Fund**) to be reserved for a period of up to 12 months after the payment of the Distribution Amounts to account for:
  - i. any possible calculation or administration errors;
  - ii. any likely additional Administration Costs, subject to Court Approval; and
  - iii. such other matters as the Scheme Administrator sees fit,  
which amounts may be applied in accordance with this Settlement Scheme during that 12-month period in the Scheme Administrator's discretion to;
- (c) pay any further amounts approved to be deducted from the Settlement Sum or the Residual Settlement Distribution Fund Sum by the Court;
- (d) any tax authority for any tax obligation and/or tax related expense;
- (e) to the payment of any Interim Distribution Amounts to applicable Participating Group Members in accordance with the provisions of this Settlement Scheme; and
- (f) the payment of Distribution Amounts to Participating Group Members in accordance with the provisions of this Settlement Scheme, as determined in accordance with clauses 8.3 – 8.10 below.

### **Calculation of Distribution**

8.3. Once any Reviews in accordance with clause 7 are completed and the payments referred to in subclauses 8.1 and 8.2(a) – (d) are made, the Scheme Administrator will calculate the Distribution Amount payable to each Participating Group Member from the Residual Settlement Distribution Fund Sum.

8.4. In accordance with clause 5 of the Loss Assessment Formula, the Residual

Settlement Distribution Fund Sum will be distributed to individual Participating Group Members in the proportion which their Final Distribution Amount bears to the aggregate Final Distribution Amounts for all Participating Group Members (being a pro rata distribution). Each individual Participating Group Member's Distribution calculated in accordance with this clause constitutes the Participating Group Member's Final Distribution Amount.

### **Interim Distribution**

8.5. The Scheme Administrator may, in its absolute discretion, elect to make an Interim Distribution to a Participating Group Member of a proportion of the Participating Group Member's Distribution Amount. The proportion payable is to be determined by the Scheme Administrator having regard to the imperative to retain sufficient funds to pay pending claims and any deductions or future deductions from the Settlement Sum, which proportion may be varied from time to time for all Participating Group Members.

### **Payment of Interim Distribution Amount**

8.6. Upon the Scheme Administrator calculating the quantum of an Interim Distribution Amount that is to be paid in accordance with clause 8.5:

- (a) the Scheme Administrator will notify the Participating Group Member who is to receive the Interim Distribution Amount; and
- (b) the Scheme Administrator will pay the Interim Distribution Amount in accordance with the Scheme Administrator's calculation, with such payment to be made to the Participating Group Member who has:
  - i. received notification of their Distribution Amount more than 28 days prior to the Interim Distribution Payment being made; and
  - ii. either:
    - A. not sought a Review pursuant to clause 7; or
    - B. received a final and binding decision of a Review Assessor pursuant to clauses 7.8 – 7.11.

### **Adjustment of Distribution Amounts**

8.7. The Distribution Amount will be paid to a Participating Group Member after:

- (a) adjusting for any Interim Distribution Amount paid to that Participating Group Member; and
- (b) adjusting for any Review costs payable by that Participating Group Member.

## **Determination of Distribution Amounts**

- 8.8. As soon as reasonably practicable following:
- (a) assessment of all Participating Group Members' claims under the Settlement Scheme;
  - (b) the elapse of any time periods for Participating Group Members to exercise their rights to Reviews under the Settlement Scheme; and
  - (c) the determination by Review Assessors of any Reviews, the Scheme Administrator must determine the Final Distribution Amounts which are to be paid to Participating Group Members.
- 8.9. Final Distribution Amounts are to be determined by the Scheme Administrator, taking into account:
- (a) the remainder of the Residual Settlement Distribution Fund Sum and any projected interest income on the Residual Settlement Distribution Fund Sum up to the time of payment of the Final Distribution Amounts;
  - (b) the total number of Participating Group Members;
  - (c) the Scheme Administrator's best estimate of the final costs of administering the Settlement Scheme;
  - (d) any actuarial, financial, or accounting advice obtained by the Scheme Administrator for the purpose of determining Final Distribution Amounts; and
  - (e) any other matters that the Scheme Administrator considers relevant.

## **Payment of Distribution Amounts**

- 8.10. Upon the Scheme Administrator determining the quantum of the Final Distribution Amounts that are to be paid in accordance with clauses 8.3 – 8.9, it is to:
- (a) pay the Final Distribution Amounts in accordance with the Scheme Administrator's determination to all Participating Group Members; and
  - (b) notify Participating Group Members of their Final Distribution Amounts.

## **Contingency Fund and Remaining Balance**

- 8.11. When the Scheme Administrator considers, in its absolute discretion, that it is no longer required to retain the Contingency Fund, the Scheme Administrator will consider the most practical and efficient allocation of the Contingency Fund and Remaining Balance.
- 8.12. The Scheme Administrator may elect to allocate the Contingency Fund and the

Remaining Balance, subject to Court approval, to:

- (a) pay any additional Administration Costs;
  - (b) if it is in the interest of fairness and efficiency to all Participating Group Members, make a further payment to some or all Participating Group Members based on the proportion which their Final Distribution Amount bears to the aggregate Final Distribution Amounts for all Participating Group Members;
  - (c) if it is in the interest of fairness and efficiency to all Participating Group Members, pay some or all Participating Group Members an ex-gratia payment as calculated by the Scheme Administrator; and/or
  - (d) pay an amount to a suitable charitable or not-for-profit organisation.
- 8.13. Without limiting the application of clause 8.11, the Scheme Administrator, may, subject to Court approval:
- (a) consider alternative solutions as to how the Contingency Fund and Remaining Balance should be allocated and paid;
  - (b) allocate and pay the Contingency Fund and Remaining Balance at different times; and/or
  - (c) allocate and pay the Contingency Fund and/or Remaining Balance using a range of solutions.

## **9. PROVISION OF BANK DETAILS AND PROCESSING DISTRIBUTIONS TO PARTICIPATING GROUP MEMBERS**

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### **Provision of Bank Details**

- 9.1. A Participating Group Member whose Final Distribution Amount is greater than zero (0) must, by any reasonable date specified by the Scheme Administrator, provide sufficient bank account details to the Scheme Administrator to enable the Scheme Administrator to make payment of that Participating Group Member's Interim Distribution Amount or Final Distribution Amount in accordance with clauses 8.2(e) – (f).
- 9.2. The Scheme Administrator, in its absolute discretion:
- (a) may make further attempts to contact Participating Group Members to obtain sufficient bank account details; and
  - (b) reserves the right to deduct any additional costs incurred in making such further attempts from the Final Distribution Amounts of those Participating Group Members.

- 9.3. If a Participating Group Member fails to provide sufficient bank account details by the date specified by the Scheme Administrator, and following at least one reminder by the Scheme Administrator, the:
- (a) Participating Group Member's Interim Distribution Amount or Final Distribution Amount will be forfeited, and the Participating Group Member will have no claim against the Scheme Administrator or the Settlement Distribution Fund; and
  - (b) forfeited Interim Distribution Amounts or Final Distribution Amounts will form part of the Remaining Balance to be distributed in accordance with clauses 8.11 – 8.13.

#### **Processing Distributions to Participating Group Members**

- 9.4. The Distribution of Interim Distribution Amounts or Final Distribution Amounts to Participating Group Members will be made by electronic funds transfer, except where:
- (a) a Participating Group Member demonstrates to the Scheme Administrator's satisfaction that distribution by electronic funds transfer is impracticable for that Participating Group Member; or
  - (b) the Scheme Administrator, in its absolute discretion, considers that another method would be more conducive to effecting a timely distribution to any Participating Group Member or group of Participating Group Members.
- 9.5. For the avoidance of doubt, if the Scheme Administrator is unable to attempt payment of a Distribution to a Participating Group Member, or a Distribution to a Participating Group Member is rejected, due to:
- (a) incorrect bank account information provided by the Participating Group Member; or
  - (b) any other action or inaction by the Participating Group Member,  
the Scheme Administrator is not obliged to (but may, in its absolute discretion) make further inquiries with the Participating Group Member to reattempt the payment of the Distribution.
- 9.6. If, after the final payment of Distributions has been made, the Scheme Administrator is unable to effect payment of a Distribution as outlined in clause 9.5, the Distributions will be deemed to have been made, such that Participating Group Members will have no claim against the Scheme Administrator or the Residual Settlement Distribution Fund Sum; and the Distribution will form part of the



Remaining Balance.

## **10. APPLICATION OF INTEREST**

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- 10.1. Interest accrued on funds held in the Settlement Distribution Fund and the Settlement Reserve Fund may be applied, in the first instance, to payment of Administration Costs.
- 10.2. Any Interest which is not otherwise required for the payment of Administration Costs will form part of the Settlement Distribution Fund and be available for distribution to Participating Group Members.
- 10.3. The Scheme Administrator may at any time:
- (a) elect to pay income tax on any interest remaining after application to the payment of Administration Costs where it determines that the cost of distributing the interest will be disproportionate to the benefit of including the residual interest in the Settlement Distribution Fund; and
  - (b) convert the Settlement Distribution Fund to a non-interest earning account if it determines that the cost of administering the taxation implications of further interest being earned on the Settlement Distribution Fund will be disproportionate to the further interest expected to be earned.

## **11. CLAIMS MADE ON BEHALF OF OTHER PERSONS AND/OR THIRD PARTIES**

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### **Application of this clause**

- 11.1. The following provisions apply in circumstances where a person participates in the Settlement Scheme on behalf of another person who is a Registrant or Participating Group Member, whether in respect to all or part of the Registrant's or Participating Group Member's claim.

### **Bankrupt persons**

- 11.2. The Scheme Administrator may rely on information, instructions and/or declarations from and steps taken pursuant to this Settlement Scheme by a person who declares to the Scheme Administrator that they are trustee of a bankrupt person.

### **Deceased estates**

- 11.3. The Scheme Administrator may rely on information, instructions, and/or declarations from and steps taken pursuant to this Settlement Scheme by:
- (a) a person who is named in any will as the executor of a deceased Registrant's and/or Participating Group Member's estate, if that person provides:
    - (i) a copy of the Registrant's/Participating Group Member's death certificate;

- (ii) a copy of the Registrant's/Participating Group Member's will; and
  - (iii) if deemed necessary by the Scheme Administrator, a statutory declaration confirming that they will act in accordance with the will in relation to any payment and the deceased Registrant's/Participating Group Member's estate; or
- (b) if the Registrant/Participating Group Member dies intestate, a person who represents the deceased Registrant's/Participating Group Member's estate, if that person provides:
  - (i) a copy of the Registrant's/Participating Group Member's death certificate; and
  - (ii) if deemed necessary by the Scheme Administrator, a statutory declaration confirming that they will act in accordance with the laws of intestacy in relation to any payment and the deceased Registrant's/Participating Group Member's estate,  
  
as if it had been provided by the Registrant/Participating Group Member themselves.

11.4. The Scheme Administrator may require the executor or representative to provide a Grant of Probate or Letters of Administration.

#### **Group Members under a legal incapacity**

- 11.5. Where the Scheme Administrator becomes aware that a Group Member is under a legal incapacity, the Scheme Administrator may rely on information, instructions, and/or declarations from and steps taken pursuant to this Settlement Scheme:
- (a) by a person who appears authorised to manage the legal or financial affairs of the Group Member, for example as a result of an enduring power of attorney or an order of an appropriate tribunal or court; and
  - (b) pursuant to section 14 of the Act, the Scheme Administrator may act on the basis that there is dispensation with the requirements of sections 76(3) and 160(2) of the Act, and instead the Registrant's or Participating Group Member's claim will be taken to have been approved by the Court if the Scheme Administrator assesses and determines the Registrant's or Participating Group Member's claim in accordance with the provisions of this Settlement Scheme as if it had been provided by the Registrant or Participating Group Member themselves.

#### **Supporting evidence**

- 11.6. Where a person participates in the Settlement Scheme on behalf of another person who is a Registrant/Participating Group Member in accordance with clause 11, the

Scheme Administrator may:

- (a) require the person to provide supporting documentary evidence and/or a statutory declaration to show that they are so authorised to act, or
- (b) exercise its discretion to amend any requirements for documentation, taking into consideration the estimated Distribution and/or to ensure the efficient and effective resolution of claims.

## **12. RIGHTS AND OBLIGATIONS OF PARTICIPATING GROUP MEMBERS**

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### **Cooperation of Participating Group Members**

12.1. Each Registrant and Participating Group Member must cooperate with the Scheme Administrator and take all steps that they are required to take pursuant to this Settlement Scheme and/or that are reasonably requested or directed by the Scheme Administrator, including:

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

and each Registrant and Participating Group Member must do so:

- (f) complying to the best of their 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 by the Scheme Administrator.

### **Obligation regarding honesty**

12.2. In fulfilling the obligations in clause 12.1, each Registrant and Participating Group Member must act honestly and must take all reasonable steps to ensure that any of their agents or representatives likewise act honestly.

### **Failure to comply**

12.3. Non-Responsive Group Members and Withdrawn Group Members will have their claims assessed as \$0 by the Scheme Administrator. Where a Participating Group Member becomes a Non-Responsive Group Member or a Withdrawn Group

Member after the Scheme Administrator has issued a Notice of Assessment, the Scheme Administrator can issue a new Notice of Assessment assessing the claim as \$0.

- 12.4. For the avoidance of doubt, a Non-Responsive Group Member or Withdrawn Group Member will not be entitled to recover any amount they might have received pursuant to this Settlement Scheme, but for a failure to comply with the requirements under this Settlement Scheme, in any future distribution of moneys.

#### **Forfeiture of Distribution**

- 12.5. A Participating Group Member may notify the Scheme Administrator in writing that they wish to forfeit their Interim Distribution Amount or Distribution Amount. Any Interim Distribution Amount or Distribution Amount forfeited by a Participating Group Member will form part of the Residual Settlement Distribution Fund Sum to be distributed in accordance with clause 8.2. The Participating Group Member's decision to forfeit their Distribution is final and the Participating Group Member will not be entitled to recover any amount they might have received pursuant to this Settlement Scheme, but for their decision to forfeit, in any future distribution of moneys.

#### **Participating Group Members indemnify the Scheme Administrator**

- 12.6. If a Participating Group Member has a legal obligation by reason of receiving a Distribution pursuant to this Settlement Scheme, whether under statute or contract or otherwise to any agency, payer, or insurer, to pay or repay a sum from their Distribution payment and they do not notify the Scheme Administrator of such obligation prior to receiving a Distribution pursuant to this Settlement Scheme, the Participating Group Member indemnifies and holds harmless the Scheme Administrator from and against any claim associated with that legal obligation.

### **13. COSTS**

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

- 13.1. Subject to other provisions of this Settlement Scheme, Administration Costs are to be paid:
- (a) to the Scheme Administrator on a "solicitor and own client" basis; in the event that the Scheme Administrator is a legal practice, or on such other reasonable basis as the Court considers appropriate if the Scheme Administrator is not a legal practice;
  - (b) in the first instance, from any interest earned on the Settlement Reserve Fund

and the Settlement Distribution Fund, unless the Scheme Administrator otherwise determines, and thereafter from the remainder of the Settlement Sum;

- (c) in such amounts as are approved by the Court from time to time during the implementation of this Settlement Scheme; and
- (d) in the event the Scheme Administrator is the Solicitors, at the hourly rates set out below or at such other rates that are approved by the Court from time to time, and in the event that the Scheme Administrator is not a legal practice on such other basis as the Court may approve:

<b>Position</b>	<b>Hourly rate (100%) (ex GST)</b>
Principal / Special Counsel / Settlement Claims Manager > 15 years	\$ 905.00
Principal / Special Counsel / Settlement Claims Manager < 15 years	\$ 825.00
Senior Associate	\$ 670.00
Associate	\$ 615.00
Solicitor	\$ 500.00
Trainee Lawyer / Law Graduate	\$ 400.00
Law Clerk / Paralegal	\$ 285.00
Lit Tech Consult / Data Analyst / Legal Engineer / Business Analyst	\$ 275.00
Client Services Officer / Business Analyst	\$ 205.00

### **Cost of Reviews**

- 13.2. For the avoidance of any doubt and subject to clause 13.1, the costs associated with a Review (including the reasonable fees of a Review Assessor, if engaged by the Administrator) are Administration Costs, except to the extent covered by a payment from a Registrant or Participating Group Member (including the amount of any bond that is not refunded to the Registrant or Participating Group Member).

### **Costs of lawyers other than the Scheme Administrator**

- 13.3. Nothing in this Settlement Scheme prevents a Registrant or Participating Group Member from retaining or seeking advice in respect of this settlement from a lawyer who is not performing the role of Scheme Administrator, except that the Registrant or Participating Group Member:
- (a) does so at their own cost; and
  - (b) is not entitled to recover any legal costs from the Scheme Administrator and any such legal costs must not be treated as Administration Costs unless the Scheme Administrator made a written request that the Registrant or Participating Group Member's lawyer carry out the legal work in question.

### **14. COURT SUPERVISION**

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- 14.1. The Scheme Administrator may refer any issues arising in relation to the Settlement Scheme or the administration of the Settlement Scheme to the Court for determination.
- 14.2. On the application of the Scheme Administrator, or of its own motion, the Court may vary or amend the terms of this Settlement Scheme.
- 14.3. Any costs incurred by the Scheme Administrator in any such reference to the Court, or in any application made by the Scheme Administrator, will be deemed to be Administration Costs, unless the Court otherwise orders.
- 14.4. Within ten (10) business days of the completion of the administration of this Settlement Scheme the Scheme Administrator will inform the Court and the Parties in writing that this has occurred.

### **15. IMMUNITY FROM CLAIMS**

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- 15.1. The completion of the distribution of the Settlement Distribution Fund will satisfy any and all rights, claims, or entitlements of all Registrants and Participating Group Members in or arising out of the Proceeding.
- 15.2. The Scheme Administrator will have no liability to any Registrant or Participating Group Member who does not receive a Distribution or receives a Distribution in an incorrect amount arising from:
- (a) incorrect or otherwise insufficient bank account information provided by the Registrant or Participating Group Member or persons acting on their behalf;
  - (b) fraudulent conduct of a party other than the Scheme Administrator;
  - (c) an electronic funds transfer using the bank account information provided by the

- Participating Group Member or persons acting on their behalf;
- (d) a failure to receive a communication described in the Settlement Scheme or who, for any other reason, failed to submit documentation to the Scheme Administrator, Review Assessor, or the Court within a time limit set under the Settlement Scheme; and/or
  - (e) any error or omission by the Scheme Administrator or Review Assessor made in good faith.

## **16. NOTICES**

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- 16.1. Any notice or communication to be given pursuant to this Settlement Scheme, sent by the Scheme Administrator, will be deemed given and received for all purposes associated with this Settlement Scheme if it is:
- (a) addressed to the person to whom it is given; and
  - (b) either:
    - i. sent by email to that person's email address as nominated by or on behalf of the Registrant or Participating Group Member and recorded on the Claims Database and no email "undelivered" reply is received by the Scheme Administrator; or
    - ii. sent by pre-paid mail, to that person's postal address as nominated by or on behalf of the Registrant or Participating Group Member and recorded on the Claims Database and the notice is not returned to the Scheme Administrator.
- 16.2. Any notice or communication that complies with this clause will be deemed to be given and received:
- (a) if it was sent by email, at the time it was sent;
  - (b) if it was sent by mail to an addressee in Australia, three clear Business Days after being sent; or
  - (c) if it was sent by mail to an addressee overseas, five clear Business Days after being sent.
- 16.3. For the avoidance of doubt, if a notice or communication is undelivered by email or post in accordance with clause 16.2, and a Registrant or Participating Group Member has not informed the Scheme Administrator of any change in their contact details in accordance with clause 12.1(d), the Scheme Administrator will determine, in its absolute discretion, whether the notice or communication:

- (a) will be sent via alternative means; or
  - (b) is deemed to have been given in accordance with clause 16.2.
- 16.4. If the Scheme Administrator exercises its discretion under clause 16.3(b) and deems a notice or communication to be given, that Registrant or Participating Group Member will be a Non-Responsive Group Member.
- 16.5. The Scheme Administrator is required to accept changes to address details provided and verified by Registrants or Participating Group Members up until the point of Distribution.
- 16.6. The Scheme Administrator's contact details are as follows unless and until the Scheme Administrator notifies the sender otherwise:
- 16.7. By mail:
- NSW Junior Doctors Class Action (Settlement Administration Team)  
Maurice Blackburn  
Level 21, La Trobe Street  
MELBOURNE VIC 3000
- 16.8. By email: [nswjuniordoctors@mauriceblackburn.com.au](mailto:nswjuniordoctors@mauriceblackburn.com.au)

## **17. TIME**

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- 17.1. The time for doing any act or thing under this Settlement Scheme may be extended by the Scheme Administrator in its absolute discretion.
- 17.2. The time for doing any act or thing under this Settlement Scheme may be extended by order of the Court.



## Annexure A – Loss Assessment Formula

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### 1. Unrostered overtime

- 1.1 Each Participating Group Member’s preliminary entitlement in respect of unpaid, unrostered overtime (including time required to be worked during meal break periods on day shifts, Mondays to Fridays) for each calendar year will be calculated pursuant to methods 1 and 2 below.
- 1.2 Method 1: The Participating Group Member’s preliminary entitlement for unrostered overtime for each fortnight that they were employed by the Defendants as a Junior Medical Officer during the Claim Period will be calculated as follows

*Average hours \* Rate of pay \* Full-time equivalent load = Preliminary entitlement for unrostered overtime for the fortnight*

Method 2: The sum of all amount/s calculated pursuant to method 1 for each calendar year will be multiplied by the Weighting assigned to that calendar year.

<b>Term</b>	<b>Meaning</b>
Average hours	The estimated average number of 9.48 hours of unpaid, unrostered overtime worked per junior medical officer per fortnight during the Claim Period.  It is important to note that this estimate is <b>not</b> an entitlement. The entitlement of each Participating Group Member cannot be quantified because (1) there are no records or data that would enable actual or average actual hours to be determined; (2) each Participating Group Member’s experience and working hours are different; and (3) it will be reduced to reflect the fact that some of the time spent by Participating Group Members at hospitals would not be overtime for which an amount is payable under the applicable version of the <i>Public Hospital Medical Officers (State) Award</i> .
Rate of pay	The hourly rate of pay set out in the applicable version of the <i>Health Professional and Medical Salaries (State) Award</i> for the Participating Group Member’s Classification during the fortnight.
Classification	Any of the following categories of junior medical officer: intern, resident (1 <sup>st</sup> year – 4 <sup>th</sup> year), registrar (1 <sup>st</sup> year – 4 <sup>th</sup> year), or senior registrar.
Full-time equivalent load	The Participating Group Member’s ordinary hours of work during the fortnight divided by 80.
Weighting	An adjustment made to reflect the fact that less unrostered overtime was claimed by, and paid to, Participating Group Members before 2019 than after it because of the introduction of UROC and the expansion of the categories of authorised unrostered overtime in the policy directives.

### 2. Meal breaks

- 2.1 Each Participating Group Member’s preliminary entitlement in respect of meal breaks on shifts other than day shifts, Mondays to Fridays, for each calendar year

will equal the sum of any amount/s calculated pursuant to methods 3 and 4 below for that calendar year.

- 2.2 Method 3: Where HealthRoster data is available for the whole of a fortnight, the Participating Group Member's preliminary entitlement in respect of meal breaks on shifts other than day shifts, Mondays to Fridays, for that fortnight will be calculated as the sum of the following amounts.

*Where the Participating Group Member was rostered to:*

- (a) *start a shift before 8am or end a shift after 6pm on Mondays to Fridays; or*
- (b) *a shift on Saturdays or Sundays; and*

*30 or 60 minutes was deducted from that shift for a meal break, the amount of that deduction.*

- 2.3 Method 4: Where HealthRoster data is unavailable for the whole or part of a fortnight during which the Participating Group Member worked, their preliminary entitlement in respect of meal breaks on shifts other than day shifts, Mondays to Fridays, for that fortnight will be calculated as follows.

*The average of all Participating Group Members preliminary entitlements in respect of meal breaks calculated pursuant to method 1 on a per fortnight basis \* the number of fortnights during which the Participating Group Member worked but HealthRoster data is unavailable for the whole or part of those fortnights.*

### **3. Rostered overtime**

- 3.1 Each Participating Group Member's preliminary entitlement in respect of underpayment of rostered overtime for each calendar year will equal the sum of any amount/s calculated pursuant to the method below.

- 3.2 For each fortnight in the calendar year:

- (a) *Calculate the total number of paid hours for the fortnight ('A').*
- (b) *Treat the following as overtime:*
  - (i) *time designated as overtime hours in the Defendants' payroll data;*
  - (ii) *time worked in excess of 10 hours per effective start date; and*
  - (iii) *time worked in excess of 10 days for the fortnight (allocating the shortest worked day/s to overtime) ('B').*
- (c) *A – contracted fortnightly hours = the total number of overtime hours for the fortnight ('C').*
- (d) *C – B = residual overtime hours ('D'). Where B is greater than C, D is zero.*
- (e) *B + D = total overtime hours ('E').*
- (f) *Apply the following multipliers to E:*
  - (i) *1.5 x multiplier to the first two hours (or part thereof); and*

(ii)  $2.0 \times \text{multiplier to any additional time ('F')}$ .

(g)  $F + \text{contracted fortnightly hours} = \text{total but for effective hours ('G')}$ .

(h) Calculate the effective number of paid hours for the fortnight (where 1 hour paid at ordinary time = 1 hour; 1 hour paid at 1.5 x multiplier = 1.5 hours; and 1 hour paid at 2.0 x multiplier = 2 hours) ('H').

(i)  $G - H = \text{shortfall in paid hours for the fortnight ('I')}$ .

(j)  $I * \text{Rate of pay} = \text{preliminary entitlement to compensation for underpayment of rostered overtime for the fortnight}$ .

#### **4. Interest**

4.1 For each calendar year in the Claim Period, the sum of the Participating Group Member's preliminary entitlement/s to unrostered overtime, meal breaks, and rostered overtime for that calendar year will be multiplied by the interest weighting assigned to that calendar year.

#### **5. Apportioning the Residual Settlement Distribution Fund Sum**

5.1 The Residual Settlement Distribution Fund Sum will be apportioned between Participating Group Members according to the following method.

(a) The sum of a Participating Group Member's preliminary entitlements to unrostered overtime, meal breaks, rostered overtime, and interest ('J').

(b) The sum of all Participating Group Members' preliminary entitlements to unrostered overtime, meal breaks, rostered overtime, and interest ('K').

(c) Residual Settlement Distribution Fund Sum ('L').

(d)  $(J / K) * L = \text{the Participating Group Member's Distribution (i.e., their share of the total monies available to all Participating Group Members)}$ .