

Casey v DePuy International Limited and Johnson & Johnson Medical Pty Ltd
Federal Court of Australia, Proceeding ACD 10 of 2010

COMPENSATION PROTOCOL

1. INTRODUCTION AND OVERVIEW

- 1.1 The Liability Protocol provides a regime for assessing whether Group Members in the Proceeding are eligible to receive compensation. This Compensation Protocol:
- (a) only applies to Eligible Group Members;
 - (b) provides a regime for assessing and processing the compensation entitlements of Eligible Group Members pursuant to the settlement of the proceeding.
- 1.2 The Compensation Protocol provides for four different categories of claims as set out in clause 3.1.
- 1.3 The Compensation Protocol provides for:
- (a) compensation for non-economic loss and Gratuitous Care to be determined in accordance with clause 4 below;
 - (b) compensation for financial losses to be determined in accordance with clause 5 below.
- 1.4 Section 6 sets out the procedure for assessing a claim. If there is a dispute between the parties in relation to an Eligible Group Member's entitlements or assessment, the dispute is to be resolved by Independent Counsel in accordance with clause 10.
- 1.5 The Compensation Protocol also provides, subject to conditions, for a single advance payment of \$15,000 to Eligible Group Members suffering financial hardship (clause 7), claims by the estates of Eligible Group Members (clause 9), processes for persons under a legal incapacity (clause 11) and the costs of making claims (clause 13).

2. INTERPRETATION

Affected Implant has the meaning given in the statement of claim filed by the applicant on 7 September 2010. For the purpose of this Compensation Protocol, it does not include any other components of a prosthesis of which an LCS ® Duofix™ Femoral Component constituted a part.

Assessor has the meaning given in the Liability Protocol.

Date of Assessment means the date on which an Eligible Group Member's compensation is finally determined pursuant to this Compensation Protocol, being the date on which (as applicable):

- (a) the Respondents, or either one of them, notify an Eligible Group Member that their claim is accepted; or
- (b) the Eligible Group Member accepts an offer by the Respondents; or
- (c) a dispute concerning the amount of compensation is determined by Independent Counsel.

Eligible Group Member means a Group Member who has been assessed pursuant to the Liability Protocol as being eligible to receive compensation.

Gratuitous Care means past gratuitous attendant care services within the meaning of the TPA.

Group Member means a group member in the proceeding, as defined in the further amended originating application to be filed in the Proceeding.

Group Member's lawyer means the legal representative of an Eligible Group Member or, where the Group Member has not appointed a lawyer, the Eligible Group Member.

Maurice Blackburn means Maurice Blackburn Pty Ltd (ACN 105 657 949), the solicitor for the applicant and some Eligible Group Members.

NRA means Norton Rose Australia, the solicitors for the Respondents.

Proceeding means *Casey v DePuy International Limited and Johnson & Johnson Medical Pty Ltd*, Federal Court of Australia Proceeding ACD 10 of 2010.

Respondents means DePuy International Limited and Johnson & Johnson Medical Pty Ltd whether together or separately and where a clause provides that the Respondents will do something the Respondents are jointly and severally responsible for doing that thing.

Revision means the surgical removal of an Affected Implant and/or the tibial component and/or the patellar component of the prosthesis of which the Affected Implant constituted a part and it also includes the primary implantation of a patella resurfacing prosthesis.

Surgical Procedure means an invasive surgical procedure involving one or more of the following:

- (a) arthroscopy;
- (b) arthroscopic wash-out;
- (c) arthroscopic aspiration;

- (d) arthroscopic instillation;
- (e) arthroscopic biopsy;
- (f) arthroscopic synovectomy;
- (g) manipulation under general anaesthetic;
- (h) removal of ectopic bone;
- (i) revision of the ultrahigh molecular polyethylene component of the prosthesis of which the Affected Implant constituted a part;
- (j) biopsy;
- (k) staged removal of internal fixation;
- (l) synovectomy; or
- (m) scar excision.

TPA means the *Trade Practices Act 1974* (Cth) as in force immediately before 1 January 2011.

3. DETERMINATION OF CATEGORY OF CLAIM

3.1 An Eligible Group Member will be assessed in accordance with this clause 3 as falling into one of the following categories (**Categories**):

- (a) **Category A:** Any Eligible Group Member who does not meet the criteria for Categories B, C or D of the Compensation Protocol;
- (b) **Category B:** Any Eligible Group Member who has undergone one Revision plus one other Surgical Procedure consequent on the Affected Implant;
- (c) **Category C:** Any Eligible Group Member who has undergone one Revision plus two or three other Surgical Procedures consequent on the Affected Implant;
- (d) **Category D:** Any Eligible Group Member who meets one or more of the following criteria:
 - (i) has undergone one Revision plus four or more other Surgical Procedures consequent on the Affected Implant; and/or
 - (ii) has undergone more than one Revision consequent on the Affected Implant; and/or

- (iii) has experienced extraordinary and significant complications or injury in excess of that to which Eligible Group Members in Category A, B or C would experience as a result of failure of an Affected Implant.

3.2 For the purpose of assessing the applicable Category pursuant to clause 3.1:

- (a) where an Eligible Group Member's tibial component and/or patellar component was revised during the same operation as the revision of the Affected Implant, the operation will be counted as one Revision; and
- (b) a Surgical Procedure will not be taken into account in assessing the Category if the Eligible Group Member underwent the Surgical Procedure either:
 - (i) during the same operation as a Revision; or
 - (ii) within seven days before or after a Revision and during the same period of hospitalisation;
- (c) where an Eligible Group Member underwent more than one Surgical Procedure during the same operation, the operation will be counted as one Surgical Procedure; and
- (d) for the avoidance of doubt, the primary implantation of a patellar resurfacing prosthesis will not be counted as a Revision if it was not consequent on an Affected Implant.

3.3 Within three months of either of the following dates (whichever is later):

- (a) the determination that an Eligible Group Member is eligible in accordance with the Liability Protocol to receive compensation; or
- (b) the Eligible Group Member's injuries stabilising,

the Group Member's lawyer will provide to NRA (insofar as they have not previously been provided to NRA) medical records confirming the Surgical Procedures and/or Revisions the Eligible Group Member underwent consequent on the Affected Implant.

3.4 Within one month of the Group Member's lawyer either providing medical records to NRA in accordance with clause 3.3 or notifying NRA that there are no additional medical records to be provided:

- (a) the Group Member's lawyer will notify NRA if the Eligible Group Member considers that they fall within Category D(iii); or
- (b) in the absence of a notification pursuant to clause 3.4(a), the Category that is applicable to the Eligible Group Member will be determined according to the following procedure:

- (i) in the first instance, the Group Member's lawyer and NRA will seek to agree on whether the Eligible Group Member falls into Category A, Category B, Category C, Category D(i) or Category D(ii);
- (ii) if the Group Member's lawyer and NRA are unable agree, the Group Member's lawyer will within a further seven days request a report from the Eligible Group Member's treating surgeon concerning the number of Surgical Procedures and/or Revisions which the treating surgeon considers the Group Member has undergone; and
- (iii) if the Eligible Group Member's treating surgeon is unwilling or unable to provide a report pursuant to clause 3.4(b)(ii) or if on receipt of the treating surgeon's report the Group Member's lawyer and NRA are still unable to agree, the Group Member's lawyer will within a further fourteen days issue a request in the form of **Schedule A** for a report from an Assessor who will be:
 - A. if an Assessor was engaged to assess the Eligible Group Member pursuant to the Liability Protocol, the same Assessor; or
 - B. if an Assessor was not engaged to assess the Eligible Group Member pursuant to the Liability Protocol, an Assessor allocated by NRA using the procedure set out in the Liability Protocol for the appointment of Assessors; and
- (iv) in the unlikely event that the applicable Category remains in dispute after receipt of the report from the Assessor, Independent Counsel will be requested to determine the dispute in accordance with clause 10;
- (v) the onus is on the Eligible Group Member to establish, on the balance of probabilities, that the Revision and/or Surgical Procedures are consequent on the Affected Implant.

4. COMPENSATION FOR NON-ECONOMIC LOSS AND GRATUITOUS CARE

- 4.1 Eligible Group Members are entitled to compensation for non-economic loss and Gratuitous Care in accordance with the following table:

Category	Non economic loss and Gratuitous Care
Category A	\$30,000
Category B	\$40,000
Category C	\$65,000

Category	Non economic loss and Gratuitous Care
Category D(i)	Individual assessment
Category D(ii)	Individual assessment
Category D(iii)	Individual assessment

4.2 If an Eligible Group Member notified NRA in accordance with clause 3.4(a) that they consider that they fall within Category D(iii):

- (a) the Eligible Group Member bears the burden of establishing their entitlement to more compensation than they would have received under this protocol if they had not elected to be assessed under Category D(iii); and
- (b) if the Eligible Group Member fails to discharge this burden, they will be entitled to receive the compensation that they would have otherwise received if they had not elected to be assessed under Category D(iii).

4.3 Where an Eligible Group Member has undergone revision surgery in respect of two Affected Implants (that is, one in each knee):

- (a) the table in clause 4.1 will be used to calculate the Eligible Group Member's compensation for non-economic loss and Gratuitous Care in respect of each knee and these amounts will then be added together; and
- (b) if the surgeries occurred at the same time or during the same admission to hospital , a discount of 25 percent will be applied to the aggregate amount;
- (c) if the surgeries did not occur at the same time or during the same admission to hospital but the second surgery did occur within 6 months of the first surgery, a discount of 12.5 per cent will be applied to the aggregate amount.

4.4 If compensation for non-economic loss and Gratuitous Care is to be individually assessed pursuant to clause 4, the compensation will be determined or assessed in accordance with the provisions and principles for the assessment of non-economic loss and Gratuitous Care in Part VIB of the TPA.

5. COMPENSATION FOR FINANCIAL LOSSES

5.1 The compensation payable to an Eligible Group Member for financial losses will be calculated, determined or assessed pursuant to the provisions and principles for the assessment of damages or compensation for personal injury in Part VIB of the TPA.

5.2 The losses recoverable will be limited to losses which, on the balance of probabilities, were caused by the Eligible Group Member having been the recipient of an Affected Implant, after taking into account the effect of any unrelated contributing causes.

5.3 “**Third Party**” means any:

- (a) government department or agency;
- (b) insurer, including a private health insurer or worker’s compensation insurer; or
- (c) worker’s compensation authority.

Out-of-pocket expenses

5.4 The Respondents will pay reasonable out-of-pocket expenses incurred and/or paid and/or to be paid by an Eligible Group Member or by a Third Party on behalf of an Eligible Group Member.

5.5 The Respondents will not pay and will not be liable for medical and other health care costs relating to the surgery during which the Affected Implant was surgically implanted.

Economic loss

5.6 The Respondents will pay reasonable lost income, sick leave, holiday leave, superannuation entitlements or other economic loss of an Eligible Group Member arising out of that Eligible Group Member’s past or future loss of earnings.

Interest

5.7 The Respondents will pay interest, calculated in accordance with Part VIB of the TPA, on any amount payable under clauses 5.4 and 5.6 up to the Eligible Group Member’s Date of Assessment.

5.8 Interest will not be payable on any amount paid by a Third Party.

Miscellaneous

5.9 Payments made by the Respondents pursuant to clauses 4.1, 5.1, 5.4 and 5.6 are inclusive of all payments made by the Respondents as set out in a Schedule B list relating to the Eligible Group Member.

6. PROCEDURE FOR ASSESSING COMPENSATION ENTITLEMENTS

6.1 Within one month of the determination of the Category that is applicable to the Eligible Group Member:

- (a) NRA will notify the Eligible Group Member's lawyer whether or not the Respondents have paid any of the Eligible Group Member's treatment costs and associated expenses in accordance with existing funding arrangements; and
- (b) if so, NRA will provide to the Eligible Group Member's lawyer a list, in the form of **Schedule B**, of any payments made by the Respondents to the Eligible Group Member or a third party.

6.2 Within three months of receiving notification in accordance with clause 6.1, the Eligible Group Member's lawyer will provide the following information and documents (**Claim Documents**) to NRA in so far as they are relevant:

- (a) particulars of any lost income, sick leave, other leave, superannuation or other economic loss claimed and documents in support of such a claim;
- (b) particulars of out-of-pocket expenses and documents in support of such a claim;
- (c) particulars of the cost of any care or services, other than Gratuitous Care, and documents in support of any claim for the cost of such care;
- (d) any relevant Notice of Charge under the *Health & Other Services (Compensation) Act 1995* (Cth);
- (e) any relevant notice served by Centrelink, workers compensation authority or insurer or other government department or related entity;
- (f) any other relevant documents in support of the Eligible Group Member's claim.

6.3 Where non-economic loss and Gratuitous Care are to be individually assessed:

- (a) the Eligible Group Member's Claim Documents will also include:
 - (i) an overview of the Eligible Group Member's relevant medical history and details of the symptoms and treatment relating to the failure of the Affected Implant;
 - (ii) any medical or expert reports, medical certificates and or medical records upon which the Eligible Group Member intends to rely;
 - (iii) particulars of any Gratuitous Care received by the Eligible Group Member or unable to be provided by the Eligible Group Member to another person as a consequence of the failure of the Affected Implant;
- (b) the timeframe for provision of the Claim Documents to NRA may be extended by the Eligible Group Member by an additional three months.

- 6.4 If the Claim Documents submitted by the Eligible Group Member are considered by the Respondents to be insufficient to enable an assessment of the Eligible Group Member's claim, within one month of receiving the Claim Documents the Respondents will request clarification of the Claim Documents and/or seek further particulars from the Group Member's lawyer and the Group Member's lawyer will endeavour to provide clarification and/or particulars.
- 6.5 If, after receiving clarification and/or particulars from the Eligible Group Member's lawyer pursuant to clause 6.4, the Respondents maintain that the Claim Documents are insufficient to enable an assessment of the Eligible Group Member's claim:
- (a) the Respondents:
 - (i) may, within one month, request documents or particulars from a third party and the Eligible Group Member will provide any authorities to the Respondents that are necessary to facilitate such requests; and if so
 - (ii) will request that the documents first be sent to the Eligible Group Member's lawyer, who will have five days from the date of receipt to notify the Respondents of any claim for legal professional privilege and who will otherwise forward the documents (other than the privileged documents) to the Respondents; and
 - (b) the Eligible Group Member may make a notification under clause 3.4(a) despite any earlier determination about the Category that is applicable to the Eligible Group Member; and
 - (c) within one month of the Eligible Group Member's Claim Documents being finalised in accordance with clauses 6.2, 6.3, 6.4 or 6.5(a) (as applicable), the Respondents may request the Eligible Group Member to attend any reasonable medical examination/s:
 - (i) the Respondents will arrange for the examination/s to occur as soon as possible but in any event within six months of the request made to the Eligible Group Member;
 - (ii) the Eligible Group Member must attend the examination/s and the Eligible Group Member's failure to do so without good reason will result in the Eligible Group Member's claim being suspended until such time as they agree to attend the examination/s; and
 - (iii) any report obtained by the Respondents as a result of such examination/s is to be provided to the Eligible Group Member's lawyer as soon as is practicable after receipt by the Respondents or either one of them.
- 6.6 Within one month of completing the steps in clauses 6.2, 6.3, 6.4 and/or 6.5 (as applicable), NRA will:

- (a) where non-economic loss and Gratuitous Care are *not* being individually assessed, advise the Eligible Group Member's lawyer whether the Respondents accept or dispute any of the claimed compensation for financial losses; and
 - (b) where non-economic loss and Gratuitous Care are being individually assessed, make an offer in writing to the Eligible Group Member's lawyer, who will, within one month of the date of the offer, notify NRA whether the offer is accepted or not.
- 6.7 If there is a dispute in relation to the quantum of an Eligible Group Member's claim, the parties will attempt to resolve the dispute by negotiation in good faith. If the parties are unable to resolve the dispute, it will be referred to Independent Counsel for resolution in accordance with clause 10.
- 6.8 The Respondents will pay the agreed or assessed amount of compensation to the Eligible Group Member in accordance with the Deed of Release that is executed pursuant to clause 12.1.

7. HARDSHIP PENDING RESOLUTION OF CLAIMS

- 7.1 An Eligible Group Member may make a request in writing to NRA for a single advance payment if he or she has suffered or is suffering financial hardship. The request shall set out the circumstances of the hardship.
- 7.2 Within 28 days of NRA receiving a request pursuant to clause 7.1 above, the Respondents will, if reasonably satisfied that there is hardship, pay the Eligible Group Member \$15,000 by way of an advance payment.
- 7.3 Any advance payment will be deducted from the compensation to be paid pursuant to this Compensation Protocol.
- 7.4 In the event that an advance payment is made under clause 7.2 but compensation is not paid pursuant to this Compensation Protocol, the advance payment must be repaid by the Eligible Group Member to the Respondents within 6 months of the date of the advance payment.

8. GROUP MEMBERS WHO CANNOT UNDERGO REVISION SURGERY

- 8.1 Where an Eligible Group Member cannot, for acceptable medical reasons, as provided pursuant to the Liability Protocol, undergo surgical revision of an Affected Implant, the Eligible Group Member will be deemed to fall within Category A.

9. ESTATES

- 9.1 A representative of the estate of a deceased Eligible Group Member is entitled to make a claim under this Compensation Protocol, subject to the following:

- (a) *non-economic loss and Gratuitous Care*: the Respondents will pay \$7,500 to the estate;
- (b) *financial losses*: the Respondents will compensate the estate for financial losses up to the date of death but will not compensate the estate for future financial losses.

10. INDEPENDENT COUNSEL

- 10.1 A barrister may at any time be appointed by agreement between the parties to perform the role of Independent Counsel. If the parties are unable to agree, the parties agree to accept a barrister nominated by the President of the NSW Bar Association.
- 10.2 Subject to clause 15.3 below, the following may be referred to Independent Counsel for determination:
- (a) a dispute as to the Category that is applicable to an Eligible Group Member;
 - (b) a dispute concerning the amount of compensation for financial losses; and
 - (c) a dispute concerning the amount of compensation for non-economic loss and/or Gratuitous Care where it is to be individually assessed.
- 10.3 If either party wishes to refer a matter to Independent Counsel for determination, the party intending to make the referral (**Referring Party**) shall notify the other party (**Other Party**) of its intention and shall include in the notification:
- (a) its final offer or position in respect of the matter in dispute; and
 - (b) the name of the proposed Independent Counsel.
- 10.4 Within 7 days of the notification pursuant to clause 10.3, the Other Party shall notify the Referring Party of:
- (a) its final offer or position in respect of the matter in dispute; and
 - (b) whether it accepts the Referring Party's proposal for Independent Counsel and, if not, its alternative proposal.
- 10.5 The final offers made in accordance with clause 10.3 and 10.4 are the offers that are to be taken into account for the purpose of determining which party is liable to pay the costs of the determination in accordance with clause 13.2.
- 10.6 If a dispute is referred to Independent Counsel for determination:
- (a) the Referring Party will provide Independent Counsel with a copy of this Compensation Protocol together with the Eligible Group Member's Claim

Documents (including any additional documents or particulars provided or obtained in accordance with clauses 6.2, 6.3, 6.4 and/or 6.5 above);

- (b) the parties may make written submissions to Independent Counsel and:
 - (i) submissions on behalf of the Referring Party are to be provided to Independent Counsel and the Other Party within seven days of the provision of the Claim Documents to Independent Counsel;
 - (ii) submissions on behalf of the Other Party are to be provided to Independent Counsel and the Referring Party within 14 days of the provision of the Claim Documents to Independent Counsel;
- (c) the determination by Independent Counsel will be in accordance with the principles and provisions for the assessment of compensation and damages for personal injury under Part VIB of the TPA, except insofar as those principles and provisions are inconsistent with this Compensation Protocol in which case this Compensation Protocol will prevail;
- (d) Independent Counsel will make a determination concerning any items in dispute and will provide a written assessment to the Eligible Group Member's lawyer and NRA within one month of receiving the Eligible Group Member's Claim Documents;
- (e) the assessment of a dispute by Independent Counsel is (subject to Court approval where required in accordance with clause 11) binding on the Eligible Group Member and the Respondents with no right of appeal except in relation to an error of law.

11. PERSONS UNDER A LEGAL INCAPACITY

- 11.1 This clause applies if an Eligible Group Member is a "person under a legal incapacity" within the meaning of the *Federal Court Rules 2011*.
- 11.2 If any entitlement to or assessment of compensation is subject to approval by the Court pursuant to rules 7.11 or 9.70 of the *Federal Court Rules 2011*, the parties will at the earliest opportunity join in supporting the Eligible Group Member's "litigation representative" or "interested person" to seek appropriate orders for approval of the relevant compensation payment.
- 11.3 Subject to clause 11.4 below, if the Court does not approve the payment to the Eligible Group Member, the claim will be referred back to the parties for renegotiation and the parties will again join in seeking appropriate orders for approval at the earliest opportunity after the agreement of the renegotiated payment.
- 11.4 In relation to compensation that had been assessed by Independent Counsel, if the Court does not approve the payment, the claim will be reassessed by Senior Counsel appointed by agreement between the parties or, in the absence of agreement, by

Senior Counsel nominated by the President of the NSW Bar Association. After assessment by Senior Counsel, the relevant parties will then again join in supporting the Eligible Group Member's "litigation representative" or "interested person" to seek appropriate orders for approval of the relevant compensation payment at the earliest opportunity after the claim has been reassessed.

12. RELEASE AND INDEMNITY

12.1 As soon as practicable after the Date of Assessment that is applicable to an Eligible Group Member, they will deliver to NRA an executed Deed of Release and Indemnity in the form attached as **Schedule C** (modified as appropriate in cases that involve allegations that a doctor or hospital was involved in causing loss or injury to the Eligible Group Member).

13. COSTS OF CLAIMS

13.1 Where a legal representative acts on behalf of an Eligible Group Member in making a successful claim pursuant to the Liability Protocol and pursuant this Compensation Protocol, the Respondents will pay the following costs (inclusive of the costs referred to in clause 8 of the Liability Protocol):

- (a) professional fees for each stage of the assessment process as set out in **Schedule D**;
- (b) all disbursements reasonably incurred, including, the reasonable costs of obtaining medical records and the cost of an assessment by the Eligible Group Member's treating surgeon or an Assessor, as set out in **Schedule D**;
- (c) the costs of any medical examination pursuant to clause 6.5(b) including reasonable travel and accommodation expenses, will be paid directly by the Respondents;
- (d) where the parties are required to take steps pursuant to clause 11 above, the Respondents will pay the Eligible Group Member's reasonable costs of taking those steps on a party/party basis;
- (e) where an Eligible Group Member or the Respondents make an application to the Court pursuant to clause 15.6(c) or clause 15.7, costs of the application will be determined by the Court.

13.2 If Independent Counsel is requested to determine a dispute, the costs of Independent Counsel and the costs incurred by the parties after the referral to Independent Counsel was served, will be paid:

- (a) up to the date of referral, in accordance with Schedule D;
- (b) by the Eligible Group Member if Independent Counsel's determination is less favourable to the Eligible Group Member than any offer made by the

Respondents, with the Respondents' additional costs to be paid on an indemnity basis;

- (c) by the Respondents if Independent Counsel's determination is more favourable to the Eligible Group Member than any offer made by the Eligible Group Member in respect of the disputed item, with the Eligible Group Member's additional costs to be paid on an indemnity basis; and
- (d) in any other case, the costs of Independent Counsel will be paid jointly and each party will bear their own costs incurred after the date of referral.

13.3 Any costs payable by the Eligible Group Member under clause 13.2(b) shall be paid through deduction of the amount of the costs payable from the amount otherwise payable to the Eligible Group Member under this Compensation Protocol.

13.4 If the legal costs claimed under clause 13.2 are unable to be agreed:

- (a) the dispute will be determined by a costs assessor agreed by the parties;
- (b) the referral shall be made in like manner as a referral to Independent Counsel, including the making of final offers;
- (c) the costs assessor will be requested to make a determination within one month of the referral and he or she will provide written notification of the determination to both parties; and
- (d) the costs of the costs assessor shall be paid by the party who obtains a less favourable outcome than their final offer and each party shall otherwise bear their own costs of the referral.

13.5 Where costs or disbursements are to be paid, they are to be paid in the amount fixed, agreed or assessed (whichever is later) within 30 days.

14. GROUP MEMBER CONTRIBUTIONS TO LEGAL COSTS INCURRED IN CONNECTION WITH THE PROCEEDING

14.1 Group Members who are entitled to receive compensation pursuant to this Compensation Protocol will make a contribution (**Costs Contribution**) to the payment of the unpaid portion of costs incurred by Pamela Casey in connection with the Proceeding up to the date of settlement agreement and owing to Maurice Blackburn together with interest on the amount that is unpaid from time to time (**Outstanding Costs**) as follows:

Category of Group Member	Costs Contribution
Category A	\$900
Category B	\$1,200
Category C	\$2,000
Category D	\$2,300

14.2 For ease of administration:

- (a) Maurice Blackburn will deduct the applicable Costs Contributions from the compensation amounts payable to Group Members who are its clients;
- (b) the Respondents will deduct the applicable Costs Contributions from the compensation amounts payable to Group Members who are not clients of Maurice Blackburn and the Respondents will then retain those Costs Contributions and every two months will pay the aggregate Costs Contributions to Maurice Blackburn;

14.3 Maurice Blackburn and the Respondents will cease deducting Costs Contributions from Group Members' compensation payments after the Outstanding Costs have been fully paid to Maurice Blackburn.

15. GENERAL

15.1 For the avoidance of doubt, the extent to which loss or injury arising out of any act or omission of any doctor or hospital in connection with the failure and/or revision of the Affected Implant or the components of the prosthesis of which the Affected Implant constituted a part will be compensable under this Compensation Protocol, will be determined according to the TPA and, to the extent that the application of the TPA draws on the common law, by reference to the common law in force as at 16 August 2012.

15.2 Where the context permits it, steps that need to be taken by an Eligible Group Member may be taken by the Eligible Group Member's legal representative.

15.3 A Group Member's lawyer and NRA will use their best endeavours to adhere to the timeframes stipulated in this Compensation Protocol.

15.4 If necessary, a Group Member's lawyer and NRA may at any time agree to extend the timeframes contemplated in this Compensation Protocol and neither the Eligible Group Member nor the Respondents will unreasonably refuse to extend a timeframe if requested by an Eligible Group Member or the Respondents.

- 15.5 Where an Eligible Group Member or Group Member's lawyer is in breach by more than 60 days of a timeframe stipulated in this Compensation Protocol as extended by any agreement pursuant to paragraph 15.4 and there is no reasonable explanation for the breach, the Respondents may apply to the Federal Court for orders seeking to strike out the Group Member's claim, alternatively seek directions from the Federal Court, including an order for costs.
- 15.6 In the event of any disagreement or dispute between an Eligible Group Member's lawyer and NRA as to the implementation, interpretation or application of this Compensation Protocol:
- (a) the Eligible Group Member's lawyer and NRA will use their best endeavours to seek to resolve the dispute;
 - (b) if the Eligible Group Member's lawyer and NRA are unable to resolve the dispute, advice may be sought from Independent Counsel;
 - (c) if the dispute remains unresolved, a party or an Eligible Group Member may apply to the Federal Court of Australia for orders.
- 15.7 An Eligible Group Member or the Respondents may apply to the Federal Court of Australia in respect of any point of law arising from the implementation of this Compensation Protocol in relation to the Eligible Group Member.

Schedule A**Letter from the Group Member's Lawyer to an Assessor
requesting a report on the number of Revisions and Surgical Procedures
[Clause 3.4(b)(iii) of the Compensation Protocol]**

[Omitting formal parts]

[Date]

[Assessor's name and address]

Dear [Salutation and Assessor's surname]

DePuy LCS Duofix femoral components - Compensation Protocol (Protocol)**Claimant: [Group Member's name]**

We act for [Name of Group Member].

[Salutation and Group Member's surname] was surgically implanted with a DePuy LCS Duofix femoral component on [date] and has been assessed as eligible to receive compensation under the Protocol.

[If applicable] We note that you were previously engaged by Norton Rose Australia to assess [Salutation and Group Member's surname] under a separate Liability Protocol.

In order to assist us in determining the amount of compensation to which [Salutation and Group Member's surname] is entitled under the Protocol, we ask you to provide us with a report in which you address the following questions:

1. How many "Revisions" did [Salutation and Group Member's surname] undergo?
2. How many "Surgical Procedures" did [Salutation and Group Member's surname] undergo consequent on their DePuy LCS Duofix femoral component?

For the purpose of the assessment we **enclose** the following materials:

- (a) [identify materials];
- (b) [etc].

For the purpose of preparing your report, please note the following definitions of "Revision" and "Surgical Procedure" under the Protocol:

A “**Revision**” is defined in the Protocol as the surgical removal of a DePuy LCS Duofix femoral component and/or the tibial component and/or the patellar component of the prosthesis of which the DePuy LCS Duofix femoral component constituted a part.

A “Revision” also includes the primary implantation of a patella resurfacing prosthesis if it was consequent on a DePuy LCS Duofix femoral component.

If the tibial component and/or patellar component was revised during the same operation as the revision of the LCS Duofix femoral component, the operation is to be counted as one Revision.

A “**Surgical Procedure**” is defined in the Protocol as an invasive Surgical Procedure involving one or more of the following:

- (a) arthroscopy;
- (b) arthroscopic wash-out;
- (c) arthroscopic aspiration;
- (d) arthroscopic instillation;
- (e) arthroscopic biopsy;
- (f) arthroscopic synovectomy;
- (g) manipulation under general anaesthetic;
- (h) removal of ectopic bone;
- (i) revision of the ultrahigh molecular polyethylene component of the prosthesis of which the Affected Implant constituted a part;
- (j) biopsy;
- (k) staged removal of internal fixation;
- (l) synovectomy; or
- (m) scar excision.

However, please note that a Surgical Procedure is *not* to be taken into account if [Salutation and Group Member’s surname] underwent the Surgical Procedure either:

- (a) during the same operation as a “Revision” (as defined above); or
- (b) within seven days before or after a “Revision” (as defined above) and during the same period of hospitalisation.

In addition, if the patient underwent more than one Surgical Procedure during the same operation, the operation will be counted as one Surgical Procedure.

Please provide a written report of your opinion to us within 28 days of receiving this letter and at the same time please also return the enclosed materials to us.

Yours faithfully

[Signature]

cc Norton Rose Australia

Schedule C

Release and indemnity
[Clause 12.1 of the Compensation Protocol]

[To be inserted]

Schedule D

**Professional fees and disbursements payable for each stage of legal work under the Liability Protocol and Compensation Protocol where a Group Member is assessed as being eligible for compensation
[Clause 13.1 of the Compensation Protocol]**

Professional fees

	Stage	Professional fees for the stage
1.	Liability: Notification of intention to make a claim under the Liability Protocol	
1.1	Notification of intention to make a claim pursuant to clause 3.1 of the Liability Protocol	\$485 + GST
2.	Liability: Assessment of liability under clause 5 of the Liability Protocol	
2.1	If the Respondents waive the need for liability assessment pursuant to clause 5.1 of the Liability Protocol <u>or</u>	\$122 + GST
2.2	If there is an Explant and: <ul style="list-style-type: none"> (a) liability <i>is</i> agreed pursuant to clauses 5.2(c) of the Liability Protocol; <u>or</u> (b) liability is agreed pursuant to clause 5.3(b) of the Liability Protocol; <u>or</u> (c) liability is <i>not</i> agreed pursuant to clause 5.2(c) of the Liability Protocol <u>and</u> further steps are taken pursuant to clause 5.2(c) <u>or</u> (d) liability is not agreed pursuant to clause 5.3(b) of the Liability Protocol and further steps are taken pursuant to clauses 5.3(b) of the Liability Protocol; <u>or</u> 	<ul style="list-style-type: none"> \$1940 + GST \$1700 + GST \$3750 + GST \$3750 + GST
2.3	If there is no Explant and liability assessment is carried out pursuant to clause 5.4 of the Liability Protocol	\$2170 + GST
3.	Liability: If applicable, assessment by an Assessor under clause 6 of the Liability Protocol	
3.1	Assessment by an Assessor	\$970 + GST
4.	Liability: If applicable, assessment by Special Assessors under clause 6 of the Liability Protocol	
4.1	Appointment of and assessment by Special Assessors pursuant to clauses 7.1 to 7.9 of the Liability Protocol; <u>and</u>	\$1090 + GST

	Stage	Professional fees for the stage
4.2	If necessary, provision of material sciences evidence to the Special Assessors pursuant to clause 7.10 of the Liability Protocol; <u>and</u>	\$1500 + GST
4.3	If necessary, resolution of dispute among the Special Assessors pursuant to clause 7.11 of the Liability Protocol	\$970 + GST
5.	Compensation: Determination of Category of claim under clause 3 of the Compensation Protocol	
5.1	Provision of materials pursuant to clause 3.2 of the Compensation Protocol and any notification pursuant to clause 3.3(a) of the Compensation Protocol; <u>and</u>	\$970 + GST
5.2	If no notification is made pursuant to clause 3.3(a) of the Compensation Protocol, negotiation as to whether a Group Member falls within Categories A, B, C, D(i) or D(ii) pursuant to clause 3.3(b)(i) of the Compensation Protocol; <u>and</u>	\$485 + GST
5.3	If necessary, obtaining a report from the Group Member's surgeon or an Assessor pursuant to clauses 3.3(b)(ii) or 3.3(b)(iii) of the Compensation Protocol	\$730 + GST
6.	Compensation: Assessment of quantum of claim under clause 6 of the Compensation Protocol	
6.1	Preparation and finalisation of quantum claim if non-economic loss and Gratuitous Care are <i>not</i> to be individually assessed pursuant to clause 4.1 of the Compensation Protocol; <u>or</u>	\$4,000 + GST
6.2	Preparation and finalisation of quantum claim if non-economic loss and Gratuitous Care <i>are</i> to be individually assessed pursuant to clause 4.1 of the Compensation Protocol; <u>and</u>	\$5700 + GST
6.3	If applicable and necessary for claims where non-economic loss and Gratuitous Care are to be individually assessed:	
	(a) providing clarification or further particulars pursuant to clause 6.4 of the Compensation Protocol; <u>and</u>	\$500 + GST
	(b) carrying out the steps in clause 6.5 of the Compensation Protocol	\$1,210 +GST
7.	Compensation: Referral to Independent Counsel	
7.1	Referral by the Group Member to Independent Counsel; <u>or</u>	\$970 + GST
7.2	Referral by the Respondents to Independent Counsel	\$485 + GST

NOTES:

1. Stages 2.1, 2.2(a), 2.2(b) and 2.3 are alternatives. Stages 6.1 and 6.2 are alternatives and stage 6.3 is an additional contingency in respect of clause 6.2.
2. Where the Respondents provide advice pursuant to paragraph 5.5 of the Liability Protocol, professional fees are payable up to and including the Stage at which the Respondents so advised.
3. The costs of any application to the Court under clause 11 of the Compensation Protocol in respect of persons under a legal incapacity are dealt with separately in clause 13 of the Compensation Protocol.
4. In relation to stage 7, costs incurred *after* the referral to Independent Counsel (including steps taken pursuant to clause 10.6 of the Compensation Protocol) are separately dealt with in clause 13.2 of the Compensation Protocol.

Disbursements

Disbursements, to the extent to which they have been properly and reasonably incurred, will be paid as follows:

1. Counsel's fees – for Category D claims, a reasonable amount
2. Courier – at cost
3. Facsimile – at cost
4. Medical reports and records, expert reports – a reasonable amount
5. Photocopying – maximum \$0.20 per page
6. Telephone – at cost
7. Travel and accommodation – at cost
8. Disbursements otherwise not provided – at cost, or otherwise a reasonable amount.