

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

Version 3  
Dated 14 June 2017

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

## Overview and summary

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

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

## **1. Definitions and interpretation**

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### **1.1 Definitions**

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

### **1.2 Interpretation**

In this Settlement Scheme:

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

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

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

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

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

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

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

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

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

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

- (a) preparation of Eligibility Books pursuant to clause 5.6;
- (b) preparation of Claim Books pursuant to clause 7.4;
- (c) resolution of Liens pursuant to clause 8; and
- (ca) subject to (d) – (h) below, any other functions that the Administrators determine may be delegated in order to promote the efficient administration of this Settlement Scheme

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

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

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

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

- (a) are subject to the same obligations, requirements and limitations that would apply pursuant to this Settlement Scheme to the Administrators if the relevant functions had not been delegated, including:
  - (i) the obligations in clauses 2.1(a) and 2.1(b);
  - (ii) any requirements arising from the implementation of clause 2.2(b); and
  - (iii) the restrictions in clauses 5.6(c), 7.5 and 7.6;
- (b) must work cooperatively with the Administrators in the performance of their delegated functions;

- (c) must promptly notify the Administrators if a Group Member purports to give DBH or LAM notice of:
  - (i) an election to receive a Fast Track Resolution pursuant to clause 6.3; or
  - (ii) a request for a Review pursuant to clause 9.2;
- (d) are to be paid for professional fees in accordance with clauses 13.1 or 13.2, as applicable, and (subject to clauses 2.4(e)-(g)) are to be paid their reasonable disbursements, with such costs to be treated as Administration Costs for the purpose of clause 13.1; and
- (e) must consult with and seek approval from the Administrators before invoking or relying on clauses 5.6(d)(ii), 5.6(d)(iii) or 7.5, and if DBH or LAM fail to do so the Administrators may in their absolute discretion decline to reimburse DBH or LAM for the costs of any report obtained pursuant to those clauses;
- (f) must consult with and seek approval from the Administrators before incurring a disbursement that is more than \$1,500, and if DBH or LAM fail to do so the Administrators may in their absolute discretion decline to reimburse DBH or LAM for such disbursements;
- (g) must take steps to minimise disbursements wherever possible.

## **2.5 Correction of errors**

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

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

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

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

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

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

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

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

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

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### **4.1 Registration of claims**

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

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

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

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

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

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

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

For the purpose of clause 4.3:

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

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

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

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

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

(a) illness or incapacity; or

(b) a prolonged absence from their usual place of residence,

except that the Administrators must not accept a late registration:

(c) if it is received by the Administrators more than 12 months after the date on which it was required to be effected pursuant to clause 4.3; and

(d) regardless of clause (c), if it is received by the Administrators after 30 June 2023.

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

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#### **5.1 Eligibility Criteria**

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

(a) the Group Member was implanted with one or more ASR Implants in Australia; and

(b) the Group Member underwent ASR Revision as defined in clause 5.2; and

(c) the ASR Revision was carried out earlier than thirteen (13) years after the Group Member was implanted with the ASR Implant that was the subject of the ASR Revision; and

(d) the ASR Revision was not an Ineligible Revision as defined in clause 5.3; and

(e) the Group Member has not:

(i) opted out of the ASR Class Action; and/or

(ii) entered into a deed of release with the Respondents or any of their related entities in respect of an ASR Claim (whether in Australia or elsewhere).

## 5.2 ASR Revision

An “**ASR Revision**” means either:

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

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

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



### 5.3 Ineligible Revisions

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

#### Fracture of the femoral neck

The ASR Revision:

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

#### Post-Operative Infection

The ASR Revision:

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

#### Unrelated Trauma

The ASR Revision:

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

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

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

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

### 5.4 Clarification regarding future ASR Revisions

For the avoidance of doubt:

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

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

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

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

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

## 5.6 Process for determining eligibility

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

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

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

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

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

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

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

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

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

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

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

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

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

## **6. Fast Track Resolution**

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

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

### **6.2 Fast Track Resolution**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **6.9 Discretion to accept late notification to withdraw election to receive a Fast Track Resolution**

If a Group Member:

- (a) has elected to receive a Fast Track Resolution pursuant to clause 6.3; and
- (b) subsequently notifies the Administrators that they wish to withdraw the election to receive a Fast Track Resolution,

the Administrators may in their absolute discretion accept this late notification to withdraw the election to receive a Fast Track Resolution, subject to clause 6.10.

#### **6.10 Circumstances where late notification to withdraw election to receive a Fast Track Resolution must not be accepted**

If the Administrators have:

- (a) resolved all Liens in relation to the Group Member's claim; or
- (b) paid the Group Member the Fast Track Resolution,

the Administrators must not accept the late notification to withdraw the election to receive the Fast Track Resolution pursuant to clause 6.9.

## **7. Assessment of compensation**

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

This clause 7 applies only to those Group Members who:

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

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

Group Members' claims will be assessed and determined:

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

except that:

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

### 7.3 Process for determining Group Members' claims

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

- (a) the Administrators will appoint a number of Assessors to a "**Panel**" for the purpose of assessing and determining Group Members' claims;
- (b) the Administrators will prepare "**Claim Books**" in accordance with clause 7.4;
- (c) the Administrators will allocate a Group Member's Claim Book to an Assessor who is randomly selected from the Panel;
- (d) if, after reviewing the Group Member's Claim Book, the Assessor considers that additional information or materials are needed in order to complete the assessment, the Assessor will inform the Administrators, who will:
  - (i) work cooperatively with the Assessor in order to address the issues raised by the Assessor; and
  - (ii) to the extent that it is necessary, supplement the Group Member's Claim Book;
- (e) the Assessor may also choose to confer with the Group Member or their personal or other representative;
- (f) the Assessor will then:
  - (i) make a determination as to the amount of compensation that the Group Member is assessed as being entitled to receive pursuant to this Settlement Scheme; and
  - (ii) prepare and provide to the Administrators a brief statement of reasons for the Assessor's determination, including details of the amounts assessed under all heads of damages;
- (g) after receiving an Assessor's determination and statement of reasons, the Administrators will promptly send to the Group Member a "**Notice of Assessment**" in which the Administrators:
  - (i) provide information to the Group Member about the determination of their entitlements under this Settlement Scheme;
  - (ii) enclose a copy of the Assessor's statement of reasons; and
  - (iii) provide information to the Group Member in relation to their right to seek a Review under clause 9.

### 7.4 Preparation of Claim Book

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



- (a) instructions and information from the Group Member;
- (b) information from any other person such as a family member or friend of the Group Member;
- (c) contemporaneous medical records, to the extent that those records have not already been obtained pursuant to clause 5.6(c);
- (d) tax returns and other tax, accounting or financial documents;
- (e) employment records or other information from the Group Member's employer/s;
- (f) invoices regarding any treatment or other expenses incurred by the Group Member;
- (g) subject to clause 7.7, information or records held by the Respondents as to the details of any payments made to the Group Member pursuant to the ASR Reimbursement Programme;
- (h) subject to clauses 7.5 and 7.6, reports from:
  - (i) a treating doctor;
  - (ii) an "**Independent Expert**", being a medical expert (such as an orthopaedic surgeon or rehabilitation physician) or allied health expert (such as an occupational therapist or physiotherapist); or
  - (iii) a forensic accounting expert.

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

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

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

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

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

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

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

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

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

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

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

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

#### **7.9 Role of Assessors**

Assessors appointed to the Panel:

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

## **8. Liens**

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

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

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

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

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

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

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

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

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

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

If a Lien is asserted by Medicare:

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

## **8.6 Cooperation of the Respondents**

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

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

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

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

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

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

- (c) any necessary statutory clearances (for example under the *Social Security Act 1991* (Cth)) have been obtained; and
- (d) to the extent that it is required by statute or contract, Residual Liens have been resolved

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

For the purpose of this clause 8:

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

## **8.9 Lien Disputes**

If:

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

then:

- (c) within ten (10) Business Days of an impasse being reached or there being unreasonable delay, the Administrators or the Respondents will refer the Lien

Dispute for determination by an independent barrister who is appointed by agreement between the Respondents and the Administrators;

- (d) a determination by an independent barrister is final and binding on the Respondents, the Group Member and the Administrators except as to an error of law;
- (e) the independent barrister's costs will be paid by either the Respondents or the Administrators, depending on whether the determination is, on balance, against the interests of the Respondents or the Group Member.

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

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

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

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

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

## **9. Review of determinations**

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

A Group Member has the right to seek a “**Review**” of any of the following determinations:

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

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

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

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

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

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

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

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

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

### **9.5 Process for Reviews**

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

- (a) the Administrators will engage a Review Assessor;
- (b) the Administrators will provide the following materials to the Review Assessor:
  - (i) the Group Member's written notice by which he or she requested the Review; and
  - (ii) either of the following, depending on the nature of the Review that is sought by a Group Member:
    - A. Eligibility Book and Notice of Eligibility; or
    - B. Claim Book and Notice of Assessment (including the Reviewer's statement of reasons);
- (c) save in exceptional circumstances, the Review Assessors must not consider any new evidence or additional materials that are not already included in the materials referred to in clause 9.5(b);
- (d) the Review Assessor will then:
  - (i) in an Eligibility Review, make a determination as to whether the Administrators made an error in applying the Eligibility Criteria;

- (ii) in a Compensation Review, make a determination as to the amount of compensation that the Group Member is assessed as being entitled receive pursuant to this Settlement Scheme, and in doing so the Review Assessor must only:
  - A. consider the issues in relation to which the Group Member seeks a Review; and
  - B. determine whether the Assessor made an error in applying the principles in clause 7.2; and
- (iii) in relation to either type of Review, prepare and provide to the Administrators a brief statement of reasons for the Review Assessor's determination and, if relevant, include details of the amounts assessed under all relevant heads of damages;
- (e) in carrying out a Compensation Review, a Review Assessor may determine that:
  - (i) the Group Member is entitled to more compensation than was initially assessed; or
  - (ii) the Group Member is entitled to less compensation than was initially assessed (subject to clause 7.2(c));
- (f) after receiving a Review Assessor's determination and statement of reasons, the Administrators will promptly send to the Group Member a "**Notice of Review**" in which the Administrators:
  - (i) provide information to the Group Member about the determination of their Review and the impact of that determination on the Group Member's entitlements under this Settlement Scheme; and
  - (ii) enclose a copy of the Review Assessor's statement of reasons.

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

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

## **9.7 Role of Review Assessors**

Review Assessors engaged by the Administrators:

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

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

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

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

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

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

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

### **10.3 Management of the Settlement Sum**

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

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

### **10.4 Payments to Group Members**

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

- (a) make payments of Fast Track Resolutions at any time, subject to clause 8;
- (b) subject to clause 8, make payments to individual Group Members in instalments, with a portion of Assessed Compensation Amounts to be withheld pending the assessment of additional Group Members, and those Assessed Compensation Amounts liable to be adjusted in light of such additional assessments; and
- (c) make payments to tranches of Group Members over time, provided that at least 100 Group Members have had their compensation assessed before the first tranche may be paid,



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

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

## **10.5 Payments to the Applicants**

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

*Note:* The intent of this clause is to enable expeditious partial payment to the Applicants. The rationale for this clause is that the Applicants' Claim Books may, as a result of the preparation of evidence for trial, be finalised earlier than the Claim Books of any Group Members and, as a result, there is no utility in deferring partial payment to the Applicants until at least 100 Group Members have had their compensation assessed.

## **10.6 Final compensation payments**

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

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

## **10.7 Adjustments to compensation payments**

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

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

## **10.8 Interim payments**

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

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

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

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

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

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

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

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

(e) executing documents,

and each Group Member must do so:

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

### **11.3 Obligation regarding honesty**

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

### **11.4 Failure to comply**

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

- (a) decline to accept the Group Member's registration or claim;
- (b) determine that the Group Member is not eligible to receive compensation pursuant to this Settlement Scheme;
- (c) apply a discount to the amount of compensation that the Group Member would otherwise be entitled to receive; or
- (d) determine that the Group Member's compensation is nil (\$0),

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

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

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

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

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

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

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

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

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

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

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

## **13. Costs**

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

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

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

<u>Role</u>	<u>Hourly rate (excluding GST)</u>
Principal or Partner	\$790
Special Counsel	\$720
Senior Associate	\$610
Associate	\$540
Lawyer	\$440

<u>Role</u>	<u>Hourly rate (excluding GST)</u>
Graduate Lawyer / Trainee Lawyer / Articled Clerk	\$350
Paralegal / Legal Clerk / Law Clerk	\$320
Litigation Technology Consultant	\$240

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

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

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

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

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

### **13.4 Costs of Reviews**

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

#### Eligibility Review

- (a) if a Group Member succeeds in an Eligibility Review:
  - (i) the costs of the Review will be Administration Costs; and
  - (ii) any bond paid by the Group Member will be returned to the Group Member;
- (b) if a Group Member fails in an Eligibility Review:

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

#### Compensation Review

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

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

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

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

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

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

Where the Administrators consider that:

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

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

## Schedule – Dictionary

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



**Term**

**Meaning**

**Assessed Compensation Amount**

The amount of compensation that was determined for a Group Member under clause 7.3 or, if applicable, clause 9.5, subject to any election made by the Group Member pursuant to clause 11.1

For the avoidance of doubt, Assessed Compensation Amount does not encompass or refer to a Fast Track Resolution

**Assessor**

A member of the Bar or a Senior Lawyer with substantial experience in personal injury litigation, and may include one or more Senior Lawyers who are employed by the Administrators or either of them

**Assumed Liens**

Liens asserted by a Qualified Lienholder with respect to an Eligible Claimant's payment under the Settlement Scheme established by this Deed for the reimbursement or payment of:

- (a) medical expenses associated with Covered Revisions and Covered Re-Revisions, provided:
  - (i) the Covered Revision or Covered Re-Revision was performed as a result of advice or a recommendation of an orthopaedic surgeon; and
  - (ii) the medical expenses relate to either:
    - A. radiological investigations (including x-rays, ultrasound scans, MRI scans or other radiological investigations), pathology tests (including metal ion testing) or consultations with an orthopaedic surgeon in order to determine whether revision surgery was advisable; or
    - B. treatment (for the avoidance of doubt including removal of an antibiotic spacer or open reduction of a dislocation) that was provided no later than one hundred and eighty (180) days after the Covered Revision; and
- (b) medical expenses directly associated with an ASR Implant that were incurred between 24 August 2010 and the date of a Covered Revision.

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

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

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

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

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

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

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

[End]