



Federal Court of Australia
District Registry: Victoria
Division: General

No: VID972/2018

HOLLY SOUTHERNWOOD
Applicant

BRAMBLES LIMITED
Respondent

ORDER

JUDGE: JUSTICE MURPHY

DATE OF ORDER: 08 May 2019

WHERE MADE: Melbourne

THE COURT ORDERS THAT:

Consolidation

1. Pursuant to Rule 30.11 of the *Federal Court Rules 2011* (the **Rules**) and section 33ZF of the *Federal Court of Australia Act 2011* (the **Act**), the proceeding *William Vincent Kidd and Mary Agnes Collum as Trustees for the Magness-Bennett Superannuation Fund v Brambles Limited* (VID 1006/2018 (**Kidd Proceeding**)) be consolidated with this proceeding (VID 972/2018) (**Southernwood Proceeding**) and the consolidated proceeding be known as *Holly Southernwood, and William Vincent Kidd & Mary Agnes Collum as Trustees for the Magness-Bennett Superannuation Fund v Brambles Limited* to be identified as VID 972/2018 (**Consolidated Proceeding**).
2. The applicant in the Southernwood Proceeding (the **Southernwood Applicant**) and the applicants in the Kidd Proceeding (the **Kidd Applicants**) are to be the joint representative applicants in the Consolidated Proceeding (the **Joint Applicants**).
3. Pursuant to rule 1.32 of the Rules and section 33ZF of the Act, Maurice Blackburn Pty Ltd (**Maurice Blackburn**) and Slater & Gordon Limited (**Slater and Gordon**) (together, **the Lawyers**) are granted leave to be jointly named as solicitors on the record for the Joint Applicants in the Consolidated Proceeding on the following bases:



- (a) a litigation committee will be established comprised of an equal number of solicitors from the Lawyers (with no more than three solicitors from each Lawyer), which will be responsible for making major strategic decisions, managing the litigation and allocating tasks between the Lawyers over the course of the litigation on an equal basis (calculated by reference to hours of work performed by each of the Lawyers), with the primary determinant of the allocation of work to be the interests of group members having regard to:
 - (i) the skills and experience of the Lawyers and their respective staff;
 - (ii) the objective of ensuring that the total legal costs are reasonable and proportionate; and
 - (iii) the objective of minimising, to the greatest extent possible, the legal costs incurred through overlapping or duplicated work;
- (b) the Lawyers will work together to reduce duplication in work, whilst ensuring that each has a sufficient degree of oversight over the work performed by the other;
- (c) the Lawyers will nominate one physical address and one email address for service on the Joint Applicants;
- (d) one set of counsel will be engaged to represent the Joint Applicants and the group members in the Consolidated Proceeding;
- (e) all correspondence and other communication from the Joint Applicants' solicitors to the Respondent's solicitors will be sent or made by only Maurice Blackburn or Slater and Gordon;
- (f) the Joint Applicants will jointly:
 - (i) make any interlocutory applications that are necessary in the Consolidated Proceeding save for any application in respect of non-common issues;
 - (ii) respond to any interlocutory applications filed by the Respondent in the Consolidated Proceeding;



- (iii) retain, brief and instruct expert witnesses in the Consolidated Proceeding; and
 - (iv) conduct the discovery process in the Consolidated Proceeding, including the coordination of electronic discovery, requests, processes and technology;
 - (g) the Respondent need only produce one set of discovery documents to the Joint Applicants in the Consolidated Proceeding; and
 - (h) by 4.00 pm on 13 May 2019 the Joint Applicants shall enter into a cooperative litigation protocol which shall address the manner in which the Lawyers are to cooperate in the conduct of the Consolidated Proceeding with the protocol to be filed with the Court on a confidential basis.
4. Costs incurred in the Kidd Proceeding and Southernwood Proceeding will be costs in the Consolidated Proceeding, other than costs thrown away due to the Kidd Applicants' amendment to their statement of claim.
5. In the event that the Joint Applicants in the Consolidated Proceeding are required to provide security for costs, Harbour and IMF (both as defined in the Funding Terms attached as Annexure A, '**Funding Terms**') will each provide a form of security for costs that shall be acceptable to the Respondent, or as otherwise ordered by the Court, and in the following proportions:
- (a) Harbour to provide 50%; and
 - (b) IMF to provide 50%.
6. In the event that an adverse costs order is made against the Joint Applicants in the Consolidated Proceeding, Harbour and IMF will each meet any such order in the following proportions:
- (a) Harbour to pay 50%; and
 - (b) IMF to pay 50%.

Common Fund Order

7. Subject to further order, pursuant to sections 23 and 33ZF of the Act and rule 1.32 of the Rules, the Funding Terms in Annexure A be approved and be binding upon the



Joint Applicants, the group members, IMF, Harbour, and the Lawyers (as defined in the Funding Terms).

8. Order 7 is subject to the provision of an undertaking by each of IMF, the Southernwood Applicant, Slater and Gordon, Harbour, the Kidd Applicants and Maurice Blackburn to each other and to the Court that they will comply with their obligations under the Funding Terms, being those in **Annexure A** (as may be further modified as the Court thinks fit).

Pleadings

9. Pursuant to rules 8.21 and 16.51 of the Rules, the Joint Applicants in the Consolidated Proceeding are granted leave to file and serve by 4.00 pm on 13 May 2019:
 - (a) a consolidated originating application that is in substantially the same form as the amended originating application filed in the Kidd Proceeding on 27 March 2019; and
 - (b) a consolidated statement of claim that is in substantially the same form as the amended statement of claim filed in the Kidd Proceeding on 14 March 2019.
10. Pursuant to rule 1.34 of the Rules:
 - (a) the requirements of rule 8.23(2)(a) of the Rules are dispensed with for the purpose of the consolidated originating application to be filed by the Joint Applicants in the proposed Consolidated Proceeding;
 - (b) the requirements of rule 16.59(2)(a) of the Rules are dispensed with for the purpose of the consolidated statement of claim to be filed by the Joint Applicants in the Consolidated Proceeding.
11. By 4.00 pm on 13 May 2019, the Joint Applicants in the Consolidated Proceeding are to file and serve a consolidated originating application and a consolidated statement of claim.
12. By 4.00 pm on 6 June 2019, the Respondent file its defence to the consolidated statement of claim.



Costs Reference

13. Pursuant to sections 33ZF(1) and 37P(2) of the Act, Cate Dealehr, Legal Costs Consultant, is appointed as an independent costs referee (**Costs Referee**) for the purpose of:
 - (a) conducting inquiries every four months (commencing from the date of these Orders) as to the question of whether there is unnecessary or excessive duplication in the work being performed by the Lawyers in the Consolidated Proceeding, having regard to the matters set out in paragraphs (i) to (iii) of Order 3 above; and
 - (b) providing confidential written reports to the Lawyers and to the Court every four months (commencing from after the date of these Orders) stating the Costs Referee's opinion on the question set out at 13(a) above, including any recommendations for reducing duplication where identified.
14. The Lawyers must cooperate and provide such information, access to personnel and access to documents as the Costs Referee may reasonably require.
15. Without affecting the powers of the Court as to costs, IMF and Harbour are to be jointly and severally liable for the reasonable fees of the Costs Referee in the first instance, which fees will become part of the Joint Applicants' costs.
16. Subject to any further order of the Court, for the purpose of any order made pursuant to sections 33V or 33ZJ of the Act approving payment or part-payment of the Joint Applicants' legal costs and disbursements out of any settlement sum or Court award of damages in the Consolidated Proceeding, the total amount so approved will not include an amount that is referable to work performed by the Lawyers that has been identified by the Costs Referee as being unnecessarily or excessively duplicative.

Other

17. The Consolidated Proceeding is listed for a further case management hearing on 4 October 2019 at 9.30 am, or such earlier date as either party requests.
18. The parties' costs of the Respondent's interlocutory application dated 18 October 2018, the Applicant's interlocutory application dated 20 March 2019, and the Kidd Applicants' application for case management orders, are reserved.



Date that entry is stamped: 8 May 2019

Warrick Soden
Registrar



ANNEXURE A
BRAMBLES LTD SHAREHOLDER CLASS
ACTION FUNDING TERMS

1. Definitions and interpretation

1.1. The following definitions apply in these Funding Terms:

Brambles	means Brambles Ltd.
BXB Securities	means an ordinary fully-paid share issued by Brambles and listed on the Australian Securities Exchange.
Claims	means the claim or claims the Joint Applicants or any Group Member has or may have against any one or more of the Respondents for loss and damage caused to the Joint Applicants or Group Member by the conduct of one or more of the Respondents in relation to or arising out of the Joint Applicants' or Group Members' acquisition of an interest in BXB Securities during the period specified in the statement of claim filed in respect of the Consolidated Proceeding as amended from time to time.
Consolidated Proceeding	means the proceedings resulting from the consolidation of VID 1006/2018 and VID 972/2018 and any other legal proceedings to prosecute some or all of the Claims, including: <ol style="list-style-type: none">(a) proceedings brought in contemplation of the Consolidated Proceeding ; and(b) any other proceedings or process as part of or consequent on the class action (including any alternative dispute resolution processes engaged to resolve some or all of the Claims), but does not include any appeals of such legal proceedings or related enforcement actions unless the Funders have (in their absolute discretion) agreed to fund the particular appeal or enforcement proceedings.
Costs Order	means any order made by a court requiring one or more parties to the Consolidated Proceeding to pay the costs incurred by another party or parties to the Consolidated Proceeding.
Disbursements	means any third party expense that the Lawyers incur, whether as principals or as agents on behalf of Group Members and/or the



Joint Applicants, in relation to the conduct of the Consolidated Proceeding, Kidd Proceeding and/or Southernwood Proceeding (or as otherwise specified), Legal Work and including external advice and any external legal services which the Lawyers consider reasonably necessary to: (a) investigate the Claims; (b) prosecute the Claims; (c) negotiate a Settlement of the Claims.

Funders

means:

1. IMF Bentham Limited (ACN 067 298 088), acting in its capacity as the investment manager and agent for each of IMF Bentham Limited (Fund 2) Pty Ltd (ACN 621 682 504) and IMF Bentham Limited (Fund 3) Pty Ltd (ACN 621 682 460), in the IMF Applicable Funder Percentage, its successors and assigns (**IMF**); and
2. Harbour Fund III, L.P., its successors and assigns (**Harbour**).

Funding

means the IMF Funding Agreement and Harbour Funding Agreement.

Agreements

Funding Period

commences on the date that the Court approves the interlocutory application for Order 7 of the Southernwood Applicant's proposed orders dated 20 March 2019 and ends on the Termination Date.

Funding Terms

means these terms.

Group Members

means all persons who are identified as group members in the Consolidated Proceeding and who do not validly opt out of the Consolidated Proceeding.

GST Act

means the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*.

GST

means the amount obtained by multiplying the prevailing rate of GST (currently 10%) by an amount equal to the consideration to be received by IMF or Harbour for any taxable supply made to any Group Member by IMF or Harbour under or in connection with these Funding Terms (unless otherwise defined, terms used in this definition have the same meaning as in the GST Act).

Harbour

Funding

means a funding agreement between Harbour and a Group Member in relation to the Claims, including the funding agreement between the Funder and the Kidd Applicants as at the



Agreement	commencement of the Funding Period.
Harbour	means:
Project Costs	<p>(a) 75% of the reasonable legal fees of Maurice Blackburn incurred in the conduct of each stage of the Consolidated Proceeding and the Kidd Proceeding;</p> <p>(b) all of Harbour's reasonable out-of-pocket costs and expenses (including Disbursements) incurred in relation to the conduct of each stage of the Consolidated Proceeding and the Kidd Proceeding, including in relation to any consultants engaged by Harbour (other than those costs and expenses already referred to in this definition);</p> <p>(c) if a Resolution Sum includes specified property other than money, any reasonable costs and expenses incurred by the Lawyers in selling any such property, or any costs of counsel incurred if there is any dispute about the monetary value of any such property;</p> <p>(d) any costs of taxation or assessment incurred if Harbour requires that Maurice Blackburn submit any one or more of their invoices to taxation or assessment; and</p> <p>(e) any GST payable on any Supply made by any entity as a result of the above costs or expenses being incurred,</p> <p>and for the avoidance of doubt, and unless expressly stated otherwise, includes amounts described in (a) to (e) above which have been incurred during, or are in respect of, a period before or during the Funding Period.</p>
IMF Parent	Means IMF Bentham Limited (ACN 067 298 088).
IMF Applicable Funder Percentage	The proportion, expressed as a percentage, by which the IMF Funding Companies enjoy their rights and undertake their obligations (on a several not joint and several basis) which, as at the date of the Funding Terms is 75% by IMF Fund 2 and 25% by Fund 3 and is subject to amendment by notification from IMF.
IMF Funding Companies	IMF Bentham Limited (Fund 2) Pty Ltd (ACN 621 682 504) (IMF Fund 2) and IMF Bentham Limited (Fund 3) Pty Ltd (ACN 621 682 460) (IMF Fund 3).



IMF Funding Agreement means a funding agreement between IMF and a Group Member in relation to the Claims, including the funding agreement between the Funder and the Southernwood Applicant as at the commencement of the Funding Period.

IMF Project Costs means:

- (a) 75% of the reasonable legal fees of Slater and Gordon incurred in the conduct of each stage of the Consolidated Proceeding and the Southernwood Proceeding;
- (b) all of IMF's reasonable out-of-pocket costs and expenses (including Disbursements) incurred in relation to the conduct of each stage of the Consolidated Proceeding and the Southernwood Proceeding, including in relation to any consultants engaged by IMF (other than those costs and expenses already referred to in this definition);
- (c) if a Resolution Sum includes specified property other than money, any reasonable costs and expenses incurred by the Lawyers in selling any such property, or any costs of counsel incurred if there is any dispute about the monetary value of any such property;
- (d) any costs of taxation or assessment incurred if IMF requires that Slater and Gordon submit any one or more of their invoices to taxation or assessment;
- (e) any GST payable on any Supply made by any entity as a result of the above costs or expenses being incurred,

and for the avoidance of doubt, and unless expressly stated otherwise, includes amounts described in (a) to (e) above which have been incurred during, or are in respect of, a period before or during the Funding Period.

Joint Applicants means the joint lead applicants in the Consolidated Proceeding who have entered into a Funding Agreement with IMF or Harbour whom, as at the commencement of the Funding Period are:

1. Holly Southernwood (**Southernwood Applicant**); and
2. William Vincent Kidd and Mary Agnes Collum as Trustees for the Magness-Bennett Superannuation Fund (**Kidd Applicants**).



- Joint Project Costs** means:
- (a) 100% of the total Disbursements of the Lawyers paid and incurred for the conduct of each stage of the Consolidated Proceeding (but excluding costs incurred solely in respect of the Kidd Proceeding or Southernwood Proceeding);
 - (b) in the event that the Joint Applicants in the Consolidated Proceeding are required to provide security for costs, the amount payable in respect of security for costs;
 - (c) any adverse Costs Order made against the Joint Applicants in the Consolidated Proceeding; and
 - (d) the costs of counsel in providing the advice referred to in clause 7 or clause 9.
- Kidd Proceeding** means proceeding VID1006/2018 prior to becoming a Consolidated Proceeding including the period prior to commencement of that proceeding.
- Lawyers** means:
1. Slater & Gordon Limited or any firm of lawyers appointed in their place by the Southernwood Applicant, and with IMF's consent; and
 2. Maurice Blackburn Pty Ltd, or any firm of lawyers appointed in their place by the Kidd Applicants, and with Harbour's consent.
- Legal Work** means legal work performed by Slater and Gordon pursuant to the Slater and Gordon Retainer Agreements, and legal work performed by Maurice Blackburn pursuant to the Maurice Blackburn Retainer Agreements, including such advice and services reasonably necessary to (a) investigate the Claims; (b) prosecute the Consolidated Proceeding; (c) negotiate a Settlement of the Claims; and (d) comply with the IMF Funding Agreement and Harbour Funding Agreement respectively and these Funding Terms.
- Maurice Blackburn Remaining Costs** means any 'at risk' component of Maurice Blackburn's professional fees, as prescribed in the Maurice Blackburn Retainer Agreements, but excluding any 'uplift' component on any conditional legal costs. The Maurice Blackburn Retainer



Agreement provides for the following Remaining Costs:

- (a) 25% of Maurice Blackburn's reasonable professional fees incurred for the sole purpose of performing the Legal Work in so far as such professional fees are incurred before or during the Funding Period and in accordance with the Maurice Blackburn Retainer Agreement; plus
 - (b) interest on any amounts in a bill for Maurice Blackburn's legal costs which remain unpaid for 30 days after Maurice Blackburn has issued that bill with interest calculated from that date and calculated at the rate prescribed by the applicable legal profession regulations or rules,
- but these Funding Terms shall exclude any 'uplift' component on any conditional legal costs otherwise payable under the Maurice Blackburn Retainer Agreement.

**Maurice
Blackburn
Retainer
Agreement**

means the retainer and costs agreement between Maurice Blackburn and a Group Member, including the costs agreement signed by the Kidd Applicants on 1 June 2018.

Other Parties

means any other person or entity which:

- (a) becomes a party to the Consolidated Proceeding at the initiative of a Respondent; or
- (b) the Lawyers recommend be joined to the Consolidated Proceeding and in respect of whom the Funders agree in writing to accept adverse Cost Order exposure.

Resolution

means when all or any part of a Resolution Sum is received and, where a Resolution Sum is received in parts, a "Resolution" occurs each time a part is received.

Resolution Sum

means the amount or amounts, or the market value of any goods or services, for which some or all of the Claims are Settled, or for which judgment is given, including the value of any favourable terms of future supply of goods or services, any interest and any costs recovered pursuant to a Costs Order in favour of the Joint Applicants or by agreement.

Respondent

means Brambles and any Other Parties named as defendants or respondents in the Consolidated Proceeding.



Retainer Agreements	means the Slater and Gordon Retainer Agreement and Maurice Blackburn Retainer Agreement.
Slater and Gordon	means the ‘at risk’ component of Slater and Gordon’s professional fees, as prescribed in the Slater and Gordon Retainer Agreements.
Remaining Costs	<p>The Slater and Gordon Retainer Agreement provides for the following Remaining Costs:</p> <p>(a) 25% of Slater and Gordon’s reasonable professional fees incurred for the sole purpose of performing the Legal Work in so far as such professional fees are incurred before or during the Funding Period and in accordance with the Slater and Gordon Retainer Agreements; plus</p> <p>(b) interest on any amounts described in (a) above accrued from the date of the relevant invoice or monthly statement in which the services were rendered and calculated at the rate prescribed by the applicable legal profession regulations or rules,</p> <p>but excluding any ‘uplift’ component on any conditional legal costs.</p>
Slater and Gordon Retainer Agreement	means the retainer and costs agreement between Slater and Gordon and a Group Member, including the costs agreement signed by the Southernwood Applicant on 31 May 2018.
Settlement	means any settlement, compromise, discontinuance or waiver of the Claims or part of the Claims, and “Settles” and “Settled” shall be construed accordingly.
Southernwood Proceeding	means proceeding VID 972/2018 prior to becoming a Consolidated Proceeding including the period prior to commencement of that proceeding.
Termination Date	means the date on which these Funding Terms are terminated in accordance with clause 8 below.
Trust Account	means an interest-bearing trust account established and maintained by the Lawyers for the sole purpose of receiving Resolution Sums under these Funding Terms.

1.2. Unless the context otherwise requires, the following rules of interpretation apply to these Funding Terms:

1.2.1. a reference to any agreement or document is a reference to such agreement or



document as validly amended, varied, restated, assigned or novated from time to time (in each case, other than in breach of the relevant agreement or the provisions of these Funding Terms, in which case it shall remain a reference to such agreement or document immediately prior to such amendment); and

- 1.2.2. a reference to any legislation or legislative provision includes any statutory modification, amendment or re-enactment of that legislation or legislative provision, and includes any subordinate legislation or regulations issued under that legislation or legislative provision.

2. Professional Fees and Existing Agreements

- 2.1. Where there are any differences in comparable professional fee rates charged by Slater and Gordon and Maurice Blackburn in accordance with their respective Retainer Agreements, the lower applicable rate shall prevail such that the fee rates charged by both Slater and Gordon and Maurice Blackburn will be the same.
- 2.2. For the duration of the Funding Period, these Funding Terms will prevail over the Funding Agreements.
- 2.3. Upon the request of a Group Member, Maurice Blackburn and/or Slater and Gordon shall provide that Group Member with a copy of their respective Retainer Agreements on a confidential basis.

3. Obligations of the Funders

- 3.1. IMF must pay the IMF Project Costs.
- 3.2. Harbour must pay the Harbour Project Costs.
- 3.3. IMF and Harbour must pay the Joint Project Costs in the following proportions:
 - 3.3.1. IMF shall pay 50% of the Joint Project Costs; and
 - 3.3.2. Harbour shall pay 50% of the Joint Project Costs.
- 3.4. Subject to any Court order to the contrary, IMF and Harbour will each meet any Costs Order incurred in the Consolidated Proceeding after the Funding Period in the following proportions:
 - 3.4.1. IMF shall pay 50% of any such costs; and
 - 3.4.2. Harbour shall pay 50% of any such costs.
- 3.5. If the Joint Applicants agree or are ordered to provide security for costs in the Consolidated Proceeding, they will each or together provide a form of security for costs that shall be acceptable to the Respondent (and any other applicable party to the Consolidated Proceeding), or as otherwise ordered by the Court, and in the following



proportions:

- 3.5.1. IMF (or the IMF Parent) to provide 50%; and
- 3.5.2. Harbour to provide 50%.
- 3.6. Each of IMF and Harbour will bear its own costs in relation to the provision of security for costs and will not seek reimbursement of those costs from any Resolution Sum.
- 3.7. The Funders will not be obliged to fund any appeal or defence of appeal of the Consolidated Proceeding but will have the option of doing so.
- 3.8. The Funders will not be obliged to accept adverse Costs Order exposure in respect of an additional respondent but will have the option of doing so.

4. Costs and Commission

- 4.1. Subject to further order, and pursuant to sections 23 and 33ZF of the Act and rule 1.32 of the Rules, upon Resolution the Funders and the Lawyers are entitled to be paid or to have distributed the following amounts from the Resolution Sum, to be paid or distributed in order of priority listed below and with all payments within a priority level to be made *pari passu* and *pro rata*:
 - 4.1.1. first:
 - (a) reimburse Harbour for all paid and Court-approved Harbour Project Costs including any additional amount on account of GST; and
 - (b) reimburse IMF for all paid and Court-approved IMF Project Costs, including any additional amount on account of GST.
 - 4.1.2. second, pay to the Funders, as consideration for the funding of the Consolidated Proceeding, a total amount, to be expressed as a percentage of the aggregate Resolution Sums as the Court considers reasonable of no more than:
 - (a) [an amount to be determined by the Court] of the Resolution Sum, where Resolution is before the first day of commencement of a trial in relation to the Consolidated Proceeding;
 - (b) [an amount to be determined by the Court] of the Resolution Sum, where Resolution is on or after the first day of the commencement of trial in relation to the Consolidated Proceeding,with the amounts payable to the Funders to be equally apportioned to each of IMF and Harbour, and including any additional amount on account of GST.
 - 4.1.3. third, pay Slater and Gordon and Maurice Blackburn for any court approved unpaid Disbursements, GST, interest and Slater and Gordon Remaining Costs



(if applicable) in accordance with the Slater and Gordon Retainer Agreement and Maurice Blackburn Remaining Costs (if applicable) in accordance with the Maurice Blackburn Retainer Agreement;

- 4.1.4. fourth, pay to the Joint Applicants any unpaid expenses (including fair and reasonable compensation for their time) incurred as a result of their acting as representative in the Consolidated Proceeding, as approved by the Court; and
- 4.1.5. fifth, the remainder of the Resolution Sum be distributed to Group Members on a pro rata basis.
- 4.2. The amounts referred to in clause 4.1 above will not become due or owing by the Joint Applicants and Group Members unless and until a Resolution occurs and must not exceed the aggregate Resolution Sums.
- 4.3. All Resolution Sums are to be paid to, and received by, the Lawyers and paid immediately into a Trust Account opened jointly by the Lawyers and kept for that purpose.
- 4.4. If, despite clause 4.3 above, the Joint Applicants or any Group Member directly receive any amounts, assets or benefits in respect of a Settlement or judgment of some or all of the Claims, he, she or it will cause the amounts, assets or benefits to be paid or directed to the Lawyers to be dealt with as part of the Resolution Sum including, if appropriate, the realisation of the market value of any such assets or benefits.
- 4.5. The Lawyers will pay out of any Resolution Sum held on the Trust Account the amounts referred to in clause 4.1 above in accordance with these Funding Terms prior to any distribution to the Joint Applicants and Group Members in accordance with any distribution scheme approved by the Court.
- 4.6. The Group Members will not seek to encumber any part of the Resolution Sum in a manner which adversely affects the Funders' entitlements under the Funding Terms.

5. Relationship Between the Joint Applicants, Lawyers and Funders

- 5.1. Slater and Gordon's professional duties are owed to the Southernwood Applicant and not to IMF.
- 5.2. Maurice Blackburn's professional duties are owed to the Kidd Applicants and not to Harbour.
- 5.3. IMF may at its discretion give day-to-day instructions to Slater and Gordon on all matters concerning the Claims and the Consolidated Proceeding, subject to clauses 5.4 and 5.5, clause 7 and clause 9. IMF shall generally give day-to-day instructions to Slater and Gordon and Harbour shall defer to the instructions of the Kidd Applicants and the advice of Maurice Blackburn.



- 5.4. The Southernwood Applicant may override any instruction given by IMF, subject to clauses 7 and 9 below. The Southernwood Applicant may give binding instructions to Slater and Gordon and make binding decisions on behalf of the Group Members in relation to the Claims up to the time of any court approval of Settlement of the Claims or the delivery of judgment in respect of the common issues in the Consolidated Proceeding (including, but not limited to, instructions and decisions in relation to Settlement), save where, in the reasonable professional opinion of Slater and Gordon, separate instructions are required from the Group Members.
- 5.5. The Kidd Applicants may override any instruction given by IMF, subject to clauses 7 and 9 below. The Kidd Applicants may give binding instructions to Maurice Blackburn and make binding decisions on behalf of the Group Members in relation to the Claims up to the time of any court approval of Settlement of the Claims or the delivery of judgment in respect of the common issues in the Consolidated Proceeding (including, but not limited to, instructions and decisions in relation to Settlement), save where, in the reasonable professional opinion of Maurice Blackburn, separate instructions are required from the Group Members.
- 5.6. Subject to clauses 7 and 9, if the Lawyers notify the Funders and the Joint Applicants that the Lawyers believe that circumstances have arisen such that they may be in a position of conflict with respect to any obligations they owe to the Joint Applicants and any obligations they owe to the Funders, then the Lawyers' obligations to the Joint Applicants prevail (and for the avoidance of doubt, the Lawyers can continue to offer advice to and take instructions from the Joint Applicants in such circumstances).
- 5.7. The Lawyers will:
 - 5.7.1. keep the Funders fully informed of all matters concerning the Claims and the Consolidated Proceeding, including any mediation and settlement discussions; and
 - 5.7.2. ensure that the Funders and Joint Applicants are given all necessary information and advice in order for the Funders to make informed assessments and, in respect of IMF, to provide informed instructions.
- 5.8. The Funders will:
 - 5.8.1. implement their respective conflict management protocols so as to comply with the *Corporations Amendment Regulation 2012 (No. 6) (Cth)*;
 - 5.8.2. agree that, should any conflict arise as between the interests of the Funders and the interests of the Joint Applicants and Group Members, then the Lawyers may continue to provide the Legal Work to the Joint Applicants and Group Members



and the Funders will raise no objection to them doing so;

- 5.8.3. provide the Joint Applicants with timely and clear disclosure of any material breach of the *Corporations Amendment Regulation 2012 (No. 6) (Cth)*;
- 5.8.4. not retain the Lawyers as their solicitors for any purpose connected with the Consolidated Proceeding;
- 5.8.5. upon the request of a Group Member, provide that Group Member with a copy of the current and applicable conflict management protocols as referred to above at clause 5.8.1.

6. Confidentiality

- 6.1. The Funders shall strictly maintain the confidentiality of any information provided to the Funders by the Joint Applicants or the Lawyers for a purpose connected to the Consolidated Proceedings, and shall adopt proper and effective procedures for maintaining the confidentiality and safe custody of the information.
- 6.2. Where any information is provided to the Funders, the Funders shall:
 - 6.2.1. adopt proper and effective procedures for maintaining the confidentiality and safe custody of that information;
 - 6.2.2. only use that information for purposes for which the information was provided; and
 - 6.2.3. not disclose the information contained therein to any person other than the Joint Applicants, Lawyers or counsel retained in the Consolidated Proceeding and any third parties it is required to disclose information to in the course of, and for the purpose of, the Consolidated Proceeding, including to any provider of after the event insurance, advisor, sub-litigation advisor, attorney, consultant, associated company, insurer, shareholder or agent – provided it takes reasonable steps to ensure that any third party also retain the confidentiality of the documents.

7. Settlement

- 7.1. If there is disagreement between the Funders and the Joint Applicants as to whether to settle the Consolidated Proceeding, or as to the appropriate terms for the Settlement of the Consolidated Proceeding, within 5 days of either of the Funders or the Joint Applicants providing notice of any such disagreement:
 - 7.1.1. the Lawyers will brief the most senior counsel of those retained by the Lawyers to advise as to whether, in senior counsel's opinion, settlement of the Consolidated Proceeding on the terms is fair and reasonable in all of the



- circumstances;
- 7.1.2. representatives of the Funders may attend any conference with Senior Counsel at which the issue is to be discussed;
 - 7.1.3. the legal costs of obtaining senior counsel's advice shall be met by the Funders as part of the Joint Project Costs; and
 - 7.1.4. the advice of senior counsel will be final and binding on both the Joint Applicants and the Funders.
- 7.2. Under clause 7.1 above, in determining whether a proposed settlement is reasonable having regard to all the circumstances, senior counsel may proceed as he or she sees fit to inform himself or herself before forming and delivering his or her advice, but any such determination shall include the following considerations:
- 7.2.1. the strengths and weaknesses of the claims of all Group Members;
 - 7.2.2. the quantum of the claims of all Group Members and any difficulties which might exist in proving that quantum;
 - 7.2.3. the recoverability of a judgment sum from the Respondent;
 - 7.2.4. the extent to which further legal costs incurred in the Consolidated Proceeding are likely to be recoverable from the Respondent;
 - 7.2.5. the risk of the Funders being ordered to pay adverse costs and the quantum of such costs. Counsel will have regard to this factor as though all Group Members carried such risk rather than the Funders;
 - 7.2.6. the matters set out at paragraph [248/95] of the Australian Securities and Investments Commission's *Regulatory Guide 248: Litigation schemes and proof of debt schemes: Managing conflicts of interest* (April 2013); and
 - 7.2.7. any other matters senior counsel considers relevant.

8. Termination

- 8.1. These Funding Terms may only be terminated by order of the Court on application by the Joint Applicants, Group Members, Harbour or IMF, and upon notice given to the Joint Applicants, the Funders and such other persons as ordered by the Court.
- 8.2. If the Funding Terms are terminated under clause 8.1 above then (subject to any contrary order of the Court) all obligations of the Joint Applicants, the relevant Group Members, the Funders and the Lawyers under these Funding Terms will cease on the Termination Date, save for the following:
 - 8.2.1. where there has been no material breach of these Funding Terms by the Funders and the application pursuant to clause 8.1 is made by a Group Member, the



Funders will continue to be entitled to receive payment from any Resolution Sums (whether received before or after the Termination Date) pursuant to clause 4 unless otherwise ordered by the Court;

- 8.2.2. where there has been a material breach of these Funding Terms by IMF and/or Harbour, the relevant funder will only be entitled to receive payment from any Resolution Sum (whether received before or after the Termination Date) as ordered by the Court;
- 8.2.3. where there has been no material breach of these Funding Terms by IMF and/or Harbour and the application pursuant to clause 8.1 is made by IMF and/or Harbour, the relevant funder will continue to be entitled to receive payment from any Resolution Sums (whether received before or after the Termination Date) pursuant to clauses 4.1.1 and 4.1.2 unless otherwise ordered by the Court; and
- 8.2.4. IMF and/or Harbour must pay:
 - (a) any outstanding costs pursuant to clauses 3.1, 3.2 and 3.3 above incurred up to the Termination Date; and
 - (b) to the extent such amounts are not captured by clause 8.2.4(a) above, any quantified Costs Order against the Joint Applicants in respect of costs which arise in, or are attributed to, the period ending on the Termination Date.

9. Dispute Resolution

- 9.1. Subject to clause 7 and clause 9.2, any dispute arising between any of IMF, Harbour, the Joint Applicants and/or the Lawyers (including a dispute between members of the litigation committee) regarding the conduct of the Consolidated Proceeding that cannot be resolved within a reasonable period of time will be referred to the most senior counsel of those retained by the Lawyers for a final decision, which the Funders, the Joint Applicants and the Lawyers agree will bind them.
- 9.2. If a dispute arises which would be referred to senior counsel pursuant to clause 9.1 and IMF, Harbour, the Joint Applicants, the Lawyers or counsel considers that it is not appropriate for counsel to advise on or determine the dispute, the Lawyers may refer the dispute to an independent adjudicator, save that, failing agreement within a reasonable time by the Funders, the Joint Applicants and the Lawyers as to such independent adjudicator, the dispute is to be referred to an independent adjudicator to be appointed by the President of the Law Institute of Victoria for a final decision, which the Funders, the Joint Applicants the Lawyers agree will bind them.



- 9.3. For the avoidance of doubt, the disputes regulated pursuant to this clause include:
- 9.3.1. any appeal of the Consolidated Proceeding;
 - 9.3.2. the addition or removal of Respondents to or from the Consolidated Proceeding;
 - 9.3.3. the termination of the Lawyers' appointment; or
 - 9.3.4. the appointment of alternative Lawyers.