

**PRIVATE AND CONFIDENTIAL****Re: The Mesoblast Shareholder Litigation Funding Scheme ARSN 656 647 586 - Consolidation update**

We are writing to update you on the status of the claims filed against Mesoblast Limited.

You are receiving this update because you are, or have applied to become, a member of The Mesoblast Shareholder Litigation Funding Scheme ARSN 656 647 586 (**Scheme**) created to fund the proceedings filed by Phi Finney McDonald Lawyers and funded by Omni Bridgeway, *Oil Surveillance Australia Pty Ltd (ACN 092 979 498) ATF D.A Lynch Superfund v Mesoblast Limited (ACN 109 431 870) (VID303/2022)*.

***Executive Summary***

- *The Federal Court has ordered that the class action being funded by Omni Bridgeway be consolidated with a competing class action that was filed by William Roberts Lawyers.*
- *Omni Bridgeway will co-fund the consolidated proceedings with ICP, the funder of the William Roberts class action, on a 50:50 basis in accordance with Joint Funding Terms approved by the Court.*
- *Under the Joint funding Terms the funders' entitlements to any claim proceeds received will remain the same but be equally split.*
- *The funding of the consolidated proceeding is expected to move to a 'contractual' structure under which members will be asked to enter into a litigation funding agreement directly with Omni Bridgeway, with the existing managed investment scheme structure in the process of being deregistered.*

**Consolidation update**

As foreshadowed in the Product Disclosure Statement issued in respect of the Scheme on 7 February 2022 (as supplemented by the Supplementary PDS dated 11 May 2022) (together the **PDS**), a second class action against Mesoblast was filed by William Roberts Lawyers in June this year, being *Paul Tibor Horskey v Mesoblast Limited (VID268/2022)*. The William Roberts class action is funded by ICP Funding Pty Ltd and managed by Investor Claim Partners Pty Ltd (together, **ICP**).

On 19 October 2022 the Federal Court ordered that the two class actions be consolidated into one proceeding (**Consolidation Order**) known as *Paul Tibor Horskey and Oil Surveillance Australia Pty Ltd ATF D.A Lynch Superfund v Mesoblast Limited (ACN 109 431 870) (VID268/2022) (Consolidated Proceedings)*.

Phi Finney McDonald and William Roberts will be joint solicitors on the record in the Consolidated Proceedings.

Pursuant to the Consolidation Order, Omni Bridgeway and ICP are now co-funding the Consolidated Proceedings on joint funding terms agreed between Omni Bridgeway and ICP, as set out in Annexure A to the Consolidation Order (**Joint Funding Terms**).

A copy of the Consolidation Order and the Joint Funding Terms can be accessed at <https://portal.omnibrigeway.com/cases/register/mesoblast-overview>.

## **ADDITIONAL NOTICES AND UPDATES RELATING TO THE CONSOLIDATION**

### **Notice of amendment to Scheme constitution**

Upon the making of a Court Order in the Proceedings, the terms of the Scheme constitution are automatically amended (without the need for a variation agreement) in such manner as necessary to give effect to any terms of the Court Order which conflict with the terms of the constitution.

The effect of the Consolidation Order has been to automatically amend (to the extent necessary) the terms of the Scheme constitution to give effect to the Joint Funding Terms.

By this notice, the trustee of the Scheme, Omni Bridgeway Investment Management Limited (**OBIML**), gives notice to members that the constitution for the Scheme has been amended to the extent necessary to give effect to the Joint Funding Terms with effect from the date of the Consolidation Order, being 19 October 2022.

### **Effect on Members**

In summary, the effect of the Joint Funding Terms and associated updates to the Constitution mean that from the date of the Consolidation Order, ICP and Omni Bridgeway are required to equally fund:

- 75% of the legal costs and 100% of the disbursements of the Consolidated Proceedings;
- any adverse costs order made in the Consolidated Proceedings; and
- any obligation to provide security for costs in the Consolidated Proceedings.

A reconciliation of project costs incurred by ICP and Omni Bridgeway prior to the Consolidation Order will be undertaken to ensure each funder bears a 50% portion of the project costs of the Consolidated Proceedings to date.

The commercial funding terms of each of ICP and Omni Bridgeway, being the amounts to which each funder is entitled in the event of a successful outcome in the Consolidated Proceedings, were effectively the same and have been reflected in the Joint Funding Terms. This means there are no material changes to the commercial funding terms, which will essentially remain the same (the key difference being the funders will now share equally in any entitlements to claim proceeds).

Measures have been put in place to ensure the impact of the consolidation on group members remains minimal. The lawyers and the joint lead applicants are required to abide by a Cooperative Litigation Protocol to ensure legal work is apportioned equally between the lawyers and to avoid duplication of work and costs where possible. Further, an independent costs assessor has been appointed to assess, on a six monthly basis, whether unnecessary or duplicative work has been performed by the lawyers.

Group members who have signed a Conditional Legal Costs Agreement with Phi Finney McDonald will receive a further update in relation to that agreement.

### **Notice of deregistration of Scheme**

Further to the update posted to Omni Bridgeway's website dated 23 June 2022, OBIML also wishes to provide an update to members following its consideration of the judgment delivered by the Federal Court of Australia in *LCM Funding Pty Ltd v Stanwell Corporation Limited 2022 FCAFC 103 (LCM Case)*.

As you would be aware, the Scheme is registered with ASIC as a managed investment scheme and subject to the registration regime contained in Chapter 5C of the *Corporations Act 2001 (Cth) (Corporations Act)*. This is because, when the Scheme was established, the *Corporations Amendment (Litigation Funding) Regulations 2020 (Cth) (2020 Regulations)*, enacted on 22 July 2020, were in force.

The 2020 Regulations were introduced in reliance on the decision in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pty Ltd (2009) 180 FCR 11 (the Brookfield Case)*, which found that litigation funding schemes were managed investment schemes.

However, on 16 June 2022, the Full Court of the Federal Court of Australia in the LCM Case reversed the decision in the Brookfield Case by finding that litigation funding schemes are not managed investment schemes for the purposes of the Corporations Act and should not be subject to the managed investment scheme regime under the Corporations Act.

In response to the Court's decision in the LCM case, the Government has indicated that it proposes to introduce an explicit exemption from the managed investment scheme regime under the Corporations Act through the introduction of the *Corporations Amendment (Litigation Funding) Regulations 2022 (2022 Regulations)*. The Government has recently released an exposure draft for the 2022 Regulations.

### **Voluntary deregistration of Scheme**

OBIML has considered the impact of the LCM Case and the proposed 2022 Regulations. In light of these, on 29 September 2022, OBIML lodged an application with ASIC under section 601PA of the Corporations Act for the voluntary deregistration of the Scheme as a managed investment scheme.

Following receipt of the application, the Corporations Act requires that ASIC give notice of the proposed deregistration of the Scheme in the ASIC Gazette and, when two months have passed, ASIC may proceed to deregister the Scheme.

OBIML will provide a further update to members at such time that ASIC confirms that it has deregistered the Scheme.

### **Effect on Members**

OBIML does not anticipate that there will be any impact on the members of the Scheme as a result of the deregistration of the Scheme as a managed investment scheme under the Corporations Act.

Omni Bridgeway will continue to fund the joint costs in the class action with ICP, consistent with the Joint Funding Terms, and OBIML will continue to administer the Scheme in accordance with the

Scheme's constitution (as modified by the Consolidation Order and Joint Funding Terms).

Further, OBIML does not anticipate that the deregistration of the Scheme as a managed investment scheme under the Corporations Act will have a direct impact on the class action proceeding itself, nor scheme members' status as group members in the class action.

*What do I need to do?*

There is no action required to be taken by members of the Scheme; the deregistration process will be completed by OBIML on behalf of the Scheme. Members will be notified once the deregistration process is complete.

**Proposal to move Scheme members to litigation funding agreement**

In light of the Consolidation Order and Joint Funding Terms and associated amendments that have now been made to the Scheme constitution, the proposed deregistration of the existing Scheme and the proposed 2022 Regulations, OBIML and Omni Bridgeway (Fund 5) Australian Inv. Pty Ltd (the original Funder of the class action under the Scheme's constitution) plan to update the structure of their funding arrangement. The plan is to move from a registered managed investment scheme to a unilateral contractual arrangement. This will involve OBIML and Omni Bridgeway (Fund 5) Australian Inv. Pty Ltd issuing a litigation funding agreement for entry into by members (to be provided to members in due course).

The terms of the litigation funding agreement will set out the terms of the post-Consolidation funding arrangement and reflect the Joint Funding Terms.

OBIML will be in contact with a further update for members shortly.

**Notice pursuant to section 1017B of the Corporations Act**

This notice also constitutes notice by OBIML to existing Scheme members pursuant to section 1017B of the Corporations Act, to inform members of changes to information contained in the PDS.

A copy of this notice will also be displayed on our website at the following address for the purpose of ensuring that new members have up to date information:

<https://portal.omnibridgeway.com/cases/register/mesoblast-overview>