



Federal Court of Australia

District Registry: Victoria

Division: General

No: VID268/2022

**PAUL TIBOR HORSKY**

Applicant

**MESOBLAST LIMITED (ACN 109 431 870)**

Respondent

## **ORDER**

**JUDGE:** JUSTICE BEACH

**DATE OF ORDER:** 19 October 2022

**WHERE MADE:** Melbourne

### **THE COURT ORDERS THAT:**

#### **Consolidation**

1. Pursuant to Rule 30.11 of the *Federal Court Rules 2011* (Cth) and section 33ZF of the *Federal Court of Australia Act 1976* (Cth), the proceeding *Oil Surveillance Australia Pty Ltd (ACN 092 979 498) ATF D.A Lynch Superfund v Mesoblast Limited (ACN 109 431 870)* (VID303/2022) (Oil Surveillance Proceeding) be consolidated with this proceeding *Paul Tibor Horsky v Mesoblast Limited (ACN 109 431 870)* (VID268/2022) (Horsky Proceeding) and the consolidated proceeding be known as *Paul Tibor Horsky and Oil Surveillance Australia Pty Ltd ATF D.A Lynch Superfund v Mesoblast Limited (ACN 109 431 870)* to be identified as VID268/2022 (Consolidated Proceeding).
2. The applicant in the Horsky Proceeding (the Horsky Applicant) and the applicant in the Oil Surveillance Proceeding (the Oil Surveillance Applicant) 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, William Roberts Pty Ltd (William Roberts) and Phi Finney McDonald Pty Ltd (PFM) (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 basis:

- (a) ICP Funding Pty Ltd (ICP) ACN 626 526 458 and Omni Bridgeway (Fund 5) Australian Invt. Pty Ltd (Omni Bridgeway) fund the Consolidated Proceeding on the terms set out in the Joint Funding Terms in Annexure A of these orders;
- (b) the Court notes that ICP, Omni Bridgeway, the Lawyers and the Joint Applicants are to, within 14 days of the date of these orders, enter into an agreement/agreements which reflects the Joint Funding Terms;
- (c) the Joint Applicants and the Lawyers conduct the Consolidated Proceeding in accordance with the Cooperative Litigation Protocol in Annexure B to these orders;
- (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 either William Roberts or PFM;
- (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; and



- (g) the Respondent need only produce one set of any discovery documents to the Joint Applicants in the Consolidated Proceeding.
4. Orders 1 to 3 are subject to the Joint Applicants and the Lawyers providing undertakings to the Court in the form set out in Annexure C to these orders within 7 days of the date of these orders being made.
  5. Costs incurred in the Horsky Proceeding and the Oil Surveillance Proceeding to date and hereafter shall be costs incurred in the Consolidated Proceeding.
  6. In the event that the Joint Applicants in the Consolidated Proceeding are required to provide security for costs, ICP and Omni Bridgeway 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) ICP to provide 50%; and
    - (b) Omni Bridgeway to provide 50%.
  7. In the event that an adverse costs order is made against the Joint Applicants in the Consolidated Proceeding, ICP and Omni Bridgeway will each meet any such order in the following proportions:
    - (a) ICP to provide 50%; and
    - (b) Omni Bridgeway to provide 50%.

### **Costs Referee**

8. Pursuant to section 33ZF and section 54A of the Act an independent costs referee (Costs Referee) be appointed for the purpose of:
  - (a) conducting inquiries every six months (commencing from the date of the making of these orders) as to the question of whether there is unnecessary or excessive work (including any duplication of work) being performed by the Lawyers in the Consolidated Proceeding, having regard to:



- (i) the skills and experience of the Lawyers;
    - (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) providing confidential written reports (of no more than 10 pages) to the Court (Costs Report) and to the Lawyers every six months (commencing after the date of the making of these orders) stating the Costs Referee's opinion on the question set out in paragraph (a) above.
9. Within 14 days of the date of these orders, the Joint Applicants are to identify a suitable candidate to carry out the role of Costs Referee, provide the candidate's curriculum vitae to the Court and seek orders from the Court for that candidate's appointment.
10. The Lawyers must provide such information, access to personnel and access to documents as the Costs Referee requires.
11. The reasonable fees of the Costs Referee shall be borne equally by the Joint Applicants in the Consolidated Proceeding and shall not be recoverable against the Respondent in the Consolidated Proceeding.
12. The costs of any work performed in the Consolidated Proceeding on and after the date of these orders that has been identified by the Costs Referee and/or the Court as costs relating to work that has been performed by reason of there being two firms jointly representing the Joint Applicants and where such work would not have needed to be performed if there was only one firm representing the Joint Applicants, are:
- (a) not to be recoverable against the Joint Applicants or group members in the Consolidated Proceeding; and
  - (b) not to be recoverable against the Respondent in the Consolidated Proceeding.



### **Pleadings**

13. The Joint Applicants shall file and serve a consolidated statement of claim in the form set out in Annexure D to these orders within 1 business day of the date of these orders being made.

### **Other**

14. The hearing of the Carriage Motion (as that term is defined in the orders made on 22 July 2022) listed on 25 October 2022 be vacated.
15. The Consolidated Proceeding be listed for a case management hearing on 25 October 2022 at 10:15am.
16. The costs of and incidental to the Carriage Motion shall be treated as the parties' costs in the cause in the Consolidated Proceeding.

Date that entry is stamped: 19 October 2022

*Sia Lagos*  
Registrar



## ANNEXURE A

### JOINT FUNDING TERMS

#### 1. Definitions and Interpretations

1.1. The following definitions apply in these Funding Terms:

<b>Claims</b>	means the claim or claims the Joint Applicants or any Group Member has or may have against the Respondent for loss and damage caused to the Joint Applicants or Group Member by the conduct of the Respondent in relation to or arising out of the Joint Applicants' or Group Member's acquisition of an interest in Mesoblast Securities during the period specified in the statement of claim filed in respect of the Consolidated Proceeding as amended from time to time.
<b>Consolidated Proceeding</b>	<p>means the proceeding resulting from the consolidation of Horsky Proceeding (VID268/2022) and the Oil Surveillance Proceeding (VID303/2022) and any other legal proceedings to prosecute some or all of the Claims, including:</p> <ol style="list-style-type: none"> <li>1. proceedings brought in contemplation of the Consolidated Proceeding; and</li> <li>2. 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),</li> </ol> <p>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.</p>
<b>Costs Order</b>	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.
<b>Delegate</b>	means a provider of after the event insurance, advisor, sub-litigation advisor, attorney, contractor, employee, officer, director, auditor, consultant, associated company, insurer, insurance broker, shareholder or agent.
<b>Disbursements</b>	<p>means any third party expense (including GST) 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, Horsky Proceeding and/or Oil Surveillance Proceeding (or as otherwise specified), Legal Work and including external advice and any external legal services which the Lawyers consider reasonably necessary to:</p> <ol style="list-style-type: none"> <li>1. investigate the Claims;</li> <li>2. prosecute the Claims; and</li> </ol>



	3. negotiate a Settlement of the Claims.
<b>Funders</b>	means:  1. ICP Funding Pty Ltd (ACN 626 526 458) ( <b>ICP Funding</b> ); and  2. Omni Bridgeway (Fund 5) Australian Invt. Pty Ltd (ABN 91 635 083 984) ( <b>Omni Bridgeway</b> ).
<b>Funding Agreements</b>	means the ICP Funding Agreement and Omni Bridgeway Funding Agreement.
<b>Funding Commission</b>	means a percentage of the aggregate Resolution Sum as the Court considers reasonable, which is currently:  1. 19% of the Net Resolution Sum, if Resolution occurs on or before 30 June 2022;  2. 24% of the Net Resolution Sum, if Resolution occurs on or after 1 July 2022 but on or before 31 December 2023; or  3. 29% of the Net Resolution Sum, if Resolution occurs on or after 1 January 2024,  and which percentages will be increased by an additional:  4. 5% where any appeal or defence of appeal of the Consolidated Proceeding is funded by the Funders pursuant to clause 3.8; and  5. 2.5% where adverse Costs Order exposure is accepted in respect of an additional respondent pursuant to clause 3.9.
<b>Funding Period</b>	means the period that commences on [INSERT the date that the Court makes the consolidation orders] and ends on the Termination Date.
<b>Funding Terms</b>	means these terms.
<b>Group Members</b>	means all persons who are identified as group members in the Consolidated Proceeding and who do not validly opt out of the Consolidated Proceeding.
<b>GST Act</b>	means the <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth).
<b>GST</b>	means the amount obtained by multiplying the prevailing rate of GST (currently 10%) by an amount equal to the consideration to be received by ICP or Omni Bridgeway for any taxable supply made to any Group Member by ICP or Omni Bridgeway 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).
<b>Horsky Proceeding</b>	means proceeding VID 268/2022 prior to becoming a Consolidated Proceeding including the period prior to commencement of that proceeding.
<b>ICP</b>	means ICP Funding Pty Ltd (ABN 32 626 526 458) and Investor Claim Partner Pty Ltd (ABN 41 611 462 027).
<b>ICP Funding Agreement</b>	means a funding agreement between ICP and a Group Member in relation to the Claims, including the funding agreement between ICP and the Horsky Applicant. For the avoidance of doubt, a funding agreement for the purpose of this definition includes the relevant terms of the Mesoblast Litigation Funding Scheme for so long as that scheme remains in force.
<b>ICP Project Costs</b>	means the dollar amounts agreed to be paid by ICP Funding for Legal Costs in respect of the Claims referred to in clause 4 of the ICP Funding Agreement, accrued prior to the commencement of the Funding Period.
<b>Joint Applicants</b>	means the joint lead applicants in the Consolidated Proceeding who have entered into a Funding Agreement with ICP or Omni Bridgeway whom, as at the commencement of the Funding Period are: <ol style="list-style-type: none"> <li>1. Paul Tibor Horsky (<b>Horsky Applicant</b>); and</li> <li>2. Oil Surveillance Australia Pty Ltd ACN 092 498 ATF D.A Lynch Superfund (<b>Oil Surveillance Applicant</b>).</li> </ol>
<b>Joint Project Costs</b>	means the dollar amounts agreed to be paid by the Funders for Legal Costs in respect of the Claim and pursuant to this agreement.
<b>Lawyers</b>	means: <ol style="list-style-type: none"> <li>1. William Roberts Pty Ltd (<b>William Roberts</b>) or any firm of lawyers appointed in their place by the Horsky Applicant, and with Omni Bridgeway's consent; and</li> <li>2. Phi Finney McDonald Pty Ltd (<b>PFM</b>), or any firm of lawyers appointed in their place by the Oil Surveillance Applicant, and with ICP's consent.</li> </ol>
<b>Legal Costs</b>	means: <ol style="list-style-type: none"> <li>1. the reasonable legal fees of the Lawyers incurred in performing the Legal Work on behalf of the Horsky Applicant and/or the Oil Surveillance Applicant; and</li> <li>2. Disbursements incurred by any of the Funders, any of the Lawyers or any of the Joint Applicants,</li> </ol> <p>in respect of the Claim and pursuant to the terms of the Funding Agreements.</p>



<b>Legal Work</b>	<p>means legal work performed by William Roberts pursuant to the William Roberts Retainer Agreement, and legal work performed by PFM pursuant to the PFM Retainer Agreement, including without limitation such advice and services reasonably necessary to:</p> <ol style="list-style-type: none"> <li>1. investigate the Claims;</li> <li>2. prosecute the Consolidated Proceeding;</li> <li>3. negotiate a Settlement of the Claims; and</li> <li>4. comply with the ICP Funding Agreement and the Omni Bridgeway Funding Agreement respectively, and these Funding Terms.</li> </ol>
<b>Mesoblast</b>	means Mesoblast Limited (ACN 109 431 870).
<b>MSB Securities</b>	<p>means the following Mesoblast security interests:</p> <ol style="list-style-type: none"> <li>1. ordinary shares;</li> <li>2. American Depositary Receipts;</li> <li>3. equity swap confirmations in Mesoblast; and</li> <li>4. US over-the-counter securities traded with the symbol "MEOBF".</li> </ol>
<b>Net Resolution Sum</b>	means the Resolution Sum, less the aggregate amount of the Joint Project Costs, the ICP Project Costs and the Omni Bridgeway Project Costs.
<b>Oil Surveillance Proceeding</b>	means proceeding VID 303/2022 prior to becoming a Consolidated Proceeding including the period prior to commencement of that proceeding.
<b>Omni Bridgeway Funding Agreement</b>	means a funding agreement between Omni Bridgeway and a Group Member in relation to the Claims, including the funding agreement between the Funder and the Oil Surveillance Applicant. For the avoidance of doubt, a funding agreement for the purpose of this definition includes the terms on which Group Members have applied to become funded members of the Mesoblast Shareholder Litigation Funding Scheme for so long as that scheme remains in force.
<b>Omni Bridgeway Project Costs</b>	means the dollar amounts agreed to be paid by Omni Bridgeway for Legal Costs in respect of the Claims referred to in the Omni Bridgeway Funding Agreement, accrued prior to commencement of the Funding Period.
<b>Other Parties</b>	means any other person or entity which:



	<ol style="list-style-type: none"> <li>1. becomes a party to the Consolidated Proceeding at the initiative of the Respondent; or</li> <li>2. the Lawyers recommend be joined to the Consolidated Proceeding and in respect of whom the Funders agree in writing to accept adverse Costs Order exposure.</li> </ol>
<b>PFM Fee Uplift</b>	means an amount equal to 25% of the PFM Remaining Costs.
<b>PFM Remaining Costs</b>	means PFM professional fees incurred to carry out work under the PFM Retainer Agreement which are not payable by the Funders under the Funding Agreement, and which are payable only in the event of a Successful Outcome (as that term is defined in the PFM Retainer Agreement).
<b>PFM Retainer Agreement</b>	means the retainer and costs agreement between PFM and a Group Member, including the costs agreement signed by the Oil Surveillance Applicant on 30 May 2022.
<b>Related Entities</b>	has the meaning given to related bodies corporate in the <i>Corporations Act 2001</i> (Cth), extended to include trusts and other pooling vehicles that would be related bodies corporate if the definition in the <i>Corporations Act 2001</i> (Cth) used the same test to refer to entities other than bodies corporate.
<b>Resolution</b>	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.
<b>Resolution Sum</b>	means the amount or amounts, or the market value of any goods or services or any benefits, 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 or any benefits, any interest and any costs recovered pursuant to a Costs Order in favour of the Joint Applicants or by agreement.
<b>Respondent</b>	means Mesoblast and any Other Parties named as respondents in the Consolidated Proceeding.
<b>Responsible Entity</b>	means the responsible entity of the Mesoblast Litigation Funding Scheme or the Mesoblast Shareholder Litigation Funding Scheme, as applicable.
<b>Retainer Agreements</b>	means the William Roberts Retainer Agreement and PFM Retainer Agreement.
<b>Settlement</b>	means any agreement providing for the settlement, compromise, discontinuance, withdrawal, dismissal or waiver of all or part of the Claims. "Settle" has a corresponding meaning.
<b>Termination Date</b>	means the date on which these Funding Terms are terminated in accordance with clause 8 below.



<b>Trust Account</b>	means an interest-bearing trust account established and maintained by the Lawyers for the sole purpose of receiving the Resolution Sum under these Funding Terms.
<b>William Roberts Fee Uplift</b>	means an amount equal to 25% of the William Roberts Remaining Costs.
<b>William Roberts Remaining Costs</b>	means William Roberts' professional fees incurred to carry out work under the William Roberts Retainer Agreement which are not payable by the Funders under the Funding Agreements, and which are payable only in the event of a Successful Outcome (as that term is defined in the William Roberts Retainer Agreement).
<b>William Roberts Retainer Agreement</b>	means the retainer and costs agreement between William Roberts and a Group Member, including the retainer and costs agreement signed by the Horsky Applicant on 25 November 2021.

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.

1.3. Excluding the relationship of each Joint Applicant and their respective Lawyers, nothing in this agreement shall be deemed to create any partnership, agency or fiduciary relationship as between the parties.

## **2. Professional Fees and Existing Agreements**

2.1. For the duration of the Funding Period, these Funding Terms will prevail over the Funding Agreements, and for the avoidance of doubt, the Funding Agreements continue in full force and effect to the extent they are not revised by the Funding Terms.

2.2. Upon the request of a Group Member, PFM and/or William Roberts shall provide that Group Member with a copy of their respective Retainer Agreements on a confidential basis.

## **3. Obligations of the Funders**

3.1. ICP must pay the ICP Project Costs.



- 3.2. Omni Bridgeway must pay the Omni Bridgeway Project Costs.
- 3.3. ICP and Omni Bridgeway are to exchange the details of the ICP Project Costs and Omni Bridgeway Project Costs within 7 days of them agreeing to these terms, with a view to undertaking a reconciliation as soon as practicable so that each of ICP and Omni Bridgeway shall pay 50% of the aggregate of the ICP Project Costs and Omni Bridgeway Project Costs.
- 3.4. ICP and Omni Bridgeway must pay the Joint Project Costs as follows:
  - 3.4.1. it is intended that each of:
    - (a) ICP and Omni Bridgeway are to each pay 50% of the Joint Project Costs; and
    - (b) William Roberts and PFM are to each incur approximately 50% of the Lawyers' fees component of the Joint Project Costs on an ongoing basis;
  - 3.4.2. William Roberts shall issue bills for the Joint Project Costs it incurs to ICP;
  - 3.4.3. PFM shall issue bills for the Joint Project Costs it incurs to Omni Bridgeway; and
  - 3.4.4. on a regular basis at times to be determined by the Funders, the Funders are to undertake a reconciliation as between them, with a payment made from one Funder to the other (as necessary) for the purpose of bringing the proportionate amount of Joint Project Costs incurred up to that time that have been paid by each Funder to 50%.
- 3.5. Subject to any Court order to the contrary, ICP and Omni Bridgeway will each meet any Costs Order incurred in the Consolidated Proceeding after the Funding Period in the following proportions:
  - 3.5.1. ICP shall pay 50% of any such costs; and
  - 3.5.2. Omni Bridgeway shall pay 50% of any such costs.
- 3.6. 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:
  - 3.6.1. ICP to provide 50%; and
  - 3.6.2. Omni Bridgeway to provide 50%.
- 3.7. ICP and Omni Bridgeway 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.
- 3.8. 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.



- 3.9. 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 *Federal Court of Australia Act 1976* (Cth) and rule 1.32 of the *Federal Court Rules 2011* (Cth), 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*, reimburse ICP and Omni Bridgeway for all paid and Court-approved Joint Project Costs (which include, for the avoidance of doubt, the Omni Bridgeway Project Costs and ICP Project Costs), including any additional amount on account of GST in respect of such costs;
  - 4.1.2. *second*, pay to the Funders, as consideration for the funding of the Consolidated Proceeding, the Funding Commission, with the amounts payable to the Funders to be equally apportioned to each of ICP and Omni Bridgeway, and including any additional amount on account of GST in respect of the Funding Commission;
  - 4.1.3. *third*, pay William Roberts for any court approved unpaid Disbursements, GST, interest and William Roberts Remaining Costs plus the William Roberts Fee Uplift in accordance with the William Roberts Retainer Agreement and pay PFM for any court approved unpaid Disbursements, GST, interest and PFM Remaining Costs plus the PFM Fee Uplift in accordance with the PFM 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 lead applicants 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 an order is made by the Court in the Consolidated Proceeding to that effect.
- 4.3. The Resolution Sum is 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, they 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 or an agent appointed by them 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. William Roberts's professional duties are owed to the Horsky Applicant and not to ICP.

- 5.2. PFM's professional duties are owed to the Oil Surveillance Applicant and not to Omni Bridgeway.

- 5.3. The Joint Applicants hereby authorise ICP and Omni Bridgeway to jointly give day-to-day instructions to William Roberts and PFM on all matters concerning the Claims and the Consolidated Proceeding, subject to clauses 5.3, 5.5, 5.6, 7 and 9.

- 5.4. The Horsky Applicant may override any instruction given by ICP and Omni Bridgeway, subject to clauses 7 and 9 below. The Horsky Applicant may give binding instructions to William Roberts 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 William Roberts, separate instructions are required from the Group Members.

- 5.5. The Oil Surveillance Applicant may override any instruction given by ICP and Omni Bridgeway, subject to clauses 7 and 9 below. The Oil Surveillance Applicant may give binding instructions to PFM 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 PFM, 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, where applicable, 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; and
- 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. In providing to the Funders or a Responsible Entity any documents or information about the Claims and the Proceedings, the Joint Applicants do not intend to waive any privilege that may attach to such documents or information and they are being provided in furtherance of the common interest that the Joint Applicants, the Funders and any Responsible Entity have in relation to the Claims.
- 6.3. Where any information is provided to the Funders, the Funders shall:
  - 6.3.1. adopt proper and effective procedures for maintaining the confidentiality and safe custody of that information;
  - 6.3.2. only use that information for purposes for which the information was provided; and
  - 6.3.3. 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 Related Entities, Delegate, any debt or equity capital provider and their Delegates or the provider of participation funding to the Proceedings or its Delegates – 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 the most 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 the most senior counsel at which the issue is to be discussed;
  - 7.1.3. the Legal Costs of obtaining the most senior counsel's advice shall be met by the Funders as part of the Joint Project Costs; and
  - 7.1.4. the advice of the most 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, the most senior counsel may proceed as he, she or they see fit to inform himself, herself or themselves before forming and delivering his, her or their advice, but any such determination shall include the following considerations:
- 7.2.1. the complexity and likely duration of the litigation;
  - 7.2.2. the stage of the Consolidated Proceeding;
  - 7.2.3. the risks of establishing liability;
  - 7.2.4. the risks of establishing loss or damage;
  - 7.2.5. the risks of maintaining the Consolidated Proceeding;
  - 7.2.6. the ability of the Respondent to withstand a greater judgment;
  - 7.2.7. the range of reasonableness of the settlement in light of the best recovery;
  - 7.2.8. the range of reasonableness of the settlement in light of all the attendant risks of litigation;
  - 7.2.9. the terms of any opinion received from any independent expert in relation to the issues which arise in the Consolidated Proceeding; and
  - 7.2.10. any other matters the most 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, Omni Bridgeway or ICP, 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 the Resolution Sum (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 ICP and/or Omni Bridgeway, 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 ICP and/or Omni Bridgeway and the application pursuant to clause 8.1 is made by ICP and/or Omni Bridgeway, the relevant funder will continue to be entitled to receive payment from the Resolution Sum (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. ICP and/or Omni Bridgeway must each pay:
  - (a) their 50% portion of 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, their 50% portion of 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 ICP, Omni Bridgeway, the Joint Applicants and/or the Lawyers 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 the most senior counsel pursuant to clause 9.1 and ICP, Omni Bridgeway, 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, without limitation:



- 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.