

**Kuterba and Another v Sirtex Medical Limited**

**Federal Court of Australia VID1375/2017**

**SETTLEMENT DISTRIBUTION SCHEME**

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**BACKGROUND**

- A. The Settlement Distribution Scheme establishes a procedure for distributing the Settlement Sum to be paid by SRX pursuant to a settlement of the Proceeding approved by the Court.
- B. The Settlement Distribution Scheme does not become operative until the Court has made the Approval Orders.
- C. The Settlement Distribution Scheme provides for the following major steps:
- (a) Maurice Blackburn, or other entity, will be appointed as Administrator of the Settlement Distribution Scheme.
  - (b) The delegation of Administrative Functions by the Administrator to IMF.
  - (c) IMF, on instruction from the Administrator, will send each Registered Group Member a Trade Check and Declaration Notice.
  - (d) Each Registered Group Member shall have an opportunity to notify IMF, as delegate of the Administrator, of any amendments to the Registrant's Trade Data, within 28 days after the Approval Date.
  - (e) IMF, on instruction from the Administrator, will perform an Assessment for each Registered Group Member and will deliver an Assessment Notice to each group member.
  - (f) Each Registered Group Member will be given an opportunity to notify IMF and the Administrator of any objections to its Assessment Notice, and provide for any objections to be referred to Independent Counsel for Review.
  - (g) Interest earned on the Settlement Sum may be applied, to the extent necessary, for payment of Administration Costs.
  - (h) Prior to any distribution to Registered Group Members, the Administrator will deduct the Applicants' Legal Costs, the Applicants' Reimbursement Payment, any Administration Costs and the Funding Costs (as approved by the Court) from the Settlement Distribution Fund, leaving a Residual Settlement Sum.
  - (i) The Administrator will distribute all or part of the Residual Settlement Sum to Registered Group Members according to the relationship their assessed loss bears to the assessed loss of all Registered Group Members.
  - (j) IMF, on instruction from the Administrator, shall send each Registered Group Member a Remittance Notice.
  - (k) Any remaining undistributed component of the Residual Settlement Sum may

be paid as a donation to the Cancer Council or redistributed to eligible Registered Group Members.

## **OPERATIVE PROVISIONS**

### **1. DEFINITIONS AND INTERPRETATION**

1.1. In the Settlement Distribution Scheme, the following terms have the meanings defined below (clause references are references to the clauses of this document unless otherwise specified):

**Act** means the Federal Court of Australia Act 1976 (Cth).

**Administration Costs** mean Court-approved actual or estimated costs and disbursements of the Administrator calculated at the rates set out in Schedule A and approved by the Court in connection with the administration of the Settlement Distribution Scheme, including (without limitation) assessing Registered Group Members' claims, administering the Settlement Distribution Scheme, Independent Counsel's fees and any distributions paid to Registered Group Members.

**Administrative Function** means:

- (a) the tasks explicitly noted to be, under the Settlement Distribution Scheme, an Administrative Function delegated to IMF by the Administrator;
- (b) any other task that is not legal in nature that the Administrator delegates to IMF during the course of the settlement distribution process; and
- (c) in all instances, responding to general enquiries from Registered Group Members (other than those of a legal nature) regarding the settlement distribution process, including (but not limited to) any other Administrative Function performed by IMF.

**Administrator** means Maurice Blackburn acting as the Court appointed administrator of the Settlement Distribution Scheme, or any other administrator so appointed by the Court.

**Administrator Staff** means the persons delegated by the Administrator (including IMF) to perform the functions necessary or convenient for the efficient implementation of the Settlement Distribution Scheme, and includes the Administrator and IMF in respect of those administrator staff.

**Aggrieved Registered Group Member** means a Registered Group Member whose estimated distribution will, by reason of an Amended Assessment Notice issued to other Registered Group Members, be reduced by more than ten (10) per cent.

**Amended Assessment Notice** means the notice, in a form to be determined by the Administrator, required by cl 8.5 of the Settlement Distribution Scheme.

**Applicants** means Mr Pawel Kuterba and Mr Todd Hayward.

**Applicants' Legal Costs** means:

- (a) the Applicants' costs of, and incidental to, the Proceeding and costs associated with settlement approval and the preparation and administration of the Settlement Distribution Scheme up until and including the settlement approval hearing as approved by the Court; and
- (b) such amount of costs as may be approved by the Court as having been reasonably incurred by Hayward and/or AFPL in the conduct of the Hayward Proceeding.

**Applicants' Reimbursement Payment** means a payment (subject to Court approval) to the Applicants for reimbursement of their time and expenses in prosecuting the Proceeding. Where the payment is expressed in aggregate it shall be divided equally between the Applicants.

**Approval Date** means the date on which the Approval Orders are made.

**Approval Notice** means a notice, in a form approved by the Court, informing Group Members of the Approval Orders and the commencement of the Settlement Distribution Scheme.

**Approval Orders** has the same meaning as in the Settlement Deed.

**Assessment** means the value of a Registered Group Member's claim calculated in accordance with the Loss Assessment Formula.

**Assessment Notice** means the notice, in a form to be determined by the Administrator, required by cl 8.4 of the Settlement Distribution Scheme to be sent to each Registered Group Member setting out the Assessment of the value of that Registered Group Member's claim (and, where the context permits, includes any Amended Assessment Notice under cl 8.5).

**Cancer Council** means the Cancer Council (ACN 130 793 725).

**Claim Data** means the following information for each Registered Group Member: name, address, email address, telephone number, HIN or SRN, and Trade Data.

**Claims Database** means a database constructed by or on behalf of IMF to contain the Claim Data for each Registered Group Member.

**Court** means the Federal Court of Australia.

**Declaration** means a declaration made by a Registered Group Member or their authorised representative in response to the receipt of a Trade Check and Declaration Notice that the Trade Data held on the Claims Database is true and correct and does not require any alteration.

**Distribution** means a payment made to a Registered Group Member in accordance with cl 11.

**Final Assessment** means:

- (a) an Assessment contained in a Assessment Notice or an Amended Assessment Notice which is taken to have been accepted by a Registered Group Member under cl 8.5; and
- (b) an Assessment contained in a Review Determination under cl 9.

**Final Distribution Amount** means an amount calculated in accordance with cl 11.3.

**Funding Agreement** means any agreement between Pawel Kuterba or a Group Member and IMF pursuant to which IMF agreed to fund the Proceeding in return for a share of the proceeds received by Pawel Kuterba or that Group Member (as is relevant).

**Funding Costs** means the amount payable to IMF, as the litigation funder for the Proceeding, in accordance with the Funding Terms and the Approval Orders.

**Funding Terms** means Annexure A to the Orders made in this Proceeding dated 30 April 2018.

**Group Member** has the same meaning as in the Settlement Deed.

**High Court** means the High Court of Australia.

**IMF** means IMF Bentham Limited (ACN 067 298 088).

**Independent Counsel** means a barrister of the New South Wales Bar or Victorian Bar having at least 5 years' post-admission experience nominated by the Administrator, who is empowered under the Settlement Distribution Scheme to conduct any Review.

**Interest** means interest earned on the monies held in the Settlement Distribution

Account, and any interest which accrues on the Settlement Sum while held in the Settlement Distribution Account prior to the Approval Orders being made.

**Late Registrant** means a Group Member who or which has attempted to register their claim in the manner contemplated by the Orders made in the Proceeding on 26 June 2019, save that the purported registration was sent to IMF after the Registration Deadline.

**Loss Assessment Formula** means the formula by which losses are calculated as contained in Confidential Schedule B to the Settlement Distribution Scheme.

**Maurice Blackburn** means Maurice Blackburn Pty Ltd (ACN 105 657 949).

**Notice of Suspended Distribution** means the notice, in a form to be determined by the Administrator, required to be sent to each Registered Group Member whose Final Distribution Amount remains undistributed in accordance with cl 11 of the Settlement Distribution Scheme.

**Preliminary Payment** means a partial payment to a Registered Group Member in accordance with cl 11.5.

**Proceeding** means Federal Court of Australia proceeding VID 1375 of 2017 titled *Kuterba and Another v Sirtex Medical Limited*.

**Registered Group Member** means a Group Member who has completed online or returned to IMF a group member registration form or both a Funding Agreement with IMF and Retainer and Costs Agreement with Maurice Blackburn as at the Registration Deadline.

**Registration Deadline** means 7 August 2019, being the date, consistent with Order 5 of the Orders of the Court dated 26 June 2019, on or before which any Group Member wishing to be eligible to receive a distribution is required to register details of their claim with IMF.

**Relevant Period** means the period from 24 August 2016 to 6.09 pm 16 December 2016 inclusive.

**Remaining Balance** means the amount remaining in the Settlement Distribution Fund, following the cancellation by the Administrator of part or all of the Final Distribution Amounts for those Registered Group Members who fail to present a cheque or to provide accurate payment instructions within 28 days after the date of a Notice of Suspended Distribution.

**Remittance Notice** means, the notice, in a form to be determined by the Administrator, to be sent to each Registered Group Member who has received a Distribution, setting out the following information:

- (a) the component of a Registered Group Member's Distribution, which for Australian income taxation purposes, represents a distribution from the Settlement Sum; and
- (b) the component of a Registered Group Member's Distribution, which for Australian income taxation purposes, represents a distribution from the interest earned on the Settlement Sum; and
- (c) for Registered Group Members who are located outside of Australia, or whom have provided banking details for a bank account located outside of Australia, details of any amounts withheld from the interest component noted at (b) above.

**Residual Settlement Sum** means the amount of the Settlement Distribution Fund remaining after deduction of the amounts listed at cl 11.1.

**Retainer** means a costs disclosure and costs agreement between Maurice Blackburn and any Group Member relating to the Proceeding.

**Review** means the procedure provided in cl 9 for the review of an Assessment Notice at a Registered Group Member's request.

**Review Determination** means a written determination of Independent Counsel providing notice to the Registered Group Member and the Administrator of the calculation and the result of a Review under cl 9.

**Sanction** means all economic or financial sanctions or trade embargoes imposed, administered or enforced from time to time by Australia, the United Nations Security Council, the European Union, any European Union member state, Her Majesty's Treasury of the United Kingdom, the United States government, including those administered by the Office of Foreign Assets Control of the United States Department of the Treasury or the United States Department of State, or any other relevant sanctions authority.

**Sanctions Check** means a check conducted by any insurer of SRX who is liable to indemnify SRX in relation to the Proceeding, to ensure that no Distributions are made under the Settlement Distribution Scheme to persons who are subject to a Sanction.

**Settlement Approval Date** means the date on which the Approval Order is made in the

Proceeding.

**Settlement Deed** means the Settlement Deed between Pawel Kuterba, Todd Hayward, Sirtex Medical Limited (ACN 78 166 122), Maurice Blackburn Pty Ltd (ACN 105 657 949), IMF Bentham Limited (ACN 067 298 088), Australian Funding Partners Limited (ACN 167 628 597) dated June 2019 and executed in counterparts between 21 and 25 June 2019.

**Settlement Distribution Account** means the interest bearing trust account opened by Maurice Blackburn in accordance with cl 3 of the Settlement Deed.

**Settlement Distribution Fund** means the monies from time to time held in the Settlement Distribution Account.

**Settlement Distribution Scheme** means the terms of this settlement distribution scheme as approved by the Court, including any Schedules.

**Settlement Sum** means the amount of \$40,000,000 inclusive of costs and interest.

**SRX** means Sirtex Medical Limited (ACN 78 166 122).

**SRX Shares** means ordinary shares in SRX.

**Successful Review** means a Review conducted in accordance with cl 9 that results in a Final Assessment for a Registered Group Member which is more than five (5) per cent greater than:

- (a) the Assessment contained in that Registered Group Member's Assessment Notice (if no Amended Assessment Notice has been issued to that Registered Group Member); or
- (b) the Assessment contained in that Registered Group Member's Amended Assessment Notice (if an Amended Assessment Notice has been issued to that Registered Group Member).

**Trade Check and Declaration Notice** means a notice sent by IMF to a Registered Group Member, setting out the name of the Registered Group Member, HIN or SRN (where available) and the Trade Data held by IMF in the Claims Database for that Registered Group Member.

**Trade Data** means details of the date, quantity and total consideration (including where provided brokerage and tax associated with each trade) in SRX Shares made by a Registered Group Member during the Claim Period and the opening balance of SRX



Shares held by that Registered Group Member immediately prior to the commencement of share trading on 24 August 2016.

1.2. Headings are for convenience only and do not affect interpretation. The following rules apply unless the context requires otherwise:

- (a) the singular includes the plural, and the converse also applies;
- (b) a gender includes all genders;
- (c) if a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (d) a reference to a person includes a corporation, trust, partnership, unincorporated body or other entity, whether or not it comprises a separate legal entity;
- (e) a reference to dollars and \$ is to Australian currency; and
- (f) a reference to anything done by any person includes a reference to the thing as done by a director, officer, servant, agent, personal representative or legal representative if permitted to be so done by law or by any provision of the Settlement Deed or the Settlement Distribution Scheme.

## **2. SCHEME ADMINISTRATOR**

2.1. The Settlement Distribution Fund shall be administered and applied by the Administrator with certain Administrative Functions Delegated to IMF.

2.2. The Administrator will, with the assistance of IMF, subject to and in accordance with the Settlement Distribution Scheme:

- (a) hold the Settlement Distribution Fund on trust until the Settlement Distribution Fund is distributed; and
- (b) distribute the Settlement Distribution Fund (including any interest accrued) as expeditiously as possible.

2.3. The Administrator or IMF, in discharging any function or exercising any discretion conferred by the Settlement Distribution Scheme, shall administer this Scheme fairly according to its terms, as a duty owed to the Court in priority to any obligation to any individual Group Member.

2.4. Notwithstanding anything elsewhere contained in the Settlement Distribution Scheme, the Administrator may at any time and in its sole discretion correct any error, slip or omission occurring in the course of its administration of the Settlement Distribution Scheme.

- 2.5. Where a Registered Group Member is a Registered Group Member by virtue of a registration submitted on their behalf by a trustee, investment manager, responsible entity or agent, the Administrator and IMF may rely on any information, instruction or declarations provided by that trustee, investment manager, responsible entity or agent as if it had been provided by the Registered Group Member itself.
- 2.6. The Administrator, IMF and the Administrator Staff, in discharging any function or exercising any power or discretion conferred by this Scheme, shall not be liable for any loss to Group Members arising by reason of any mistake or omission made in good faith or of any other matter or thing except wilful and individual fraud and wrongdoing on the part of the Administrator, IMF or the Administrator Staff who are sought to be made liable.
- 2.7. The Administrator is required to comply with the taxation obligations of any trust created for the benefit of Registered Group Members in the course of the Settlement administration and may seek expert advice to enable this. Any tax that the Administrator may be required to pay in respect of an individual Registered Group Member may be deducted from that Registered Group Member's entitlement to the Settlement Distribution Fund. Any taxation obligations payable by any trust(s) created by the establishment of the Settlement Distribution Fund will be deducted from the Settlement Distribution Fund.

### **3. DELEGATION BY THE ADMINISTRATOR**

- 3.1. The Administrator shall delegate the Administrative Functions to IMF.
- 3.2. For the avoidance of doubt, any action taken by IMF in its performance of the Administrative Functions under the Settlement Distribution Scheme, will be of the same force and consequence as if that action had been performed by the Administrator, subject to the following exceptions:
- (a) Consistent with cl 3.5, where there is a disagreement between IMF and the Administrator regarding the action; or
  - (b) Where the action involves any error, omission, negligence on the part of IMF or its staff.
- 3.3. Notwithstanding cl 3.1 and 3.2, the Administrator shall maintain general oversight of the performance of the Administrative Functions by IMF and may, from time to time, confer with and give instructions to IMF regarding IMF's performance of the Administrative Functions.
- 3.4. IMF shall make the Claims Database available for inspection by the Administrator at all times during the operation of the Settlement Distribution Scheme for such purpose/s as the Administrator requires.

- 3.5. To the extent of any disagreement between IMF and the Administrator regarding any matter relating to the Settlement Distribution Scheme, the decision of the Administrator will prevail.

**4. SETTLEMENT DISTRIBUTION ACCOUNT, SETTLEMENT DISTRIBUTION FUND AND SETTLEMENT SUM**

- 4.1. If the Approval Orders are made, within seven (7) business days of the later of the following dates:

- (a) seven (7) business days after any appeal period in respect of the Approval Orders (whether under the rules of the Court or the High Court) expires without an appeal being commenced; or
- (b) in circumstances where an appeal in respect of the Approval Orders is commenced, seven (7) business days after that appeal is finally determined (including any determination in respect of that appeal by the High Court), the result of which is that the Approval Order is made or confirmed,

the amount held in the Settlement Distribution Account, being the Settlement Sum and Interest, will comprise the Settlement Distribution Fund.

**5. LATE REGISTRATIONS AND NON REGISTRANTS**

- 5.1. Pursuant to Order 5 of the Orders of the Court made in the Proceeding on 26 June 2019, only those Group Members who are Registered Group Members are eligible to receive a distribution from the Settlement Distribution Fund.

- 5.2. Notwithstanding cl 5.1, if the Court makes an order entitling a Late Registrant to be eligible to receive a distribution from the Settlement Distribution Fund, the Late Registrant shall be deemed to be a Registered Group Member for the purpose of the Settlement Distribution Scheme.

- 5.3. Any Group Member who is not a Registered Group Member (including any Late Registrant in respect of whom the Court does not make an order of the kind referred to in cl 5.2) will remain a Group Member for all purposes but:

- (a) shall not be entitled to receive a Distribution from the Settlement Distribution Fund; and
- (b) shall not be entitled to receive any notices under the Settlement Distribution Scheme.

**6. CONFIRMATION OF CLAIM DATA**

- 6.1. At all times, IMF, in performing an Administrative Function, must use reasonable endeavours to ensure the accuracy of the Claims Database, including, to the extent

necessary, updating the Claims Database for any amended or corrected Trade Data provided under cl 6.3, requesting further information or documents from a Registered Group Member or requesting further information or documents from third parties.

- 6.2. Prior to the commencement of the Settlement Distribution Scheme, IMF distributed a Trade Check and Declaration Notice to all Registered Group Members.
- 6.3. If, within 28 days of the Approval Date, a Registered Group Member does not, in response to a Trade Check and Declaration Notice:
  - (a) provide a Declaration; or
  - (b) notify IMF that the Trade Data held for that Registered Group Member is incorrect or requires amendment,

IMF and by extension, the Administrator, may rely upon the Trade Data contained in the Trade Check and Declaration Notice as true and correct for the purposes of the Settlement Distribution Scheme.

- 6.4. Where, within the period stipulated at cl 6.3 above, a Registered Group Member notifies IMF that the Trade Data listed in a Trade Check and Declaration Notice is incorrect and requires amendment, IMF may, subject to cl 6.1, request the Registered Group Member provide such information or documentation as is necessary to verify the amendment and may make changes to the Claims Database if so satisfied.
- 6.5. After the conclusion of the period set out at cl 6.3 above, no amendments to a Registered Group Member's Trade Data may be made, unless necessary as a result of an error, slip or omission on the part of the Administrator or IMF or as the result of a Successful Review.
- 6.6. Notwithstanding any other clause in the Settlement Distribution Scheme, if in the opinion of the Administrator, at any stage a Registered Group Member's Claim Data contains insufficient information or does not otherwise substantiate a Registered Group Member's claim, the Administrator or IMF, in performing an Administrative Function, may, by written notice, require the Registered Group Member to provide and verify by a statutory declaration or other means that the Administrator deems appropriate and within a time that the Administrator deems reasonable, such further information as the Administrator may require.

**7. SANCTIONS CHECK**

- 7.1. As soon as practicable, after the Approval Date, the Administrator shall, on request from any insurer of SRX who is liable to indemnify SRX in relation to the Proceeding, provide such information as that insurer requires for the insurer to conduct Sanctions Checks.
- 7.2. Provision of information in accordance with cl 7.1 is subject to the recipient insurer of SRX providing a confidentiality undertaking to the Administrator.
- 7.3. If, following the receipt of information from the Administrator under cl 7.1, one or more of SRX's insurers notifies the Administrator that a Registered Group Member is a prohibited person under any applicable Sanction, that Registered Group Member shall be taken to be a Registered Group Member for all purposes of the Settlement Distribution Scheme, but the Administrator shall not distribute any money from the Settlement Distribution Fund to that Registered Group Member without further order of the Court.

**8. ASSESSMENT NOTICE**

- 8.1. No earlier than 28 days after the Approval Date, the Administrator shall instruct IMF, in performing an Administrative Function, to perform an Assessment for each Registered Group Member under the Settlement Distribution Scheme by applying the Loss Assessment Formula, based on the Trade Data contained in the Claims Database in relation to each Registered Group Member.
- 8.2. The Assessment for each Registered Group Member must take into account the amounts to be deducted from the Settlement Distribution Fund listed at cl 11.1.
- 8.3. As soon as practicable, after the calculation of the preliminary estimates of the distributions for each Registered Group Member under cl 8.1, IMF shall deliver a schedule of the Assessments to the Administrator, such that the Administrator may confirm that the Loss Assessment Formula has been correctly applied.
- 8.4. Once the Administrator is satisfied that the Loss Assessment Formula has been correctly applied by IMF, the Administrator shall, as soon as practicable, instruct IMF to, in performing an Administrative Function, deliver to each Registered Group Member an Assessment Notice, listing:
- (a) the Claim Data relating to that Registered Group Member;
  - (b) the Assessment of that Registered Group Member's claim calculated in accordance with cl 8.3;
  - (c) the Administrator's reasonable estimate of the Registered Group Member's expected distribution under the Settlement Distribution Scheme;

- (d) the terms of cl 8.5 to 8.7 below;
- (e) the availability and terms of the Review procedure in cl 9 below;
- (f) any other information that the Administrator considers would assist Registered Group Members in determining whether to seek a Review;
- (g) in the case of a Registered Group Member referred to in cl 7.3, the terms and effect of that clause; and
- (h) where the Registered Group Member's Assessment is greater than zero (0), details any actions required of the Registered Group Member regarding the provision of payment details.

8.5. If, within 28 days of the date of the Assessment Notice, a Registered Group Member notifies IMF of any error, slip or omission in the Assessment Notice not related to that Registered Group Member's Trade Data, IMF shall notify the Administrator of the notification from the Registered Group Member. The Administrator may, in its absolute discretion, correct the Claims Database and direct IMF to, in performing an Administrative Function, send to that Registered Group Member, and any Aggrieved Registered Group Member, an Amended Assessment Notice.

8.6. For the avoidance of doubt, consistent with cl 6.5, a Registered Group Member cannot make changes to their Trade Data following receipt of an Assessment Notice.

8.7. The accuracy of an Assessment Notice shall be deemed to be accepted by a Registered Group Member, unless the Registered Group Member, within 28 days of the date of the Assessment Notice, delivers to the Administrator a written request for a Review together with copies of all documents on which the Registered Group Member relies for the purposes of the Review, including any statement of reasons for seeking the Review.

## **9. REVIEW**

9.1. Consistent with cl 8.7, all requests for a Review must be in writing and be sent to the Administrator, together with any supporting documentation.

9.2. In the event that a request for a Review is delivered to IMF, it will, for the purposes of this clause, be deemed to have been delivered to the Administrator on that date. In such circumstances, IMF shall, within 2 business days of receipt, in performing an Administrative Function, forward the request for Review to the Administrator.

9.3. Upon receipt of a request for a Review, the Administrator shall review the request and copies of documents on which the Registered Group Member relies for the purposes of the Review and:

- (a) if satisfied that the request discloses an error, slip or omission by the Administrator or IMF or any other administrative or clerical error, correct the notice to which the request relates; or
- (b) in all other cases, refer the request to the Independent Counsel.

9.4. If a request for a Review is referred to the Independent Counsel, the Independent Counsel may by written notice direct the Registered Group Member to submit such further documentation in support of the Review as the Independent Counsel may consider appropriate. Such documentation must be submitted within 28 days of the date of any such written notice, failing which the request for Review shall be deemed never to have been made and the accuracy of the Assessment Notice shall be deemed to be accepted by the Registered Group Member.

9.5. The Independent Counsel shall, within 14 days after:

- (a) the receipt by the Administrator of the request for the Review; or
- (b) receipt by the Independent Counsel of documentation provided in response to a written direction under cl 9.4,

whichever is the later:

- (c) make an Assessment of the Registered Group Member's claim in accordance with the methodology prescribed in cl 8.1; and
- (d) give written notice of the result of the Review to the Registered Group Member and the Administrator.

9.6. A Review Determination is final and binding, save that, prior to the expiry of 7 days after notice is given of the Review Determination in accordance with cl 9.5, the Registered Group Member has liberty to apply to the Court only on a question of law arising from the Review Determination.

9.7. A Registered Group Member requesting a Review shall pay the costs of the Review calculated at \$800, exclusive of GST, for the first two hours' attendance by the Independent Counsel (or any part thereof) and \$450 per hour, exclusive of GST, for each subsequent hour (or any part thereof).

9.8. The Independent Counsel may, by written notice, require a Registered Group Member to pay to the Administrator an amount the Independent Counsel reasonably estimates will represent the cost of the Review, which will be held by the Administrator on trust for the purposes of paying the costs of the Review upon presentation by the Independent Counsel of a tax invoice. If this amount is not provided as required within 10 days of the

date that the written notice requiring payment into trust was sent to the Registered Group Member requesting the Review, the Independent Counsel shall issue a Review Determination confirming the Registered Group Member's Assessment Notice, noting that no payment has been made into trust as required.

- 9.9. If no further documentation is requested by the Independent Counsel under cl 9.4 in respect of a Registered Group Member's request for Review, and that Registered Group Member's request results in a Successful Review, the Registered Group Member will be reimbursed from the Settlement Distribution Fund for any costs of the Successful Review paid by the Registered Group Member in accordance with cl 9.7. The reimbursed costs of the Successful Review will be deemed to be Administration Costs.
- 9.10. If any costs of a Review (other than a Successful Review for which the Registered Group Member is entitled to reimbursement under cl 9.9) have not been paid by a Registered Group Member before any distribution to that Registered Group Member, the Administrator shall deduct those costs from any sum which otherwise would be distributed to the Registered Group Member who sought the Review in priority to all other entitlements. That Registered Group Member shall remain liable for any costs not recovered by a deduction pursuant to this clause and the Administrator, in administering the Settlement Distribution Scheme, may apply to the Court for an order requiring the Registered Group Member to pay those costs.

## **10. APPLICATION OF INTEREST**

- 10.1. Interest may be applied, in the first instance, to payment of Administration Costs.
- 10.2. Any additional Administration Costs shall be paid to the Administrator out of the Settlement Distribution Fund before any final distribution of the Settlement Distribution Fund.
- 10.3. Any Interest which is not otherwise required for the payment of Administration Costs, will form part of the Settlement Distribution Fund and be available for distribution to Registered Group Members.
- 10.4. The Administrator may at any time convert the Settlement Distribution Fund to a non-interest earning account if it determines that the cost of administering the taxation implications of further interest being earned on the Settlement Distribution Fund will be disproportionate to the further interest expected to be earned.

## **11. DISTRIBUTION**

- 11.1. Prior to any distribution from the Settlement Distribution Fund to Registered Group



Members, the Settlement Sum shall be treated as a common fund and the following payments shall be made from the Settlement Distribution Fund:

- (a) an amount to the Applicants for the Applicants' Legal Costs;
- (b) an amount to the Applicants for the Applicants' Reimbursement Payment;
- (c) an amount to the Administrator for Administration Costs incurred by the Administrator to the extent not already paid under cl 10.1; and
- (d) an amount to IMF, as the litigation funder, for the Funding Costs.

11.2. Once the payments referred to in cl 11.1 are made, the amount in the Settlement Distribution Fund, referred to as the Residual Settlement Sum, shall then be distributed in accordance with this clause.

11.3. The Residual Settlement Sum shall be distributed to Registered Group Members in the proportion which the Final Assessment of each Registered Group Member bears to the aggregate of the Final Assessments for all Registered Group Members. Each Registered Group Member's distribution calculated in accordance with this clause constitutes the Registered Group Member's Final Distribution Amount.

11.4. As soon as practicable, after distribution to Registered Group Members, the Administrator shall instruct IMF, in performing an Administrative Function, to send to each Registered Group Member who has received a Distribution, a Remittance Notice.

11.5. Notwithstanding cl 11.1 above, if at any time in respect of the Registered Group Members:

- (a) no Review has been requested, or all Reviews have been completed; or
- (b) the highest reasonable estimate of the value of the Assessments still awaiting the determination of Final Assessment is less than 20% of the amount available for distribution to Registered Group Members,

the Administrator, in its absolute discretion, may make a Preliminary Payment to Registered Group Members by distribution from the Settlement Distribution Fund in accordance with the procedure set out in cl 11.3, but shall withhold an amount not less than double the highest reasonable estimate of the Assessments still awaiting the determination of Final Assessment, plus its highest reasonable estimate of the Administration Costs likely to be incurred prior to the final distribution of the Settlement Distribution Fund. For the avoidance of doubt, any such Preliminary Payment:

- (i) may be made prior to the determination of the Final Assessments of all Registered Group Members; but

- (ii) may not be made to a Registered Group Member until the determination of the Final Assessment of that Registered Group Member's claim.

- 11.6. Subject to cl 11.1, other than a Preliminary Payment made under cl 11.5, no distribution shall be made from the Settlement Distribution Fund until the Final Assessment of every Registered Group Member has been determined and the Applicants' Legal Costs, Applicants' Reimbursement Payment, Administration Costs and Funding Costs have been paid in full.
- 11.7. If a Preliminary Payment is made, any Administration Costs incurred after the date of the Preliminary Payment shall, subject to order of the Court, be paid to the Administrator prior to the final distribution of the remaining amount in the Settlement Distribution Fund.
- 11.8. The distribution of Preliminary Payments and Final Distribution Amounts to Registered Group Members will be attempted by electronic funds transfer, except where:
- (a) a Registered Group Member demonstrates that distribution by electronic funds transfer is impracticable for that Registered Group Member; or
  - (b) the Administrator, in its absolute discretion, considers that another method would be more conducive to effecting a timely distribution to any Registered Group Member or group of Registered Group Members.
- 11.9. Following the first attempted distribution of Final Distribution Amounts by electronic funds transfer, any further distributions may, at the discretion of the Administrator, be made by issuing cheques.
- 11.10. If any Registered Group Member's Final Distribution Amount, or part thereof, remains in the Settlement Distribution Fund 60 days after:
- (a) all cheques comprising Registered Group Members' Final Distribution Amounts have been sent to Registered Group Members; or
  - (b) in the event that no cheques are issued, the earliest date by which the electronic transfer of a Final Distribution Amount to every Registered Group Member has been attempted,
- the Administrator shall instruct IMF, in performing an Administrative Function, to issue a Notice of Suspended Distribution to each Registered Group Member whose Final Distribution Amount, or part thereof, remains in the Settlement Distribution Fund.
- 11.11. The Notice of Suspended Distribution will notify the relevant Registered Group Member that if, within 28 days of the date of the notice:

- (a) any cheques comprising all or part of that Registered Group Member's Final Distribution Amount remain unrepresented; or
- (b) any electronic funds transfer comprising all or part of that Registered Group Member's Final Distribution Amount cannot be made, due to either the failure to provide, or the provision of inaccurate, payment instructions; or
- (c) if the Registered Group Member otherwise fails to claim their Final Distribution Amount,

the Administrator may, in its absolute discretion, cancel that Registered Group Member's entitlement to a Distribution under the Settlement Distribution Scheme and the funds comprising all or part (as is applicable) of the Registered Group Member's Final Distribution Amount shall be dealt with in accordance with cl 11.12.

11.12. Where, within 28 days of a Notice of Suspended Distribution, a Registered Group Member fails to either, present any cheques comprising all or part of that Registered Group Member's Final Distribution Amount, or provide accurate payment instructions to enable the Administrator to make a Distribution to that Registered Group Member by electronic funds transfer:

- (a) the Administrator may, in its absolute discretion, cancel that Registered Group Member's entitlement to a Distribution under the Settlement Distribution Scheme and retain any corresponding funds in the Settlement Distribution Fund;
- (b) if the Remaining Balance is \$50,000 or less, the remaining funds shall be paid as a donation to the Cancer Council;
- (c) if the Remaining Balance is greater than \$50,000, any remaining funds will be redistributed to Registered Group Members (other than those Registered Group Members whose entitlement to a Distribution has been cancelled under cl 11.12(a)) on a pro rata basis as soon as practicable, save that:
  - (i) if any Registered Group Member stands to receive an amount of less than \$500 then that amount may be forfeited at the Administrator's discretion and paid as a donation to the Cancer Council;
  - (ii) if the cost of redistributing the Remaining Balance in the Settlement Distribution Fund is unreasonably disproportionate to the average pro-rated redistribution payments to be made, the Administrator, in its discretion, pay the Remaining Balance as a donation to the Cancer Council; or

- (iii) if a Registered Group Member is unable to receive a Distribution for the reason that a Registered Group Member is an entity that can no longer receive a Distribution, that Distribution may, in the Administrator's discretion, not be counted toward the amount referred to in cl 11.12(c) for the purpose of determining if a redistribution is required and will instead be included in any donation made to the Cancer Council; and
- (d) if 28 days after a redistribution pursuant to clause 11.12(c), funds remain in the Settlement Distribution Fund, those funds will be forfeited and paid as a donation to the Cancer Council.

## **12. IMMUNITY FROM CLAIMS**

- 12.1. The completion of distributions made pursuant to cl 11 (including distributions made by cheques that remain unrepresented for 28 days after the Notice of Suspended Distribution) shall satisfy any and all rights, claims or entitlements of all Group Members in or arising out of the Proceeding.
- 12.2. The Administrator will have no liability to any Registered Group Member who does not receive a Distribution or receives a Distribution in an incorrect amount arising from:
  - (a) a failure of a Registered Group Member to correct its Claim Data recorded on the Claims Database in accordance with the Settlement Distribution Scheme;
  - (b) incorrect or otherwise insufficient bank account information provided by the Registered Group Member;
  - (c) incorrect or otherwise insufficient Claim Data provided by the Registered Group Member;
  - (d) fraudulent conduct of a party other than the Administrator;
  - (e) an electronic funds transfer using the bank account information provided by the Registered Group Member; and/or
  - (f) any error or omission made by IMF.
- 12.3. IMF will have no liability to the Administrator or any Registered Group Member who does not receive a Distribution or receives a Distribution in an incorrect amount arising from:
  - (a) a failure of a Registered Group Member to correct its Claim Data recorded on the Claims Database in accordance with the Settlement Distribution Scheme;
  - (b) incorrect or otherwise incomplete information provided to IMF by or on behalf of a Registered Group Member, including any Claim Data;
  - (c) failure of a Registered Group Member to notify IMF of an update to its contact

details listed on the Claims Database;

- (d) a failure by a Registered Group Member to request a correction/recalculation of the estimation of compensation entitlements in accordance with the Settlement Distribution Scheme; and/or
- (e) any error or omission made by the Administrator.

### **13. SUPERVISION BY THE COURT**

- 13.1. The Administrator may refer any issues arising in relation to the Settlement Distribution Scheme or the administration of the Settlement Distribution Scheme to the Court for determination.
- 13.2. On the application of the Administrator, or of its own motion, the Court may vary or amend the terms of the Settlement Distribution Scheme.
- 13.3. Any costs incurred by the Administrator in any such reference to the Court, or in any application made by the Administrator, shall be deemed to be Administration Costs, unless the Court otherwise orders.
- 13.4. At the settlement approval hearing, the Applicants and Respondent will jointly request the Court to make final orders:
  - (a) dismissing the Proceeding with no order as to costs as between the parties; and
  - (b) vacating all orders as to costs previously made in the Proceeding,
 with such orders to take effect from the date on which the final Distribution from the Settlement Distribution Fund is confirmed by the Administrator to the Court.

### **14. NOTICE**

- 14.1. Any notice to be given pursuant to the Settlement Distribution Scheme, whether sent by the Administrator or IMF, shall be deemed given and received for all purposes associated with the Settlement Distribution Scheme if it is:
  - (a) addressed to the person to whom it is to be given; and
  - (b) either:
    - (i) sent by email to that person's email address (being, in respect of a Registered Group Member, the email address listed on the Claims Database) and a server through which it is transmitted produces a report that states that the email has been sent to the inbox of that person; or

- (ii) sent by pre-paid mail, to that person's postal address (being, in respect of a Registered Group Member, the current postal address recorded in the Claims Database).

14.2. A notice that complies with cl 14 will be deemed to have been given and received:

- (a) if it was sent by email, at the time it was sent;
- (b) if it was sent by mail to an addressee in Australia, two clear business days after being sent; or
- (c) if it was sent by mail to an addressee overseas, five clear business days after being sent.

14.3. Where a Registered Group Member is not a natural person and where one person has been nominated as the contact in respect of several Registered Group Members, it is sufficient for the purpose of giving notice that any of the provisions of cl 14.1 are complied with in relation to that nominated person.

14.4. IMF's address and email address shall be as set out below unless and until the Administrator or IMF notifies the sender otherwise:

Client Liaison Team  
IMF Bentham Ltd  
PO Box Z5106  
Perth WA 6831  
Email: 403354@imf.com.au

14.5. The Administrator's address and email address shall be as set out below unless and until the Administrator notifies the sender otherwise:

Sirtex Settlement Administrator  
Maurice Blackburn Pty Ltd  
Level 21, 380 LaTrobe Street  
MELBOURNE VIC 3000  
Email: SClassAction4@mauriceblackburn.com.au

## **15. TIME**

15.1. The time for doing any act or thing under the Settlement Distribution Scheme may be extended by the Administrator in its absolute discretion.

15.2. The time for doing any act or thing under the Settlement Distribution Scheme may be extended by order of the Court.

