



Federal Court of Australia

District Registry: Victoria

Division: General

No: VID572/2019

DALE ROBERT ALFORD and another named in the schedule
Applicant

AMP SUPERANNUATION LIMITED (ACN 008 414 104) and others named in the
schedule
Respondent

ORDER

JUDGE: JUSTICE MURPHY

DATE OF ORDER: 20 August 2019

WHERE MADE: Melbourne

THE COURT ORDERS THAT:

Consolidation

1. Pursuant to Rule 30.11 of the *Federal Court Rules 2011* (the **Rules**) and section 33ZF of the *Federal Court of Australia Act 2011* (the **Act**), the proceeding *Anne Cooper and Jodie Mitchell v AMP Superannuation Limited and another* (VID 701/2019) (**Cooper Proceeding**) be consolidated with this proceeding (VID 572/2019 (**Alford Proceeding**)) and the consolidated proceeding be known as *Dale Robert Alford, Sebastian Smith, Anne Cooper and Jodie Mitchell v AMP Superannuation Limited and others* to be identified as VID 572/2019 (**Consolidated Proceeding**).
2. The applicants in the Alford Proceeding (the **Alford Applicants**) and the applicants in the Cooper Proceeding (the **Cooper Applicants**) are to be the joint representative applicants in the Consolidated Proceeding (the **Joint Applicants**).
3. Pursuant to rule 1.32 of the Rules and section 33ZF of the Act, Maurice Blackburn Pty Ltd (**Maurice Blackburn**) and Slater & Gordon Limited (**Slater and Gordon**) (together, the **Lawyers**) are granted leave to be jointly named as solicitors on the record for the Joint Applicants in the Consolidated Proceeding on the following bases:



- (a) a litigation committee will be established comprised of two solicitors from each of the Lawyers, which will be responsible for making major strategic decisions, managing the litigation and allocating tasks between the Lawyers over the course of the litigation, with the primary determinant of the allocation of work to be the interests of group members having regard to:
 - (i) the skills and experience of the Lawyers and their respective staff;
 - (ii) the objective of ensuring that the total legal costs are reasonable and proportionate; and
 - (iii) the objective of minimising, to the greatest extent possible, the legal costs incurred through overlapping or duplicated work;
- (b) the Lawyers will work together to reduce duplication in work, whilst ensuring that each has a sufficient degree of oversight over the work performed by the other;
- (c) the Lawyers will nominate one physical address and one email address for service on the Joint Applicants;
- (d) one set of counsel will be engaged to represent the Joint Applicants and the group members in the Consolidated Proceeding;
- (e) all correspondence and other communication from the Joint Applicants' solicitors to the Respondent's solicitors will be sent or made by only Maurice Blackburn or Slater and Gordon;
- (f) the Joint Applicants will jointly:
 - (i) make any interlocutory applications that are necessary in the Consolidated Proceeding save for any application in respect of any non-common issues;
 - (ii) respond to any interlocutory applications filed by the Respondent in the Consolidated Proceeding;
 - (iii) retain, brief and instruct expert witnesses in the Consolidated Proceeding; and
 - (iv) conduct the discovery process in the Consolidated Proceeding, including the coordination of electronic discovery, requests, processes and technology;



- (g) the Respondent need only produce one set of discovery documents to the Joint Applicants in the Consolidated Proceeding; and
 - (h) by 27 August 2019 the Joint Applicants shall enter into a cooperative litigation protocol which shall address the manner in which the Lawyers are to cooperate in the conduct of the Consolidated Proceeding with the protocol to be filed with the Court.
4. Costs incurred in the Alford Proceeding and Cooper Proceeding will be costs in the Consolidated Proceeding.
 5. In the event that the Joint Applicants in the Consolidated Proceeding are required to provide security for costs, Harbour and Therium (both as defined in the Funding Terms attached as Annexure A, '**Funding Terms**') will each provide a form of security for costs that shall be acceptable to the Respondent, or as otherwise ordered by the Court, and in the following proportions:
 - (a) Harbour to provide 50%; and
 - (b) Therium to provide 50%.
 6. In the event that an adverse costs order is made against the Joint Applicants in the Consolidated Proceeding, Harbour and Therium will each meet any such order in the following proportions:
 - (a) Harbour to pay 50%; and
 - (b) Therium to pay 50%.

Common Fund Order

7. Subject to further order, pursuant to sections 23 and 33ZF of the Act and rule 1.32 of the Rules, the Funding Terms in Annexure A be approved and be binding upon the Joint Applicants, the group members, the Respondents, Harbour, Therium and the Lawyers (as defined in the Funding Terms).
8. Order 7 is subject to the provision of an undertaking by each of Therium, the Cooper Applicants, Slater and Gordon, Harbour, the Alford Applicants and Maurice Blackburn to each other and to the Court that they will each comply with their respective obligations



under the Funding Terms, being those in Annexure A (as may be further modified as the Court thinks fit).

Pleadings

9. Pursuant to rules 8.21 and 16.51 of the Rules, the Joint Applicants in the Consolidated Proceeding are granted leave to file and serve by 17 September 2019:
 - (a) a consolidated originating application; and
 - (b) a consolidated statement of claim.
10. Pursuant to rule 1.34 of the Rules:
 - (a) the requirements of rule 8.23(2)(a) of the Rules are dispensed with for the purpose of the consolidated originating application to be filed by the Joint Applicants in the Consolidated Proceeding;
 - (b) the requirements of rule 16.59(2)(a) of the Rules are dispensed with for the purpose of the consolidated statement of claim to be filed by the Joint Applicants in the Consolidated Proceeding.
11. By no later than six weeks after service of the consolidated statement of claim the Respondents are to file their defence to the consolidated statement of claim.

Costs Reference


12. Pursuant to sections 33ZF(1) and 37P(2) of the Act, Ms Elizabeth Harris, Legal Costs Consultant, is appointed as an independent costs referee (**Costs Referee**) for the purpose of:
 - (a) conducting inquiries every four months (commencing from the date of these Orders) as to the question of whether there is unnecessary or excessive work (including any unnecessary or excessive duplication of work) being performed by the Lawyers in the Consolidated Proceeding, having regard to the matters set out in paragraphs (i) to (iii) of Order 3 above; and
 - (b) providing confidential written reports to the Lawyers and to the Court every four months (commencing from after the date of these Orders) stating the Costs Referee's opinion on the question set out at 12(a) above, including any



recommendations for reducing duplication where identified or otherwise reducing costs.

13. The Lawyers must cooperate and provide such information, access to personnel and access to documents as the Costs Referee may reasonably require.
14. Without affecting the powers of the Court as to costs, the Joint Applicants are to be jointly and severally liable for the reasonable fees of the Costs Referee in the first instance, which fees will become part of the Joint Applicants' costs.
15. Subject to any further order of the Court, for the purpose of any order made pursuant to sections 33V or 33ZJ of the Act approving payment or part-payment of the Joint Applicants' legal costs and disbursements out of any settlement sum or Court award of damages in the Consolidated Proceeding, the total amount so approved will not include an amount that is referable to work performed by the Lawyers that has been identified by the Costs Referee as being unnecessary or excessive.

Date that entry is stamped: 20 August 2019


Registrar



ANNEXURE A CLASS ACTION FUNDING TERMS

1. Definitions and interpretation

1.1. The following definitions apply in these Funding Terms:

Administration Costs	means the reasonable cost of the administration of any scheme for the distribution of any Resolution Sum, including fees charged by and expenses paid by the Administrator, including court fees, barristers' fees, external photocopying fees, IT project management fees, data processing fees, process service fees, expert report fees, external costs consultants fees, interstate agents' fees, travel and accommodation fees.
Administrator	means the administrator appointed by the Court of any scheme for the distribution of the Resolution Sum.
Alford Proceeding	means proceeding VID572/2019 prior to becoming a Consolidated Proceeding including the period prior to commencement of that proceeding.
AMP Life	means AMP Life Limited.
AMP Services	means AMP Services Limited.
AMP Super	means AMP Superannuation Limited.
Claims	means the claim or claims the Joint Applicants or any Group Member has or may have against any one or more of the Respondents for loss and damage caused to the Joint Applicants or Group Member by the conduct of one or more of the Respondents for the relief set out in the originating application (as amended from time to time) arising from the matters stated in the statement of claim filed in respect of the Consolidated Proceeding (as amended from time to time).
Consolidated Proceeding	<p>means the proceedings resulting from the consolidation of VID 572/2019 and VID 701/2019 and any other legal proceedings to prosecute some or all of the Claims, including:</p> <ul style="list-style-type: none">(a) proceedings brought in contemplation of the Consolidated Proceeding; and(b) any other proceedings or process as part of or consequent on the class action (including any alternative dispute resolution processes engaged to resolve some or all of the Claims), <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>
Cooper Proceeding	means proceeding VID 701/2019 prior to becoming a Consolidated Proceeding including the period prior to commencement of that proceeding.
Costs Order	means any order made by a court requiring one or more parties to the Consolidated Proceeding to pay the costs incurred by another party



	or parties to the Consolidated Proceeding.
Disbursements	means any third party expense that the Lawyers incur, whether as principals or as agents on behalf of Group Members and/or the Joint Applicants, in relation to the conduct of the Consolidated Proceeding, Alford Proceeding and/or Cooper Proceeding (or as otherwise specified), Legal Work and including external advice and any external legal services which the Lawyers consider reasonably necessary to: (a) investigate the Claims; (b) prosecute the Claims; (c) negotiate a Settlement of the Claims.
Funders	means: <ol style="list-style-type: none">1. Therium Litigation Finance Atlas AFP IC, its successors and assigns (Therium); and2. Harbour Fund IV, L.P., its successors and assigns (Harbour).
Funding Agreements	means the Therium Funding Agreement and Harbour Funding Agreement.
Funding Period	commences on the date that the Court approves these Funding Terms and ends on the Termination Date.
Funding Limit	means the limit on Legal Costs and Disbursements payable by each Funder to each of the Lawyers under their respective agreements with the Lawyers.
Funding Terms	means these terms.
Group Members	means all persons who are identified as group members in the Consolidated Proceeding and who do not validly opt out of the Consolidated Proceeding.
GST Act	means the <i>A New Tax System (Goods and Services Tax) Act 1999 (Cth)</i> .
GST	means the amount obtained by multiplying the prevailing rate of GST (currently 10%) by an amount equal to the consideration to be received by Therium or Harbour for any taxable supply made to any Group Member by Therium or Harbour under or in connection with these Funding Terms (unless otherwise defined, terms used in this definition have the same meaning as in the GST Act).
Harbour Funding Agreement	means a funding agreement between Harbour and a Group Member in relation to the Claims, including the funding agreement between the Funders and the Alford Applicants as at the commencement of the Funding Period.
Harbour Project Costs	Means: <ol style="list-style-type: none">(a) 75% of the reasonable legal fees of Maurice Blackburn incurred in the Project Investigation and the conduct of each stage of the Consolidated Proceeding and the Alford Proceeding, subject to the operation of the Funding Limit;(b) all of Harbour's out-of-pocket costs in respect of Disbursements incurred by Maurice Blackburn on behalf of the Alford Applicants or the Joint Applicants in relation to the Project Investigation and the conduct of each stage of the Consolidated Proceeding, subject to the operation of the Funding Limit;



- (c) any costs incurred by Harbour in connection with the enforcement of these Funding Terms; and
- (d) any GST payable on any Supply made by any entity as a result of the above costs or expenses being incurred,

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

Joint Applicants

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

- 1. Anne Cooper and Jodie Mitchell (**Cooper Applicants**); and
- 2. Dale Robert Alford and Sebastian Smith(**Alford Applicants**).

Joint Project Costs

means:

- (a) 100% of the total Disbursements of the Lawyers paid and incurred for the conduct of each stage of the Consolidated Proceeding (but excluding costs incurred solely in respect of the Alford Proceeding or Cooper Proceeding), subject to the operation of the Funding Limit(s);
- (b) in the event that the Joint Applicants in the Consolidated Proceeding are required to provide security for costs, the amount payable in respect of security for costs;
- (c) any adverse Costs Order made against the Joint Applicants in the Consolidated Proceeding;
- (d) any costs associated with any scheme for the distribution of any Resolution Sum, including the costs of any Administrator which is appointed;
- (e) the costs of counsel in providing the advice referred to in clause 7 or clause 9;
- (f) any GST payable on any taxable supply made by any entity as a result of the above costs.

Lawyers

means:

- 1. Slater & Gordon Limited or any firm of lawyers appointed in their place by the Cooper Applicants, and with Therium's written consent; and
- 2. Maurice Blackburn Pty Ltd, or any firm of lawyers appointed in their place by the Alford Applicants, and with Harbour's written consent.

Legal Work

means legal work performed by Slater and Gordon pursuant to the Slater and Gordon Retainer Agreements, and legal work performed by Maurice Blackburn pursuant to the Maurice Blackburn Retainer Agreements, including such advice and services reasonably necessary to (a) investigate the Claims; (b) prosecute the Consolidated Proceeding; (c) negotiate a Settlement of the Claims; and (d) comply with the Therium Funding Agreement and Harbour Funding Agreement respectively and these Funding Terms.

Maurice Blackburn

means any 'at risk' component of Maurice Blackburn's professional



Remaining Costs	fees, as prescribed in the Maurice Blackburn Retainer Agreements. The Maurice Blackburn Retainer Agreement provides for the following Remaining Costs: <ul style="list-style-type: none">(a) 25% of Maurice Blackburn’s reasonable professional fees incurred for the sole purpose of performing the Legal Work in so far as such professional fees are incurred before or during the Funding Period and in accordance with the Maurice Blackburn Retainer Agreement; plus(b) interest on any amounts in a bill for Maurice Blackburn’s legal costs which remain unpaid for 30 days after Maurice Blackburn has issued that bill with interest calculated from that date and calculated at the rate prescribed by the applicable legal profession regulations or rules; plus(c) Maurice Blackburn’s reasonable professional fees incurred over the applicable Funding Limit; plus(d) a 25% ‘uplift’ component on any conditional legal costs.
Maurice Blackburn Retainer Agreement	means the retainer and costs agreement between Maurice Blackburn and a Group Member, including the costs agreements signed by the Alford Applicants.
NM Super	means N. M. Superannuation Pty Ltd
NMLA	means The National Mutual Life Association of Australasia Limited
NMMT	means NMMT Limited
Other Parties	means any other person or entity which: <ul style="list-style-type: none">(a) becomes a party to the Consolidated Proceeding at the initiative of a Respondent; or(b) the Lawyers recommend be joined to the Consolidated Proceeding and in respect of whom the Funders agree in writing to accept adverse Cost Order exposure.
Project Investigation	means the Lawyers’ Legal Work performed in connection with the investigation of the Alford Proceeding and the Cooper Proceeding and the Claims, and includes without limitation the Lawyers’ investigation into whether the Alford Proceeding and the Cooper Proceeding may be brought, its strengths and weaknesses and prospects of success.
Resolution	means when all or any part of a Resolution Sum is received and, where a Resolution Sum is received in parts, a “Resolution” occurs each time a part is received.
Resolution Sum	means the amount or amounts, or the market value of any goods or services, for which some or all of the Claims are Settled, or for which judgment is given, or which the Respondents are ordered to pay, including the value of any favourable terms of future supply of goods or services, any interest and any costs recovered pursuant to a Costs Order in favour of the Joint Applicants or by agreement.
Respondent	means AMP Super, NM Super, AMP Life, AMP Services, NMLA, NMMT and any Other Parties named as defendants or respondents in the Consolidated Proceeding.



Retainer Agreements	means the Slater and Gordon Retainer Agreement and Maurice Blackburn Retainer Agreement.
Slater and Gordon Remaining Costs	means the ‘at risk’ component of Slater and Gordon’s professional fees, as prescribed in the Slater and Gordon Retainer Agreements. The Slater and Gordon Retainer Agreement provides for the following Remaining Costs: (a) 20% of Slater and Gordon’s reasonable professional fees incurred for the sole purpose of performing the Legal Work in so far as such professional fees are incurred before or during the Funding Period and in accordance with the Slater and Gordon Retainer Agreements; plus (b) Slater and Gordon’s reasonable professional fees incurred over the applicable Funding Limit; plus (c) a 25% ‘uplift’ component on any conditional legal costs.
Slater and Gordon Retainer Agreement	means the retainer and costs agreement between Slater and Gordon and a Group Member, including the costs agreements signed by the Cooper Applicants.
Senior Counsel	means the Senior Counsel or Queen’s Counsel retained by the Lawyers in respect of the Proceedings, or if more than one then the most senior of them.
Settlement	means any settlement, compromise, discontinuance or waiver of the Claims approved by the Court, and "Settle," "Settles" or "Settled" shall be construed accordingly.
Termination Date	means the date on which these Funding Terms are terminated in accordance with clause 8 below.
Therium Funding Agreement	means a funding agreement between Therium and a Group Member in relation to the Claims, including the funding agreements between the Funders and the Cooper Applicants as at the commencement of the Funding Period.
Therium Project Costs	means: (a) 80% of the reasonable legal fees of Slater and Gordon incurred in the conduct of each stage of the Consolidated Proceeding and the Cooper Proceeding, subject to the Funding Limit; (b) all of Therium’s reasonable out-of-pocket costs and expenses, including Disbursements incurred by Slater and Gordon, in relation to the Project Investigation and the conduct of each stage of the Consolidated Proceeding and the Therium Proceeding, including in relation to any consultants engaged by Therium (other than those costs and expenses already referred to in this definition), subject to the Funding Limit; (c) any costs of taxation or assessment incurred if Therium requires that Slater and Gordon submit any one or more of their invoices to taxation or assessment; (d) any GST payable on any Supply made by any entity as a result of the above costs or expenses being incurred, and for the avoidance of doubt, and unless expressly stated otherwise,



includes amounts described in (a) to (d) above which have been incurred during, or are in respect of, a period before or during the Funding Period.

Trust Account

means an interest-bearing trust account established and maintained by the Lawyers for the sole purpose of receiving Resolution Sums under these Funding Terms.

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

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

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

2. Professional Fees and Existing Agreements

2.1. For the duration of the Funding Period, these Funding Terms will prevail over the Funding Agreements.

2.2. Upon the request of a Group Member, Maurice Blackburn and/or Slater and Gordon shall provide that Group Member with a copy of their respective Retainer Agreements on a confidential basis.

3. Obligations of the Funders

3.1. Therium must pay the Therium Project Costs subject to and in accordance with the Therium Funding Agreement.

3.2. Harbour must pay the Harbour Project Costs subject to and in accordance with the Harbour Funding Agreement.

3.3. Therium and Harbour must pay the Joint Project Costs in the following proportions:

3.3.1. Therium shall pay 50% of the Joint Project Costs; and

3.3.2. Harbour shall pay 50% of the Joint Project Costs.

3.4. Subject to any Court order to the contrary, Therium and Harbour will each meet any Costs Order so far as it related to costs incurred in the Consolidated Proceeding during the



Funding Period in the following proportions:

- 3.4.1. Therium shall pay 50% of any such costs; and
 - 3.4.2. Harbour shall pay 50% of any such costs.
- 3.5. If the Joint Applicants agree or are ordered to provide security for costs in the Consolidated Proceeding, they will each or together provide a form of security for costs that shall be acceptable to the Respondent (and any other applicable party to the Consolidated Proceeding), or as otherwise ordered by the Court, and in the following proportions:
- 3.5.1. Therium to provide 50%; and
 - 3.5.2. Harbour to provide 50%.
- 3.6. 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.
- 3.7. The Funders will not be obliged to accept adverse Costs Order exposure in respect of an additional respondent but will have the option of doing so.

4. Costs and Commission

- 4.1. Subject to further order, and pursuant to sections 23 and 33ZF of the Act and rule 1.32 of the Rules, upon Resolution the Funders and the Lawyers are entitled to be paid or to have distributed the following amounts from the Resolution Sum, to be paid or distributed in order of priority listed below and with all payments within a priority level to be made *pari passu* and *pro rata*:
- 4.1.1. first:
 - (a) reimburse Harbour for all paid and Court-approved Harbour Project Costs including any additional amount on account of GST; and
 - (b) reimburse Therium for all paid and Court-approved Therium Project Costs, including any additional amount on account of GST;
 - 4.1.2. second, pay to the Funders, as consideration for the funding of the Consolidated Proceeding, such amount as determined by the Court at the time any Resolution Sum is approved with the amounts payable to the Funders to be equally apportioned to each of Therium and Harbour, and including any additional amount on account of GST;
 - 4.1.3. third, pay to the Joint Applicants any unpaid expenses (including fair and reasonable compensation for their time) incurred as a result of their acting as



representative in the Consolidated Proceeding, as approved by the Court;

- 4.1.4. fourth, pay Slater and Gordon and Maurice Blackburn for any court approved unpaid Disbursements, GST, interest and Slater and Gordon Remaining Costs (if applicable) in accordance with the Slater and Gordon Retainer Agreement and Maurice Blackburn Remaining Costs (if applicable) in accordance with the Maurice Blackburn Retainer Agreement;
 - 4.1.5. fifth, pay to the Administrator the Administration Costs (inclusive of GST paid or payable); and
 - 4.1.6. sixth, the balance of the Resolution Sum in accordance with a distribution scheme to be approved by the Court.
- 4.2. The amounts referred to in clause 4.1 above will not become due or owing by the Joint Applicants and Group Members unless and until a Resolution occurs and must not exceed the aggregate Resolution Sums.
 - 4.3. All Resolution Sums are to be paid to, and received by, the Lawyers and paid immediately into a Trust Account opened jointly by the Lawyers and kept for that purpose, or be paid into Court or otherwise as the Court directs, in accordance with the direction of the Court to be given at the time such payments are to be made.
 - 4.4. If, despite clause 4.3 above, the Joint Applicants or any Group Member directly receive any amounts, assets or benefits in respect of a Settlement or judgment of some or all of the Claims, he, she or it will cause the amounts, assets or benefits to be paid or directed to the Lawyers to be dealt with as part of the Resolution Sum including, if appropriate, the realisation of the market value of any such assets or benefits.
 - 4.5. The Lawyers will pay out of any Resolution Sum held in the Trust Account the amounts referred to in clause 4.1 above in accordance with these Funding Terms prior to any distribution to the Joint Applicants and Group Members in accordance with any distribution scheme approved by the Court.
 - 4.6. The Group Members will not seek to encumber any part of the Resolution Sum in a manner which adversely affects the Funders' entitlements under the Funding Terms.

5. Relationship Between the Joint Applicants, Lawyers and Funders

- 5.1. Slater and Gordon's professional duties are owed to the Cooper Applicants and not to Therium.
- 5.2. Maurice Blackburn's professional duties are owed to the Alford Applicants and not to



Harbour.

- 5.3. The Cooper Applicants will give binding instructions to Slater and Gordon, and the Alford Applicants will give binding instructions to Maurice Blackburn, and the Cooper Applicants and the Alford Applicants will together make binding decisions on behalf of the Group Members in relation to the Claims up to the time of any court approval of the Settlement of the Claims or the delivery of judgment in respect of the common issues in the Proceedings (including, but not limited to, instructions and decisions in relation to Settlement), save where, in the reasonable professional opinion of the Lawyers, separate instructions are required from the Group Members.
- 5.4. 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).
- 5.5. The Lawyers will:
 - 5.5.1. keep the Funders fully informed of all matters concerning the Claims and the Consolidated Proceeding, including any mediation and settlement discussions;
 - 5.5.2. ensure that the Funders and Joint Applicants are given all necessary information and advice in order for the Funders to make informed assessments; and
 - 5.5.3. incur any Legal Costs and Disbursements over the applicable Funding Limit on a conditional basis, payable only from the Resolution Sum.
- 5.6. The Funders will:
 - 5.6.1. implement their respective conflict management protocols so as to comply with the *Corporations Amendment Regulation 2012 (No. 6) (Cth)*;
 - 5.6.2. 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;
 - 5.6.3. provide the Joint Applicants with timely and clear disclosure of any material breach of the *Corporations Amendment Regulation 2012 (No. 6) (Cth)*;
 - 5.6.4. not retain the Lawyers as their solicitors for any purpose connected with the



Consolidated Proceeding;

- 5.6.5. 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 5.6.1.

6. Confidentiality

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

7. Settlement

- 7.1. If there is disagreement between the Funders and the Joint Applicants as to whether to settle the Consolidated Proceeding, or as to the appropriate terms for the Settlement of the Consolidated Proceeding, within 5 days of either of the Funders or the Joint Applicants providing notice of any such disagreement:
 - 7.1.1. the Lawyers will brief the most Senior Counsel of those retained by the Lawyers to advise as to whether, in Senior Counsel's opinion, settlement of the Consolidated Proceeding on the terms is fair and reasonable in all of the circumstances;
 - 7.1.2. representatives of the Funders may attend any conference with Senior Counsel at which the issue is to be discussed;



- 7.1.3. the legal costs of obtaining Senior Counsel's advice shall be met by the Funders as part of the Joint Project Costs; and
 - 7.1.4. the advice of Senior Counsel will be final and binding on both the Joint Applicants and the Funders.
- 7.2. Under clause 7.1 above, in determining whether a proposed settlement is reasonable having regard to all the circumstances, Senior Counsel may proceed as he or she sees fit to inform himself or herself before forming and delivering his or her advice, but any such determination shall include the following considerations:
- 7.2.1. the strengths and weaknesses of the claims of all Group Members;
 - 7.2.2. the quantum of the claims of all Group Members and any difficulties which might exist in proving that quantum;
 - 7.2.3. the recoverability of a judgment sum from the Respondents;
 - 7.2.4. the extent to which further legal costs incurred in the Consolidated Proceeding are likely to be recoverable from the Respondents;
 - 7.2.5. the risk of the Funders being ordered to pay adverse costs and the quantum of such costs. Counsel will have regard to this factor as though all Group Members carried such risk rather than the Funders;
 - 7.2.6. the matters set out at paragraph [248.95] of the Australian Securities and Investments Commission's *Regulatory Guide 248: Litigation schemes and proof of debt schemes: Managing conflicts of interest* (April 2013); and
 - 7.2.7. any other matters senior counsel considers relevant.

8. Termination

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



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

- 8.2.2. where there has been a material breach of these Funding Terms by Therium and/or Harbour, the relevant funder will only be entitled to receive payment from any Resolution Sum (whether received before or after the Termination Date) as ordered by the Court;
- 8.2.3. where there has been no material breach of these Funding Terms by Therium and/or Harbour and the application pursuant to clause 8.1 is made by Therium and/or Harbour, the relevant funder will continue to be entitled to receive payment from any Resolution Sums (whether received before or after the Termination Date) pursuant to clauses 4.1.1 and 4.1.2 unless otherwise ordered by the Court; and
- 8.2.4. Therium and/or Harbour must pay:
 - (a) any outstanding costs pursuant to clauses 3.1, 3.2 and 3.3 above incurred up to the Termination Date; and
 - (b) to the extent such amounts are not captured by clause 8.2.4(a) above, any 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 Therium, Harbour, the Joint Applicants and/or the Lawyers (including a dispute between members of the litigation committee) regarding the conduct of the Consolidated Proceeding that cannot be resolved within a reasonable period of time will be referred to the most senior counsel of those retained by the Lawyers for a final decision, which the Funders, the Joint Applicants and the Lawyers agree will bind them.
- 9.2. If a dispute arises which would be referred to senior counsel pursuant to clause 9.1 and Therium, Harbour, the Joint Applicants, the Lawyers or counsel considers that it is not appropriate for counsel to advise on or determine the dispute, the Lawyers may refer the dispute to an independent adjudicator, save that, failing agreement within a reasonable time by the Funders, the Joint Applicants and the Lawyers as to such independent adjudicator, the dispute is to be referred to an independent adjudicator to be appointed by the President of the Law Institute of Victoria for a final decision, which the Funders, the Joint Applicants



the Lawyers agree will bind them.

9.3. For the avoidance of doubt, the disputes regulated pursuant to this clause include:

- 9.3.1. any appeal of the Consolidated Proceeding;
- 9.3.2. the addition or removal of Respondents to or from the Consolidated Proceeding;
- 9.3.3. the termination of the Lawyers' appointment; or
- 9.3.4. the appointment of alternative Lawyers.



Schedule

No: VID572/2019

Federal Court of Australia
District Registry: Victoria
Division: General

Second Applicant	SEBASTIAN SMITH
Second Respondent	N.M. SUPERANNUATION PTY LTD (ACN 008 414 104)
Third Respondent	AMP LIFE LIMITED (ACN 079 300 379)
Fourth Respondent	NMMT LIMITED (ACN 058 835 573)
Fifth Respondent	AMP SERVICES LIMITED (ACN 081 143 786)
Sixth Respondent	THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED (ACN 004 020 437)