

## NOTICE OF FILING

### Details of Filing

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*Sia Lagos*

Registrar

### Important Information

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VID312 of 2024

Federal Court of Australia  
District Registry: Victoria  
Division: General

**MINNIE MCDONALD v THE COMMONWEALTH OF AUSTRALIA**

**OUTLINE OF SUBMISSIONS OF THE LEGAL REPRESENTATIVES  
OF THE APPLICANT**

**1 INTRODUCTION**

1 Pursuant to its interlocutory application dated 6 November 2024, the legal representatives of the Applicant (**Shine**) seek orders that the Court approve:

- a) a proposed apportionment of the Agreed Costs Component from the Settlement Sum which reimburses the Litigation Funder, **LLS** Fund Services Pty Ltd (ABN 51 627 975 213) for its Project Costs, provides part-payment to Shine for its costs and places the balance of the party-party costs in a controlled monies account for payment of the Applicant's future costs (order 1);
- b) the payment of the Applicant's Actual and Future Costs (orders 2 and 3); and
- c) a proposal for the Applicant's Actual and Future Costs, and any commission granted to LLS, to be paid in simultaneous and equal tranches from the settlement fund (order 4).

2 The above proposed orders are contained in **Attachment A** to these submissions.

3 The proposed orders adopt the approach taken by Murphy J in *Street v State of Western Australia* [2024] FCA 1368. Shine submits that analogous orders ought to be made in this

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proceeding, having regard to the substantive similarities in the material facts giving rise to each of the proceedings, together with the similar terms of the Settlement Deed, Settlement Distribution Scheme and Legal Funding Agreement (**LFA**) in both matters.

4 Order 3(a) seeks orders for the approval of Shine’s costs (being the Applicant’s Actual Costs) including an uplift fee, in light of paragraph 73 of the report provided by Elizabeth Harris to the Court on 27 November 2024, as reissued on 28 November 2024 (**Harris Report**), in which Ms Harris does not provide a view as to the reasonableness of the uplift. On the basis that an estimate of Counsel fees was not disclosed to the Applicant with the Conditional **Costs Agreement** and Disclosure, Ms Harris states that “it is a matter for the Court as to whether an uplift is to be allowed.” While Shine accepts this matter is within the Court’s discretion, for the reasons developed in these submissions, Shine submits that it is both fair and reasonable that it be granted its uplift fee, having regard to all the circumstances of the proceeding.

5 While these submissions focus on whether the grant of Shine’s uplift fee is fair and reasonable, Shine may seek leave to be heard on any further matters arising from the submissions made by the amici curiae (which will be served on 13 December 2024), to the extent they concern Shine’s position.

## 2 LEGAL PRINCIPLES

6 The relevant legal principles which arise for consideration in approving a settlement (including deductions from the settlement) under s 33V of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**) are outlined in Section B (paragraphs 6 to 9) and paragraph 57 of the Applicant’s submissions dated 25 October 2024.<sup>1</sup> Shine adopts those submissions.

7 Relevant to whether the grant of Shine’s uplift fee is fair and reasonable in the circumstances, and as Ms Harris acknowledges, the authorities confirm the following:

- a) a cost agreement may be valid, notwithstanding the failure to disclose an estimate of counsel fees, including in circumstances where it is unlikely that a client would have made a different decision to enter into the costs agreement if disclosure was made in a timely manner;<sup>2</sup>

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<sup>1</sup> Court Book Tab B-1, pp 0010 to 0012.

<sup>2</sup> *Schmid v Skimming* [2020] VSC 493 at [70]. See also Harris Report, [68].

- b) even if the costs agreement is void *in futuro* or *ab initio* because of a failure to comply with disclosure obligations, this may not disentitle the law firm to an uplift fee given the law practice is still entitled to be paid fair and reasonable legal costs;<sup>3</sup> and
- c) an uplift fee has been allowed by the Court in circumstances where the lack of disclosure would not have resulted in the client making a different decision and did not result in any of the group members being disadvantaged.<sup>4</sup>

### 3 THE GRANT OF SHINE'S UPLIFT FEE IS FAIR AND REASONABLE

8 Consistent with the Court's broad power under ss 33V and 33ZF of the FCAA, the grant of Shine's uplift fee is subject to the Court's discretion. This is expressly recognised by Ms Harris.<sup>5</sup>

9 For the following four reasons, and having regard to the principles outlined above, Shine submits that the grant of its uplift fee is fair and reasonable in all the circumstances:

- a) *First*, the extent of any non-compliance with the disclosure obligations under the LPUL is technical in nature and resulted in no prejudice to the Applicant. Shine's uplift fee was clearly disclosed to the Applicant in the Costs Agreement.<sup>6</sup> Further, Counsel's estimate of fees was ultimately provided to the Applicant. Neither of these matters are disputed by Ms Harris.<sup>7</sup> While Ms Harris notes that Counsel's fee estimate was provided after the proceedings had been on foot for 3 years, it is important to note that Shine disclosed an estimate of disbursements for the proceedings, which included counsel fees, in the Costs Agreement.<sup>8</sup> On that basis, the absence of the disclosure of Counsel's cost estimate was unlikely to have resulted in the Applicant making a different decision in respect of entering into the costs agreement.<sup>9</sup> Indeed, the Applicant accepts that it would be appropriate to allow

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<sup>3</sup> *Wills v Woolworths Group Ltd* [2022] FCA 1545 at [33] and [68] – [69]. See also Harris Report, [71].

<sup>4</sup> Provided that s 182 of the LPUL is not contravened, which is not suggested in this case. See *Burke v Ash Sounds Pty Ltd (No 5)* [2020] VSC 772 at [44] to [46].

<sup>5</sup> Harris Report, [73].

<sup>6</sup> See clauses 1 and 5.5, Court Book Tab C-1.30, pp 0863 and 0866.

<sup>7</sup> See Harris Report, [42] and [47].

<sup>8</sup> See, for example, table with a summary of legal costs and disbursements, Court Book Tab C-1.30, pp 0867.

<sup>9</sup> Cf *Schmid v Skimming* [2020] VSC 493 at [70] and *Burke v Ash Sounds Pty Ltd* at [45].

Shine's proposed uplift, if the Court finds that Shine's deferral of its fees benefited Group Members.<sup>10</sup>

- b) *Second*, disentitling Shine to its uplift fee would amount to an unfair and unjust result in circumstances where:
- i) if it were not for Shine's substantive work in this matter, the proceedings would not have been commenced, let alone settled with a positive outcome for affected Group Members. In particular, Shine undertook a significant amount of work on behalf of the Applicant from the very outset of the matter (i.e., from preliminary work with the Applicant and other sample group members),<sup>11</sup> through to the discovery,<sup>12</sup> preparation (and preservation) of evidence,<sup>13</sup> conduct of the opt out and bookbuild processes<sup>14</sup> and, ultimately, the mediation and settlement of the proceedings;<sup>15</sup>
  - ii) Shine has, to date, funded a significant portion of the costs in this proceeding – being over \$4 million of the approximately \$14 million in legal costs and disbursements, excluding the uplift fee (i.e., approximately 30% of all legal costs and disbursements incurred).<sup>16</sup> For this reason, the litigation would not have continued (and, ultimately, resolved) without Shine's significant contribution to costs;
  - iii) in addition to funding a significant portion of the costs in this proceeding, Shine has consistently shouldered material financial risk in light of the delay in the payment of its legal costs by LLS under the LFA.<sup>17</sup> In particular:

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<sup>10</sup> Applicant's submissions on the second day of the settlement hearing dated 2 December 2024, [12].

<sup>11</sup> See, for example, Affidavit of Vicky Antzoulatos dated 25 October 2024, Court Book Tab C-1 (**First Antzoulatos Affidavit**), [121] and [123].

<sup>12</sup> See Section E of the First Antzoulatos Affidavit, [34] to [38].

<sup>13</sup> See Sections F and G of the First Antzoulatos Affidavit, [43] to [49].

<sup>14</sup> See Sections H and I of the First Antzoulatos Affidavit, [50] to [57].

<sup>15</sup> See Section J of the First Antzoulatos Affidavit, [63] to [67].

<sup>16</sup> See table headed "Costs to Date with Settlement" in the First Antzoulatos Affidavit, [130]. The amounts have been calculated by subtracting the total amount of legal fees billed to LLS (i.e., \$5,703,683.12) and the total amount of disbursements billed to LLS (i.e., \$4,091,025.80) from the total costs to date, excluding the uplift (i.e., \$14,076,859.70).

<sup>17</sup> See Court Book Tab C-1.32.

- (A) Shine was required to provide invoices in draft form, for LLS' approval before final issuance.<sup>18</sup> The time period for the assessment of Shine's draft invoices ranged considerably from 0 to 226 days.<sup>19</sup>
- (B) Once Shine's final invoices were issued, the time by which the invoice was paid ranged between 77 to 369 days (i.e., over a year), with an average of 112 days between the issuance of Shine's invoice to LLS and the payment of such invoices.<sup>20</sup>
- c) *Third*, Shine has resolved to fund the necessary future work required in respect of the outreach and registration program. The cost of this work is not insignificant – capped at \$8 million (inclusive of GST).<sup>21</sup> Shine does not intend to charge an uplift fee in respect of the outreach and registration program.<sup>22</sup>
- d) *Fourth*, Shine's uplift fee was approved in *Street*, including in respect of pre-retainer costs (subject to adjustments resulting from the reduction in Shine's professional fees),<sup>23</sup> in circumstances similar to those described above.

#### 4 CONCLUSION

10 For the reasons outlined in this submission, the Court should make the orders contained in Attachment A to these submissions, including the grant of Shine's uplift fee.

D R Sulan

Banco Chambers

J Ibrahim

Banco Chambers

2 December 2024

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<sup>18</sup> First Antzoulatos Affidavit, [152].

<sup>19</sup> First Antzoulatos Affidavit, [163].

<sup>20</sup> First Antzoulatos Affidavit, [145].

<sup>21</sup> Affidavit of Vicky Antzoulatos dated 2 December 2024 (**Fourth Antzoulatos Affidavit**), [29].

<sup>22</sup> Fourth Antzoulatos Affidavit, [29(f)].

<sup>23</sup> See *Street*, [230] to [234]; [248] to [266].

# “Attachment A”

No. VID312/2021

Federal Court of Australia  
District Registry: Victoria  
Division: General

## **MINNIE MCDONALD**

Applicant

## **COMMONWEALTH OF AUSTRALIA**

Respondent

### **SHINE’S PROPOSED MINUTE OF ORDER**

**JUDGE:** CHIEF JUSTICE MORTIMER

**DATE OF ORDER:** [XX MONTH] 2024

**WHERE MADE:**

#### **THE COURT NOTES THAT:**

- A. Unless otherwise stated, defined terms in these orders bear the same meaning as the term defined in the Settlement Deed made between the Applicant and the Commonwealth of Australia and dated 30 August 2024.

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

1. Pursuant to s 33V of the Federal Court of Australia Act 1976 (Cth) (Act), the payment of the Agreed Costs Component from the Settlement Sum is approved, and the Respondent is to pay \$15,000,000 (\$15 million) within seven days after the Exhaustion of Appeal Date, in satisfaction of its obligation to pay the Agreed Cost Component under the Deed, to be disbursed as follows:
  - (a) to the Funder in the amount of \$9,717,951.55 in reimbursement for its Project Costs under the litigation funding agreement with the Applicant in respect of legal costs which it has paid to Shine; and
  - (b) the remainder (\$5,282,048.45):
    - (i) \$1,045,000.00 (\$1.045 million) to the Funder in reimbursement for its Project Costs under the litigation funding agreement in respect of after-the-event insurance premiums it has paid;

- (ii) \$1,024,104.95 to Shine in part-payment of the Applicant's Actual Costs; and
  - (iii) the balance (\$3,212,943.50) to be paid into an interest-accruing Controlled Monies Account (Controlled Monies Account) to be set up by the Administrator (as defined in clause 1.1 of the Settlement Deed), and all monies in the Controlled Monies Account, including all interest earned on the Controlled Monies Account from time to time, are funds held for payment of the Applicant's future costs incurred in conducting the Registration Process in accordance with cll 3 to 25 of the Deed (Applicant's Future Costs), which may be drawn down by the Administrators for that purpose in such amounts as are approved by the Court.
- 2. Pursuant to s 33V of the Act, the payment of the Applicant's Future Costs in the amount of up to \$8,000,000 (inclusive of any GST) from the Controlled Monies Account and Settlement Fund Account is approved, and to be paid in such amounts as are approved by the Court from time to time, on application by the Applicant.
- 3. Pursuant to s 33V of the Act, the following payments from the Settlement Fund Account are approved:
  - (a) the Applicant's Actual Costs in the amount of \$3,897,334.29 , including an uplift fee for the Applicant's solicitors; and
  - (b) the Applicant's Future Costs, in such amounts as are approved by the Court from time to time, on application by the Applicant, part-payment of which will be paid from the Controlled Monies Account.
- 4. The Court orders that until such time as the Applicant's Future Costs are paid in full:
  - (a) the Applicant's Actual Costs and the Applicant's Future Costs be paid to Shine; and
  - (b) any commission granted to the Funder;be paid in equal amounts and at the same time, pursuant to any sequence of payments sought by the Applicant.

Date that entry is stamped:

Chief Justice Mortimer