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*Sia Lagos*

Registrar

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## MCDONALD v COMMONWEALTH (VID312/2021)

### APPLICANT'S SUBMISSIONS ON SETTLEMENT APPLICATION, SECOND HEARING

#### A. SCOPE OF SUBMISSIONS

1. On 14 November 2024, the Court (among other things) approved the settlement of this proceeding, made orders appointing the Administrator, approved certain deductions, and reserved certain matters for a second hearing fixed for 17 December 2024. The matters reserved for the second hearing concern:
  - 1.1 *First*, proposed payments from the Settlement Fund Account concerning the Applicant's legal costs and disbursements and the amount to be paid to the funder;
  - 1.2 *Secondly*, the priority of payment as between Shine and the funder; and
  - 1.3 *Thirdly*, the sequence of payments made from the Settlement Fund Account.
2. These submissions only address the first and third of these matters. The Applicant takes no position in relation to the second of these matters (i.e. the question of priority between Shine and the funder), save to note, *first*, that the funding agreement does make provision for priorities in some respects, and, *secondly*, in the recent settlement approval decision of Murphy J in the WA Stolen Wages Class Action, the Court dealt with the same issue in a particular way: *Street v State of Western Australia* [2024] FCA 1368 (**Streets 33V Judgment**) at [409].

#### B. DEDUCTIONS FROM THE SETTLEMENT FUND ACCOUNT

3. The Applicant does not repeat the articulation of principles relevant to deductions that appeared at paragraph 57 of the Applicant's written submissions dated 25 October 2024. There are three aspects to be addressed in terms of deductions from the Settlement Fund Account. They are these:
  - 3.1 the legal costs up to and including 17 December 2024 ("past legal costs");
  - 3.2 future legal costs (i.e., the outreach and registration process); and

3.3 amounts to be deducted in relation LLS' commission and other funding costs.

4. These are addressed in turn.

#### **B.1. Costs up to the second settlement approval hearing (“past costs”)**

5. The Applicant recognises that without both Shine and the funder, a settlement of the kind which the Court approved on 14 November 2024 may not have been reached. The Applicant recognises that fair and reasonable legal costs ought to be allowed.

6. The court-appointed Referee, Elizabeth Harris, has prepared a report (dated 27 November 2024, and reissued 28 November 2024) addressing legal costs and disbursements up to 17 December 2024. (In that report, the costs between 1 November 2024 and 17 December were addressed as ‘future costs’, but for the purposes of these submissions, they are treated as ‘past costs’ because they cover a reasonably short period that will have elapsed at the time of the second settlement approval hearing). The report does not address the costs of the outreach and registration processes envisaged by the Settlement Deed. These costs are addressed separately.

7. The Referee’s report contains two principal conclusions regarding costs up to 17 December 2024.

8. *First*, the Referee found that the Applicant’s reasonable costs and disbursements were, on a GST inclusive basis, \$14,065,311.05 (excluding any uplift) or \$14,718,079.31 but which should be \$14,701,100.79 (including an uplift)<sup>1</sup>. Those figures should actually be reduced by the amount of the Referee’s own fees (which are to be paid from a separate account), and should be **\$14,003,601.05** (GSTi, but excluding uplift) or **\$14,639,390.79** (GSTi, but including uplift). The figure reflects the Referee’s application of expertise to apply a global discounting adjustment to the actual costs incurred of \$15,456,174.21 (but

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<sup>1</sup> The Applicant has identified an addition error in the right-hand column of Table 1 at [4] of the Harris Report. The sum of the sub-total of costs to 30 October 2024 (\$13,764,558.59) and the subsequent entries (\$874,832.20 and \$61,710) is \$14,701,100.79, and not \$14,718,079.31. There appears to be a further addition error in the left-hand column of that table. The sum of the sub-total of costs to 30 October 2024 (\$14,461,77.94) and the subsequent entries (\$904,445.30 and \$61,710) is \$15,427,900.24 and not \$15,456,174.21. The table otherwise appears to be correct.

which should be \$15,366,190.24):<sup>2</sup> see at [3] and [4]. The discounting adjustment was therefore \$1,362,589.19 (~9%). The Referee applied a global adjustment to the legal costs incurred on account of a number of matters, including: (a) the size of Shine's team (at [81]); (b) internal conferences (at [84]-[88]); (c) where the time billed appeared unreasonable for the nature of the work concerned (at [94]); (d) time spent on document preparation (at [95]-[96]), (e) work that was administrative or clerical in nature (at [115]); (f) media publication of the claim and an amount of time spent on drafting pleadings (at [135]-[136]); (g) time spent on subpoenas etc (at [147]-[148]); (h) administrative work in the opt-out process (at [155]); (i) certain legal costs associated with the preparation of Dr Skyring's expert report (at [174]-[177]); (j) certain attendances at mediation (at [188]-[199]); (k) development and maintenance of the registration and claims portal used for the purposes of the registration process (at [192] and [233]).

9. The *second* principal conclusion drawn by the Referee was that the party and party costs that would be recovered were in the GST exclusive amount of \$10,742,056.55 (or the GST inclusive amount of \$11,816,262.21) (both of which excluded any uplift component): see [245]. Again, however, these figures include the Referee's own fees on a party and party basis, which should be excluded because they are being paid from a different account, the effect of which is that the party and party costs that would be recovered are the GST exclusive amount of **\$10,685,956.50** (or the GST inclusive amount of **\$11,754,552.15**.) These figures were arrived at by application of the Referee's skill and expertise, after excluding items or making adjustments, starting from the baseline of the reduced solicitor and own client assessment, to the tune of 14% of the professional fees, which included the following: (a) adjusting Shine's hourly rates by reference to the scale rates (at [249]-[250]); (b) exclusions for certain work associated with communicating with LLS (at [256]-[257]); (c) reductions on account of the number of fee earners involved in the matter, and their level of seniority (at [260]). The Referee then applied a 10% adjustment to non-hourly rate scale items (at [262]) and applied a 20% loading on account of the difficulty and novelty of the matter (see at [264]-[268]). The Referee allowed Counsel's fees on a party and party basis in the amount of \$1,689,200 (excl GST) which was subject

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<sup>2</sup> As per n 1 above, the correct sum of the first column of Table 1 (being the Actual Costs) is \$15,427,900.24. Subtracting the Referee's fees from this amount leave \$15,366,190.24.

to a 9% reduction, which included an exclusion of fees on account of an advice in 2020 which was for the benefit of LLS (at [272]-[276]). No reduction was made on account of the experts' fees or other disbursements. 'Future costs' (ie, costs up to 17 December 2024) in the amount of \$795,302 (excl GST) were allowed: at [283].

10. The Applicant submits that in the absence of error by the Referee, her independent report (which appears thorough and considered) ought be accepted.
11. It is necessary to address the subject of Shine's proposed uplift fee, which on the Referee's findings would total \$577,990.67 (excluding GST): Report at [195]. The GST inclusive amount would be **\$635,789.74**. On that question, the Applicant accepts (1) that the Conditional Costs Agreement she signed provided for 25% of Shine's fees to be deferred and the subject of an uplift of 25% (cl5.2, 5.4 and 5.5 CB0865-0866); and (2) Shine resourced the proceeding and did carry a substantial amount of its fees over that amount in the circumstances described in Section M2.4 of the First Antzoulatos Affidavit where the Funder was in arrears (CB0186-0190). The Applicant accepts that she and group members benefitted from Shine's deferral of its fees as provided for in the costs agreement, and from Shine's preparedness to carry a greater proportion of its fees than it originally expected. The Applicant does not disagree with the observation of Murphy J at [30] of the Street s 33V Judgment, that "*the requirement for Shine (rather than the Funder) to resource the case to the extent that it did imposed a significant further cost burden on class members through Shine's 25% uplift fees*", but does not wish to overstate the proportion of the uplift attributable to this. The total uplift proposed represents a deferral of \$2,311,962.68 (GSTe) of Shine's fees, out of the total allowed solicitor and client fees of \$7,631,111.48 (GSTe), which is a deferral of around 30% of fees, rather than 25%. We also understand that Shine will not charge an uplift for the period after 30 September 2024.
12. The Applicant accepts that if the Court finds that Shine's deferral of its fees did benefit group members, it would be appropriate to allow as fair and reasonable, the proposed uplift which Shine has sought. This is because the gravamen of the jurisdiction under s 33V(2) is to allow fair and reasonable claims for the remuneration of those whose efforts benefitted group members: see, e.g., Street s 33V Judgment at [78]-[82] per

Murphy J. If the Court were to reduce the Referee's allowance for Shine's fees further, this would have a consequential adjustment to the amount of uplift.

13. If the Referee's opinion is adopted, and Shine's uplift is allowed as claimed:
  - 13.1 the amount of **\$11,754,552.15** (being the party and party costs assessed by her) will be paid from the component of the settlement being paid by the Commonwealth on account of the "Applicant's Agreed Costs", which is defined to mean "*the Applicant's legal costs and disbursements as between party and party of the Class Action, within the meaning of Schedule 1 of the FCR, up to a maximum amount of \$15,000,000 (any GST inclusive)*". The definition specifically excludes any uplift component (and none is included in the above figure), but specifically includes "*future costs and disbursements incurred in relation to Settlement Approval and conducting the Registration Process*". These are returned to in Section B.2 below. That, however, means the remaining amount of the \$15,000,000 being paid separately by the Commonwealth to contribute towards Registration Process costs will be **\$3,245,447.85** (incl GST) to the extent party and party costs incurred in the future exceed that sum.
  - 13.2 The excess of the Applicant's Actual Costs to the party and party component (in terms of the past costs component) is **\$2,884,838.64**<sup>3</sup> (incl GST), and that amount stands to be deducted from general settlement funds.
  - 13.3 The costs of the Referee to date are \$61,710 (incl GST), which will be deducted from the \$1,000,000 agreed to be paid by the Commonwealth towards the "Costs Assessor's Costs", under the Deed, leaving \$938,290 for future costs assessments (and the costs of the *amici curiae*, which it appears the Commonwealth accepts may be paid from this account).

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<sup>3</sup> \$14,639,390.79 less \$11,754,552.15 equals \$2,884,838.64.

## B.2. Future costs (ie, the Registration Process)

14. We turn now to the 'future costs', being principally the costs of the future Registration Process, including the physical outreach program.
15. At the outset we acknowledge that the Applicant is mindful that the Court has appointed *amici curiae* who will address this question. That is not to say, however, that the Applicant (and group members she represents) do not have an interest in this question. They do have an interest in ensuring that the Registration Process is conducted properly, efficiently and (most importantly) effectively, so as to ensure that group members have the best possible opportunity to register claims in a way which maximises the likelihood of their claim being accepted. The Applicant does not support an unreasonably costly process and welcomes scrutiny of the proposed costs (both now, and in the future), but the Applicant does recognise that the Registration Process will involve cost if it is to be effective in achieving its aims, and those aims including maximising the number of Eligible Claimants. Group members as a whole (and, indeed, individually) will benefit from the expenditure of such costs, provided they are reasonable.
16. The Applicant believes that the Registration Process will involve cost over and above the amount remaining to be paid by the Commonwealth. This is because, on the basis set out above, then:
  - 16.1 The amount remaining in the Commonwealth's separate component for the Applicant's Agreed Costs would be **\$3,245,447.85** (incl GST); and if the ratio between party-party and solicitor-client costs experienced to date (76.3%<sup>4</sup>) holds constant in the future, then that sum would be expended once total costs of the Registration process exceed **\$4,253,054.64** (incl GST); and
  - 16.2 The Applicant does not believe an effective Registration Process can be carried on into the future and up to the Registration Date of 31 August 2025 for less than approximately \$4.25 million.

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<sup>4</sup> The ratio is calculated on a basis excluding uplift, as uplift may not be allowed going forward:  
 $\$10,685,956.40 : \$14,003,601.05 = 76.31\%$

17. This means that the correct prism through which the Court ought to be assessing the fairness and reasonableness of the future costs of the Registration Process is to ask whether that total future sum (especially such parts of it as exceed \$4.25 million) is justifiable and is likely to result in the Registration Process being conducted properly, efficiently and effectively. As we will explain below, the best evidence at the moment is that a realistic cost for this work is \$8,000,000 (which is the amount put forward by Shine in a revised budget prepared by it).
18. There is necessarily a balance to be struck. While the Court must guard against costs which are unreasonably high, the Applicant submits that the Court must equally guard against the prospect that the quality of the Registration Process is eroded to the detriment of group members, so that poorer outcomes are achieved. Put simply, the Court must guard against false economies. For example, if a 25% cost saving (\$100 to \$75) also results in 25% less group members being reached or providing non-deficient registrations (say 75 rather than 100), then because that 75% (\$75) will be paid by a smaller number of people there would in fact be a real cost saving of \$nil, as each person would still be paying \$1 in costs). It is not suggested that the analysis resolves itself so simplistically, as these things are not at all easy to assess given they are future-looking, but it does indicate what must be guarded against – which, on that example, is that 25 people entirely miss out, when their inclusion would not have cost any other group member any more.
19. When the Court is assessing whether the proposed future amounts in respect of the Registration Process are fair and reasonable and in the interests of group members, that must be done against the background of the following matters:
  - 19.1 *First*, the Registration Process was and is an integral part of the settlement that the Court has approved. Part of the settlement was that the Registration Process would have the features set out in Sections B to E of the Scheme, and that the Applicant, by her solicitors, Shine Lawyers, is responsible for completing it (cl 2.2.3 (CB0217)). It is only if the Registration Process is carried out in accordance with this agreement will the Commonwealth be obliged to contribute money



towards it out of the \$15 million amount set aside for the “Applicant’s Agreed Costs”.

- 19.2 *Secondly*, a matter which the Applicant submitted tended in favour of this settlement was her expectation that a similar outcome could be expected in terms of ultimate registration to that which had been recently achieved in *Street v WA*, where a similarly sized demographic produced estimated total registrations of ~8,750 *after a similar Registration Process over a similar period of time*. The Applicant’s approach to whether the settlement was fair and reasonable was premised on an assumption that the outreach program in this proceeding would be the same as, or at least substantially similar to, that which was conducted in *Street v WA*. It was the success of the registration process in *Street v WA* (in terms of the number of registrants) that gave the Applicant confidence that similar numbers of registrants could be reached in this proceeding.
- 19.3 *Thirdly*, the Registration Process in this case has been designed so as to be both (1) modelled on the *Street v WA* registration process; (2) but includes lessons from it which ought to make it better and also more cost-effective. While Murphy J did disallow some of the costs of the *Street v WA* registration process, his Honour was also at pains to explain the features of the group that meant that registration costs were higher than normal, and commended the quality of the work done by Shine: see *Street v WA* s 33V Judgment at [24], [61], [203]. The conversion rate (“acceptance rate”) of registration to eligible registration was very high being between 85-95%: *Street v WA* s 33V judgment at [64].
- 19.4 *Fourthly*, the estimated cost of the future Registration Process in this case is much less than the \$12 million in fees actually incurred in *Street v WA* (prior to the reduction to \$8 million ordered by Murphy J).
- (i) The original estimate at the time of the First Settlement Approval Hearing in Alice Springs (CB, C1.29) was:~\$8.5 million in Shine fees less a ~\$1.175 million discount (totalling \$7.341 million), plus disbursements of ~\$1.25 million, and GST, thereby reaching a total of **~\$9.5 million**. It may be

noted that this is significantly less than the \$12 million incurred in *Street v WA*, and set out in the *Street v WA* s 33V judgment at [193].

- (ii) Shine's revised budget which gives further consideration to efficiencies, and which has had regard to the findings of Murphy J as to the rates of Shine's Law Clerks (reducing their hourly rate to \$200/hour), and includes reductions on account of "travel days", and a daily cap for the total amount charged on outreach per day for admitted staff, is now **~\$8 million**. We understand that Shine is prepared to treat this as an \$8 million cap<sup>5</sup>, and is also prepared to carry the costs of the Registration Process and Outreach Program (ie, without litigation finance) and without charging an uplift fee in relation to its costs for this stage of work.
- (iii) The foregoing means that, looked at in the broad, the Registration Process would be conducted by Shine at a cost which is comparable to that which was allowed by Murphy J in *Street v WA*, after his Honour reduced the costs assessor's allowed costs by \$4 million.

19.5 *Fifthly*, the Court can (and should) actively monitor the progress (and cost) of this Registration Process at intervals as it is progressing. This significantly reduces the prospect of a repeat of what Murphy J saw the problem of very large costs being incurred without the Court being kept informed along the way. (See *Street v WA* s 33V Judgment at [24]).

20. The Applicant also wishes to caution against looking only at the absolute number when considering the expected costs of the Registration Process. The per capita cost is more informative. If there are a further 9,000 registrants on top of the 6,000 preliminary registrants at the time of the first hearing (*Antzoulatos* at [103] (CB 0172)) to produce a total of 15,000 registrants, and around 8,750 eligible claimants:

20.1 Shine's original \$9.5 million estimate (after deduction of the ~\$3.245 million remaining in the Commonwealth's separate payment of \$15 million) came down

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<sup>5</sup> On the conditions set out in paragraph 28 of the Fourth *Antzoulatos* Affidavit.

to \$6.255 million. This works out at ~\$417 per registrant, and ~\$715 per eligible claimant (assuming there are 8,750 of them);

20.2 Shine's revised \$8 million estimate (after deduction of the ~\$3.245 million remaining in the Commonwealth's separate payment of \$15 million) comes down further to \$4.755 million. This works out at ~\$317 per registrant, and ~\$543 per eligible claimant (assuming there are 8,750 of them).

21. The numbers are plainly large in absolute terms, but this is a large class with unique challenges in registration. It is obviously true that the claim group would also bear the additional \$2,884,838.64 in past costs as assessed by the Referee (if allowed by the Court), but those are in a different category.

22. The Applicant notes that in addition to reducing its estimate for the cost of the currently planned Registration Process, Shine Lawyers has given attention to possible alternatives, in conjunction with considering the remarks of the Court at the First Approval Hearing, together with correspondence received in the meantime. The Affidavit of Vicky Antzoulatos dated 2 December 2024 (**Fourth Antzoulatos Affidavit**) outlines two such alternatives:

22.1 a 'hybrid' approach, where Shine works with any willing stakeholders to carry out the outreach program; and

22.2 a stakeholder driven approach, where any willing stakeholders carry out the outreach program without substantial Shine involvement.

23. The Applicant has concerns about these alternatives (and particularly the second of them). On the present evidence, there do not appear to be any relevant stakeholders that are prepared to be involved in the outreach program, though it is possible that willing stakeholders (who are both capable and conflict free) will come to light before the second approval hearing. However, on the state of the present evidence, the estimated cost of the alternative outreach programs is inherently uncertain. More importantly to the Applicant, however, is the fact that the efficacy of these alternatives is even more

uncertain, whereas the current approach has been proven to be successful in the *Street v WA* proceeding.

24. Accordingly, on the present evidence, the Applicant submits that the Court should favour the current approach, provided that the Court can be satisfied that the cost associated with it (which has now been significantly reduced by Shine Lawyers) is both (1) as low as reasonably possible without eroding quality; and (2) monitored by the Court throughout the Registration Process (together with the efficacy of the process itself) to ensure that unforeseen cost increases are addressed before they become a problem.
25. The Applicant makes a number of other observations regarding the outreach and registration process:
  - 25.1 The cohort of group members are widely dispersed throughout the Northern Territory. Many are in remote communities, with limited technological access, and with limited literacy and numeracy. Any registration process is, for these reasons, going to be an involved process and a degree of travel is inevitable;
  - 25.2 The cohort of group members have vulnerabilities which mean that a high rate of initial deficiencies in registration, having regard to the approved criteria, are likely to be encountered. An integral part of the Registration Process is a co-ordinated back office that can contact group members by telephone, and assist them to complete registration forms that are initially submitted in an incomplete or deficient form. (Such difficulties will not be likely where registrations are taken by appropriately qualified personnel during the physical component of the Registration Process);
  - 25.3 Any registration process that, in effect, deputises a number of entities or institutions to carry out the outreach program on their own or with Shine is likely to give rise to a number of complicating factors, at least some of which may increase the cost of the Registration Process and reduce its quality. These are addressed in more detail in the Fourth Antzoulatos Affidavit. For instance, this may give rise to: (a) the need to coordinate multiple groups with differing

institutional capacities including providing training on eligibility and filling out the registration forms; (b) increased costs associated with rectifying registration forms; (c) providing different experiences to claimants by virtue of the different entities with which they may deal; and (d) issues relating to the confidentiality of group member information and potential conflicts of interest. It is uncertain whether the 'net' effect will involve cost savings or not; and

25.4 Many group members (and especially those who have registered preliminary registrations where more work may be needed to complete or rectify them) will have familiarity with Shine Lawyers as an institution, and it is felt that they will be more comfortable in making their registrations with Shine personnel than with a third party. It cannot be assumed that Aboriginal people in the NT necessarily all have relationships of trust with other stakeholder entities (egg, land councils may in fact represent only one of historically competing claim groups).

**B.3. Total costs**

26. The foregoing would mean that the Court is asked to approve the following legal costs (including GST):

Past Costs (Harris Report)	\$14,639,390.79
Registration Process future costs	\$8,000,000.00
<b>TOTAL</b>	<b>\$22,639,390.79</b>

27. As noted above, the future costs need not be approved now, because they will need to be assessed by the Referee periodically as they are incurred. However, it should be noted that if the capped amount is reached, then the total costs in this case (past and future) will total just under \$22.7 million, which is significantly less than the ~\$27.5 million costs approved by Murphy J in *Street v WA*.

28. As has been explained above, those total costs will result in the \$15,000,000 component for the Applicant's Agreed Costs being fully exhausted (because the \$8,000,000 will result in the party and party component of future costs exceeding \$3.245 million). If that

comes to pass, then the result will be that \$7,639,390.79 being the “Applicant’s Actual Costs” for the purposes of the Settlement Deed, so as to be payable from Group Member funds (~\$2.885m of which represents past costs, and ~\$4.754m of which represents future costs).

#### **B.4. Deductions on account of LLS’s claim for funding commission**

29. The Applicant cannot take matters further than what was submitted on the last occasion in relation to the amounts to be deducted from the Settlement Fund Account in relation to LLS’ commission and the costs of ATE insurance: see AWS (25 October 2024) at [84]-[90].
30. The evidence shows that the matter did require litigation funding for it to be commenced and conducted, and the Applicant and group members did benefit from the funding that was provided.

#### **C. SEQUENCE OF PAYMENTS**

31. The 14 November 2024 orders specified that there should be no Differentiation Order, as defined in cl 1.1 of the Deed. The consequence of this order is that, under the settlement, the amount payable in respect of each Eligible Claimant is to be the same.
32. The Applicant has prepared a supplementary distribution model, which has been excerpted below. That model assumes that the costs of the *amici curiae* involve an additional \$100,000 being paid from the “Costs Assessors Costs” (over the \$200,000 budgeted for the Costs Assessor).
33. The proposed sequence of payments is more fully articulated in the proposed annexure to any minute of order directing the sequence of payments, appearing at **Annexure A** to these submissions. This may be affected by the positions adopted by LLS, Shine and the *amici curiae*.

### **C.1. Minimum Payments**

34. The Applicant still considers that a minimum payment approach, such as that which the Applicant advanced at the last hearing, is beneficial. As submitted on the last occasion, the settlement is a 'process' settlement, which does not involve the payment of a single amount, and instead involves the Lump Sum component and the tranches payable on an ongoing basis.
35. In view of the ageing cohort of Eligible Claimants, and the desirability of seeing justice done in their lifetime, the sequence of payments should be such that payment may be made as quickly as possible. It is for this reason that the Applicant proposes a minimum payment per Eligible Claimant
36. The minimum payment mechanism is particularly important for living Eligible Claimants, and will benefit them the most (because payments in respect of deceased group members will need to be made after descendants have been identified). Any proposed sequence of payments that delays payments to living Eligible Claimants heightens the risk that they would pass away before seeing justice be done.
37. The Applicant considers that it would be desirable for the Court to provide guidance in the form of directions to the Administrator as to the quantum of minimum payments. That provides certainty both to the Administrator and to group members.

### **C.2. Distribution model adjusted for equal payments, and the appropriate level of minimum payments**

38. The Applicant considers \$10,000 to be the appropriate amount for the Court to fix as a minimum payment.
39. The below table illustrates what may be expected to be paid on account of Eligible Claimants at different levels of registration on certain assumptions, namely that the total legal costs do not exceed \$23 million (ie, incorporating Shine's capped budget for the Registration Process), that the Funder's claim is allowed in full and that the allowances for administration and costs assessor costs are not exceeded. It does not incorporate any

positive adjustment for interest which may be earned on the settlement sum from time to time.

		1000 ECs	2000 ECs	3000 ECs	4000 ECs	5000 ECs	6000 ECs	7000 ECs
Gross settlement	"Per Person Sum"	\$ 18,000,000	\$ 36,000,000	\$ 54,000,000	\$ 72,000,000	\$ 90,000,000	\$ 108,000,000	\$ 126,000,000
	Agreed Costs	\$ 15,000,000	\$ 15,000,000	\$ 15,000,000	\$ 15,000,000	\$ 15,000,000	\$ 15,000,000	\$ 15,000,000
	Admin Costs	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000
	CA Costs	\$ 300,000	\$ 300,000	\$ 300,000	\$ 300,000	\$ 300,000	\$ 300,000	\$ 300,000
	<b>Total settlement</b>	<b>\$ 35,300,000</b>	<b>\$ 53,300,000</b>	<b>\$ 71,300,000</b>	<b>\$ 89,300,000</b>	<b>\$ 107,300,000</b>	<b>\$ 125,300,000</b>	<b>\$ 143,300,000</b>
Deductions Sought	Reimbursement	\$ 165,000	\$ 165,000	\$ 165,000	\$ 165,000	\$ 165,000	\$ 165,000	\$ 165,000
	Costs referee	\$ 300,000	\$ 300,000	\$ 300,000	\$ 300,000	\$ 300,000	\$ 300,000	\$ 300,000
	Administration	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000
	Total legal costs	\$ 22,700,000	\$ 22,700,000	\$ 22,700,000	\$ 22,700,000	\$ 22,700,000	\$ 22,700,000	\$ 22,700,000
	Commission	\$ 7,060,000	\$ 10,660,000	\$ 14,260,000	\$ 17,860,000	\$ 21,460,000	\$ 25,060,000	\$ 28,660,000
	ATE premium	\$ 1,045,000	\$ 1,045,000	\$ 1,045,000	\$ 1,045,000	\$ 1,045,000	\$ 1,045,000	\$ 1,045,000
	<b>Total deductions</b>	<b>\$ 33,270,000</b>	<b>\$ 36,870,000</b>	<b>\$ 40,470,000</b>	<b>\$ 44,070,000</b>	<b>\$ 47,670,000</b>	<b>\$ 51,270,000</b>	<b>\$ 54,870,000</b>
Net settlement	Balance	\$ 2,030,000	\$ 16,430,000	\$ 30,830,000	\$ 45,230,000	\$ 59,630,000	\$ 74,030,000	\$ 88,430,000
<b>Distributions</b>								
	ECs	1000	2000	3000	4000	5000	6000	7000
	Per person	\$ 2,030	\$ 8,215	\$ 10,277	\$ 11,308	\$ 11,926	\$ 12,338	\$ 12,633
	Net to GMs (%)	5.8%	30.8%	43.2%	50.6%	55.6%	59.1%	61.7%

		8000 ECs	9000 ECs	10000 ECs	11000 ECs	12000 ECs	13000 ECs	14000 ECs
Gross settlement	"Per Person Sum"	\$ 144,000,000	\$ 162,000,000	\$ 180,000,000	\$ 180,000,000	\$ 180,000,000	\$ 180,000,000	\$ 180,000,000
	Agreed Costs	\$ 15,000,000	\$ 15,000,000	\$ 15,000,000	\$ 15,000,000	\$ 15,000,000	\$ 15,000,000	\$ 15,000,000
	Admin Costs	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000
	CA Costs	\$ 300,000	\$ 300,000	\$ 300,000	\$ 300,000	\$ 300,000	\$ 300,000	\$ 300,000
	<b>Total settlement</b>	<b>\$ 161,300,000</b>	<b>\$ 179,300,000</b>	<b>\$ 197,300,000</b>	<b>\$ 197,300,000</b>	<b>\$ 197,300,000</b>	<b>\$ 197,300,000</b>	<b>\$ 197,300,000</b>
Deductions Sought	Reimbursement	\$ 165,000	\$ 165,000	\$ 165,000	\$ 165,000	\$ 165,000	\$ 165,000	\$ 165,000
	Costs referee	\$ 300,000	\$ 300,000	\$ 300,000	\$ 300,000	\$ 300,000	\$ 300,000	\$ 300,000
	Administration	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000	\$ 2,000,000
	Total legal costs	\$ 22,700,000	\$ 22,700,000	\$ 22,700,000	\$ 22,700,000	\$ 22,700,000	\$ 22,700,000	\$ 22,700,000
	Commission	\$ 32,260,000	\$ 35,860,000	\$ 39,460,000	\$ 39,460,000	\$ 39,460,000	\$ 39,460,000	\$ 39,460,000
	ATE premium	\$ 1,045,000	\$ 1,045,000	\$ 1,045,000	\$ 1,045,000	\$ 1,045,000	\$ 1,045,000	\$ 1,045,000
	<b>Total deductions</b>	<b>\$ 58,470,000</b>	<b>\$ 62,070,000</b>	<b>\$ 65,670,000</b>	<b>\$ 65,670,000</b>	<b>\$ 65,670,000</b>	<b>\$ 65,670,000</b>	<b>\$ 65,670,000</b>
Net settlement	Balance	\$ 102,830,000	\$ 117,230,000	\$ 131,630,000	\$ 131,630,000	\$ 131,630,000	\$ 131,630,000	\$ 131,630,000
<b>Distributions</b>								
	ECs	8000	9000	10000	11000	12000	13000	14000
	Per person	\$ 12,854	\$ 13,026	\$ 13,163	\$ 11,966	\$ 10,969	\$ 10,125	\$ 9,402
	Net to GMs (%)	63.8%	65.4%	66.7%	66.7%	66.7%	66.7%	66.7%

40. The foregoing shows that within the range of 6,000 to 8,000 eligible claimants which was accepted at the time of the first settlement approval hearing, the equal payment is in excess of \$12,250, and therefore that there is minimal risk of the minimum payment of \$10,000 not being achievable. Indeed, the table shows that the number of eligible claimants would either need to fall below ~3,000, or increase above ~13,000 for there to be any prospect of a minimum payment of \$10,000 not being achievable. Both such prospects are remote. The former is remote given that there are already in excess of 6,000 registrations. The latter is remote given that it exceeds the actuarial assessment of the number of eligible claimants with surviving children.
41. The Applicant understands that Shine (in its separate interest) does not oppose the minimum payment mechanism, or the amount of \$10,000. The Funder's position is presently unclear, although at the last hearing it did appear to support the concept, but had reservations about whether the amount ought be less than \$10,000.



42. Accordingly, it is respectfully submitted it would be appropriate for a minimum initial payment of \$10,000 to be paid in relation to living Eligible Claimants promptly, with a subsequent top up payment to be made after any deductions for legal costs and funding commission are discharged (and for the 'full' payment to be made then in respect of deceased Eligible Claimants after spouses or children have had the chance to register). It is submitted the Administrator ought be directed to make such a payment to living Eligible Claimants.

### **C.3. Overall returns to group members**

43. The foregoing table also shows what percentage of the total settlement will go to Group Members at different levels of registration.

44. As noted, the Applicant presents the scenario of 6,000 Eligible Claimants but considers the scenario in which there are 8,000 Eligible Claimants to be the 'base case' and a more realistic scenario, at least where the Registration Process is roughly equivalent to that in *Street v WA*. In that range group members would be receiving between 59% and 63.5% of the total settlement funds

### **C.4. The impact of priority of payments**

45. As noted above, the Applicants do not address the priority of payments issue, as it is considered this is a matter for the Court. Regardless of what the Court determines in relation to that issue, the premise of the Applicant's proposed sequence of payments would not change.

46. The only difference would be that, instead of deductions being discharged at the same rate, one deduction would be discharged before the other.

2 December 2024



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## ANNEXURE A – SEQUENCE OF PAYMENTS

1. The following directions to the Administrator determine how monies received into the Settlement Fund Account pursuant to cll 2.6 and 2.11 of the Scheme are to be dealt with.
2. If for any reason substantial but not complete compliance is possible, the Administrators are to proceed at their reasonable discretion. If substantial compliance is not possible, the Administrators are to apply to the Court for further directions.
3. The Administrators are to maintain accounts for the purposes of complying with these directions, which are for bookkeeping purposes and may be comprised of mingled funds held in the single Settlement Fund Account. These accounts comprise funds held for:
  - (a) First, the minimum payment to be made in respect of each Eligible Claimant, which may be drawn down by the Administrators in making payments (including interim payments) under the Scheme (Minimum Payment Reserve Account);
  - (b) Second, approved deductions (Deductions Reserve Account), which may be drawn down by the Administrators to make payment under the Scheme in respect of:
    - i) the Reimbursement Payments; and
    - ii) any other deduction approved by the Court on account of the amount of the Applicant's Actual Costs and the amount to be paid to the Funder.
  - (c) Third, payments to be made in addition to the amount of the Minimum Payments, which may be drawn by the Administrators for that purpose or as directed by the Court in making payments other than interim payments under the Scheme (Reserve Account).

### Minimum Payment Reserve Account

4. Upon receipt of any monies into the Settlement Fund Account, the Administrator must allocate and accrue to the Minimum Payment Reserve Account a sum which enables a Minimum Payment of \$10,000 to be made in respect of each Eligible Claimant to whom the payment is referable.

5. Amounts allocated to the Minimum Payment Reserve Account on account of the Commonwealth paying the Lump Sum or otherwise making a payment into the Settlement Fund Account with respect to the claim of one or more Eligible Claimants are to be distributed as follows:
  - (a) Each living Eligible Claimant is to receive \$10,000 as an Interim Payment in accordance with cl 2.11 at the first available opportunity after the Appeal Expiry Date.
  - (b) The balance of the Minimum Payment Reserve Account is to then be reserved for making payments to Eligible Descendant Claimant/s in accordance with the Scheme.

#### Deduction Reserve Account

6. Upon receipt of any monies into the Settlement Fund Account, the Administrator must allocate and accrue to the Deduction Reserve Account:
  - (a) the difference between the amount paid into the Settlement Fund Account and the total amount paid into the Minimum Payment Reserve Account, provided that the sum in the Deduction Reserve Account from time to time does not exceed the deductions approved by the Court; and
  - (b) all interest earned on the Settlement Fund Account from time to time until all deductions approved by the Court have been paid out of the Deduction Reserve Account (which interest may be deducted on an ongoing basis in accordance with paragraph 8 below).
7. Amounts allocated to the Deductions Reserve Account are to be distributed in the following manner, to the extent that the deductions are approved by the Court, and within 14 days of amounts being allocated to the Deduction Reserve Account:
  - (a) First, the Reimbursement Payments may be drawn by the Administrators immediately and must be paid to the recipients within 14 days of there being at least \$165,000 in the Deductions Reserve Account.

(b) Second, the balance of the Deductions Reserve Account from time to time may be drawn on by the Administrators for the payment of the Applicant's Actual Costs, Funder Commission and Funder ATE Costs, in tranches per each 1,000 Eligible Claimants assessed by the Administrator to be eligible, in the order, amount and sequence ordered by the Court.

8. Interest accruing in the Deductions Reserve Account shall accrue in the first instance towards the payment of Administration Costs, in accordance with the Scheme cll 40-41.

#### Reserve Account

9. The Administrator must allocate and accrue to the Payment Reserve Account all amounts over and above the amounts standing to the Minimum Payment Reserve Account and the Deductions Reserve Account from time to time.

10. The Reserve Account is to be distributed equally between all Eligible Claimants. Such payment is in addition to the payment made from the Minimum Payment Reserve Account, such that:

(a) Each living Eligible Claimant is to receive his or her proportionate share of the Reserve Account in addition to what he or she has received as an Interim Payment as a further payment (or in addition to the Minimum Payment if no Interim Payment was made).

(b) Each deceased Eligible Claimant is to receive his or her proportionate share of the Reserve Account in addition to the Minimum Payment as a single payment (such amounts to be paid between the relevant Eligible Descendant Claimant/s).