

**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST**

S ECI 2023 01227

B E T W E E N

ROBERT LAIRD KILAH

Plaintiff

-and-

MEDIBANK PRIVATE LTD (ACN 080 890 259)

Defendant

ORDER

JUDGE OF THE COURT: The Honourable Justice Attiwill

DATE MADE: 6 September 2023

ORIGINATING PROCESS: Writ filed 28 March 2023

HOW OBTAINED: At the hearing of the plaintiff's summons filed 11 August 2023 and amended on 5 September 2023, on 6 September 2023

ATTENDANCE: Mr A Hochroth with Mr H C Whitwell, of counsel, for the plaintiff
Mr N P De Young with Ms J A Findlay and Ms Alison Martyn, of counsel, for the defendant

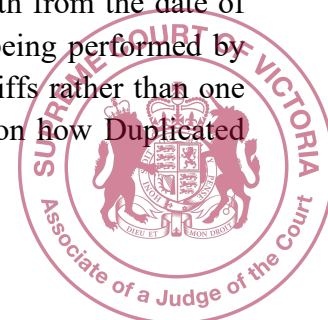
OTHER MATTERS: A. This order is signed by the Judge pursuant to Rule 60.02(1)(b) of the *Supreme Court (General Civil Procedure) Rules 2015*.
B. The Court made substantially similar orders in proceeding S ECI 2023 02833.



THE COURT ORDERS THAT:

Consolidation

1. Pursuant to s 33ZF of the *Supreme Court Act 1986* (Vic) (**Supreme Court Act**) and rule 9.12 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) (**the Rules**):
 - (a) this proceeding and proceeding S ECI 2023 02833 (**Sinnamon Proceeding**) (together, the **Proceedings**) are consolidated and the consolidated proceeding shall be known as *Robert Laird Kilah and Brendan Francis Sinnamon v Medibank Private Limited* to be identified as S ECI 2023 01227 (**Consolidated Proceeding**);
 - (b) the Plaintiff in this proceeding (**Kilah Plaintiff**) and the Plaintiff in the Sinnamon Proceeding (**Sinnamon Plaintiff**) (together, **Plaintiffs**) are the joint representative plaintiffs in the Consolidated Proceeding;
 - (c) Quinn Emanuel, solicitors for the Kilah Plaintiff, and Phi Finney McDonald, solicitors for the Sinnamon Plaintiff (together, the **Solicitors**) are granted leave to be the joint solicitors for the Plaintiffs in the Consolidated Proceeding on the basis that by 4.00pm on 11 September 2023 the Plaintiffs enter into a cooperative litigation protocol (as set out in the Annexure to this order) which addresses the manner in which the Solicitors are to cooperate in the conduct of the Consolidated Proceeding (**Cooperative Litigation Protocol**).
2. Order 1 is made subject to the Plaintiffs and the Solicitors providing, by **4.00pm on 11 September 2023**, undertakings to the Court in the form set out in the Schedule to this order.
3. Subject to order 13, the costs incurred in the Proceedings are the parties' reserved costs in the Consolidated Proceeding.
4. The costs of any work performed in the Consolidated Proceeding on behalf of the Plaintiffs that is performed by reason of there being two firms jointly representing the Plaintiffs rather than one will not be recoverable against group members or the defendant in the Consolidated Proceeding.
5. Pursuant to s 33ZF of the *Supreme Court Act*, Mr Roland Matters, legal costs consultant, is appointed as an independent costs monitor (the **costs monitor**) for the purpose of:
 - (a) conducting inquiries every six months (commencing one month from the date of these orders) on whether there is any, and if so what, work being performed by reason of there being two firms jointly representing the Plaintiffs rather than one firm (**Duplicated Work**) and making any recommendations on how Duplicated Work may be avoided;



- (b) providing confidential written reports to the Court and the Solicitors every six months (within one month of the completion of each inquiry), which state the cost monitor's opinion on the matters in [5(a)] of this order, identifying and describing any Duplicated Work in sufficient detail, and retaining such records from the costs monitor's inquiries, to enable the quantification of the costs relating to any Duplicated Work, at a later time.
6. The Solicitors must provide such information, access to personnel and access to documents as the costs monitor may reasonably require.
 7. The reasonable fees of the costs monitor shall be borne equally by the Plaintiffs and are not recoverable against the defendant or group members in the Consolidated Proceeding.
 8. The costs monitor may indicate his acceptance of the appointment by filing with the commercial court registry, within 7 days of the date of this order, a written consent to act and providing it to the Solicitors.
 9. In the event and at the time at which the quantification of the plaintiffs' costs payable by the defendant (adverse costs) arises for determination, any party to this proceeding may make an application regarding the adoption of the costs monitor's reports, including, in the case of the defendant, application for disclosure of those reports.

Pleadings

10. By **4.00pm on 2 October 2023**, the Plaintiffs must file and serve a consolidated writ and consolidated statement of claim.
11. By **4.00pm on 20 November 2023**, the Defendant must file and serve a defence.
12. By **4.00pm on 11 December 2023**, the Plaintiffs must file and serve any reply.

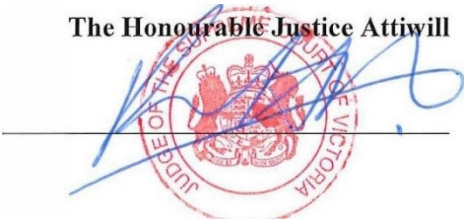
Other

13. The costs of the Plaintiffs' amended summonses filed 5 September 2023 are the parties' costs in the Consolidated Proceeding.
14. The proceeding is listed for a case management conference at **9.30am on 6 October 2023**.
15. Liberty to apply.



DATE AUTHENTICATED: 7 September 2023

The Honourable Justice Attiwill



SCHEDULE

FORM OF JOINT PLAINTIFFS' UNDERTAKINGS

**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST**

S ECI 2023 01227

BETWEEN

ROBERT LAIRD KILAH

Plaintiff

and

MEDIBANK PRIVATE LIMITED (ACN 080 890 259)

Robert Laird Kilah undertakes to the Court to enter into the Cooperative Litigation Protocol annexed to the orders of the Court dated 6 September 2023, and undertakes to instruct his solicitors, Quinn Emanuel Urquhart & Sullivan LLP, to comply with the Cooperative Litigation Protocol in conducting the Consolidated Proceeding.

Signature: _____

Robert Laird Kilah

Dated: _____



SOLICITORS ON THE RECORD FORM OF UNDERTAKING

**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST**

S ECI 2023 01227

BETWEEN

ROBERT LAIRD KILAH

Plaintiff

and

MEDIBANK PRIVATE LIMITED (ACN 080 890 259)

Quinn Emanuel Urquhart & Sullivan, LLP as solicitors for the Plaintiff, undertake to the Court to conduct the Consolidated Proceeding in accordance with the Cooperative Litigation Protocol annexed to the orders of the Court dated 6 September 2023.

Signature: _____

On behalf of: Quinn Emanuel Urquhart & Sullivan, LLP

Signatory: [insert]

Capacity: [insert]

Dated: _____



ANNEXURE A

Kilah v Medibank Private Ltd (S ECI 2023 01227)
&
Sinnamon v Medibank Private Ltd (S ECI 2023 02833)

Cooperative Litigation Protocol

Recitals

- A. On 28 March 2023, Mr Robert Laird Kilah (**Kilah Plaintiff**) commenced proceeding S ECI 2023 01227 (**Kilah Proceeding**) in the Supreme Court of Victoria (**Supreme Court**) against Medibank Private Ltd (ACN 080 890 259) (**Medibank**).
- B. The Kilah Proceeding was issued by Quinn Emanuel Urquhart & Sullivan (**Quinn Emanuel**), the solicitors for the Kilah Plaintiff.
- C. On 29 June 2023, Dr Brendan Francis Sinnamon (**Sinnamon Plaintiff**) commenced proceeding S ECI 2023 02833 (**Sinnamon Proceeding**) in the Supreme Court against Medibank.
- D. The Sinnamon Proceeding was issued by Phi Finney McDonald Pty Ltd (**Phi Finney McDonald**), the solicitors for the Sinnamon Plaintiff.
- E. By orders dated 30 June 2023, the Honourable Justice Attiwill ordered a timetable to determine the multiplicity issue that arose by reason of the commencement of the two proceedings. By orders dated 19 July 2023, Attiwill J extended the timetable.
- F. Quinn Emanuel and Phi Finney McDonald (together, the **Solicitors**) conferred in relation to the multiplicity issue and the future conduct of the two proceedings, having regard to the similarity of allegations and commonality of group members in the proceedings.
- G. On 25 July 2023, Quinn Emanuel, on behalf of the Kilah Plaintiff, and Phi Finney McDonald, on behalf of the Sinnamon Plaintiff, agreed to consolidate the two proceedings.
- H. Quinn Emanuel and Phi Finney McDonald agree between themselves, in the event that the proceedings are consolidated, that:
 - a. they will each pay 50% of any adverse costs orders against the Kilah Plaintiff and the Sinnamon Plaintiff (**Plaintiffs**);
 - b. they will each give 50% of the total amount of any security for costs ordered in the event a group costs order is made in the proceeding;
 - c. If Quinn Emanuel and Phi Finney McDonald have jointly procured ATE insurance to cover the costs of any adverse costs orders:



- i Quinn Emanuel is liable for payment of 50% of the premium payable pursuant to the ATE insurance policy; and
 - ii Phi Finney McDonald is liable for payment of 50% of the premium payable pursuant to the ATE insurance policy.
- d. if only one of Quinn Emanuel or Phi Finney McDonald have procured ATE insurance to cover adverse costs orders, the firm procuring the ATE insurance shall be solely liable for the premium payable pursuant to the ATE policy.
- I. The Kilah Plaintiff and the Sinnamon Plaintiff agree between themselves, in the event that the proceedings are consolidated, that they will each give 50% of the total amount of any security for costs ordered against the Plaintiffs.
- J. On 6 September 2023, Attiwill J made orders consolidating the Kilah Proceeding and the Sinnamon Proceeding (**Consolidated Proceeding**) and granting leave to the Solicitors to be jointly solicitors for the Plaintiffs in the Consolidated Proceeding, on the provision of:
 - a. undertakings by each of the Plaintiffs that they would enter into this Cooperative Litigation Protocol (**Protocol**) and that they would instruct their respective solicitors to comply with this Protocol in conducting the Consolidated Proceeding; and
 - b. undertakings by each of the Solicitors that they would conduct the Consolidated Proceeding in accordance with the Protocol.
- K. This Protocol sets out the manner in which the Solicitors must cooperate in the conduct of the Consolidated Proceeding.

1 Commencement Date

- 1.1 The term of this Protocol shall begin from the date on which it is executed (**Commencement Date**).
- 1.2 The term of this Protocol shall continue until terminated pursuant to clause 15.

2 Cooperation

- 2.1 The Plaintiffs will co-operate on the conduct of the Consolidated Proceeding.

3 Major decisions

- 3.1 Any major decision in the litigation will be:
 - a. made in accordance with clauses 5.4 and 5.5;
 - b. subject to the operation of, and compliance with, retainers, legal costs agreements (which continue to be operative subject to this Protocol), and any orders of the Court; and



- c. if applicable, made following and taking into account any advice from counsel.
- 3.2 Subject to clause 3.3, ‘major decisions’ shall include the following in respect of the Consolidated Proceeding:
- a. a decision requiring the Plaintiffs to seek approval from the Court;
 - b. the making of any interlocutory applications or the response to any interlocutory applications filed by another party;
 - c. the claims made in, and parties to, the pleadings in the Consolidated Proceeding, including to add, remove or substantially amend the claims or the claim period;
 - d. a decision to amend the definition of “group member”;
 - e. a decision to open or close the class;
 - f. the making, acceptance or rejection of a settlement offer and any terms of settlement;
 - g. discovery to be sought from, provided to or negotiated with another party;
 - h. a decision to accept or amend the loss methodology used to calculate the damages claimed by (or otherwise assessed on behalf of) the Plaintiffs and group members;
 - i. a decision to issue any notices or respond to any notices under the Supreme Court Act (including any issued by the Court under its own motion);
 - j. a decision to appeal or not appeal any order, judgment or decision of the Court (including a decision to defend or not defend any appeal by another party);
 - k. a decision to retain or change counsel;
 - l. a decision to retain, brief or instruct an independent expert witness or consulting expert (together, **Experts or Consultants**);
 - m. a decision to terminate any retainers with Experts or Consultants;
 - n. the filing of any evidence from Experts or Consultants including responding to any responsive evidence filed by another party;
 - o. the filing of any lay evidence (other than evidence from the Kilah Plaintiff or the Sinnamon Plaintiff);
 - p. the approval of the fee structure of any contracts or fee agreements with Experts or Consultants;
 - q. a decision to undertake a piece of work likely to cost \$10,000 or more;



- r. a decision to terminate this Protocol pursuant to clause 15;
- s. a decision to discontinue the Consolidated Proceeding; and
- t. subject to clause 3.3 below, any other decision which any member of the Litigation Committee identifies as being a decision of significant importance to the conduct of the Consolidated Proceeding.

3.3 For the avoidance of doubt, the following matters do not comprise a ‘major decision’ and are excluded from this section:

- a. decisions as to the form of any security for costs to be provided by the Plaintiffs, with all matters in respect of the form of security to remain at the sole discretion of each Plaintiff; and
- b. any other matters that the Litigation Committee (as defined in clause 5.1) has deemed not to comprise a ‘major decision’, or any matters falling within the delegation described at clause 5.6.

4 Avoidance of Duplication of Work and Costs

4.1 The Solicitors will work together in seeking to avoid duplication of work in accordance with this Protocol.

4.2 The Kilah Plaintiff and the Sinnamon Plaintiff shall instruct Quinn Emanuel and Phi Finney McDonald respectively to avoid duplicated work.

4.3 For the purpose of this Protocol ‘duplicated work’ is work that is performed by reason of there being two firms representing the Plaintiffs rather than one firm.

4.4 To facilitate the avoidance of duplicated work the Plaintiffs will jointly undertake the following matters:

- a. nominate one email address for service;
- b. file a consolidated writ and consolidated statement of claim in the Consolidated Proceeding;
- c. engage one set of counsel to represent the Plaintiffs and the group members in the Consolidated Proceeding;
- d. make any interlocutory applications;
- e. respond to any interlocutory applications filed by the Defendant;
- f. retain, brief and instruct expert witnesses;



- g. conduct the discovery process;
- h. prepare, file and serve any evidence; and
- i. confer on any major decisions and listing dates.

5 Litigation Committee

5.1 To ensure efficient cooperation in relation to the Consolidated Proceeding, the Solicitors will convene a committee comprising two lawyers appointed by each firm. The identity of the lawyers so appointed will be, initially:

- a. Damian Scattini and Meagan Bertolatti of Quinn Emanuel; and
- b. Ben Phi and Cameron Myers of Phi Finney McDonald,

but may be amended at the discretion of the appointing firm,

(Litigation Committee).

5.2 The Litigation Committee shall be responsible for:

- a. the making of major decisions in accordance with clause 3;
- b. management of the litigation;
- c. determining the efficient distribution and coordination of work in the Consolidated Proceeding between the Solicitors in accordance with clause 3;
- d. seeking to resolve, in the first instance, any concerns or disputes in relation to the conduct of the Consolidated Proceeding in accordance with clause 13;
- e. overseeing the process referred to in clause 11.1 for the sharing of disbursements which are incurred for the joint benefit of the Plaintiffs and the Consolidated Proceeding;
- f. identifying actions that may be taken to avoid duplicated work, including considering and implementing any recommendations of the Costs Monitor referred to in clause 16.3.

5.3 The Litigation Committee will communicate by whatever means and at whatever frequency is necessary for the efficient and effective conduct of the Consolidated Proceeding.

5.4 Each member of the Litigation Committee will act on the basis of utmost good faith in accordance with their obligations to the Court and under any existing conditional legal costs agreement and other relevant financing arrangements in the Consolidated Proceeding.



- 5.5 If the Litigation Committee is not able to reach unanimous agreement on any decision relating to the Consolidated Proceeding, then the dispute resolution procedure set out at clause 13 will apply.
- 5.6 Upon agreement by at least one Litigation Committee member from each of the Solicitors, the Litigation Committee may delegate, to either Quinn Emanuel or Phi Finney McDonald (and their legal personnel), sole carriage and responsibility for decision-making including sending correspondence without the approval of the other firm in relation to any aspect of the Consolidated Proceeding so as to promote efficiency and reduce duplication in the conduct of the Consolidated Proceeding.
- 5.7 In respect of all matters except for matters individual to the Kilah Plaintiff or the Sinnamon Plaintiff, for the purposes of avoiding duplication of costs and effort, work is to be distributed between the personnel of Quinn Emanuel and Phi Finney McDonald in a manner which so far as possible ensures the number and seniority of legal personnel conducting a task will be no more than if there was only a single representative proceeding conducted by a single firm. The primary determinant of the allocation of work shall however be the interests of group members having regard to:
- a. the skills and experience of the Solicitors and their respective staff;
 - b. the objective of ensuring that the total legal costs are reasonable and proportionate; and
 - c. the objective of avoiding legal costs incurred through overlapping or duplicated work.
- 5.8 Nothing in this Protocol provides:
- a. Quinn Emanuel, or the Kilah Plaintiff, with the right to provide instructions to Phi Finney McDonald;
 - b. for the termination or discontinuance of the legal costs agreements entered into between the Kilah Plaintiff and other Kilah Proceeding group members, and Quinn Emanuel;
 - c. Phi Finney McDonald, or the Sinnamon Plaintiff, with the right to provide instructions to Quinn Emanuel;
 - d. for the termination or discontinuance of the legal costs agreements entered into between the Sinnamon Plaintiff and other Sinnamon proceeding group members, and Phi Finny McDonald.

6 Division of legal work

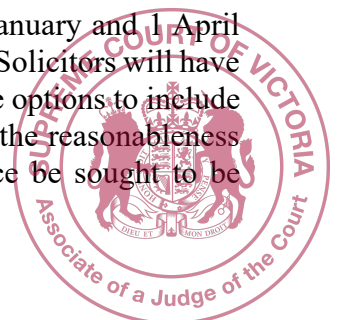
- 6.1 Subject to clauses 6.4 and 6.5, the Solicitors will each perform approximately 50% of the legal work by professional staff and paralegals in the Consolidated Proceeding.
- 6.2 Costs incurred by the Solicitors (as applicable) associated with:



- a. securing funding, “book building”; and
- b. internal reporting (including to any litigation funder) as to the Consolidated Proceeding;

are not to be treated as legal work for the purposes of clause 6.1 above.

- 6.3 Where particular tasks, such as conferences with expert witnesses, are to occur in circumstances where such tasks may have a significant bearing on the course or conduct of the litigation, where possible and practical, a representative from each of Quinn Emanuel and Phi Finney McDonald will be involved.
- 6.4 The Solicitors will each work together and coordinate tasks actively to:
- a. reduce any duplicated work to the maximum extent possible;
 - b. ensure that the other has a sufficient degree of oversight as to be comfortable with the work performed; and
 - c. ensure that the work is conducted in a timely manner and the Plaintiffs meet Court deadlines.
- 6.5 The Solicitors will cooperatively share their work product with each other, as appropriate, subject to the following:
- a. each party maintains the intellectual property in its own work product, precedents and systems; and
 - b. the sharing of work product, precedents and systems does not entitle one party to access the entire file of the other party.
- 6.6 Every month, the Solicitors will exchange a professional fee summary which lists each fee earner and the total amount of 6-minute units performed by those fee earners during the previous month.
- 6.7 If a party has any concerns regarding the division of legal work, the party must raise those concerns within 30 days after receiving the professional fee summary. A failure to do so within 30 days will disentitle the party from later disputing the division of legal work undertaken within the relevant month.
- 6.8 Where, after the exchange and review of professional fees has occurred in an accordance with clauses 6.6-6.7, there is a material disparity in the total professional fees incurred on a quarterly basis, (commencing 1 July 2023 and following 1 October, 1 January and 1 April and so forth), at least one Litigation Committee member from each of the Solicitors will have a good faith discussion about the options to resolve the disparity, with the options to include an offsetting payment of disbursements. Any concerns or disputes over the reasonableness of the professional fees incurred by the Solicitors, will at first instance be sought to be



resolved by the dispute resolution procedure set out at clause 13.1(a) and (b). If the matter remains unresolved by the step taken in clause 13.1(b), it will be referred to a costs assessor for a final decision, by which the parties agree to be bound. The costs incurred in the engagement of a costs assessor for a final determination of the matter, will not be recoverable against group members or the defendant in the Consolidated Proceeding and will be borne by the firm against whom the final decision is made, or if none, divided equally between Quinn Emanuel and Phi Finney McDonald.

7 Correspondence

- 7.1 Phi Finney McDonald will create and host an email account in order to allow correspondence to be received from the Court and the solicitors for other parties to the Consolidated Proceeding (**Joint Service E-mail Address**). The Joint Service E-mail Address will be configured so that any e-mail sent to it is immediately forwarded to each member of the Litigation Committee and any other employees of the Solicitors.
- 7.2 As far as practicable, correspondence to another party, group members or to the Court shall be jointly sent on behalf of the Plaintiffs in the Consolidated Proceeding and will be approved by at least one Litigation Committee member from each of the Solicitors.
- 7.3 The Solicitors may send confidential and privileged correspondence only to their respective clients at their own discretion.
- 7.4 The Plaintiffs will nominate one physical address for service of the Plaintiffs for the purpose of the Consolidated Proceeding.

8 Discovery

- 8.1 The Plaintiffs agree and, if necessary at a later time, will seek orders to the effect that the Defendant need only produce one set of discovered documents to the Plaintiffs in the Consolidated Proceeding.
- 8.2 The Plaintiffs will jointly conduct the discovery process in the Consolidated Proceeding.
- 8.3 A discovery protocol will be developed (and shall be updated from time-to-time if necessary) and approved by the Litigation Committee to ensure a consistent approach is adopted in respect of the management and usage of the document database and approach to discovery review.

9 Counsel

- 9.1 One set of counsel (**Joint Counsel**) will be briefed to represent the Plaintiffs and the Group Members in the Consolidated Proceeding.
- 9.2 Michael Borsky KC, Adam Hochroth, Rebecca Howe and Huw Whitwell are presently briefed by the Plaintiffs, and upon consolidation the Litigation Committee will rationalise the composition of the Joint Counsel team for the purpose of the conduct of the Consolidated



Proceeding and on an ongoing basis will make decisions as to the briefing of counsel as needed in order to prosecute the Consolidated Proceeding.

- 9.3 In the event that any counsel is or becomes unavailable to continue in this matter for any reason, that counsel may be replaced by alternative counsel as selected and agreed by the Litigation Committee.

10 Plaintiffs and Group Members

10.1 The Kilah Plaintiff and the Sinnamon Plaintiff have each given their instructions to be joint representative plaintiffs in the Consolidated Proceeding.

10.2 Quinn Emanuel is and will be instructed by the Kilah Plaintiff.

10.3 Phi Finney McDonald is and will be instructed by the Sinnamon Plaintiff.

10.4 In the event that either of the Kilah Plaintiff and/or the Sinnamon Plaintiff ceases to be a representative plaintiff in the Consolidated Proceeding (**Former Representative Plaintiff**), then:

- a. the Former Representative Plaintiff will no longer be bound by the terms of this Protocol, subject to clause 12;
- b. in the event that any other person who is a group member in the Consolidated Proceeding (**Group Member**) instructs the solicitors for the Former Representative Plaintiff that it will act as a representative plaintiff (**Replacement Representative Plaintiff**) and those instructions are accepted by the solicitors for the Former Representative Plaintiff, then:
 - i as soon as reasonably practicable, the Former Representative Plaintiff will enter into an accession deed poll with the Replacement Representative Plaintiff by which the Replacement Representative Plaintiff undertakes to step into the shoes of the Former Representative Plaintiff in respect of their rights, obligations and liabilities in respect of the Consolidated Proceeding, and to become bound by the terms of this Protocol, as if they were named as a representative plaintiff (in respect of the proceeding associated with the Former Representative Plaintiff) under the terms of this Protocol; and
 - ii the Solicitors are instructed to jointly take all necessary steps to secure the appointment of the Replacement Representative Plaintiff as a representative plaintiff in the Consolidated Proceeding;
- c. in the event that there is no proposed Replacement Representative Plaintiff pursuant to clause 10.4(b), then the remaining representative plaintiff will use reasonable endeavours to enter into a Protocol replacing this Protocol to govern the further conduct of the Consolidated Proceeding as soon as is reasonably practicable.



- 10.5 Quinn Emanuel will not be required, and it is agreed that Quinn Emanuel is not intending, to enter into a retainer with any Phi Finney McDonald client for the purpose of the Consolidated Proceeding.
- 10.6 Phi Finney McDonald will not be required, and it is agreed that Phi Finney McDonald is not intending, to enter into a retainer with any Quinn Emanuel client for the purpose of the Consolidated Proceeding.

11 Payment of Disbursements

11.1 Subject to clause 11.4 below, the Solicitors agree to engage the same counsel, experts and all other third-party service providers and to arrange to be invoiced such that each invoice is issued separately to:

- a. Kilah Plaintiff; and
- b. Sinnamon Plaintiff,

but ensuring that both Kilah Plaintiff and Sinnamon Plaintiff are obliged to pay 50% each of the total amount owing to the third-party service provider under the relevant terms of that invoice.

11.2 The Solicitors will periodically confer and, having regard to the information exchanged pursuant to clause 11.1 and clause 11.3 allocate the incurring and payment of expenses so as to promote equal sharing.

11.3 Where a disbursement (other than counsel's fees) is likely to exceed \$10,000 then both Quinn Emanuel and Phi Finney McDonald must confer (including by self-executing email with reasonable notice) and agree that the expenditure is in the best interests of advancing the claims against the Defendant.

12 Privilege and Confidentiality

12.1 The Plaintiffs and Solicitors acknowledge that all information passed between parties to this Protocol is strictly confidential and subject to legal professional and common interest privilege, subject to any agreement to the contrary (**Confidential Information**).

12.2 Confidential Information will only be used for the purposes of the Consolidated Proceeding.

12.3 Confidential Information may be disclosed to:

- a. the Supreme Court and Judges of the Supreme Court of Victoria;
- b. solicitors and counsel employed or engaged by Phi Finney McDonald or Quinn Emanuel in relation to the conduct of the Consolidated Proceeding; and
- c. third parties subject to a confidentiality agreement.



12.4 This clause 12 survives any termination of this Protocol.

13 Dispute Resolution

13.1 Any dispute arising between the Plaintiffs, including the Solicitors and Joint Counsel, in relation to the Consolidated Proceeding will:

- a. at first instance, be sought to be resolved by the Litigation Committee as per clause 5.2(d);
- b. if the matter remains unresolved by the step taken in clause 13.1(a), be referred to both Damian Scattini of Quinn Emanuel and Ben Phi of Phi Finney McDonald;
- c. if the matter remains unresolved by the step taken in clause 13.1(b), be referred to the most senior member of counsel by title, and then tenure of title, briefed in the Consolidated Proceeding, for a final decision, by which the parties agree to be bound;
- d. if a dispute arises which would be referred to the most senior member of counsel pursuant to clause 13.1(c) and any member of the Litigation Committee or counsel considers that it is not appropriate for such counsel to determine the dispute, then Litigation Committee shall refer the dispute to an independent senior counsel appointed by the Litigation Committee, save that, failing agreement within 14 days by the Litigation Committee as to such appointment, the Litigation Committee must refer the dispute to an independent senior counsel to be appointed by the President of the Law Institute of Victoria for a final decision, whereby the independent senior counsel can seek to determine the dispute as he or she determines fit, in respect of which decision the parties agree to be bound. The parties must reasonably cooperate with requests made by the independent senior counsel to enable the independent senior counsel to determine the dispute.

13.2 The process in clause 13.1 above remains subject to instructions received from the Plaintiffs in accordance with the terms of their respective conditional legal costs agreements. The Solicitors acknowledge and agree that the interests of the respective Plaintiffs and group members in the Consolidated Proceeding are paramount.

The individuals at clause 13.1(b) may be amended at the discretion of the appointing firm.

14 Best Interests of Group Members

14.1 The Plaintiffs instruct the Solicitors to interpret and give effect to this Protocol in a manner whereby the primary consideration shall be the interests of group members in the Consolidated Proceeding.

15 Termination

15.1 Subject to this clause 15, this Protocol may only be terminated by an order of the Court.



- 15.2 If there is a purported or attempted termination of this Protocol which is not provided for in this clause 15, the Plaintiffs and the Solicitors will attempt to agree on the appropriate course, and if they cannot agree, the dispute will be resolved in accordance with the dispute resolution provisions in clause 13.
- 15.3 This Protocol (except those clauses which are expressly stated to survive termination) will terminate when the Court delivers a final judgment and any appeal period expires or any appeal is determined, or in the event of a settlement following settlement approval or dismissal of the Consolidated Proceeding.

16 Costs Monitor

- 16.1 The Plaintiffs seek orders appointing an independent costs monitor (**Costs Monitor**) for the purpose of conducting six-monthly inquiries and preparing confidential written reports as to whether there has been any duplicated work or costs as referred to in clause 4 and making any recommendations on how duplicated work may be avoided.
- 16.2 In the event that a Costs Monitor is appointed by the Court, Quinn Emanuel and Phi Finney McDonald must assist the Costs Monitor in undertaking their inquiries by:
- a. providing the Costs Monitor with reasonable access to costs invoices and addressing the Costs Referee's queries as reasonably required; and
 - b. otherwise cooperating and providing such information, access to personnel and access to documents as the Costs Monitor may reasonably require.
- 16.3 In the event that the Costs Monitor makes a recommendation on how duplicated work may be avoided, the Solicitors must consider the recommendation and implement it if they consider it appropriate to do so.

17 Miscellaneous

- 17.1 Any variation to the terms of this Protocol should be agreed by the Solicitors in writing. Such amended Protocol is to be filed with the Court within five business days of execution by both Plaintiffs.
- 17.2 This Protocol is governed by the law applicable in Victoria and the parties irrevocably and unconditionally submit to the exclusive jurisdiction of the Courts of Victoria.
- 17.3 The parties intend this Protocol to supersede any provision to the contrary contained in any conditional legal costs agreement or the terms of any funding scheme and will seek to amend those documents to the extent required to give effect to this intention.

