

Settlement Scheme
The Cosmetic Institute Class Action

23 April 2024

Ursula Raad & Ors v The Cosmetic Institute & Ors
Supreme Court of NSW, Proceeding 2017/279308

Overview and Summary

- A. On 28 March 2024, Supreme Court proceeding 2017/279308 (*Ursula Raad & Ors v The Cosmetic Institute Pty Ltd*) (the **Proceeding**) was settled for \$25 million inclusive of damages, interest, required third party repayments and costs (the **Settlement Amount**), subject to agreement about the terms of the settlement to be included in a deed of settlement and Court approval. The terms of the settlement were subsequently agreed and set out in a deed of settlement executed by the plaintiffs, and the fifth to nineteenth defendants, on 15 April 2024 (the **Deed**). Subject to approval of the settlement, the Court will consider orders about the distribution of the Settlement Amount under this (or any other) Settlement Scheme and the appointment of an Administrator to administer the Settlement Amount, or any part of it. The proposed Administrator is Turner Freeman Lawyers.
- B. This Settlement Scheme (the **Scheme**) sets out the procedures and substantive requirements for the creation of a Settlement Fund (the **Fund**) and the distribution of the Fund to group members. The Scheme enables the assessment of eligibility and rights to compensation of Participating Group Members by the Administrator and provides for the payment by the Administrator of compensation to Participating Group Members out of the Fund.
- C. The Scheme will not be operative unless and until the Court approves the proposed settlement and the distribution of the Settlement Amount, or any part of it, pursuant to section 173(2) of the *Civil Procedure Act 2005* (NSW) and makes the Approval Orders.
- D. The proposed settlement, execution of the Deed, and the operation of the Scheme, are made without admission of liability by the defendants. The settlement, the Deed and the Scheme are not to be represented as an admission of liability by the defendants.
- E. The Scheme is to be implemented in a timely and cost-effective manner. It has the following major elements:

Stage	Clause	Procedure
Registration	Clause 4	Group Members who wish to make a claim under this Scheme, and who are not already deemed to have registered by reason of having completed a Registration Form or Registration Questionnaire, must complete a Registration Form within the prescribed timeframe.
Eligibility determination	Clause 5	The Administrator will assess and determine the eligibility of Group Members to become Participating Group Members and to receive compensation under the Scheme.
Assessment of Compensation	Clause 6	The Administrator will assess and determine the amount of compensation to be paid to the Participating Group Members.

Required Repayments	Clause 7	The Administrator will identify all Required Repayments Participating Group Members are liable to make and ensure these are paid by the Defendants before compensation is paid to Participating Group Members from the Fund.
Review rights	Clause 8	A Review may be sought by a person who is dissatisfied with a determination that they are not a Participating Group Member (eligibility review), or by a Participating Group Member who is dissatisfied with a compensation assessment (compensation review)
Payment of Compensation and Scheme Finalisation	Clause 9	Following the determination of all Participating Group Member's Assessed Compensation Amounts (including after Review) and payment of all Participating Group Member's Required Repayments, the Administrator will pay Compensation to Participating Group Members.

1. Definitions and interpretation

1.1 In this Settlement Scheme, terms shall have the meanings set forth below.

"Administration Costs" means the legal costs and disbursements incurred by the Administrator or its delegates or agents in implementing, giving effect to, or administering the Settlement Fund in accordance with the terms of this Settlement Scheme.

"Administrator" means the administrator of this Settlement Scheme appointed in accordance with clause 2.1 and with the Court's approval.

"Allied Coverage Period" means claims made and notified to TCI during the period 30 June 2016 to 30 June 2017.

"Allied World" means the eighteenth defendant in the Proceedings.

"Approval Orders" means orders of the Court, whether at first instance or on appeal, approving the settlement of the Proceeding on the terms set out in the Deed and approving the management and distribution of the Settlement Amount, or any part of it, in accordance with the Scheme.

"Assessed Compensation Amount" means the amount equal to the value of the Participating Group Member's claim as assessed by the Administrator pursuant to the common law as modified by either the *Civil Liability Act 2002 (NSW)* or the *Competition and Consumer Act 2010 (Cth)* less any deductions made in accordance with the Deductions Protocol at Schedule 2. The amount payable to a Participating Group Member under the Scheme may ultimately be adjusted up or down in accordance with clause 9.

"BAS" means breast augmentation surgery.

"BPA" means any bulk payment agreement between Medicare Australia or any other Third Party and the Defendants and/or the Administrator for the payment of Required Repayments to Medicare Australia or any other Third Party that Participating Group Members are liable to make upon being assessed as

being eligible to receive an Assessed Compensation Amount.

“CGU Insurance Limited” means the Australian intermediary-based insurance company which forms part of Insurance Australia Group and is not and was never a party to the Proceedings.

“Claim or Claims” means any present or future, actual or contingent, proceeding, suit, claim, cause of action (whether in contract, tort including negligence, equity, pursuant to statute or otherwise), complaint, liability, demand, cost or expense in connection with or arising in any way from the circumstances recited in the Deed, the plaintiffs’ Claims, the Group Member Claims and the matters referred to in any of the statements of claim, as amended from time to time, the cross-claims and the Proceeding, whether or not the facts, matters or circumstances giving rise to that claim, cause of action, complaint, liability, demand, cost or expense are known to each of the parties to the Deed, but excluding any party’s right to enforce its rights under the Deed.

“Compensation Review” has the meaning given in clause 8.1(b).

“Court” means the Supreme Court of New South Wales.

“Deed” means the deed of settlement executed by the plaintiffs, and the fifth to nineteenth defendants, and exchanged on 15 April 2024.

“Deed Poll” means appendix F to the Deed, a copy of which is appendix A to the Scheme.

“Defendants” means the defendants in the Proceedings.

“Dr Dona” means the fifth defendant in the Proceedings.

“Eighth Further Amended Statement of Claim” or “8FASOC” means the final iteration of the originating process filed in the Proceedings.

“Eligibility Criteria” has the meaning given in clause 5.1.

“Eligibility Review” has the meaning given in clause 8.1(a).

“Fund” means the settlement fund comprising the Settlement Amount (or part of it), which upon the Court making the Approval Orders, is transferred to the Administrator to be held and managed as a fund and to be distributed by the Administrator under the direction of the Administrator.

“Group Members” means persons who fall within the definition of Group Members as that term is defined at paragraph 2 of the Eighth Further Amended Statement of Claim.

“Legal Costs” means the sum of the Plaintiffs’ legal costs and disbursements of the Proceeding and the Administration Costs approved by the Court in the Approval Orders.

“MDANI” means the nineteenth defendant in the Proceeding.

“Newline” means the seventeenth defendant in the Proceeding.

“Notice of Eligibility” has the meaning given in clause 5.3.

“Notice of Assessment” has the meaning given in clause 6.3.

“Notice of Review Assessment” has the meaning given in clause 8.5(f).

“Plaintiffs” means the first to twelfth plaintiffs as named in the Eighth Further Amended Statement of Claim.

“Plaintiffs’ Payments” means the payments to the plaintiffs in damages and interest approved by the Court in the Approval Orders, less any Required Repayments the plaintiffs must make.

“Post-Allied Period” means women who suffered injury consequent upon their BAS, and notified TCI of the injury, after 12 May 2017 (such claims not having been notified by the provision of the proposed Statement of Claim on the insurer because the group member had not as at that date undergone surgery or suffered injury).

“Pre-Newline Period” means women who underwent BAS, suffered injury, and whose injuries were notified to CGU Insurance Limited prior to 28 July 2014.

“Primary BAS” means, in the case of group members who underwent more than one BAS at the TCI Premises, the first BAS in time.

“Proceedings” or “Proceeding” means Supreme Court of New South Wales proceedings 2017/279308.

“Prohibited Person” means a person who is a sanctions target or appears on a list of prohibited persons pursuant to legal obligations with respect to the prevention of payments to persons or organisations associated with terrorism and/or money laundering.

“Queensland Group Members” means Group Members who underwent BAS at TCI Premises in Queensland.

“Recovery Legislation” means the *Health and Other Services (Compensation) Act 1995 (Cth)*, *Social Security Act 1991 (Cth)*, *Veterans’ Entitlements Act 1986 (Cth)*, and *National Disability Insurance Scheme Act 2013 (Cth)*.

“Registration Deadline” means 3 May 2024.

“Registration Form” means a registration form or registration questionnaire, currently or formerly in use by TFL for the purposes of persons registering their interests in the proceedings or nominating as group members, and whether or not in a form which was approved by the Court, submitted in accordance with clauses 4.1, 4.2 or 4.3

“Required Notices” means:

- (a) provision by the Plaintiffs to the Active Defendants of any notices or other documents concerning or referring to Required Repayments (including sufficient information to permit the Active Defendants to verify any notices issued under the *Health and Other Services (Compensation) Act 1995 (Cth)*, *Social Security Act 1991 (Cth)*, *Veteran’s Entitlements Act 1986 (Cth)*, *National Disability Insurance Scheme Act 2013 (Cth)* or any other statute under which the Active Defendants may be liable to pay a government body arising from or in respect of the Settlement);
- (b) provision by the Plaintiffs to the Active Defendants of any notices under the *Health and Other Services (Compensation) Act 1995 (Cth)* setting out any amounts repayable under the Settlement; and
- (c) provision by the Plaintiffs to the Active Defendants of any notices from Centrelink and/or under the *Social Security Act 1991 (Cth)* setting out any amounts repayable, if any, to

that entity under the Settlement, or confirmation that no monies are repayable; and

- (d) provision by the Plaintiffs to the Active Defendants of any notices setting out any amounts repayable, if any, under the *Veteran's Entitlements Act 1986* (Cth), *National Disability Insurance Scheme Act 2013* (Cth) or any other statute under which the Active Defendants may be liable to pay a government body arising from or in respect of the Settlement.

"Required Repayments" means any and all reimbursements and other payments that are required to be paid to third parties arising from the settlement of the plaintiffs' and Participating Group Member Claims, including:

- (a) any statutory refunds payable to any State or the Commonwealth government or statutory authority as required by law and to pay any refund to a third party as required by law;
- (b) any Advance Payment, of 10% of the Settlement Sum, payable to Medicare; and
- (c) any amounts payable under the *Health and Other Services (Compensation) Act 1995* (Cth), *Social Security Act 1991* (Cth), *Veteran's Entitlements Act 1986* (Cth), *National Disability Insurance Scheme Act 2013* (Cth) or any other statute under which the Defendants may be liable to pay a government body arising from or in respect of the Settlement.

"Review Assessor" means a member of the Bar or a solicitor who is appointed by the Administrator pursuant to clause 8.5(a). The Review Assessor must not be employed by, or be a principal of, TFL and must have at least three years' experience in personal injury litigation.

"Settlement" means settlement of the Proceeding in accordance with the terms of the Deed and subject to any Approval Orders.

"Settlement Amount" means \$25,000,000 inclusive of all damages, interest, costs, counsel fees and disbursements, Required Repayments and Administration Costs and any GST applicable to those costs or amounts.

"Surgery Evidence" means the documentation that must be obtained and provided to the Administrator to establish proof of BAS at the TCI Premises, being clinical records from The Cosmetic Institute.

"Settlement Fund" or "Fund" means the Settlement Amount less the Plaintiffs' Payments, any Required Repayments from the Plaintiffs' Payments and the Legal Costs (but excluding the Administration Costs).

"Settlement Fund Account" means an interest bearing bank account established by the Administrator for the purpose of holding the Settlement Fund (or part of it) during the implementation of the Settlement Scheme.

"Settlement Scheme" or "Scheme" means this Settlement Scheme, including the rights and obligations created by this Scheme. For the avoidance of doubt, the Settlement Scheme may be amended by the Court as it deems fit.

"TCI Entities" means the first to fourth defendants in the Proceeding, namely:

- (a) The Cosmetic Institute Pty Ltd (in liq) (ACN 153 061 155), which was registered on 6 September 2011 and entered liquidation on 10 July 2018 (TCI);
- (b) The Cosmetic Institute Parramatta Pty Limited (in liq) (ACN 144 469 036), which was registered

on 7 June 2010 and entered liquidation on 7 October 2016 (TCI Parramatta);

(c) TCI Bondi Junction Pty Limited (in liq) (ACN 165 531 895), which was registered on 28 August 2013 and entered liquidation on 10 July 2018 (TCI Bondi);

(d) TCI Southport Pty Ltd (in liq) (ACN 605 603 423), which was registered on 1 May 2015 and entered liquidation on 10 July 2018 (TCI Southport),

“TCI Premises” means any of:

- (a) Smith Street Parramatta, New South Wales (TCI Parramatta Premises);
- (b) Hollywood Avenue, Bondi Junction, New South Wales (TCI Bondi Premises);
- (c) Suite 1, 98 Marine Parade, Southport, Queensland (TCI Southport Premises);
- (d) Burwood Road, Concord, New South Wales (Concord Private Hospital);
- (e) Chetwynd Road, Guildford, New South Wales (Holroyd Private Hospital).

“TFL” means Turner Freeman Lawyers being the registered business name for the partnership bearing the entity name T.A Blundell & R Dababneh & H Dignan & F Dous & N.J Edwards-Bonello & A.J Gardiman & T.L Goldberg & A.M Hoffman & G.A McMahon.

“TFL Trust Account” means the trust account operated by TFL.

“Third Party” means any person, corporation, statutory body or any other entity to which Required Repayments must be made or from which Required Notices must be obtained, including a private health insurer (as defined in the *Private Health Insurance Act 1987* (Cth), Medicare Australia, the Department of Social Security or Centrelink, the Department of Veteran’s Affairs, and the National Disability Insurance Agency.

“Treatment Evidence” means proof, by way of contemporaneous medical records, which may include contemporaneous medical practitioner or hospital records supplemented by a letter or report from the medical practitioner providing any necessary clarification of the contents of the records in respect of which compensation is claimed under this Scheme. For the avoidance of doubt, Treatment Evidence need not be in a form which would be admissible under the *Evidence Act 1995* (NSW).

“\$ or dollar” means the lawful currency of the Commonwealth of Australia.

2. Appointment and functions of the Administrator

2.1 Appointment of the Administrator

- (a) Subject to the Court’s approval, TFL will be appointed as the Administrator to administer and implement the Scheme fairly and reasonably according to its terms.
- (b) TFL’s duties to the Court will take priority over any duties they may owe to individual Group Members.
- (c) In the performance of their functions as the Administrator, TFL will have the same immunities from suit as attach to a Referee appointed pursuant to rule 20.14 of the *Uniform Civil Procedure Rules 2005* (NSW).

2.2 Correction of errors

The Administrator may at any time correct any error, slip or omission that occurs in the administration or implementation of the Scheme.

3. Implementation of the Settlement

3.1 Payment of the Plaintiffs' Payments

As soon as reasonably practicable after the Settlement is approved by the Court, and the Defendants have paid from the Settlement Amount into the TFL Trust Account, the Plaintiffs' Payments less any Required Repayments plus Legal Costs, the Administrator will:

- (a) pay any Required Repayments from the Plaintiffs' Payments that have not already been paid by the Defendants and which the plaintiffs are liable to make;
- (b) pay to the Plaintiffs the Plaintiffs' Payments less any Required Repayments in accordance with the Approval Orders;
- (c) pay to TFL the Legal Costs, but excluding the Administration Costs, that are approved by the Court in the Approval Orders.

3.2 Payments into the Settlement Fund

Following payments pursuant to clause 3.1, the Administrator will transfer the Administration Costs into the Settlement Account to meet the costs of administering the Scheme.

3.3 Payment of Group Members' Compensation

Following payments pursuant to clauses 3.1 and 3.2, and after all Required Repayments have been made in relation to the Participating Group Members' claims, and the Defendants have paid the balance of the Settlement Amount into the Settlement Fund Account, the Administrator will:

- (a) pay any Required Repayments to Third Parties in relation to the Participating Group Members' claims that have not already been paid by the Defendants and which the Participating Group Members are liable to make in accordance with Clause 7;
- (b) apply and distribute the Fund to Participating Group Members in accordance with Clause 9.

4. Registration of Group Members

4.1 Group Members who have submitted a Registration Form

Group Members who have submitted a Registration Form or Registration Questionnaire with TFL are deemed to have registered their claim to participate in the Scheme.

4.2 Group Members who have not submitted a Registration Form

Group Members who wish to participate in the Scheme and who have not submitted a Registration Form in either of the ways specified in clause 4.1 must complete and submit the form available online by the Registration Deadline (at the following website: [www.https://www.turnerfreeman.com.au/tci/](https://www.turnerfreeman.com.au/tci/))

4.3 Alternative methods of registration

If a Group Member is not able to complete an online Registration Form and informs TFL of that inability, TFL will permit the Group Member's registration to be effected by posting to the Group Member by registered post a hard copy Registration Form with a reply paid envelope.

4.4 Failure to register by the Registration Deadline

Subject to clause 4.5, if a Group Member registers her claim after the Registration Deadline, the Group Member is not entitled to participate in the Scheme and foregoes any right she may have had to receive compensation from the Settlement Fund.

4.5 Discretion to waive late registrations

In its discretion, the Administrator may accept a late registration (that is, a registration effected after the Registration Deadline), if the Group Member has reasonable grounds for late registration, including for the following reasons:

- (a) illness or incapacity; or
- (b) a prolonged absence from her usual place of residence; or
- (c) such other reason as the Administrator may in its sole discretion accept,

except that the Administrator must not accept a late registration if it is received by the Administrator more than three months after the Registration Deadline, that is, after 3 August 2024.

5. Assessment and determination of eligibility

5.1 Eligibility Criteria

A Group Member becomes a Participating Group Member and is eligible to apply to receive compensation pursuant to the Scheme if she satisfies the following Eligibility Criteria:

- (a) the Group Member underwent BAS on or before 29 October 2017;
- (b) the Group Member's BAS was performed at any of the TCI Premises;
- (c) the Group Member's BAS was performed by, or with the assistance of, one or more of the fifth to sixteenth defendants;
- (d) the Group Member has:
 - (i) not opted out of the Proceeding; or
 - (ii) not entered into a deed of release with the Defendants or any of their related entities in respect of a claim for damages for BAS performed at any of the TCI Premises;
 - (iii) not received full and final satisfaction from any other person or entity in respect of a claim for damages for undergoing BAS at any of the TCI Premises;
- (e) the Group Member claims to have suffered an injury as a result of BAS at any of the TCI Premises;

- (f) the Group Member has registered her claim by the Registration Deadline (or by such later time as the Administrator permits in accordance with clause 4.5);
- (g) the Group Member is not a Prohibited Person such that she is prohibited from receiving compensation by reason of sanctions imposed under terrorism and/or money laundering legislation or regulations.

5.2 Process for determining eligibility

The Administrator will assess and determine the eligibility of a Group Member pursuant to clause 5.1 in accordance with the following provisions:

- (a) the Administrator will obtain the Group Member's Surgery Evidence;
- (b) the Administrator will confirm whether the Group Member has filed an opt out notice and, if so, will obtain a copy of the opt out notice;
- (c) the Administrator will, if necessary, provide to the Defendants an authority signed by the Group Member to obtain confirmation from the Defendants as to whether clause 5.1(d)(ii) applies to the Group Member;
- (d) the Administrator will obtain evidence from the Group Member of any compensation she has received and, if necessary, provide to any relevant person or entity an authority signed by the Group Member to obtain confirmation as to whether clause 5.1(d)(iii) applies to the Group Member;
- (e) the Administrator will obtain evidence from the Defendants about whether clause 5.1(g) applies to the Group Member;
- (f) the Administrator will obtain a statutory declaration from the Group Member to the effect that she has suffered an injury and specifying what injury or injuries she claims she has suffered as a result of undergoing BAS at the TCI Premises;
- (g) upon review of the information obtained in accordance with clauses 5.2(a) to (f), the Administrator will determine whether the Group Member meets the Eligibility Criteria set out in clause 5.1 and is, therefore, a Participating Group Member.

5.3 Notification to Group Members regarding their eligibility or otherwise

After a determination is made as to whether a Group Member is a Participating Group Member, the Administrator will promptly send to the Group Member a Notice of Eligibility in which the Administrator will:

- (a) state whether the Group Member meets the Eligibility Criteria and is therefore a Participating Group Member; and
- (b) if the Group Member was assessed as ineligible to participate in the Scheme, provide:
 - i. a short statement of the basis on which the Group Member has been determined not to meet the Eligibility Criteria; and
 - ii. information in relation to her right to seek a Review under clause 8 of the Scheme in respect of the determination that they are ineligible to participate in the Scheme.

5.4 Clarification regarding steps required to be taken where a Group Member opted out or has otherwise resolved her claim

For the avoidance of doubt, if the Administrator obtains information which demonstrates that a group member fails to satisfy any of the eligibility criteria in 5.1(b), the Administrator:

- (a) is not obliged to obtain any further information or materials under clause 5.2; and
- (b) may proceed to make a determination about eligibility.

6. Assessment of Participating Group Members' claims

6.1 Assessment of claims

Participating Group Members' Claims will be assessed and determined by the Administrator or their delegates in accordance with the Damages Assessment Protocol which appears at Schedule 1.

6.2 Process for determining Participating Group Members' claims

The Administrator may obtain the following so far as it is relevant and applicable to the assessment of the Participating Group Member's claim for injuries and damages for having undergone BAS at any of the TCI Premises:

- (a) instructions and information from the Participating Group Member (inclusive of any registration questionnaire returned by a Group Member inclusive of a questionnaire produced prior to the settlement of the proceedings);
- (b) information from any other person such as a family member or friend of the Participating Group Member;
- (c) Surgery Evidence, to the extent that those records have not already been obtained pursuant to clause 5.2(a);
- (d) Treatment Evidence;
- (e) medical, clinical or pharmacy records;
- (f) reports of treating medical practitioners;
- (g) invoices regarding any treatment or other expenses incurred by the Participating Group Member;
- (h) subject to clause 6.4, reports from:
 - (i) a treating doctor;
 - (ii) an independent health expert, being a medical or allied health expert who has not previously treated the Participating Group Member (such as a plastic surgeon, psychiatrist etc);
- (i) Upon receiving the information in 6.2(a) the Administrator will:

- (iii) assess damages in accordance with the Damages Assessment Protocol in Schedule 1;
- (iv) adjudicate as expeditiously and reasonably as possible;
- (v) make any deductions from the damages assessed under the Damages Assessment Protocol in accordance with the Deductions Protocol in Schedule 2;
- (vi) determine the Participating Group Member's Assessed Compensation Amount.

6.3 Notification of Participating Group Members' Assessed Compensation Amounts

After a determination is made of a Participating Group Member's Assessed Compensation Amount, the Administrator will promptly send to the Participating Group Member a Notice of Assessment in which the Administrator will:

- (a) state the Participating Group Member's Assessed Compensation Amount;
- (b) provide information to the Participating Group Member about the determination of her entitlements under the Scheme;
- (c) inform the Participating Group Member that she will be paid her Assessed Compensation Amount less any Required Repayments only after the Assessed Compensation Amounts have been determined for all Participating Group Members and all Required Repayments have been determined and paid for all Participating Group Members.
- (d) provide information to the Participating Group Member in relation to her right to seek a Review under clause 8.

6.4 Restrictions on reports to be obtained for a Participating Group Member's claim

With the exception of Category E Participating Group Members, the administration process, including any delegated function, is not intended to be an individual assessment of damages such as would occur in individual personal injury proceedings. Accordingly, and inclusive of Category E Participating Group Members:

- (a) the Administrator must only obtain a report from a treating doctor or other expert if it would not otherwise be reasonably practicable to reliably assess the Participating Group Member's Assessed Compensation Amount on the terms of the Scheme;
- (b) where possible, the Administrator must seek to obtain a report from a treating doctor rather than an independent health expert; for example, a report may be obtained from an independent health expert if the Participating Group Member's treating doctor is deceased or unwilling to provide a report, or the treating doctor does not have the relevant expertise to provide a report that addresses the issues raised by the Administrator;
- (c) the Administrator must not obtain more than one medical report (whether from a treating doctor or other expert) in relation to a Participating Group Member unless they are of the view that a Participating Group Member's Assessed Compensation Amount cannot otherwise be reliably assessed on the terms of the Scheme;

7. Required Repayments

7.1 Process and sequence for assessment and payment of Required Repayments

The Administrator will, in sequence:

- (a) inform the Plaintiffs that they or the Defendants may be liable to make Required Repayments as a result of their receiving the Plaintiffs' Payments;
- (b) inform the Plaintiffs that all Required Repayments in relation to their claims will be deducted from the Plaintiffs' Payments and paid directly by the Defendants or otherwise paid by TFL from the Plaintiffs' Payments;
- (c) identify any and all Required Repayments in relation to the Claims of the Plaintiffs and obtain and, if required, provide to the Defendants, all Required Notices or other relevant documents and all necessary statutory clearances (for example under the *Social Security Act 1991* (Cth) or *National Disability Insurance Scheme Act 2013* (Cth)) or Notices of Charge (under the *Health and Other Services (Compensation) Act 1995* (Cth)) to facilitate the payment of the Required Repayments as soon as reasonably practicable;
- (d) deduct and pay or authorise the Defendants to pay any Required Repayments in relation to the Plaintiffs before any compensation is paid to the Plaintiffs;
- (e) inform Participating Group Members that they or the Defendants may be liable to make Required Repayments as a result of their receiving compensation under the Scheme;
- (f) inform Participating Group Members that all Required Repayments will be paid by the Defendants or from the Fund regardless of whether that sum would ordinarily be paid directly by the Defendants;
- (g) identify any and all Required Repayments in relation to each Participating Group Member's claim and obtain and, if required provide to the Defendants, all Required Notices or other relevant documents and all necessary statutory clearances (for example under the *Social Security Act 1991* (Cth) or *National Disability Insurance Scheme Act 2013* (Cth)) or Notices of Charge (under the *Health and Other Services (Compensation) Act 1995* (Cth)) to facilitate the payment of the Required Repayments as soon as reasonably practicable;
- (h) identify and calculate any Required Repayments for each Participating Group Member based on the Assessed Compensation Amount for each Participating Group Member;
- (i) deduct and pay or authorise the Defendants to pay any Required Repayments from the Assessed Compensation Amount of each Participating Group Member before a Participating Group Member is paid the balance of her Assessed Compensation Amount.

7.2 The Administrator may enter into a BPA or any other payment or notice arrangement with Medicare Australia or any other Third Party to facilitate the efficient and expeditious payment of Required Repayments and the provision of Required Notices.

8. Review of Administrator's Determinations

8.1 Right to seek a Review

A person who has registered to participate in the Scheme has the right to seek a Review of the

following determinations:

- (a) a determination under clause 5 that the registrant is not eligible to receive compensation (**Eligibility Review**); and
- (b) in the case of a Participating Group Member, a determination under clause 6 regarding the amount of compensation that may be payable to the Participating Group Member (**Compensation Review**).

8.2 Process for seeking a Review

If a registrant (including a Participating Group Member) wishes to seek a Review, they must do so:

- (a) by giving written notice to the Administrator no later than 28 days after the Administrator has sent a Notice of Eligibility or Notice of Assessment (as applicable) to the registrant or Participating Group Member; and
- (b) the notice seeking a review of a Notice of Assessment must state the components of the assessment which the Participating Group Member disputes and the reasons why the Participating Group Member disputes those components of the assessment, and provide any additional evidence that has not been previously provided to the Administrator.

8.3 Failure to seek a Review

If a registrant or Participating Group Member does not give written notice to the Administrator within 28 days as required by clause 8.2, the registrant or Participating Group Member will be deemed to have accepted her Notice of Eligibility or Notice of Assessment (as the case may be).

8.4 Payment of a bond for Reviews

Subject to clause 13.4, where a registrant or Participating Group Member seeks either an Eligibility Review or a Compensation Review, the Administrator may, in their absolute discretion:

- (a) require that the registrant or Participating Group Member pay to the Administrator a bond not exceeding \$500 for the cost of Eligibility Review;
- (b) require that the registrant or Participating Group Member pay to the Administrator a bond not exceeding \$1,000 for the cost of Compensation Review
- (c) if the registrant or Participating Group Member fails to pay the bond within 28 days of receiving such a request from the Administrator, treat the Participating Group Member's request for a Review as void and of no effect.

8.5 Process for determination of Reviews

Following receipt of a notice seeking review and upon payment of any bond required in accordance with clause 8.4:

- (a) the Administrator will engage a Review Assessor;
- (b) the Administrator will provide the following materials to the Review Assessor:
 - (i) the registrant's or Participating Group Member's written notice and evidence by

- which she requested the Review; and
- (ii) either of the following, depending on the nature of the Review that is sought by a registrant or Participating Group Member:
 - (A) Surgery Evidence and Notice of Eligibility; or
 - (B) Material obtained pursuant to clause 6.2(a) and Notice of Assessment;
 - (c) unless the Review Assessor considers it reasonably necessary to do so, the Review Assessor will not consider any new evidence or additional materials beyond that contemplated by 8.5(b);
 - (d) the Review Assessor will then:
 - (i) in an Eligibility Review:
 - (A) make a determination as to whether the Administrator made an error in applying the Eligibility Criteria;
 - (B) if the Review Assessor is satisfied that an error was made, make a fresh determination as to whether the Group Member is eligible to receive compensation;
 - (ii) in a Compensation Review, make a determination as to the amount of compensation that the Participating Group Member is entitled to receive pursuant to this Settlement Scheme, and in doing so the Review Assessor must only:
 - (A) consider the issues in relation to which the Participating Group Member seeks a Review; and
 - (B) determine whether the Administrator made an error in assessing the claim.
 - (iii) in relation to either type of Review, prepare and provide to the Administrator a brief statement of reasons for the Review Assessor's determination and, if relevant, include details of the amounts assessed;
 - (e) in carrying out a Compensation Review, a Review Assessor must make his or her own determination of the Group Member's Assessed Compensation Amount.
 - (f) after receiving a Review Assessor's determination and statement of reasons, the Administrator will promptly send to the registrant or Participating Group Member a Notice of Review Assessment in which the Administrator provides:
 - (i) information to the registrant or Group Member about the determination of her Review and the impact of that determination on the registrant's or Group Member's entitlements (if any) under the Scheme; and
 - (ii) a copy of the Review Assessor's statement of reasons.

8.6 Determinations of Review Assessors are final and binding

- (a) A determination of a Review Assessor is final and binding on the Administrator and the

registrant or Participating Group Member who sought the Review, and neither the Administrator nor the registrant or Participating Group Member is entitled to appeal to the Court or any other court or tribunal in relation to any asserted error of jurisdiction, fact or law arising from the Review Assessor's determination.

- (b) Following a Compensation Review, the Review Assessor's determination will be deemed to be the Participating Group Member's Assessed Compensation Amount for the Participating Group Member under this Scheme, subject to any adjustment under clause 9.2.

8.7 Role of Review Assessors

Review Assessors engaged by the Administrator:

- (a) will act as independent arbitrators and not as counsel briefed to act for any individual Group Members or the Administrator;
- (b) have the same immunities from suit as attach to the office of a judge of the Court.

9. Payment of Assessed Compensation Amounts and Scheme Finalisation

9.1 Timing of Payment

To avoid the risk that Required Repayments and payments to Participating Group Members will in aggregate be greater than the sum available for distribution from the Fund, the Administrator will not make any payment to any Participating Group Member until such time as:

- (a) the Assessed Compensation Amounts are determined for all Participating Group Members;
- (b) all Review Assessments have been determined or the time for seeking review has expired;
- (c) the Required Repayments have been determined and paid for all Participating Group Members by the Defendants or, if not paid by the Defendants, by the Administrator.

9.2 Adjustment to Compensation Payments

Upon determination of the aggregate value of all Assessed Compensation Amounts, the aggregate value of all Assessed Compensation Amounts is adjusted up or down to reflect the final sum available for distribution to Participating Group Members inclusive of interest earned in the Settlement Fund Account but less the costs of administering the Scheme.

9.3 Payment of Compensation

Once the Administrator is satisfied that the steps specified in clause 9.1 and 9.2 have been completed, the Administrator will pay each Participating Group Member her Assessed Compensation Amount as expeditiously as possible:

- (a) less all Required Repayments applicable to her claim;
- (b) with a pro rata adjustment in proportion to the aggregate adjustment made under clause

9.2.

9.4 Payment of Compensation

Once all payments have been made under clause 9.3 the Administration of the Fund will cease.

10. Management of the Settlement Fund

10.1 Settlement Fund is held by the Administrator

Subject to the terms of the Deed, the Scheme, and any applicable statutory requirements, the Administrator will hold the Administration Costs and the Settlement Amount less any Required Repayments, the Plaintiffs' Payments and Legal Costs (but excluding Administration Costs) in the Settlement Fund Account.

10.2 Management of the Settlement Fund

The Administrator will take all reasonable steps to ensure that the Fund and payments to Participating Group Members are managed in such a way as to maximise the availability of sufficient funds to make compensation payments to all Participating Group Members.

10.3 Payments to Participating Group Members

The Administrator shall:

- (a) not make payments to Participating Group Members until all Participating Group Members' Assessed Compensation Amounts and Required Repayments are determined and, with respect to the Required Repayments, paid; and
- (b) ensure that, insofar as reasonably practicable, the Fund is distributed equitably amongst Participating Group Members having regard to the total Assessed Compensation Amounts, income interest earned on the Fund and Administration Costs.

11. Obligations of Group Members

11.1 Cooperation of Group Members

Each Group Member must cooperate with the Administrator and take all steps that they are required to take pursuant to the Scheme and/or that are reasonably requested or directed by the Administrator, including:

- (a) providing instructions, information, documents or other materials;
- (b) providing authorities or permissions;
- (c) attending and participating in meetings or telephone conferences with the Administrator or any other person (such as a Review Assessor);
- (d) promptly informing the Administrator of any change in her contact details;
- (e) executing documents;
- (f) executing the Deed Poll.

and each Group Member must do so:

- (g) complying to the best of the Group Member's ability with the substance and not merely the form of the requirement, request or direction; and
- (h) by the date or within the timeframe specified in the requirement, request or direction.

11.2 Obligation regarding honesty

In fulfilling the obligation in clause 11.1, each Group Member must act honestly and must take all reasonable steps to ensure that any of her agents or representatives likewise act honestly.

11.3 Disclosure to agencies and other organisations

Group Members acknowledge and agree that the Administrator may, if required by statute or contract, disclose their personal information, details of their claim or other documents and materials to an agency or other organisation including Centrelink, Medicare, the National Disability Insurance Agency, a private health insurer, a worker's compensation authority or the Australian Taxation Office.

12. Persons under a disability

12.1 Application of this clause

This clause applies if a Group Member is a "person under a legal incapacity" within the meaning of s 3 of the *Civil Procedure Act 2005* (NSW).

12.2 Process for claims requiring approval by the Court

The following procedure applies where settlement or compromise of a Group Member's claim requires approval by the Court:

- (a) if any entitlement to compensation is subject to approval by the Court pursuant to s 75 of the *Civil Procedure Act 2005* (NSW), the Administrator will at the earliest opportunity join in supporting the Group Member's tutor to seek appropriate orders for approval of the relevant compensation payment;
- (b) if the Court does not approve the payment to the Group Member, the claim will be referred back to the Administrator for further assessment and determination, and the Administrator will again join in seeking appropriate orders for approval at the earliest opportunity after the claim has been reassessed.

13. Costs

13.1 Payment of Administration Costs

Subject to the other provisions of this clause, Administration Costs are fixed in the sum of \$1.1 million. Administration Costs are to be paid from the Settlement Fund to the Administrator in 12 monthly instalments. If the administration of the Scheme is completed within 12 months, the balance of the Administration Costs less instalments already paid, will be paid to the Administrator upon completion of the administration of the Scheme.

13.2 Fees charged by Review Assessors

The Review Assessor will be paid fees of \$500 for Eligibility Review and fees of \$1,000.00 for Compensation Review. These fees are exclusive of GST and will be paid from the Administration Costs.

13.3 Costs of Reviews

The following provisions apply in relation to the costs of a Review:

Eligibility Review

- (a) if a Group Member succeeds in an Eligibility Review:
 - (i) the costs of the Review will be Administration Costs; and
 - (ii) any bond paid by the Group Member will be returned to the Group Member;
- (b) if a registrant fails in an Eligibility Review, the Administrator will apply the bond paid by the registrant to the payment of the Review costs payable by the registrant.

Compensation Review

- (c) if a Participating Group Member succeeds in a Compensation Review and the amount assessed by the Review Assessor is, in the case of a Category B to D Participating Group Member, greater than 3% of a most-extreme case higher than the amount initially assessed by the Administrator or, in the case of a Category E Participating Group Member, greater than 125% of the amount initially assessed by the Administrator, the costs of the Review will be Administration Costs and any bond paid by the Group Member will be returned to the Group Member;
- (d) if a Participating Group Member fails in a Compensation Review or succeeds in circumstances where the amount assessed by the Review Assessor is, in the case of a Category B to D Participating Group Member, less than or equal to 3% of a most-extreme case higher than the amount initially assessed by the Administrator, or, in the case of a Category E Participating Group Member, less than 125% of the amount initially assessed by the Administrator, the bond paid by the Participating Group Member will be applied toward the cost of the Review and any shortfall in costs will be deducted from the compensation payable to the Participating Group Member.

13.4 Costs of lawyers other than the Administrator or its delegates

Nothing in the Scheme prevents a Participating Group Member from retaining or seeking advice from a lawyer who is not performing the role of Administrator (which for the purpose of this clause includes TFL), except that:

- (a) the Participating Group Member does so at her own cost; and
- (b) the Participating Group Member's lawyer is not entitled to recover any legal costs from the Administrator and any such legal costs must not be treated as Administration Costs unless the Administrator made a written request that the Group Member's lawyer carry out the legal work in question.

14. Supervision by the Court

14.1 Supervision by the Court

The Administration of the Fund and implementation of the Scheme are subject to the supervision of the Court.

14.2 Administrator may apply to the Court for directions

Where the Administrator considers that:

- (a) the procedures to be followed in implementing the Scheme are in doubt or uncertain; or
- (b) it is appropriate for the Court to give directions regarding an issue concerning the implementation or administration of the Scheme,

the Administrator may approach the Court for directions and the Administrator may seek to be joined to the Proceeding for that purpose.

SCHEDULE 1 – DAMAGES ASSESSMENT PROTOCOL

1. The purpose of the Damages Assessment Protocol is to set out how a Participating Group Member's damages are to be calculated under the Scheme less any relevant deductions in Schedule 2, and to identify the nature of the evidence a Participating Group Member is expected to produce in support of her claim. A Participating Group Member's Assessed Compensation Amount will be the amount of damages assessed under this Damages Assessment Protocol less any applicable deductions under the Deductions Protocol in Schedule 2.
2. This Protocol is intended to make the process of assessing a Participating Group Member's claim as simple as possible while preserving the rights of those Participating Group Members to review the assessed value of their claims, subject to appropriate deductions.
3. The Damages Assessment Protocol:
 - (a) offers a just, quick and cheap method for calculating a Participating Group Member's damages based solely on an assessment of her non-economic loss;
 - (b) uses non-economic loss as the basis for the assessment of compensation because it ensures a Participating Group Member's individual circumstances will be considered.
 - (c) uses the magnitude of the non-economic loss assessment to:
 - i. determine whether a Participating Group Member's injury is sufficiently serious to attract any award of damages on the basis that women assessed at less than 15% of a most-extreme case are highly unlikely to have commenced proceedings for compensation outside of her participating in this class action, or to have an entitlement to any other head of damages.
 - ii. Determine whether other heads of damages should be allowed and their magnitude.
4. To make the process of assessment as streamlined as possible, the Damages Assessment Protocol recognises five categories of claim:
 - (a) claims where the Participating Group Member is not eligible to receive any damages because they have been assessed as having suffered no compensable injury (**Category A**). For the avoidance of doubt, an assessment that a woman has not suffered a compensable injury includes a woman who can demonstrate injury but not to the level of 15% of a most-extreme case.
 - (b) claims where the Participating Group Member's damages includes an amount for non-economic loss, together with a fixed sum for past and future out-of-pocket expenses, but no other head of damages because the assessed non-economic loss is consistent with an injury or disability unlikely to be severe enough to be associated with an award of any other head of damages beyond past and future out-of-pocket expenses (**Category B** and **Category C**).
 - (c) claims where the Participating Group Member's damages includes an amount for non-economic loss, together with a fixed sum for past and future out-of-pocket expenses (in greater sum than applies with respect to Category B and Category C), but no other head of damages save as in an exceptional case because the assessed non-economic loss, and the nature of the injury, is consistent with an injury or disability unlikely to be severe enough to be associated with an award of any other head of damages beyond past and future out-of-pocket expenses (**Category D**).
 - (d) claims where the Participating Group Member's non-economic loss is consistent with an injury of sufficient severity that the allocation of fixed sums for other heads of damages

is inappropriate and an individual assessment of those heads of damages is required (**Category E**).

5. For the avoidance of doubt, Participating Group Members assessed as Category B or C will not be entitled under the Scheme to damages for economic loss, or damages for gratuitous care, commercial care, or loss of capacity to provide domestic services because the injuries sustained by the Participating Group Member are unlikely to be sufficiently serious to justify such an award or to overcome the thresholds with respect to the provision of care under the applicable legislation. The Administrator may, in an exceptional case and in the Administrator's sole discretion, allow a sum in damages for economic loss or damages for gratuitous care, commercial care, or loss of capacity to provide domestic services to a Category D Participating Group Member where such group member establishes such a loss in accordance with clauses 12 and 13.
6. In respect of Participating Group Members who are assessed as Category E, and in respect of a Category D Participating Group Member whose case is an "exceptional case" such that they are allowed a sum in damages for care (pursuant to clause 12.2) and/or economic loss (pursuant to clause 13.2), if a Participating Group Member's damages are assessed at a sum greater than \$300,000, the sum in excess of \$300,000 is to be disregarded and deductions in accordance with the Deductions Protocol at Schedule 2 are to be applied to the reduced figure of \$300,000.
7. The following table sets out the criteria required to consider an award of damages under various heads of damages and the applicable clauses in the schedule:

Head of Damages	Criteria required to be met for the award of damages
Non-economic loss (pain and suffering, loss of enjoyment of life, loss of amenities, decreased life expectancy)	Clause 10
Out of Pocket Expenses	Clause 11
Provision of Gratuitous Care, Commercial Care and Loss of Capacity to Provide Services (Available only to Category D Participating Group Members)	Clause 12
Economic Loss including loss of Superannuation Benefits	Clause 13

8. In an exceptional case, the Administrator may dispense with the requirement for certain information to be provided in support of a claim if, in its sole discretion, the Administrator considers it just and reasonable to do so.
9. **Determination of category of claim**
 - 9.1 After receiving all required evidence and information, the non-economic loss of a Participating Group Member will be assessed by the Administrator under:
 - (a) In the case of Participating Group Members who underwent their primary BAS at any of the TCI Premises in New South Wales, the *Civil Liability Act 2002* (NSW);
 - (b) In the case of Participating Group Members who underwent their primary BAS at any of

the TCI Premises in Queensland. the *Competition and Consumer Act 2010* (Cth).

- 9.2 The rationale for assessment of non-economic loss pursuant to the *Competition and Consumer Act 2010* (Cth) for those women who underwent surgery at TCI Premises in Queensland is that the damages assessment under that Act is more generous than that under the *Civil Liability Act 2003* (Qld) and reduces to some degree the disparity in damages available to Participating Group Members who underwent surgery in Queensland as compared to New South Wales. It also streamlines the assessment of group members' claims, permitting all claims to be assessed by reference to a most-extreme case.
- 9.3 By reference to the Participating Group Member's assessed non-economic loss (assessed by reference to 'a most extreme case' as required by the statute, the Participating Group Member will be allocated to one of the following claim categories:
- (a) **Category A:** No claim as the Participating Group Member did not suffer any compensable injury as a result of undergoing BAS at the TCI Premises, or did not suffer an injury equal to or greater than 15% of a most-extreme case.
 - (b) **Category B:** Any Participating Group Member who has been assessed as having a non-economic loss of between 15% and 25% (inclusive) of a most-extreme case as a result of undergoing BAS at the TCI Premises.
 - (c) **Category C:** Any Participating Group Member who has been assessed as having a non-economic loss of between 26% and 29% (inclusive) of a most-extreme case as a result of undergoing BAS at the TCI Premises.
 - (d) **Category D:** Any Participating Group Member who has been assessed as having a non-economic loss of between 30% and 32% (inclusive) of a most-extreme case as a result of undergoing BAS at the TCI Premises.
 - (e) **Category E:** Any Participating Group Member who has been assessed as having a significant injury (relative to the complications ordinarily seen from failed breast augmentation surgery), being a group member who has been assessed as having a non-economic loss equal to or in excess of 33% of a most-extreme case as a result of undergoing BAS at any of the TCI Premises

10. Non-Economic Loss

- 10.1 Non-economic loss damages are to compensate a Participating Group Member for pain and suffering, loss of enjoyment of life, and loss of amenities, as a result of undergoing BAS at any of the TCI Premises.
- 10.2 A Participating Group Member will be eligible for damages for non-economic loss damages if:
- (a) the Participating Group Member has suffered and/or is suffering pain and suffering, loss of enjoyment of life, and loss of amenities, as a result of undergoing BAS at any of the TCI Premises.
 - (b) the Participating Group Member provides satisfactory evidence demonstrating that the Participating Group Member has suffered and/or is suffering pain and suffering, loss of enjoyment of life, loss of amenities, or her life expectancy is reduced as a result of undergoing BAS at any of the TCI Premises.

- (c) the Participating Group Member's non-economic loss is equal to or greater than 15% of a most extreme case.

10.3 The assessment of what percentage of a most-extreme case a Participating Group Member's injury represents will be determined by reference to the material obtained pursuant to clause 6.2(a) of the Scheme and any further information sought by the Administrator. Such information must include information about the Participating Group Member's:

- (a) pre-BAS circumstances;
- (b) post-BAS circumstances;
- (c) ability to lead a normal life;
- (d) ability to perform activities of daily life;
- (e) ability to engage in and enjoy social activities, sports, hobbies or recreational pastimes;
- (f) experience of pain and discomfort;
- (g) requirement for surgery to treat her injuries, disabilities or complications;
- (h) requirement for non-surgical treatment of her injuries, disabilities or complications; and,
- (i) any other information the Participating Group Member considers relevant or the Administrator requests.

11. Out of Pocket Expenses

11.1 General

11.2 A Participating Group Member's out of pocket expenses will be calculated depending on whether they have been assessed as Category B, C, D or E. Out of pocket expenses may where applicable include any required repayment to a Third Party such as Medicare or a private health fund which a Participating Group Member must pay.

11.3 Subject to 11.5, for Category B Participating Group Members, past and future out of pocket expenses are allowed in the sum of \$15,000 (irrespective of the true quantum of past and future out of pocket expenses) reflecting the likelihood that such women will have a modest claim for past and future treatment expenses in the nature of the cost of revision BAS performed by a surgeon other than the fifth defendant, or sixth to sixteenth defendants, the performance of which will, more likely than not, allow the Participating Group Member to achieve a satisfactory aesthetic result and terminate any ongoing disability.

11.4 Subject to 11.5, for Category C Participating Group Members, their past and future out of pocket expenses will be allowed in the sum of \$20,000, while Category D Participating Group Members will receive past and future out of pocket expenses in the sum of \$30,000. The larger sums provided for future out-of-pocket expenses reflect the likelihood that:

- (a) despite the performance of revision BAS by a surgeon other than the fifth defendant, or sixth to sixteenth defendants, Participating Group Members falling within these categories may continue to experience an unsatisfactory aesthetic result, or continue to experience disability, such that further revision BAS performed by a surgeon other than the fifth defendant, or sixth to sixteenth defendants, is required; or,

- (b) their injuries are sufficiently serious that revision BAS (i) is likely to be a staged surgical process the cost of which will exceed \$15,000 or (ii) there cannot be a reasonable degree of confidence that revision BAS performed by a surgeon other than the fifth defendant, or sixth to sixteenth defendants, will allow the Participating Group Member to achieve a satisfactory aesthetic result or cease to suffer from ongoing disability. For the avoidance of doubt, revision BAS includes mastopexy if required or if it has been performed.

11.5 In respect of Category B, C and D Participating Group Members, the allowance for past and future out of pocket expenses will be allowed only if the Participating Group Member can establish that past out of pocket expenses have been incurred for revision surgery by a surgeon other than the fifth defendant, or sixth to sixteenth defendants, or will in the future be incurred for revision surgery by a surgeon other than the fifth defendant, or sixth to sixteenth defendants. Accordingly, a Participating Group Member in Categories B, C or D who has an injury but has not undergone revision surgery, has no intention to undergo revision surgery, or has undergone revision surgery at no cost, is not entitled to damages for past and future out of pocket expenses.

11.6 In summary, past and future out of pocket expenses will be assessed in accordance with the following table:

Category	Non-economic loss as a percentage of a most extreme case	Amount for Past and Future Out of Pocket Expenses
Category A	No compensable injury	0
Category B	15% to 25%	\$15,000 (Subject to 11.5)
Category C	26% to 29%	\$20,000 (Subject to 11.5)
Category D	30% to 32%	\$30,000 (Subject to 11.5)
Category E	33% or more	Individual assessment

11.7 Past Out of Pocket Expenses

11.8 The following clauses apply to an individual assessment of past out of pocket expenses for Category E Participating Group Members.

11.9 A Category E Participating Group Member will be eligible for damages for past out of pocket expenses if:

- (a) out of pocket expenses were incurred; and
- (b) the Participating Group Member provides satisfactory evidence demonstrating that such out of pocket expenses were reasonably incurred.

11.10 Claims for compensation for past out of pocket expenses must be accompanied by:

- (a) satisfactory evidence of the out-of-pocket expenses incurred (e.g., receipts, invoices, bank or credit card statements and/or records of treatment);
- (b) satisfactory evidence or explanation that each of the past out of pocket expenses claimed was reasonable and necessary;
- (c) satisfactory evidence or explanation that each of the past out of pocket expenses was incurred as a result of injuries sustained secondary to undergoing BAS at any of the TCI Premises;

- (d) satisfactory evidence or a statement declaring that none of the claimed out of pocket expenses were paid by a Third Party such as a private health insurer, Medicare, Veteran's Affairs or the National Disability Insurance Scheme (e.g., a notice of past benefits from Medicare or a private health insurer).

11.11 Future Out of Pocket Expenses

11.12 The following clauses apply to an individual assessment of future out of pocket expenses for Category E Participating Group Members.

11.13 A Category E Participating Group Member will be eligible for damages for future out of pocket expenses if the Participating Group Member provides satisfactory evidence demonstrating that such out of pocket expenses are more likely than not to be incurred in the future.

11.14 Claims for future out of pocket expenses must be accompanied by:

- (a) satisfactory evidence of the likely cost of the out of pocket expenses (e.g., quotes, report of a treating doctor or allied health practitioner);
- (b) satisfactory evidence or explanation that each of the future out of pocket expenses claimed are most likely required as a result of injuries sustained consequent upon undergoing BAS at any of the TCI Premises;
- (c) satisfactory evidence or a statement declaring that none of the claimed out of pocket expenses will be paid by a Third Party such as a private health insurer, Medicare, Veteran's Affairs or the National Disability Insurance Scheme.

11.15 Participating Group Members may also submit any other information that the Participating Group Member considers relevant or the Administrator requests to the claim for past and/or future out of pocket expenses.

12. Provision of Gratuitous Care, Commercial Care and Loss of Capacity to Provide Services

12.1 General

12.2 Save for Category E Participating Group Members, or in exceptional cases pertaining to Category D Participating Group Members, Participating Group Members will have no claim for gratuitous care, commercial care, or loss of capacity to provide domestic services.

12.3 Accordingly, gratuitous care, commercial care, or loss of capacity to provide domestic services will be assessed in accordance with the following table:

Category	Non-economic loss as a percentage of a most extreme case	Amount for Past and Future Care and Loss of Capacity to Provide Domestic Services
Category A	No compensable injury	Nil.
Category B	15% to 25%	Nil.
Category C	26% to 29%	Nil.
Category D	30% to 32%	Nil (subject to clause 12.2)
Category E	33% or more	Individual Assessment

12.4 The following clauses apply to an individual assessment of past and future care, and damages for loss of capacity to provide domestic services for Category E Participating Group Members and, in exceptional circumstances, Category D Participating Group Members.

12.5 **Gratuitous Care**

12.6 A Category E Participating Group Member or, in exceptional circumstances, a Category D Participating Group Member, will be eligible for compensation for gratuitous care if:

- (a) the Participating Group Member has received, or will receive, gratuitous attendant care services;
- (b) the Participating Group Member provides satisfactory evidence demonstrating that such gratuitous attendant care services were or are required because of the injuries, disabilities or complications from undergoing BAS at any of the TCI Premises;
- (c) the gratuitous attendant care services have been provided, or are to be provided:
 - i. for at least 6 hours per week, and
 - ii. for a period of at least 6 consecutive months.

12.7 Claims for compensation for gratuitous attendant care services must be accompanied by satisfactory evidence that the Participating Group Member meets the requirements set out in clause 12.6(c) including:

- (a) medical evidence which supports the requirement for the provision of care;
- (b) in the case of past gratuitous care, a statutory declaration from the person who provided the largest component of gratuitous care confirming:
 - i. their estimation of the number of hours of care provided per week;
 - ii. their estimation of the period over which such care was provided, identifying any period in which the care ceased to be provided;
 - iii. a summary of the nature of the care they provided;
 - iv. their contact details.

12.8 Participating Group Members may also submit any other information that the Participating Group Member considers relevant to the claim for gratuitous care or which is requested by the Administrator.

12.9 **Commercial Care**

12.10 A Category E Participating Group Member or, in exceptional circumstances, a Category D Participating Group Member, will be eligible for compensation for commercial care if:

- (a) the Participating Group Member has received, or will receive, commercial care as a consequence of her injuries, disabilities or complications from undergoing BAS at any of the TCI Premises; and
- (b) the Participating Group Member provides satisfactory evidence demonstrating that such commercial care was paid for or will be paid for by or on behalf of the Participating Group Member (eg invoices, receipts, bank statements); and
- (c) the Participating Group Member provides satisfactory evidence demonstrating that such commercial care services were or are required.

- 12.11 Claims for commercial care must be accompanied by:
- (a) satisfactory evidence that the Participating Group Member meets the requirements set out in clause 12.10
 - (b) evidence of any payments received from, amounts payable by, or entitlement to payments (whole or partial) from a Third Party for attendant care services in respect of which a claim is made (e.g. NDIS) or, otherwise, a statement from the Participating Group Member declaring either that no such entitlement exists and/or no such payments have been made, or that any such amounts paid or entitled to be paid have been deducted from the amount of compensation claimed;
 - (c) in respect of past commercial care services, satisfactory evidence of the costs paid or payable (e.g. receipts); and
 - (d) in respect of future paid commercial care services, satisfactory evidence of their nature, estimated duration and estimated cost (e.g., quotes).
- 12.12 Participating Group Members may also submit any other information that the Participating Group Member considers relevant to the claim for the need for commercial care or which is requested by the Administrator.
- 12.13 **Loss of Capacity to Provide Domestic Services to Others**
- 12.14 A Category E Participating Group Member or, in exceptional circumstances, a Category D Participating Group Member, will be eligible for compensation for a loss of capacity to provide domestic services to others if:
- (a) the Participating Group Member provided gratuitous domestic, personal or childcare services to others (Care Recipients) before suffering injuries as a consequence of undergoing BAS at any of the TCI Premises;
 - (b) those Care Recipients were not (or will not be) capable of performing the gratuitous domestic, personal or childcare services themselves by reason of their age or physical or mental incapacity;
 - (c) it is more likely than not that, had it not been for the injuries, disabilities or complications from undergoing BAS at any of the TCI Premises, the Participating Group Member would have provided the services to the Care Recipients:
 - i. for at least 6 hours per week, and
 - ii. for a period of at least 6 consecutive months; and
 - (d) there will be a need for the gratuitous domestic, personal or childcare services to be provided for the same hours and consecutive periods as provided prior to suffering injuries as a consequence of undergoing BAS at any of the TCI Premises;
 - (e) the need for such services is reasonable in all the circumstances.
- 12.15 Claims for compensation for loss of capacity to provide domestic services to others must be accompanied by:
- (a) satisfactory evidence that the Participating Group Member meets the requirements set out in clause 12.14

- (b) satisfactory evidence of the nature of the services provided (and/or to be provided);
- (c) satisfactory evidence that the services would have been provided for at least 6 hours per week and for a period of at least 6 consecutive months but for the Participating Group member's injuries, disabilities or complications from undergoing BAS at any of the TCI Premises.

12.16 Participating Group Members may also submit any other information that the Participating Group Member considers relevant to the claim for loss of capacity to provide domestic services to others or which is requested by the Administrator.

13. Economic Loss including Loss of Superannuation Benefits

13.1 General

13.2 Save for Category E Participating Group Members, or in exceptional cases pertaining to Category D Participating Group Members, Participating Group Members will have no claim for economic loss.

13.3 Accordingly, economic loss will be assessed in accordance with the following table:

Category	Non-Economic Loss as a percentage of a most extreme case	Amount for Past and Future Economic Loss
Category A	No compensable injury	Nil.
Category B	15% to 25%	Nil.
Category C	26% to 29%	Nil.
Category D	30% to 32%	Nil (Subject to clause 13.2)
Category E	33% or more	Individual Assessment

1.1 The following clauses apply to an individual assessment of economic loss with respect to a Category E Participating Group Member (or Category D Participating Group Members in an exceptional case pursuant to Clause 13.2).

1.2 In assessing economic loss, the Administrator will consider the impact of any compensation for Economic Loss on a Participating Group Member's Centrelink benefits and the amount to be repaid to Centrelink if any.

1.3 Past Economic Loss / Past Loss of Earnings

1.4 A Category E Participating Group Member or, in exceptional circumstances, a Category D Participating Group Member, will be eligible for compensation for past economic loss if:

- (a) the Participating Group Member has suffered past economic loss; and
- (b) the Participating Group Member provides satisfactory evidence demonstrating that they have suffered past economic loss.

1.5 Claims for compensation for past economic loss must be accompanied by satisfactory evidence demonstrating that the Participating Group Member suffered past economic loss and substantiating the amount of past economic loss. It is expected that such evidence would include:

- (a) the Participating Group Member's employment or occupation at the time she underwent BAS at any of the TCI premises;

- (b) satisfactory evidence about why the Participating Group Member's employment or occupation was affected by her injuries and disabilities caused by undergoing BAS at any of the TCI Premises;
- (c) evidence of the Participating Group Member's income and superannuation (for example, payslips, taxation records, bank statements, etc) before and after undergoing BAS at any of the TCI Premises;
- (d) the period or periods that the Participating Group Member has not worked after undergoing BAS at any of the TCI Premises and details of the time taken as personal (sick) leave, annual leave, and unpaid leave (specifying which form of leave).

Note: It is preferable for this information to be provided through a record from the employer (e.g., a payslip that shows sick leave taken during that period or a letter from the employer).

- (e) evidence of any payments received from, amounts payable by, or entitlement to payments (whole or partial) from a Third Party (e.g. income protection insurer, Centrelink) for past lost earnings in respect of which a claim is made or, otherwise, a statement from the Participating Group declaring either that no such entitlement exists and/or no such payments have been made, or that any such amounts paid or entitled to be paid have been deducted from the amount of compensation claimed.

1.6 Future Economic Loss / Future Loss of Earning Capacity

1.7 A Category E Participating Group Member or, in exceptional circumstances, a Category D Participating Group Member, will be eligible for compensation for future economic loss if:

- (a) the Participating Group Member is more likely than not to suffer economic loss in the future; and
- (b) the Participating Group Member provides satisfactory evidence demonstrating that the Participating Group Member is more likely than not to suffer economic loss in the future.

1.8 Claims for compensation for future economic loss must be accompanied by satisfactory evidence demonstrating that the Participating Group Member is more likely than not to suffer economic loss in the future and substantiating the amount of future economic loss likely to be suffered. It is expected that such evidence would include:

- (a) satisfactory evidence about why the Participating Group Member's employment or occupation will be affected in the future by her injuries and disabilities caused by undergoing BAS at any of the TCI Premises;
- (b) the period or periods the Participating Group Member's employment or occupation will be affected in the future by her injuries and disabilities caused by undergoing BAS at any of the TCI Premises;
- (c) evidence of any payments that will be received from, amounts payable by, or entitlement to payments (whole or partial) from a Third Party for future economic loss in respect of which a claim is made (e.g. evidence of compensation for future lost earnings previously received from a Third Party such as an income protection insurer or Centrelink) or, otherwise, a statement from the Participating Group Member declaring either that no such entitlement exists and/or no such payments have been made, or that any such amounts paid or entitled to be paid have been deducted from the amount of compensation claimed.

1.9 Participating Group Members may also submit any other information that they consider relevant to the claim for past and/or future lost earnings or which is requested by the Administrator.

2. Compensation for Estates of Participating Group Members

- 2.1 A representative of the estate of a deceased Participating Group Member or a woman who would have been a Participating Group Member but for her death is entitled to make a claim.
- 2.2 Estates are only entitled to recover a lump sum amount of \$4,990 but are not subject to deductions in accordance with the Deductions Protocol.

SCHEDULE 2 – DEDUCTIONS PROTOCOL

1. Deductions from assessed value

- 1.1 Settlement of the class action necessarily involved compromise and a balancing of the risks and potential outcomes for group members if the proceeding were fully litigated. The purpose of the Deductions Protocol is to ensure that Participating Group Members are not over-compensated or compensated at a level which does not reasonably reflect the level of general risk in the substantive proceeding, or the group member's individual risk arising from limitation issues, difficulties in proof of individual causation or difficulties in recovering damages from some defendants.
- 1.2 Upon assessing damages pursuant to the Damages Assessment Protocol in Schedule 1, the Assessed Compensation Amount of each Participating Group Member will first be reduced by 55% to reflect:
- (a) the vagaries of self-reported data;
 - (b) the general litigation risk associated with the hearing of the common questions;
 - (c) the probability of adverse costs orders;
 - (d) difficulties with proof of individual causation;
 - (e) the risk of irrecoverability of damages from the fifth defendant for reasons other than liability risk.
- (the general deduction).**
- 1.3 After the general deduction has been applied, each Participating Group Member's Assessed Compensation Amount will then be reduced further depending on her specific circumstances and whether any of the following deductions also apply:
- (a) A deduction is to be applied in respect of limitation risk by reference to clause 8 of this Protocol.
 - (b) In respect of Category B Participating Group Members, a deduction is to be applied to reflect the inability to bring a claim outside of the class action regime or after a hearing of the common questions because of the low value of a Category B Claim and the effect that Schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (NSW) has on the viability of such claims;
 - (c) In respect of Participating Group Members who underwent BAS (or, in the case of Participating Group Members who underwent more than one BAS at the TCI Premises, her first BAS) in the Pre-Newline Period, a deduction is to be applied for the risk of irrecoverability;
 - (d) In respect of Participating Group Members who underwent BAS (or, in the case of Participating Group Members who underwent more than one BAS at the TCI Premises, her first BAS) in the Allied Coverage Period, a deduction is to be applied for the risk of irrecoverability;
 - (e) In respect of Participating Group Members who underwent BAS (or, in the case of Participating Group Members who underwent more than one BAS at the TCI Premises, her first BAS) in the Post-Allied Period, a deduction is to be applied for the risk of irrecoverability.

2. Deduction for Vagaries of Self-Reported Data

- 2.1 All Participating Group Members' are to be subject to a deduction for the vagaries of self-reported data to reflect the unchallenged information provided by Participating Group Members and the experience of personal injury lawyers that self-reported data, when subject to scrutiny including expert evidence corralled by defendants, regularly proves to be in excess of that which can be proven to the civil standard and that lay people are generally unable to disentangle tortious and non-tortious injuries

3. Deduction for Category B Participating Group Members

- 3.1 Category B Participating Group Members have claims which, at full value, are worth not more than \$100,000. Many are worth considerably less than \$50,000. The consequence of Schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (NSW) is that the maximum sum a defendant can be ordered to pay in legal costs is \$10,000 or 20% of the damages sum (whichever is greater). In the context of medical negligence litigation requiring expert evidence, it is difficult to bring such claims without any award of damages being eroded or subsumed by legal costs. For these reasons and even with the benefit of positive answers to the common questions in the Proceeding, Category B Participating Group Members' claims are unlikely to be commercially viable to pursue and/or legal representation may not be obtained to pursue the claims. A deduction of 20% is to be applied to Category B claims to reflect the commercial impracticality of pursuing such claims.

4. Deduction for Litigation Risk

- 4.1 A deduction for litigation risk, which includes the risks of being unable to prove all matters in connection with the hearing of common questions necessary to enable group members to recover damages.

5. Deduction for Individual Causation

- 5.1 A deduction is to be applied for the risk of individual causation, particularly given the risk that a Participating Group Member's injury may be found to represent the materialisation of an inherent risk of breast augmentation surgery. .

6. Deduction for Adverse Costs Orders

- 6.1 For the reasons set out in the Confidential Opinion, there is a risk of failure against certain defendants which risk carries with it the prospect of adverse costs orders.

7. Deduction for Irrecoverability of Damages

- 7.1 There is uncertainty about the capacity of the fifth defendant to pay any significant sum in damages and accordingly a discount is to be applied. Further, there is doubt about the requirement of the nineteenth defendant to indemnify the fifth defendant in the Proceeding or in relation to his activities as alleged in the Proceeding. All Participating Group Members are subject to this discount.
- 7.2 In respect of Participating Group Members falling into the Pre-Newline Period, a deduction of 50% is to be applied for the risk of irrecoverability in circumstances where the insurer on risk during the Pre-Newline Period is not a party to the Proceeding.
- 7.3 In respect of Participating Group Members falling into the Allied Coverage Period, a deduction of 25% is to be applied for the risk of irrecoverability in circumstances where Allied claims to be entitled to deny indemnity under the policy due to the operation of various exclusion clauses.
- 7.4 In respect of Participating Group Members falling into the Post-Allied Period, a deduction of 50%

is to be applied for the risk of irrecoverability in circumstances where the insurer (if any) which was on risk during the Post-Allied Period is not a party to the Proceeding.

8. Deduction for Limitation Risk

8.1 A deduction is to be applied for limitation risk, calculated as follows:

- (a) A 25% deduction is to be applied to the assessed value of a Participating Group Member's claim where the Participating Group Member last underwent BAS at any of the TCI Premises before 30 June 2012.
- (b) A 20% deduction is to be applied to the assessed value of a Participating Group Member's claim where the Participating Group Member last underwent BAS at any of the TCI Premises between 1 July 2012 and 13 September 2014.
- (c) A 15% deduction is to be applied to the assessed value of a Participating Group Member's claim where the Participating Group Member last underwent BAS at any of the TCI Premises between 14 September 2014 and 18 June 2015.
- (d) A 10% deduction is to be applied to the assessed value of a Participating Group Member's claim where the Participating Group Member last underwent BAS at any of the TCI Premises between 19 June 2015 and 18 June 2016.
- (e) A 5% deduction is to be applied to the assessed value of a Participating Group Member's claim where the Participating Group Member last underwent BAS at any of the TCI Premises between 19 June 2016 and 18 June 2017.

8.2 A discount for limitation risk in accordance with 8.1 (a) to (e) is not to be applied where a Participating Group Member can demonstrate that, prior to the joinder of the TCI Surgeons on 19 June 2020, they were or had been a person under a legal incapacity such that the limitation period was suspended and did not run for greater than three years from the date the Participating Group Member last underwent BAS at any of the TCI Premises.