



Federal Court of Australia
District Registry: New South Wales
Division: General

No: NSD1908/2016

GAVIN SMITH and others named in the schedule
Applicant

COMMONWEALTH OF AUSTRALIA (DEPARTMENT OF DEFENCE)
Respondent

ORDER

JUDGE: JUSTICE LEE

DATE OF ORDER: 05 June 2020

WHERE MADE: Sydney

THE COURT ORDERS THAT:

Settlement approval

- 1 Pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**), the settlement of this proceeding be approved on the terms set out in:
 - (a) the Settlement Deed dated 5 June 2020 in the form being pages 55 to 85 of exhibit BA-3 to the affidavit of Benjamin Allen affirmed 3 June 2020 (**Deed**), on the basis that the Deed only binds Group Members as set out in these orders and otherwise takes effect between the parties to the Deed; and
 - (b) the Settlement Distribution Scheme in the form being pages 128 to 151 of exhibit BA-1 to the affidavit of Benjamin Allen affirmed 28 May 2020 (**SDS**) as amended per Annexure A below.
- 2 Pursuant to s 33ZB of the FCAA, the persons affected and bound by the settlement of these proceedings are the Applicants, the Respondent and Group Members.

Additional Group Members

- 3 Pursuant to s 33K, and/or 33ZF of the FCAA, each of Tysmor Pty Limited and Ms Michelle Alley are:
 - (a) added as Group Members; and



- (b) are “Claimants” for the purposes of the SDS.

Appointment of Administrator and Independent Counsel

- 4 Pursuant to s 33ZF of the FCAA, Benjamin Allen, solicitor, be appointed as Administrator of the SDS to act in accordance with the SDS subject to any direction of the Court, and to have the powers and immunities conferred by the SDS on the Administrator.
- 5 Pursuant to s 33ZF of the FCAA, James Mack be appointed as Independent Counsel of the SDS to act in accordance with the SDS subject to any direction of the Court, and to have the powers and immunities conferred by the SDS on the Independent Counsel.

Deductions from settlement sum for the purposes of the SDS

- 6 The report dated 31 May 2020 of Roland Matters, appointed as Referee pursuant to the Court’s Orders dated 6 April 2020, is adopted in full.
- 7 Pursuant to s 33V(2) of the FCAA, the Court approves the following just deductions from the settlement sum only:
- (a) the “Applicants’ Legal Costs and Disbursements” in the amount of \$9,037,245.41;
 - (b) the “Reimbursement Payment” in the total amount of \$120,000 to be distributed by the Administrator in a manner which best represents the extent of work performed in a representative capacity as between the Applicants, Sample Group Members and Steering Committee Members, being Gavin Smith, Kim Smith, Ann Clout, Lindsay Clout, John Hewitt, Melissa Marshall, Nick Marshall, Cain Gorfine, Rhianna Gorfine, Kim-leeanne King, Suzanne Walker and Joanne Robinson (with any dispute as to the distribution to be resolved by the Independent Counsel as an umpire);
 - (c) the “Funding Costs” in the amount of \$21,500,000; and
 - (d) the “Funding Expenses” in the amount of \$646,177.

Administration Costs

- 8 Any application for “Administration Costs” to be deducted from the settlement sum is to be made to Justice Lee and is to be notified by sending to the Associate to Justice Lee an



affidavit from the Administrator deposing to the costs of the administration on a per property basis and explaining, with specificity, why there has been any departure from the estimate provided to the Court during the settlement approval hearing, with any such application to be determined on the papers.

Consequential matters

- 9 The Court notes that the proceeding is to be dismissed with no order as to costs but such an order for dismissal is not to be made until after an order relating to the deduction of any Administration Costs is made and the Administrator has provided to the Associate to Justice Lee a minute of order (containing a draft order dismissing the proceeding) together with written confirmation that the administration is complete.
- 10 All previous costs orders are vacated.
- 11 Pursuant to r 1.39 of the *Federal Court Rules 2011* (Cth) or otherwise, the time for any application for leave to appeal or the institution of any appeal from these orders be extended to the later of the time permitted under rr 35.13 and/or 36.03 or 14 days from the date of publication of reasons for judgment.

Confidentiality

- 12 Pursuant to ss 37AF and 37AG of the FCAA, to prevent prejudice to the proper administration of justice, the second paragraph on page 270 of exhibit BA-1 to the affidavit of Benjamin Allen affirmed 28 May 2020 remain confidential until further order.

Date that entry is stamped: 10 June 2020

Sia Lagos
Registrar



Schedule

No: NSD1908/2016

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Second Applicant	KIM SMITH
Third Applicant	ANN AND LINDSAY CLOUT SMSF PTY LTD ACN 154 516 006
Fourth Applicant	ANN CLOUT
Fifth Applicant	LINDSAY CLOUT
Sixth Applicant	JOHN ARTHUR HEWITT
Eighth Applicant	MARSHALLS TRANSPORT PTY LTD
Ninth Applicant	NICHOLAS MARSHALL
Tenth Applicant	MELISSA MARSHALL



Annexure A – Amendment to SDS

31. → A Claimant requesting a review shall pay the costs of the Review calculated at:¶
- (a). → \$800 exclusive of GST for the first two hours' attendance by the Independent Counsel (or any part thereof) and \$450 per hour exclusive of GST for each subsequent hour (or any part thereof); and ¶
 - (b). → \$1,500 exclusive of GST per property for any further valuation/s of the property if such is sought.¶

such costs to be deducted from any payments to be made to the person seeking the review unless the Independent Counsel forms the view that the request for Review was appropriate and/or justified or the Claimant obtained an outcome that was at least 10% greater than their Final Settlement Entitlement in which case the costs of the Review is to be taken from the Settlement Distribution Fund. ¶