

NOTE: THIS DOCUMENT HAS BEEN PREPARED FOR THE PURPOSE OF DISCLOSING THE TERMS OF THE COMMON FUNDING FEE APPLICATION TO GROUP MEMBERS.

THE APPLICATION FILED ON 14 FEBRUARY 2018 REFERRED TO IN THE NOTICE TO GROUP MEMBERS IS ALSO AVAILABLE FROM THE WWW.MYERCLASSACTION.COM.AU WEBSITE. THAT APPLICATION ALSO ADDRESSED THE MECHANISM FOR GIVING NOTICE TO GROUP MEMBERS OF THE OPT-OUT PROCEDURE. ORDERS CONCERNING OPT-OUT AND REGISTRATION WERE SUBSEQUENTLY MADE BY THE FEDERAL COURT OF AUSTRALIA ON 23 FEBRUARY 2018. FOR THE AVOIDANCE OF CONFUSION, THIS DOCUMENT DOES NOT SET OUT THE ORDERS WHICH THE APPLICANT PROPOSED CONCERNING THE OPT-OUT PROCEDURE AND NOTICE TO GROUP MEMBERS.

Form 22
Rule 9.35(1)

Application for an order relating to the procedure to be followed in a representative proceeding

No. VID1494 of 2016

Federal Court of Australia
District Registry: Victoria
Division: General

TPT PATROL PTY LTD as trustee for Amies Superannuation Fund

Applicant

MYER HOLDINGS LIMITED

Respondent

To MYER HOLDINGS LIMITED

The Applicant applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

If you have not already done so, you must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Filed on behalf of (name & role of party) TPT Patrol Pty Ltd atf Amies Superannuation Fund - Applicant

Prepared by (name of person/lawyer) Anthony Zita, Solicitor

Law firm (if applicable) Portfolio Law Pty Ltd

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Email tony.zita@portfoliolaw.com.au

Address for service Level 3, 362 Lt Collins Street, Melbourne VIC 3000
(include state and postcode)

[Form approved 01/08/2011]

Time and date for hearing: [Registry will insert time and date]

Place: [address of Court]

The Court ordered that the time for serving this application be abridged to [Registry will insert date, if applicable]

Date:

.....
Signed by an officer acting with the authority
of the District Registrar

Details of orders sought

On the grounds stated in the accompanying affidavit, the Applicant applies for the following order/s:

1. Pursuant to ss 23 and 33ZF of the *Federal Court of Australia Act 1976* (**the Act**) and rule 1.32 of the *Federal Court Rules 2011* (Cth) the Applicant and Group Members shall pay from any amounts for which the claims are settled or judgment is given in favour of the Applicant and Group Members:
 - (a) the costs and expenses of the proceeding; and
 - (b) 25% (plus any applicable GST) of the amount for which the claims are settled or judgment is given (or such lower percentage as the Court considers reasonable at that time).
2. The Funding Terms (**Annexure A** to these orders) further define and specify the amounts to be paid pursuant to Order 1.
3. Order 1 is subject to the provision of an undertaking by each of Australian Funding Partners Limited, Portfolio Law Pty Ltd, and the Applicant to each other and to the Court that they will comply with their obligations under the Funding Terms (**Annexure A**).

Applicant's address

The Applicant's address for service is:

Place: Level 3, 362 Little Collins Street Melbourne 3000

Email: MYRclassaction@portfoliolaw.net.au

The Applicant's address is the place of business of the Applicant's Solicitor.

Service on the Respondent

It is intended to serve this application on the Respondent.

Date: 14 February 2018

Signed by Anthony Zita
Lawyer for the Applicant

Annexure A

Funding Terms

TPT Patrol Ltd atf the Amies Superannuation Fund v Myer Holdings Limited Federal Court of Australia Proceeding VID1494/2016

A. Definitions

1. The following definitions apply in these Funding Terms:

- a. **“Administration Expenses”** means the cost of the administration of any scheme for the distribution of any Resolution Sum, including fees charged by and expenses paid by the administrator (being the person or entity appointed to administrate a scheme for the distribution of any Resolution Sum), including court fees, barristers’ fees, external photocopying fees, IT project management fees, data processing fees, process service fees, expert report fees, external costs consultants fees, interstate agents’ fees, travel and accommodation fees;
- b. **“Adverse Costs Order”** means any Costs Order made in favour of the Respondent against the Applicant in the Proceeding or in any subsequent proceeding brought by any Group Member against the Respondent in reliance on the findings made in any judgment in the Proceeding, in respect of costs of the Respondent incurred during the Funding Period;
- c. **“Applicant”** means TPT Patrol Pty Ltd as trustee for the Amies Superannuation Fund, and any other person who is a lead applicant or representative party in the Proceeding;
- d. **“Claims”** means the claim or claims the Applicant and/or Group Members have or may have against the Respondent or Other Parties for relief in relation to loss and damage caused by the Respondent and Other Parties arising out of, or connected to, the alleged failure of the Respondent to: publicly disclose information relevant to the price and/or value of MYR ED securities; and/or misleading or deceptive conduct; and/or other unlawful conduct, in relation to the price or value of MYR ED securities in the period 11 September 2014 to 19 March 2015 (inclusive) or such other period as the Lawyers advise and the Funder accepts;
- e. **“Costs Order”** means an order made by a court requiring one or more parties to the Proceeding to pay the costs incurred by another party or parties to the Proceeding;
- f. **“Funder”** means Australian Funding Partners Limited, the address for service of which is Level 6, 41 Exhibition Street, Melbourne VIC 3000;
- g. **“Funding Agreement”** means the funding agreement between the Funder and the Applicant in relation to the Claims;
- h. **“Funding Period”** means the period commencing on the date of these orders and ending on the date of the judgment in respect of any Settlement approval application or judgment in the initial trial of the Applicant’s claim and the common issues, whichever is first to occur;

- i. **“Group Members”** means all persons who are identified as group members in the Proceeding, and who do not opt out of the Proceeding by the time specified by the Court for doing so;
- j. **“GST”** means goods and services tax;
- k. **“Independent Counsel”** means a barrister with at least fifteen (15) years of experience in litigation similar to the Proceeding and who is not affiliated in any way with the Applicant, the Lawyers or the Funder;
- l. **“Lawyers”** means the lawyers, Portfolio Law Pty Ltd of Level 3, 362 Little Collins Street Melbourne 3000_or any firm of lawyers appointed in their place by the Applicant as permitted by the Funding Agreement;
- m. **“Legal Costs Agreement”** means the agreement entered into between the Lawyers and the Applicant for the Lawyers to act as lawyers to investigate and prosecute the Claims and incorporates the Lawyers’ costs disclosure.
- n. **“Legal Costs and Disbursements”** means fees and disbursements charged by the Lawyers under the Legal Costs Agreement.
- o. **MYR ED Securities** – means an ordinary fully paid share issued by the Respondent.
- p. **“Legal Work”** means such advice, legal and administrative services which the Lawyers consider reasonably necessary to investigate and prosecute the Proceeding;
- q. **“Other Parties”** means any other entity which the Lawyers recommend be joined to proceedings commenced or to be commenced against the Respondent, the joinder of whom the Funder agrees to fund;
- r. **“Proceeding”** means the representative proceeding, TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited (VID1494/2016) filed on 29 December 2016 in the Victorian Registry of the Federal Court of Australia;
- s. **“Project”** means the conduct of the Proceeding in order to achieve Resolution of the Claims.
- t. **“Project Costs”** means those costs and expenses incurred at any time prior to the conclusion of the Funding Period, being:
 - i. the reasonable Legal Costs and Disbursements (including Counsel’s fees) which are incurred by the Lawyers for the dominant purpose of preparing for, conducting and resolving the Proceedings;
 - ii. the costs involved in the provision by the Funder of any security for costs;
 - iii. any Adverse Costs Order paid by the Funder;
 - iv. all of the Funder’s out of pocket costs and expenses paid or incurred in relation to the Project (including in relation to any consultants engaged by the Funder other than those already referred to in this definition);
 - v. any costs associated with any scheme for the distribution of any Resolution Sum, including the costs of any Administrator which is appointed;
 - vi. any GST payable on any taxable supply made by any entity as a result of the above costs or expense being incurred.
- u. **“Resolution”** means when all or any part of the Resolution Sum is received and, where the Resolution Sum is received in parts, a “Resolution” occurs each time a part is received;

- v. **"Resolution Sum"** means the amount or amounts of money or the value of benefits for which (a) the Claims are Settled, or (b) for which judgment is given in favour of the Applicant in the Proceeding or (c) any subsequent proceeding brought by any Group Member against the Respondent in reliance on the findings made in any judgment in the Proceeding is Settled or for which judgment is given in favour of the Group Member and including (but not limited to): (A) any interest and costs recovered pursuant to a Costs Order or by agreement; (B) any ex gratia payments and (C) any payments in respect of the Claims where any Respondent (or any property, assets or liabilities of any Respondent) is, or comes under, the control of an external controller.
- w. **"Respondent"** means Myer Holdings Limited and any other person or entity which the Lawyers recommend be joined as respondent to the Proceeding and in respect of whom the Funder accepts, in its absolute discretion and in writing, exposure to an Adverse Costs Order;
- x. **"Settlement"** means any settlement, compromise, discontinuance or waiver, except where approval of the Court is required, in which case it means any settlement, compromise, discontinuance or waiver with the approval of the court and "Settle," "Settles" or "Settled" shall be construed accordingly.

B. Obligations of the Funder

2. The Funder must fund the Project Costs of the Applicant and Group Members, by:
 - a. paying to the Lawyers the Legal Costs and Disbursements charged by the Lawyers for all Legal Work (whether incurred before or during the Funding Period);
 - b. paying the costs of any insurance covering an Adverse Costs Order;
 - c. paying any Costs Order which the Court makes in the Proceeding against the Applicant or other Group Member in favour of the Respondent, in so far as those costs were incurred either before or during the Funding Period; and
 - d. providing any security for costs in the Proceeding, in the form that the Court orders, or in the absence of any order, in such other form as the Funder determines and the Respondent accepts.

C. Receipt and Application of Resolution Sum

3. Any Resolution Sum will be received by the Lawyers and paid immediately into a trust account kept for that purpose.
4. If the Applicant or any Group Member obtains any Settlement or obtains any judgment in respect of the Claims, it will:
 - a. treat any money, other asset or benefit received from the Respondent in connection with the Settlement or judgment as the Resolution Sum; and
 - b. cause the money, or an amount being the reasonable market value of the asset or benefit, to be delivered to the Lawyers to be dealt with as part of the Resolution Sum.
5. Subject to any Court order, the Lawyers will:

- a. first, pay to the Funder out of the account referred to in paragraph 3 above all payments referred to in paragraph 6 below;
- b. second, pay to themselves any unpaid portion of the Legal Costs and Disbursements (including any uplift fee payable on "Lawyers Professional Fees" pursuant to the Legal Costs Agreement) and any amounts in relation to GST;
- c. third, pay all Administration Expenses; and
- d. fourth, distribute the balance to the Group Members on a pro rata basis by reference to the Claims of all Group Members in accordance with any distribution scheme approved by the Court.

D. Costs and Commission

- 6. Upon Resolution, the Funder or its nominee shall be paid the following amounts from any Resolution Sum, prior to any distributions to Group Members:
 - a. an amount equal to the Project Costs (including the monies paid, or payable by the Funder pursuant to paragraph 2 above); and
 - b. an amount, as consideration for the funding of the Proceeding, being 25% plus GST of any Resolution Sum, or such other lower percentage as the Court considers reasonable.
- 7. The amounts referred to in paragraph 6 above will not become due or owing by the Group Members to the Funder unless and until Resolution.

E. Relationship Between the Applicant, Lawyers and Funder

- 8. The Lawyers' professional duties are owed to the Applicant and not to the Funder.
- 9. Subject to paragraphs 10 and 11, the Funder will give the Lawyers day-to day instructions in respect of all matters concerning the Claims.
- 10. The Applicant has the right at any time to give instructions concerning the Claims, which override any instructions given by the Funder.
- 11. Subject to paragraph 12 below, if the Lawyers notify the Funder and the Applicant that the Lawyers believe that circumstances have arisen such that they may be in a position of conflict with respect to any obligations they owe to the Applicant and those they owe to the Funder, then the Lawyers' obligations to the Applicant prevail (and for the avoidance of doubt, the Lawyers can continue to offer advice to and take instructions from the Applicant in such circumstances).
- 12. The Lawyers will:
 - a. keep the Funder fully informed of all matters concerning the Claims and the Project, including any mediation and settlement discussions (and, for the avoidance of doubt shall immediately inform the Funder of all Settlement offers or offers to engage in any alternative dispute resolution process received from the Respondent and allow the Funder the opportunity to attend any such alternative dispute resolution process agreed with any Respondent);
 - b. promptly provide to the Funder any document or information reasonably requested by the Funder;

- c. ensure that the Applicant and the Funder are given all necessary information in order to facilitate informed instructions (including, for the avoidance of doubt any information which has or may have a material impact on the Claims, the Proceeding, or the potential for any judgment sum to be recovered);
- d. unless specifically prohibited by the terms of a Court order or another professional obligation, provide to the Funder a copy of any document obtained in any Proceeding by way of discovery, subpoena or any other coercive power of the Court, subject to the Funder's, its officers and employees', implied undertaking given to the Court.

13. The Funder will:

- a. implement its Conflicts Management Policy so as to comply with the *Corporations Amendment Regulation 2012 (No. 6) (Cth)*;
- b. provide the Applicant with timely and clear disclosure of any material breach of the *Corporations Amendment Regulation 2012 (No. 6) (Cth)*;
- c. not retain the Lawyers as their solicitors for any purpose connected with the Proceeding.

F. Confidentiality

14. The Funder shall strictly maintain the confidentiality of any information provided to the Funder by the Applicant or the Lawyers for a purpose connected to the Proceeding, and shall adopt proper and effective procedures for maintaining the confidentiality and safe custody of the information.

15. Where any information is provided to the Funder, the Funder shall:

- a. adopt proper and effective procedures for maintaining the confidentiality and safe custody of the information;
- b. ensure that access to the information is only provided to the Funder's staff who are engaged in the functions for which the information was provided to the Funder;
- c. only use the information for purposes for which the information was provided; and
- d. not disclose the information contained therein to any person other than the Lawyers or counsel retained in the Proceeding.

G. Dispute Resolution

16. If there is a disagreement between the Funder and the Applicant as to whether the Proceeding should be Settled, or the appropriate terms for Settlement of the Proceeding the dispute will be referred to counsel for advice on whether, in counsel's opinion, Settlement of the Proceeding or Claims on the terms and in the circumstances identified by the Applicant, the Funder or both, is reasonable in the circumstances, for the purposes of which:

- a. the Applicant must provide notice of any objection to the proposed Settlement within 5 business days of receiving advice from the Lawyers about a proposed Settlement, and:
 - i. upon receiving the objection referred to in sub-clause, the Lawyers shall brief counsel within 5 business days of receiving the objection;

- ii. in the first instance counsel will be the most senior counsel of those retained by the Lawyers in respect of the Proceeding and/or Claims concerned (or, if no counsel has been retained, then Independent Counsel appointed and suitably briefed by the Lawyers);
 - iii. counsel may proceed as he or she sees fit to inform himself or herself before forming and delivering his or her opinion, and shall have regard to the matters set out in the Schedule. Counsel may give his or her opinion orally or in writing;
 - iv. if counsel's opinion is that the Settlement is reasonable then the Applicant agrees that the Lawyers will be instructed to do all that is necessary to settle the Proceeding, provided that any necessary approvals from the Court to the Settlement are sought and obtained;
 - v. the costs of counsel in providing an opinion under this sub-clause will be paid by the Funder and will form part of the Project Costs;
 - b. if the Applicant does not provide notice of objection to the proposed Settlement within the time specified in sub-clause (a), the Lawyers shall take all action necessary to implement the Settlement.
17. If there is a disagreement between the Funder and the Applicant regarding the Claims and/or Proceeding other than in respect of matters the subject of clause 16, the dispute will be referred to counsel, who will issue a binding Determination of the dispute, and:
- a. the Lawyers shall brief counsel within 5 business days of receiving notice of the dispute from any party;
 - b. in the first instance counsel will be the most senior counsel of those retained by the Lawyers in respect of the Proceeding and/or Claims concerned. If no counsel has been retained, then Independent Counsel will be appointed and suitably briefed by the Lawyers;
 - c. the determination will be final and binding; and
 - d. the parties to the dispute will pay, in equal shares, the costs of the Determination.

H. Termination

18. The funding arrangements under these Funding Terms may only be terminated by order of the Court, granted on application made by the Applicant, the Funder or a Group Member, upon notice given to the Applicant, the Funder and such other persons as ordered by the Court.
19. If an application is made by the Funder under paragraph 18 above, and the Court grants that application, then (subject to any contrary order of the Court):
- a. the Funder will not be entitled to receive any payment from any Resolution Sum pursuant to sub-clause 6(b) above;
 - b. the Funder will continue to be entitled to receive payment from any Resolution Sum pursuant to sub-clause 6(a) above;

- c. all obligations of the Funder under these Funding Terms will cease on the date the Funder's termination becomes effective, save for the following obligations accrued to the date of termination:
 - i. payment of any outstanding Project Costs incurred up to the date of termination;
 - ii. indemnification of the Applicant and Group Members for any Legal Costs and Disbursements reasonably incurred and payable to the Lawyers up to the date of termination; and
 - iii. payment of any quantified Costs Order against the Applicant and any Group Members in the Proceeding in respect of costs which arise in, or are attributed to, the period ending on the date the Funder's termination becomes effective.
20. If an application is made by the Applicant or a Group Member under paragraph 18 above, and the Court grants that application, then (subject to any contrary order of the Court):
- a. the Funder will continue to be entitled to receive payment from any Resolution Sum pursuant to paragraph 6 above;
 - b. all obligations of the Funder under these Funding Terms will cease on the date the Funder's termination becomes effective, save for the following obligations accrued to the date of termination:
 - i. payment of any outstanding costs pursuant to paragraph 2 above incurred up to the date of termination;
 - ii. indemnification of the Applicant and Group Members for any Legal Costs and Disbursements reasonably incurred and payable to the Lawyers up to the date of termination; and
 - iii. payment of any quantified Costs Order against the Applicant and any Group Members in the Proceeding in respect of costs which arise in, or are attributed to, the period ending on the date the Funder's termination becomes effective.

I. Funding Agreement and Legal Costs Agreement

- 21. These Funding Terms prevail over any inconsistent provision in the Funding Agreement.
- 22. These Funding Terms prevail over the terms of the Legal Costs Agreement to the extent of any inconsistency.
- 23. Except to the extent of any inconsistency with the Funding Terms, neither the Funder nor the Applicant is released from any obligation arising pursuant to the Funding Agreement by reason of the Court's making of orders giving effect to the Funding Terms.
- 24. Except to the extent of any inconsistency with the Funding Terms, the rights of neither the Funder nor the Applicant pursuant to the Funding Agreement are altered or otherwise affected by reason of the Court's making of orders giving effect to the Funding Terms.

SCHEDULE

Criteria to be applied by Counsel in giving an Opinion on a Proposed Settlement

1. In reviewing a proposed Settlement pursuant to paragraph 16 of the Funding Terms, counsel must be satisfied that the Settlement will be fair and reasonable, taking into account the Claims that will be the subject of the Settlement and any potential conflicts of interest between the Funder, the Lawyers and the group members whose Claims are subject to the proposed Settlement.
2. In satisfying himself or herself that the proposed Settlement is fair and reasonable, counsel should take into account, among other things, the following factors:
 - a. the amount offered to each group member;
 - b. the prospects of success in the Proceeding (i.e. the weaknesses, substantial or procedural, in the case advanced by the Representative);
 - c. the likelihood of the group members obtaining judgment for an amount significantly in excess of the proposed Settlement sum;
 - d. whether the proposed Settlement sum falls within a realistic range of likely outcomes;
 - e. the attitude of the group members to the proposed Settlement;
 - f. the likely duration and cost of the Proceeding if continued to judgment;
 - g. the terms of the Funding Terms about the procedure to be applied in reviewing and deciding whether to accept any Settlement offer, including any factors that will and will not be taken into account in deciding to Settle;
 - h. whether the Funder might refuse to continue to fund the Proceeding if the proposed Settlement does not take place; and
 - i. whether the proposed Settlement involves any unfairness to any group member or any categories of group members for the benefit of others.
3. Counsel should also take into account the potential for conflicts of interest between group members in accordance with the test applied by Jessup J in *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* [2006] FCA 1388; (2006) 236 ALR 322 at [41] which relevantly states:

“I propose to turn then to the question whether the settlement, including the distribution scheme, involves any actual or potential unfairness to any group members, or categories of group members, having regard to all relevant matters, including whether the overall settlement sum, even if reasonable as such, involves unfair compromises by some members, or categories of members, for the benefit of others, and whether the distribution scheme fairly reflects the apparent or assumed relative losses suffered by particular members, or categories of members. Any consideration of the fairness and reasonableness of the settlement in the present case must take into account not only the overall settlement sum and its relationship with the amount that might be considered a

best possible outcome after a successful trial, but also the structure and workings of the scheme by which that sum is proposed to be distributed amongst group members. The fairness and reasonableness of the settlement, from the point of view of any one group member, will necessarily depend on both of these factors."