

**Settlement Scheme**  
**TFS/IVS Class Action**

28 August 2023

*Lindsey Schofield & Anor v TFS Manufacturing Pty Ltd & Ors*  
Federal Court of Australia, Proceeding NSD 181 of 2020

## Overview and Summary

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- A. On 15 May 2023, Federal Court Proceeding NSD 181 of 2020 (*Lindsey Schofield & Anor v TFS Manufacturing Pty Ltd & Ors*) (the **Proceeding**) was settled, subject to Court approval, on terms subsequently set out in a deed of settlement executed by Lindsey Schofield and Chubb Insurance Australia Limited and a deed of settlement executed by Melissa Weedon and IVS Pty Ltd, Covidien Pty Limited, Peter Petros and MIPS Insurance Pty Ltd (together, the **Deeds**). The settlement was approved by the Court on 24 August 2023 pursuant to section 33V(1) of the *Federal Court of Australia Act 1976* (Cth). The Court will separately consider orders about the distribution of the Settlement Fund under this (or any other) Settlement Scheme and the appointment of an Administrator to administer the Settlement Fund created in accordance with the terms of this Settlement Scheme. The proposed Administrator is AJB Stevens Lawyers.
- B. This Settlement Scheme (the **Scheme**) sets out the procedures and substantive requirements for the distribution of the Settlement Fund. The Scheme enables the assessment of eligibility and rights to compensation of Participating Group Members by the Administrators and provides for the payment by the Administrator of compensation to Participating Group Members out of the Settlement Fund. It is to be read in conjunction with the Deeds. Terms not otherwise defined in this Settlement Scheme are as defined in the Deeds.
- C. The Settlement Scheme will not be operative unless and until the Court approves the distribution of the Settlement Fund pursuant to section 33V(2) of the *Federal Court of Australia Act 1976* (Cth) and the Approval Orders are made.
- D. The proposed settlement and this Scheme are made with a specific denial of liability and are not to be represented as an admission of liability by the Respondents or any of their related entities.
- E. The Settlement 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, must now 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.
Third Party Recovery	Clause 6	The Administrator will identify and pay all Third Party Recovery Amounts Participating Group Members are liable to make.

Assessment of Compensation	Clause 7	The Administrator will assess and determine the amount of compensation to be paid to the Participating Group Members.
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, or by a Participating Group Member who is dissatisfied with a compensation assessment.
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 Third Party Recovery amounts, the Administrator will pay Compensation to Participating Group Members.

## 1. Definitions and interpretation

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### 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 and calculated in accordance with clause 13.

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

"AJB" means AJB Stevens Lawyers Pty Ltd trading as AJB Stevens Lawyers, the proposed Administrator of the Scheme.

"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 Deeds and approving the management and distribution of the Settlement Sum 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 the *Competition and Consumer Act 2010* (Cth) less any deductions made for previous compensation recovered in respect of a claim for damages for being implanted with a TFS Implant or an IVS Implant, an entitlement to compensation as a result of being a group member in the Boston Scientific Proceeding or the Ethicon Proceeding, or for litigation risk, including the risk that the group member's claim is statute barred under limitations legislation. The amount payable to a Participating Group Member under this Settlement Scheme may ultimately be assessed up or down in accordance with clause 9.

"Boston Scientific Proceeding" means Federal Court Proceeding NSD 244 of 2021 (*Debra Fowkes v Boston Scientific Corporation & Anor*), a representative proceeding concerning vaginal mesh products the settlement of which was approved by the Court on 16 March 2023.

"BPA" means any bulk payment agreement between Medicare Australia and the Respondents and/or the Administrator for the payment of Third Party Recovery Amounts to Medicare Australia that Group

Members are liable to make upon being assessed as being eligible to receive an Assessed Compensation Amount.

“Chubb” means Chubb Insurance Australia Limited, the products liability insurer of TFS Manufacturing for various periods.

“Claim” means any claim, demand, action, suit, proceeding or liability of any kind for damages, debt, restitution, account, equitable compensation, injunctive relief, specific performance, costs, interest or any other remedy in connection with, arising from or related to the Proceeding or the matters, circumstances or allegations which are or were the subject of the Proceeding.

“Claim Deadline” means 60 days after the last day on which the Settlement Notice is published being 5 September 2023.

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

“Court” means the Federal Court of Australia.

“Covidien” means Covidien Pty Limited, the supplier or entity liable for the supply of the IVS Implants from 2001.

“Deeds” means both the settlement deed executed by Lindsey Schofield and Chubb Insurance Australia Limited and the settlement deed executed by Melissa Weedon and IVS Pty Ltd, Covidien Pty Limited, Peter Petros and MIPS Insurance Pty Ltd on.

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

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

“Ethicon Proceeding” means Federal Court Proceeding NSD 1590 of 2012 (*Kathryn Gill & Ors v Ethcion Sarl & Ors*), a representative proceeding concerning vaginal mesh products the settlement of which was approved by the Court on 16 March 2023.

“Group Members” means persons who had surgery performed on them in Australia to implant any of the IVS Implants and/or TFS Implants.

“Implant Evidence” means the documentation that must be obtained to establish proof of implantation with a TFS/IVS implant (which, for the avoidance of doubt, need not be in a form which would be admissible under the *Evidence Act 1995* (Cth)), namely:

- (a) product identification sticker, tag or label from the TFS/IVS Implant; or
- (b) medical records contemporaneous to the implantation procedure for the TFS/IVS Implant recording the product identification information (product numbers) from the product identification sticker, tag or label or information identifying the model of TFS/IVS Implant; or
- (c) medical records contemporaneous to the implantation procedure for the TFS/IVS Implant providing confirmation that the implanted device was a TFS/IVS Implant;
- (d) documentation from the implanting surgeon providing confirmation that the implanted device was a TFS/IVS Implant;

- (e) documentation from the implanting hospital providing confirmation that the implanted device was a TFS/IVS Implant; or
- (f) documentation from a private health insurer providing confirmation that the implanted device was a TFS/IVS Implant by way of prosthesis code or device description.

“Irrecoverability” has the meaning and application in Schedule 2 in relation to:

- (a) Participating Group Members who were implanted in Australia with an IVS Implant prior to 15 November 2000; and/or
- (b) Participating Group Members who were implanted in Australia with a TFS Implant prior to 30 July 2008 or after 30 July 2015, and who are not also Petros Sub-Group Members.

“IVS” means the Second Respondent, IVS Pty Ltd, the supplier of the IVS Implants prior to 2001, the interests of which were acquired by Covidien.

“IVS Implant” means an Intravaginal Sling Implant inserted with or without the use of an IVS Tunneller.

“IVS Sub-Group Members” means persons who had surgery performed on them in Australia to implant an IVS Implant.

“MIPSI” means the Fifth Respondent, MIPS Insurance Pty Ltd, the professional indemnity insurer of Petros for various periods.

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

“Notice of Assessment” has the meaning given in clause 7.3.

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

“Petros” means the Fourth Respondent, Dr Peter Petros, a former registered medical practitioner and gynaecologist.

“Petros Sub-Group Members” means Group Members who had surgery to implant any of the IVS Implants and TFS Implants by:

- (a) Petros as the Group Member’s treating gynaecologist;
- (b) A surgeon being supervised by Petros;
- (c) A surgeon being assisted by Petros;
- (d) A surgeon acting on the advice of Petros in relation to that particular Group Member.

“Queensland Group Members” means Group Members who were implanted with a TFS Implant and/or IVS Implant 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 Form” means a registration form submitted in accordance with clauses 4.1, 4.2 or 4.3

“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 AJB and must have at least five years’ experience in personal injury litigation.

“Schofield” means the First Applicant, Lindsey Schofield.

“Schofield Proceeding” means Proceeding NSD 181 of 2020 in the Federal Court (*Lindsey Schofield & Anor v TFS Manufacturing Pty Ltd & Ors*).

“Schofield Payment” means a payment to the First Applicant of \$400,000 in damages, interest and any Third Party Recovery Amounts (other than to Medicare Australia) she is liable to make.

“Settlement” means settlement of the Proceeding in accordance with the terms of the Deeds and subject to any Approval Orders.

“Settlement Sum” means \$41,450,000 inclusive of all damages, interest, costs, counsel fees and disbursements, Third Party Recovery Amounts and Administration Costs and any GST applicable to those costs or amounts.

“Settlement Fund” means the Settlement Sum (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.

“Settlement Account” means a bank account established by the Administrator for the purpose of holding the Settlement Fund (or part of it) pending or during the implementation of the Settlement Scheme and the Approval Orders.

“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.

“Surgical or 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, Surgical or Treatment Evidence need not be in a form which would be admissible under the *Evidence Act 1995* (Cth).

“TFS Implant” means the Tissue Fixation System Implant.

“TFS Manufacturing” means the First Respondent, TFS Manufacturing Pty Ltd, supplier of TFS Implants in Australia, which entered a creditors’ voluntary winding up on 24 February 2021.

“TFS Sub-Group Members” means persons who had surgery performed on them in Australia to implant an IVS Implant.

“Third Party Recovery Amounts” means any amount separately or in any combination that the Applicants, the Respondents or Group Members may be liable to make to third parties, including a private health insurer (as defined in the *Private Health Insurance Act 1987* (Cth)), to Medicare Australia by virtue of the provisions of the *Health and Other Services (Compensation) Act 1995* (Cth) or any BPA, to the Department of Social Security or Centrelink by virtue of the *Social Security Act 1991* (Cth), to the Department of Veteran’s Affairs in respect of amounts claimed under the *Veterans’ Entitlements Act 1986* (Cth), and to the National Disability Insurance Agency in respect of amounts claimed under the *National Disability Insurance Scheme Act 2013* (Cth).

“Weedon” means the Second Applicant, Melissa Weedon.

“Weedon Payment” means a payment to the Second Applicant of \$200,000 in damages, interest and any Third Party Recovery Amounts (other than to Medicare Australia) she is liable to make.

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

## **2. Appointment and functions of the Administrator**

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### **2.1 Appointment of the Administrator**

- (a) Subject to the Court’s approval, AJB will be appointed as the Administrator to administer and implement the Scheme fairly and reasonably according to its terms.
- (b) AJB’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, AJB will have the same immunities from suit as attach to a Referee appointed pursuant to s.54A of the *Federal Court of Australia Act 1976* (Cth) by the Court.

### **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**

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### **3.1 Payment of the Schofield Payment and Weedon Payment**

As soon as reasonably practicable after the Settlement is approved by the Court and the Respondents have paid the Settlement Sum into the Settlement Account less any Third Party Recovery Amounts they are liable to make from the Schofield Payment and the Weedon Payment, the Administrator will:

- (a) pay any Third Party Recovery Amounts from the Schofield Payment that have not already been paid by the Respondents and which Schofield is liable to make;
- (b) pay any Third Party Recovery Amounts from the Weedon Payment that have not already been paid by the Respondents and which Weedon is liable to make from;
- (c) pay to Schofield the Schofield Payment less any Third Party Recovery Amounts in accordance with the Approval Orders;
- (d) pay to Weedon the Weedon Payment less any Third Party Recovery Amounts in accordance with the Approval Orders; and
- (e) pay to AJB the Applicants’ costs that are approved by the Court in the Approval Orders.

### **3.2 Application of the balance of the Settlement Fund**

Following payments pursuant to clause 3.1, the balance of the Settlement Account including any interest will become the Settlement Fund which will be applied and distributed as follows:

- (a) To Third Parties in accordance with Clause 6;
- (b) to Participating Group Members in accordance with Clause 9;
- (c) to the Administrator for Administration Costs in accordance with clause 13.

#### **4. Registration of Group Members**

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##### **4.1 Group Members who have submitted a Registration Form**

Group Members who have submitted a Registration Form with AJB or Queensland Group Members who have submitted a Registration Form with Shine Lawyers 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 a Registration Form by the Claim Deadline (at the following website: <https://www.ajbstevens.com.au/class-action-form/>)

##### **4.3 Alternative methods of registration**

If a Group Member is not able to complete an online Registration Form and informs the Administrator of that inability, the Administrator 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 Claim Deadline**

Subject to clause 4.5, if a Group Member registers her claim after the Claim 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 Claim 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 their 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 six months after the Claim Deadline.

#### **5. Assessment and determination of eligibility**

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##### **5.1 Eligibility Criteria**

A Group Member becomes a Participating Group Member and is eligible to apply to receive



compensation pursuant to this Scheme if she satisfies the following Eligibility Criteria:

- (a) the Group Member was implanted with a TFS Implant and/or IVS Implant in Australia; and
- (b) the Group Member has:
  - (i) not opted out of the Proceeding; or
  - (ii) not entered into a deed of release with the Respondents or any of their related entities in respect of a claim for damages for being implanted with a TFS Implant and/or an IVS Implant; or
  - (iii) not received full and final satisfaction from any other person or entity (such as a surgeon or a hospital) in respect of a claim for damages for being implanted with a TFS Implant and/or an IVS Implant; and
- (c) the Group Member claims to have suffered an injury as a result of being implanted with a TFS Implant and/or an IVS Implant; and
- (d) the Group Member has registered their claim by the Claim Deadline (or by such later time as the Administrator permits in accordance with clause 4.5).

## **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 Implant 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 provide to the Respondents an authority signed by the Group Member to obtain confirmation from the Respondents as to whether clause 5.1(b)(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(b)(iii) applies to the Group Member;
- (e) 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 receiving a TFS Implant and/or an IVS Implant; and
- (f) upon review of the information obtained in accordance with clauses 5.2(a) to (e), 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 their right to seek a Review under clause 8 of this Settlement Scheme.

#### **5.4 Clarification regarding steps required to be taken where a Group Member opted out or has otherwise resolved their 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. Third Party Recovery**

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#### **6.1 Process and sequence for assessment and payment of Third Party Recovery Amounts**

The Administrator will, in sequence:

- (a) inform Schofield and Weedon that they or the Respondents may be liable to pay Third Party Recovery Amounts as a result of their receiving the Schofield Payment and the Weedon Payment as the case may be;
- (b) inform Schofield and Weedon that all Third Party Recovery Amounts in relation to their claims will be deducted from the Schofield Payment or the Weedon Payment and paid directly by the Respondents or otherwise paid by the Administrator from the Schofield Payment or the Weedon Payment as the case may be;
- (c) identify any and all Third Party Recovery Amounts in relation to the claims of Schofield and Weedon and obtain and, if required provide to the Respondents, all 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 Third Party Recovery Amounts as soon as reasonably practicable;
- (d) pay any Third Party Recovery Amounts in relation to Schofield and Weedon before any compensation is paid to Schofield and Weedon or any compensation or any Third Party Recovery Amounts are paid in relation to the claims of Participating Group Members;
- (e) inform Participating Group Members that they or the Respondents may be liable to pay Third Party Recovery Amounts as a result of their receiving compensation under this Settlement Scheme;

- (f) inform Participating Group Members that all Third Party Recovery Amounts will be paid from the Settlement Fund regardless of whether that sum would ordinarily be paid directly by the Respondents;
- (g) identify any and all Third Party Recovery Amounts in relation to each Participating Group Member's claim and obtain and, if required provide to the Respondents, all 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 Third Party Recovery Amounts as soon as reasonably practicable;
- (h) identify and calculate any Third Party Recovery Amounts for each Participating Group Member based on the Assessed Compensation Amount for each Participating Group Member;
- (i) deduct and pay any Third Party Recovery Amounts 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. Assessment of Participating Group Members' claims**

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### **7.1 Assessment of claims**

- (a) 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 Annexure 1.
- (b) Any delegate appointed by the Administrator to assess the claims of Participating Group Members must be a lawyer with at least five years' experience in personal injury litigation.

### **7.2 Process for determining Participating Group Members' claims**

- (a) 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 been implanted with a TFS Implant and/or an IVS Implant:
  - (i) instructions and information from the Participating Group Member;
  - (ii) information from any other person such as a family member or friend of the Participating Group Member;
  - (iii) Implant Evidence, to the extent that those records have not already been obtained pursuant to clause 5.2(a);
  - (iv) Surgical or Treatment Evidence;
  - (v) medical, clinical or pharmacy records;
  - (vi) reports of treating medical practitioners;
  - (vii) tax returns and other tax, accounting or financial documents;

- (viii) employment records or other information from the Participating Group Member's employer/s;
  - (ix) invoices regarding any treatment or other expenses incurred by the Participating Group Member;
  - (x) subject to clause 7.4, reports from:
    - (A) a treating doctor;
    - (B) an independent health expert, being a medical or allied health expert who has not previously treated the Participating Group Member (such as a urologist, urogynaecologist, occupational therapist, physiotherapist, rehabilitation physician, pain management specialist or psychiatrist); or
    - (C) an accounting expert.
- (b) Upon receiving the information in 7.2(a) the Administrator will:
- (i) assess damages in accordance with the Damages Assessment Protocol in Schedule 1;
  - (ii) adjudicate as expeditiously and reasonably as possible;
  - (iii) make any deductions from the damages assessed under the Damages Assessment Protocol in accordance with the Deductions Protocol in Schedule 2;
  - (iv) determine the Participating Group Member's Assessed Compensation Amount.

### **7.3 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 their entitlements under this Scheme;
- (c) inform the Participating Group Member that they will be paid their Assessed Compensation Amount less any Third Party Recovery Amounts only after the Assessed Compensation Amounts have been determined for all Participating Group Members and all Third Party Recovery Amounts have been determined and paid for all Participating Group Members.
- (d) provide information to the Participating Group Member in relation to their right to seek a Review under clause 8.

### **7.4 Restrictions on reports to be obtained for a Participating Group Member's claim**

Save as in respect of Category D Participating Group Members (as defined in Schedule 1), 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, to minimise Administration Costs associated with the requirements of this clause:

- (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 this Settlement 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 this Settlement Scheme;
- (d) the Administrator will only obtain a report from an accounting expert if they are of the view that it will be more cost and time efficient to do so for the purpose of determining whether a Participating Group Member has suffered economic loss, or for the purposes of quantifying the Participating Group Member's economic loss (including loss of income).

## **8. Review of Administrator's Determinations**

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### **8.1 Right to seek a Review**

A person who has registered to participate in this 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 7 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 their 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) Implant Evidence and Notice of Eligibility; or
    - (B) Material obtained pursuant to clause 7.2(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, make a determination as to whether the Administrator made an error in applying the Eligibility Criteria;
  - (ii) in a Compensation Review, make a determination as to the amount of compensation that the Participating Group Member is assessed as being 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 their Review and the impact of that determination on the registrant's or Group Member's entitlements (if any) under this 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**

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#### **9.1 Timing of Payment**

To avoid the risk that Third Party Recovery Amount payments and payments to Participating Group Members will in aggregate be greater than the sum available for distribution from the Settlement 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 reviews has expired;
- (c) the Third Party Recovery Amounts have been determined and paid for all Participating Group Members.

## **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 but less the final 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 their Assessed Compensation Amount as expeditiously as possible:

- (a) less all Third Party Recovery Amounts 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 Settlement Fund will cease.

# **10. Management of the Settlement Fund**

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## **10.1 Settlement Fund is held by the Administrator**

Upon Settlement Approval, subject to the terms of the Deed, this Scheme, and any applicable statutory requirements, the Administrator will hold the money in the Settlement Account.

## **10.2 Management of the Settlement Fund**

The Administrator will take all reasonable steps to ensure that the Settlement 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 Third Party Recovery Amounts are determined and, with respect to the Third Party Recovery Amounts, paid; and
- (b) ensure that, insofar as reasonably practicable, the Settlement Fund is distributed equitably amongst Participating Group Members having regard to the total Assessed



Compensation Amounts, income interest earned on the Settlement Fund and Administration Costs.

## **11. Obligations of Group Members**

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### **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 this 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 their contact details;
- (e) executing documents,

and each Group Member must do so:

- (f) 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
- (g) 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 their 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**

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### **12.1 Application of this clause**

This clause applies if a Group Member is a "person under a legal incapacity" within the meaning of the *Federal Court Rules 2011*.

### **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 rules

7.11 or 9.70 of the *Federal Court Rules 2011*, the Administrator will at the earliest opportunity join in supporting the Group Member's "litigation representative" or "interested person" 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**

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### **13.1 Payment of Administration Costs**

Subject to the other provisions of this clause, Administration Costs are to be paid to the Administrator:

- (a) In accordance with clause 13.2;
- (b) from the Settlement Fund;
- (c) in such amounts as are approved by the Court from time to time during the implementation of this Scheme;
- (d) in the case of disbursements which individually total no more than \$3,000, on a quarterly basis from the Settlement Fund provided that the disbursements have been reasonably incurred.

### **13.2 Costs of determining Participating Group Members' claims**

The Administrator is entitled to charge the following fees for the assessment of Participating Group Members' Claims:

<b><u>Category of Work</u></b>	<b><u>Fees (excluding GST)</u></b>
Assessment of Eligibility	\$475.00
Assessment of Damages	\$2,775.00
Administration work (including but not limited to filing, transacting, account keeping, information technology support, handling but not determining objections to compensation assessments and eligibility, corresponding with Third Parties in relation to Third Party Recovery Amounts	\$1,106.00

### **13.3 Fees charged by Review Assessors**

The Review Assessor will be paid fees of \$500 for Eligibility Review and fees of \$2,500 for Compensation Review. These fees are exclusive of GST and will be Administration Costs.

### **13.4 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 greater than 110% 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 less than 110% 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.

### **13.5 Costs of lawyers other than the Administrator or its delegates**

Nothing in this Settlement 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 AJB), except that:

- (a) the Participating Group Member does so at their 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**

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### **14.1 Supervision by the Court**

The Administration of the Settlement Fund and implementation of the Settlement 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 this 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 this 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 Settlement 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. The 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 and to ensure those women with significant injuries, being injuries which correspond to a non-economic loss assessment of greater than 40%, are compensated as fully as possible subject to appropriate deductions for having been compensated for their injuries prior to participating in this Settlement Scheme, for being eligible to be compensated in the Boston Scientific Proceeding or the Ethicon Proceeding, and for the litigation risks, including a limitation risk, associated with their claims.
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 their Non-Economic Loss;
  - (b) provides for individual assessment of a Participating Group Member's damages in significant cases, being cases where a Participating Group Member's injuries represent greater than 40% of a most extreme case;
  - (c) incorporates deductions into the assessment of claims to ensure that Participating Group Members are not over-compensated and that risks associated with their individual claims are considered.
4. To make the process of assessment as streamlined as possible, the Damages Assessment Protocol recognises four 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 from receiving a TFS Implant or an IVS Implant (**Category A**).
  - (b) claims where the Participating Group Member's damages includes only an amount for non-economic loss 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 (**Category B**). A Category B claim may include claims where the injury or disability is not severe enough to attract an award for non-economic loss, but may include a nominal sum for past treatment expenses deemed to be no greater than the minimum sum recoverable for non-economic loss.
  - (c) claims where the Participating Group Member's damages are based on an assessment of non-economic loss plus fixed sums for other heads of damages deemed appropriate or commensurate with the severity of her non-economic loss (**Category C**);
  - (d) claims where the Participating Group Member's non-economic loss is consistent with significant injury and disability so that her entitlement to other heads of damages are assessed on an individual basis (**Category D**).
5. **Determination of category of claim**
  - 5.1 After receiving all required evidence and information, the non-economic loss of a Participating

Group Member will be assessed by the Administrator under the *Competition and Consumer Act 2010* (Cth) after which she 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 receiving a TFS Implant or an IVS Implant;
  - (b) **Category B:** Any Participating Group Member who has been assessed as having a non-economic loss of less than 25% of a most extreme case;
  - (c) **Category C:** Any Participating Group Member who has been assessed as having a non-economic loss between and inclusive of 25% and 40% of a most extreme case, including the following subcategories:
    - i. Category C1: 25% to 29%
    - ii. Category C2: 30% to 35%
    - iii. Category C3: 36% to 40%
  - (d) **Category D:** Any Participating Group Member who has been assessed as having a non-economic loss of greater than 40%.
6. In an exceptional case, the Administrator may dispense with the requirement for certain information to be provided in support of a claim if, at their sole discretion, they consider it just and reasonable to do so.
7. For the avoidance of doubt, unless otherwise indicated the caps and limits imposed by the *Competition and Consumer Act 2010* (Cth) apply to the assessment of non-economic loss and to all individual assessments of damages, such as to disregard the amount by which a Participating Group Member's gross weekly earnings would (but for their injury) have exceeded an amount that is twice the amount of average weekly earnings at the date of the award.
8. The following table sets out the criteria required to consider an award of damages under various heads 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 9
Out of Pocket Expenses	Clause 10
Gratuitous Care, Commercial Care, and Loss of Capacity to Provides Domestic Services	Clause 11
Economic loss (Lost Earnings)	Clause 12

## 9. Non-Economic Loss

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- 9.1 Non-economic loss damages are to compensate a Participating Group Member for pain and suffering, loss of enjoyment of life, loss of amenities, or loss of life expectancy as a result of receiving the Implant and suffering injury and disability.

- 9.2 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, loss of amenities, or her life expectancy is reduced as a result of receiving the Implant;
  - (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 receiving the Implant;
  - (c) the Participating Group Member's non-economic loss exceeds 15% of a most extreme case; or
  - (d) notwithstanding having been assessed at less than 15% of a most-extreme case, they have incurred past out of pocket expenses which are deemed to be equivalent in value to non-economic loss at 15% of a most extreme case. For these women, the past out of pocket expenses are deemed to be the equivalent of 15% of a most extreme case because their injury and disability is unlikely to have been severe enough to attract anything other than a nominal sum for such expenses.
- 9.3 Claims for compensation for non-economic loss must be accompanied by a comprehensive statement from the Participating Group Member, and any other relevant persons, describing the impact of the injuries, disabilities or complications from receiving the Implant on the Participating Group Member's:
- (a) pre-Implant circumstances;
  - (b) post-Implant 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.

## **10. Out of Pocket Expenses**

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### **10.1 General**

- 10.2 A Participating Group Member's out of pocket expenses will be calculated depending on whether they have been assessed as Category B, C or D.
- 10.3 For Category B Participating Group Members, past and future out of pocket expenses are included in the amount for non-economic loss reflecting the probability that such women will not have any claim for past and future treatment and other expenses, or will have only a modest claim for past and future treatment expenses.

- 10.4 For Category C Participating Group Members, their past and future out of pocket expenses will be assessed in proportion to the severity of their injuries as reflected by their non-economic loss as a percentage of a most-extreme case.
- 10.5 For Category D Participating Group Members, their past and future out of pocket expenses will be assessed on an individual basis.
- 10.6 Accordingly, past and future out of pocket expenses will be assessed in accordance with the following table:

<b>Category</b>	<b>Non-Economic Loss as a percentage of a most extreme case</b>	<b>Amount for Past and Future Out of Pocket Expenses</b>
Category A	No compensable injury	0
Category B	< 25%	Included in award for non-economic loss
Category C1	25% to 29%	\$12,500
Category C2	30% to 35%	\$25,000
Category C3	36% to 40%	\$40,000
Category D	>40%	Individual assessment

**10.7 Past Out of Pocket Expenses**

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

10.9 A Category D 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.

10.10 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 receiving the Implant;
- (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).

**10.11 Future Out of Pocket Expenses**

10.12 The following clauses apply to an individual assessment of future out of pocket expenses for



Category D Participating Group Members.

- 10.13 A Category D 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.
- 10.14 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 receiving the Implant;
  - (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.
- 10.15 Participating Group Members may also submit any other information that the Participating Group Member considers relevant to the claim for past and/or future out of pocket expenses.

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

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**11.1 General**

- 11.2 A Participating Group Member's past and future gratuitous and commercial care, including any claim for damages for loss of capacity to provide domestic services, will be calculated depending on whether they have been assessed as Category B, C or D.
- 11.3 For Category B Participating Group Members, the amount for any past and future care or loss of capacity to provide domestic services is included in the amount for non-economic loss reflecting the probability that such women will not have any or only a minimal claim for care.
- 11.4 For Category C Participating Group members, past and future care or loss of capacity to provide domestic services will be assessed in proportion to the severity of their injuries as reflected by their non-economic loss as a percentage of a most-extreme case.
- 11.5 For Category D Participating Group Members, past and future care, including any claim for damages for loss of capacity to provide domestic services, will be assessed on an individual basis.
- 11.6 Accordingly, past and future care and loss of capacity to provide domestic services will be assessed in accordance with the following table:

<b>Category</b>	<b>Non-Economic Loss as a percentage of a most extreme case</b>	<b>Amount for Past and Future Care and Loss of Capacity to Provide Domestic Services</b>
Category A	No compensable injury	0
Category B	< 25%	Included in award for Non-Economic Loss
Category C1	25% to 29%	\$5,000
Category C2	30% to 35%	\$65,000

Category C3	36% to 40%	\$150,000
Category D	>40%	Individual assessment

11.7 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 D Participating Group Members.

11.8 **Gratuitous Care**

11.9 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 receiving the Implant; and
- (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.

11.10 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 11.9(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.

11.11 **Commercial Care**

11.12 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 their injuries, disabilities or complications from receiving the Implant; 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.

11.13 Claims for commercial care must be accompanied by:

- (a) satisfactory evidence that the Participating Group Member meets the requirements set out in clause 11.12;
- (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).

11.14 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.

**11.15 Loss of Capacity to Provide Domestic Services to Others**

11.16 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 receiving the Implant;
- (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 receiving the Implant, 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 receiving the Implant; and
- (e) the need for such services is reasonable in all of the circumstances.

11.17 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 11.16;
- (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 receiving the Implant.

11.18 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.

**12. Economic Loss including Loss of Superannuation Benefits**

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**12.1 General**

12.2 A Participating Group Member's past and future economic loss will be calculated depending on whether they have been assessed as Category B, C or D.

12.3 For Category B Participating Group Members, the amount for any past and future economic loss is included in the amount for non-economic loss reflecting the probability that such women will not have any or only a minimal loss.

12.4 For Category C Participating Group members, past and future economic loss will be assessed in proportion to the severity of their injuries as reflected by their non-economic loss as a percentage of a most-extreme case.

12.5 Economic loss is only recoverable if a Participating Group Member can substantiate that she was working at the time she received a TFS Implant or an IVS Implant and did in fact suffer economic loss by reason of an inability to work for a minimum of ten consecutive business days excluding the period it ordinarily takes to recover from the operation to insert the TFS or IVS Implant.

12.6 For Category D Participating Group Members, past and future economic loss will be assessed on an individual basis.

12.7 Accordingly, past and future economic loss will be assessed in accordance with the following table:

<b>Category</b>	<b>Non-Economic Loss as a percentage of a most extreme case</b>	<b>Amount for Past and Future Economic Loss</b>
Category A	No compensable injury	0
Category B	< 25%	Included in amount for non-economic loss
Category C1	25% to 29%	\$2,500
Category C2	30% to 35%	\$25,000
Category C3	36% to 40%	\$65,000
Category D	>40%	Individual assessment

12.8 The following clauses apply to an individual assessment of past and future economic loss.

**12.9 Past Economic Loss / Past Loss of Earnings**

12.10 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.

12.11 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 received the Implant;
- (b) satisfactory evidence about why the Participating Group Member's employment or occupation was affected by receiving the Implant;
- (c) evidence of the Participating Group Member's income and superannuation (for example, payslips, taxation records, bank statements, etc):
  - i. for a period prior to the injury being suffered sufficient to demonstrate her income and superannuation prior to the injury being suffered; and
  - ii. for the period after receiving the Implant was suffered (which may extend to the date on which the Claim is made but only if the Implant continues to cause injury, disabilities or complications);
- (d) the period or periods that the Participating Group Member has not worked due to the injury, disability or complications from the Implant and details of the time taken as personal (sick) leave, annual leave, and unpaid leave (specifying which form of leave).

Note: This may include leave taken because of the injury itself or to attend medical appointments.

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). Alternatively, the Participating Group Member may submit a declaration from the Participating Group Member's 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.

#### 12.12 **Future Economic Loss / Future Loss of Earning Capacity**

12.13 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.

12.14 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 as a result of receiving the Implant;
- (b) evidence of the Participating Group Member's planned retirement age if at an age other than 65. If no such evidence is provided, it will be assumed that the Participating Group Member's planned retirement age will be 65;
- (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.

12.15 Participating Group Members may also submit any other information that they consider relevant to the claim for past and/or future lost earnings.

### **13. Compensation for Estates of Participating Group Members**

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- 13.1 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.
- 13.2 Estates are only entitled to recover a lump sum amount of \$25,000 but are not subject to deductions in accordance with the Deductions Protocol.

## **SCHEDULE 2 – DEDUCTIONS PROTOCOL**

### **1. Deductions from assessed value**

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- 1.1 Upon assessing damages pursuant to the Damages Assessment Protocol in Schedule 1, deductions are to be made, where applicable, in the following order to arrive at the Assessed Compensation Amount for each Participating Group Member:
- (a) First, a deduction is to be applied for litigation risk;
  - (b) Second, a deduction is to be applied for previous compensation in the case of a group member who has brought proceedings in their own right in connection with the injuries caused by their IVS Implant or TFS Implant if those proceedings resolved by judgment or settlement and the Participating Group Member received an amount for damages or compensation.
  - (c) Third, a deduction is to be applied to the residual where a Participating Group Member has received a Boston Scientific or Ethicon Implant and is entitled to recover damages from the settlement of the Boston Scientific Proceeding or the Ethicon Proceeding.
  - (d) Fourth, a deduction is to be applied to the residual if the Participating Group Member was implanted with an IVS Implant in a period where there is risk that her assessed damages are not recoverable from any respondent (or third party);
  - (e) Fifth, a deduction is to be applied to the residual on account of limitation risk.

### **2. Deduction for Litigation Risk**

- 2.1 A deduction of 20% for litigation risk, which includes the risks of being unable to prove all aspects of a claim, the risk of failing on individual causation, the impact of unrelated co-morbidities and the risk of failing to recover compensation prior to death.

### **3. Deduction for Previous Compensation.**

- 3.1 A Group Member is not eligible to be a Participating Group Member if she has prior to settlement of the Proceeding received compensation in full and final satisfaction from persons or entities (such as an implanting surgeon or a hospital) for her claim for damages from receiving a TFS Implant or an IVS Implant.
- 3.2 A deduction is otherwise to be applied where a Participating Group Member has received damages or compensation in part satisfaction from persons or entities (such as an implanting surgeon or a hospital) for her claim for damages from receiving a TFS Implant or an IVS Implant.
- 3.3 The deduction under clause 3.2 is 50% of the sum received exclusive of legal costs. E.g. a Participating Group Member who received \$500,000 exclusive of costs but inclusive of Medicare and private health fund payments will have a \$250,000 deduction applied to the damages assessed under Schedule 1.

### **4. Deduction for Other Implant**

- 4.1 A deduction is to be applied where a Participating Group Member:
- (a) has received an implant the subject of the Boston Scientific Proceeding or the Ethicon Proceeding; and,
  - (b) is, by the assessment of the Administrator, entitled to register as a group member in the

Boston Scientific Proceeding or the Ethicon Proceeding; and,

- (c) would, by the assessment of the Administrator, be entitled to recover compensation as a consequence of registering as a group member in the Boston Scientific Proceeding or the Ethicon Proceeding.

Note: a deduction is to be applied irrespective of whether a Participating Group Member in fact registers as a group member in the Boston Scientific Proceeding or the Ethicon Proceeding.

4.2 The quantum of the deduction is as follows:

- (a) If the Participating Group Member has received one or more Boston Scientific implants and no Ethicon implants, the deduction applied to the assessed value of the Participating Group Member's claim is to be 20%;
- (b) If the Participating Group Member has received one or more Ethicon implants and no Boston Scientific implants, the deduction applied to the assessed value of the Participating Group Member's claim is to be 20%;
- (c) If the Participating Group Member has received one or more Ethicon implants and one or more Boston Scientific implants, the deduction applied to the assessed value of the Participating Group Member's claim is to be 40%.

## **5. Deduction for Irrecoverability Risk**

5.1 Covidien acquired the rights to IVS Implants, and assumed the risks associated with their manufacture and supply, on 15 November 2000. IVS Implants were manufactured and supplied by IVS Pty Ltd before that date. IVS Pty Ltd has not appeared in these proceedings and is understood to be unable to meet any liability to Participating Group Members whether in its own right or by a policy of insurance. There is no respondent to the proceedings liable to pay, or capable of paying, damages to Participating Group Members who received an IVS Implant prior to 15 November 2000.

5.2 Petros's insurance coverage with MIPS I only extends to a liability from 1 January 2001. Women who are Petros Sub-Group Members and received their IVS Implant prior to 15 November 2000 are not covered by the MIPS I policy of insurance.

5.3 Accordingly, Participating Group Members' assessed damages would ordinarily be irrecoverable if they were implanted with IVS Implants prior to 15 November 2000. There is a chance that an as yet unidentified insurer (for IVS or Petros) which is not a party to these proceedings may be identified and found to be liable to pay compensation to Participating Group Members who received an IVS Implant prior to 15 November 2000. The likelihood of this occurring is low.

5.4 TFS Manufacturing manufactured and supplied TFS Implants from about 2004 to 2016. TFS Manufacturing entered a creditors' voluntary winding up on 24 February 2021. TFS Manufacturing has no funds from which to meet any liability to Participating Group Members. Chubb was the products liability insurer of TFS Manufacturing pursuant to various policies during various periods. Chubb did not, however, insure TFS Manufacturing for the period prior to 30 July 2008 or after 30 July 2015.

5.5 There is a chance there is an as yet unidentified insurer from the time of TFS's inception to 30 July 2008. Similarly, although the TFS Implant was removed from the Australian Register of Therapeutic Goods on 5 November 2014, there is a chance there is an as yet unidentified third party (unlikely to be an insurer) from the time of the expiration of the Chubb policy which could pay compensation to Participating Group Members.

5.6 To account for the risk of irrecoverability, and rather than excluding Participating Group Members



from receiving compensation under the Scheme by reason of that risk, a deduction of 40% will be applied:

- (a) To IVS Sub-Group Members implanted with an IVS Implant prior to 15 November 2000;
- (b) Subject to clause 5.7, to TFS Sub-Group Members implanted with a TFS Implant:
  - i. Prior to 30 July 2008;
  - ii. After 30 July 2015.

5.7 No discount is to be applied in accordance with clause 5.6(b) if the TFS Sub-Group Member is also a Petros Sub-Group Member.

## **6. Deduction for Limitation Risk**

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

- (a) A 40% deduction is to be applied to the assessed value of a Participating Group Member's claim where the implant was supplied prior to the commencement of the *Trade Practices Amendment (Personal Injuries and Death) Act 2004 (No 2)* (Cth) on 13 July 2004 to reflect the significant limitation risk faced by group members bringing such claims.
- (b) A 30% deduction is to be applied to the assessed value of a Participating Group Member's claim where the implant was supplied between 13 July 2004 and 12 July 2007.
- (c) A 20% deduction is to be applied to the assessed value of a Participating Group Member's claim where the implant was supplied between 13 July 2007 and 12 July 2010.
- (d) A 15% deduction is to be applied to the assessed value of a Participating Group Member's claim where the implant was supplied between 13 July 2010 and 12 July 2013.
- (e) A 10% deduction is to be applied to the assessed value of a Participating Group Member's claim where the implant was supplied between 13 July 2013 and 24 February 2017.

6.2 A discount for limitation risk in accordance with 6.1 (a) to (e) is not to be applied where a Participating Group Member can demonstrate that, prior to the commencement of the Proceeding, 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 of implantation.