



Federal Court of Australia
District Registry: Australian Capital Territory
Division: Fair Work

No: ACD97/2017

CATHERINE DUCK
Applicant

AIRSERVICES AUSTRALIA
Respondent

ORDER

JUDGE: JUSTICE BROMWICH

DATE OF ORDER: 19 October 2018

WHERE MADE: Sydney

UPON THE UNDERTAKING:

by each of Augusta Ventures Limited, the applicant and Adero Law (**Adero**) to each other and to the Court, in the terms set out in Annexure A to this order (being that they will comply with their obligations under the Funding Terms (being Annexure B to this order) and the terms of orders 1 and 2), copies of which, signed by each of Augusta Ventures Limited, the applicant and Adero Law, are to be filed within seven days of the date of this order,

THE COURT ORDERS THAT:

Common Fund

1. Pursuant to s 33ZF of the *Federal Court of Australia Act 1976 (Cth)* (**FCA Act**), subject to a further order, upon Resolution (as defined in the Funding Terms) the applicant and group members pay from any Resolution Sum (as defined in the Funding Terms), the amounts referred to in sub-clauses 6(a) to (c) of the Funding Terms prior to any distribution to group members, in accordance with the Funding Terms.
2. Upon Resolution, the aggregate amount payable by the applicant and group members pursuant to order 1 is not to exceed the aggregate amount that would otherwise have been payable by the applicant and group members in the event that order 1 had not been made.



Opt Out

3. From no later than 31 October 2018 until the Opt Out Date, Adero is to display on the website of Adero:
 - (a) the current originating application filed in this proceeding;
 - (b) the current statement of claim filed in this proceeding;
 - (c) the current defence filed in this proceeding;
 - (d) the current reply filed in this proceeding;
 - (e) the Notice to Group Members referred to at 5 below; and
 - (f) the Opt Out Notice referred to at 6 below.
4. Pursuant to section 33J(1) of the *FCA Act*, 4.00 pm on 14 December 2018 be fixed as the time and date before which a group member may opt out of this proceeding (**Opt Out Date**).
5. The form and content of the notice in Annexure C to these orders (**Notice to Group Members**) be approved for the purposes of section 33Y(2) of the *FCA Act* as the notice that must be given to group members pursuant to section 33X(1)(a) of the *FCA Act*.
6. A group member who wishes to opt out of this proceeding must do so by filing with the Court a notice in the form of Annexure D to these orders (**Opt Out Notice**) by the Opt Out Date.
7. Pursuant to section 33Y(3) of the *FCA Act*, the Notice to Group Members be given to group members according to the following procedure:
 - (a) Adero is to cause a third party direct mail service provider, agreed between the parties, or, in default of agreement, appointed by the Court, to send by no later than 31 October 2018 a copy of the Notice to Group Members and the Opt Out Notice to each Group Member according to the following procedure:
 - (i) The respondent is to provide by no later than 24 October 2018 the third party direct mail service provider, on a confidential basis, the first and last name, title, email address (if known) and last known postal or residential address of each group member;
 - (ii) For those group members for whom an email address is held by the respondent, the third party direct mail service provider is to send the Notice to Group Members and the Opt Out Notice as attachments to an email to each such group member from a “sender” email address that does not



include the words “Airservices” or “Airservices Australia”, with the covering email to read: *“Please see attached Notice provided to you pursuant to orders of the Federal Court of Australia. Please do not respond to this email”*;

- (iii) For those group members for whom no email address is held by the respondent, the third party direct mail service provider is to send the Notice to Group Members and the Opt Out Notice to each such group member by ordinary mail as enclosures in a plain coloured envelope, the envelope to be devoid of text other than the addressee details and the return address of the third party direct mail service provider;
 - (iv) The Notice to Group Members and the Opt Out Notice and any covering email is not to include the branding or logo for Airservices Australia.
- (b) The District Registrar of the Australian Capital Territory District Registry of the Federal Court is from no later than 31 October 2018 until the Opt Out Date to cause the Notice to Group Members to be:
- (i) Posted on the website of the Federal Court of Australia; and
 - (ii) Available for inspection at the District Registry of the Federal Court of Australia in Canberra.
8. The Notice to Group Members and the Opt Out Notice may be amended by Adero before they are posted, emailed or published in order to correct any postal, website or email address, telephone number or any typesetting or typographical error.
 9. If Adero receives any completed Opt Out Notices on or before the Opt Out Date, it must file those Opt Out Notices with the Court by the Opt Out Date.
 10. If the respondent or its solicitors receive any completed Opt Out Notices on or before the Opt Out Date, it must file those Opt Out Notices with the Court by 4:00pm on Friday, 14 December 2018.
 11. Adero and the respondent’s solicitors be granted leave to inspect the Court file for the purpose of copying any Opt Out Notices that have been filed in the proceeding.
 12. The applicant pay the costs of giving the Notice to Group Members, as set out in order 7, with those costs to form part of the applicant’s costs in the proceeding.



Date that entry is stamped: 19 October 2018

David Soden
Registrar



ANNEXURE A
FORM OF UNDERTAKING

No. ACD97 of 2017

Federal Court of Australia
District Registry: Fair Work
Division: Australian Capital Territory

UNDERTAKING

[Augusta Ventures Limited *OR* Catherine Duck *OR* Adero Law] undertakes to [the other two of Augusta Ventures Limited *AND* Catherine Duck *AND* Adero Law] and to the Court to comply with its obligations under the Funding Terms (being Annexure B to the orders dated 19 October 2018) and the terms of order 1 of those orders.

Signature: _____

Party: [Augusta Ventures Limited *OR* Catherine Duck *OR* Adero Law]

Signatory:

Capacity:

Date of signature:



ANNEXURE B FUNDING TERMS

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 Representative, the Claimant and/or the Funder in the Proceedings in respect of costs of the Respondent incurred in the Proceedings;
 - (c) “**Applicant**” means Catherine Duck, and any other person who is a lead applicant or representative party in the Proceeding;
 - (d) “**Claims**” means the claims the Applicant and/or Group Members have or may have against the Respondent for relief set out the statement of claim;
 - (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 Augusta Ventures Limited of 2nd Floor, The Peak, 5 Wilton Road, London SW1V 1AN (the address for service of which will be neill.brennan@augustaventures.com);
 - (g) “**Funding Agreements**” means the funding agreement between the Funder and the Applicant and any funding agreements between the Funder and Other Funded Persons in relation to the Claims;
 - (h) “**Funding Limit**” means the amount stipulated in the budgets in the Funding Agreements;
 - (i) “**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;

- (j) “**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;
- (k) “**GST**” means goods and services tax;
- (l) “**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;
- (m) “**Lawyers**” means the lawyers, Adero Pty Ltd (ABN 96 624 398 929), or any firm of lawyers appointed in their place by the Applicant after consultation with the Funder;
- (n) “**Legal Costs Agreement**” means the agreement or agreements entered into between the Lawyers and the Applicant and Other Funded Persons for the Lawyers to act as lawyers to investigate and prosecute the Claims, which is titled “Retainer & Cost Agreement”;
- (o) “**Legal Costs and Disbursements**” means fees and disbursements charged by the Lawyers under the Legal Costs Agreement;
- (p) “**Legal Work**” means such advice, legal and administrative services which the Lawyers consider reasonably necessary to investigate and prosecute the Proceeding, as defined in the Legal Costs Agreement;
- (q) “**Other Claims**” means claims Other Funded Persons have or may have against the Respondent which claims are the same, similar, or related to the Claims;
- (r) “**Other Funded Person**” means any person who has entered into a Funding Agreement, and whose Funding Agreement has not been terminated;
- (s) “**Proceeding**” means the representative proceeding, Catherine Duck v Airservices Australia (ACD97 of 2017) filed in the ACT Registry of the Federal Court of Australia;
- (t) “**Project**” means the Project Investigation and the conduct of the Proceeding in order to achieve Resolution of the Claims and the Other Claims;



- (u) “**Project Costs**” means those costs and expenses incurred at any time prior to the conclusion of the Funding Period, being:
- (i) any Administrative Fee as defined in the Funding Agreement;
 - (ii) the costs of Project Investigation;
 - (iii) any Adverse Costs Insurance Premium as defined in the Funding Agreement;
 - (iv) the Legal Costs and Disbursements charged by the Lawyers for all Legal Work in accordance with the budgets in the Funding Agreement;
 - (v) the Legal Costs and Disbursements associated with any Alternative Dispute Resolution Process as defined in the Funding Agreement;
 - (vi) the costs involved in the provision by the Funder of any security for costs;
 - (vii) any Adverse Costs Order paid by the Funder;
 - (viii) 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);
 - (ix) any costs associated with any scheme for the distribution of any Resolution Sum, including the costs of any Administrator which is appointed;
 - (x) any GST payable on any taxable supply made by any entity as a result of the above costs or expense being incurred.
- (v) “**Project Investigation**” means the Lawyers’ Legal Work performed in connection with the investigation of the Proceeding, the Claims and the Other Claims, and includes without limitation the Lawyers’ investigation into whether the Proceeding may be brought, its strengths and weaknesses and prospects of success;
- (w) “**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;



- (x) “**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.
- (y) “**Respondent**” means Airservices Australia 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;
- (z) “**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), up to the Funding Limit;
 - (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, he or she 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 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);
 - (b) an amount, as consideration for the funding of the Proceeding, being either a reasonable percentage of the Resolution Sum or an amount calculated by reference to a multiple of the Project Costs, as determined by the Court on or after the time the Resolution Sum is agreed or determined; and
 - (c) an additional amount, on account of GST, being the amount obtained by multiplying the prevailing rate of GST (currently 10%) by an amount equal to the



consideration to be received by the Funder for any taxable supply by the Funder under or in connection with these Funding Terms.

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 may 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 be obliged to fund any appeal of the Proceedings but will have the option to do so;
- (d) 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.

15. Where any information is provided to the Funder for a purpose connected with the Proceeding, 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, counsel retained in the Proceeding and any third parties it is required to disclose information to in accordance with the Funding Agreements, including to



any provider of after the event insurance and Augusta Ventures (Australia) Pty Limited.

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 (a), 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 about the addition or removal of Respondents to or from the Proceeding, the termination of the Lawyers' appointment, or the appointment of alternative Lawyers:
- (a) a party will give the other notice of the existence of that dispute. Within 7 days of the receipt of that notice, each party, either personally or through their nominated representative, will meet and discuss the dispute with a view to agreeing a resolution to it;
 - (b) so long as the dispute does not give rise to a conflict between the interests of the Applicant and the interests of other Group Members, the Lawyers may act as representatives for the Applicant, but under no circumstances will the Lawyers act as representatives for the Funder;
 - (c) if, within 14 days of receipt of the notice of a dispute issued under sub-clause (a), that dispute has not been resolved, either party may refer that dispute to mediation, to be conducted by a mediator agreed by both parties or, failing agreement, a person nominated by the President of the New South Wales Law Society;
 - (d) the mediation will be conducted in a manner and at a place specified by the person appointed as mediator, and must be completed within 14 days of the appointment of the mediator, or one month from the date on which the dispute was referred to mediation (whichever is later). The costs of the mediator will be shared by the parties equally;
 - (e) if the dispute is not resolved within the time specified above, then, within 40 days of the date on which the dispute was referred to mediation, either party to the dispute may issue a notice referring the dispute to an independent third party for determination, and the independent third party will be a person agreed between the Applicant and the Funder, or failing agreement, a person nominated by the President of the New South Wales Law Society;
 - (f) the determination by the independent person will be final and binding, and the parties to the dispute will pay, in equal shares, the costs of the Determination.
18. 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 clauses 16 and 17, 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

- 19. 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.
- 20. If an application is made by the Funder under paragraph 19 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 paragraph 6(b) above;
 - (b) the Funder will continue to be entitled to receive payment from any Resolution Sum pursuant to paragraph 6(a) and 6(c) 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; and
 - (ii) 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.



21. If an application is made by the Applicant or a Group Member under paragraph 19 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; and
 - (ii) 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 Agreements and Legal Costs Agreements

22. These Funding Terms prevail over any inconsistent provision in the Funding Agreements.
23. These Funding Terms prevail over the terms of the Legal Costs Agreements to the extent of any inconsistency.



SCHEDULE

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

1. In reviewing a proposed Settlement pursuant to sub-clause 16(a) 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) 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.”



ANNEXURE C

FEDERAL COURT OF AUSTRALIA AIRSERVICES AUSTRALIA CLASS ACTION Notice to class members

1. Why is this notice important?

A class action has been commenced in the Federal Court of Australia which claims that various employees of Airservices Australia on or, previously on, management contracts or individual contracts of employment are covered by the ‘Airservices Australia Collective Agreement 2009–2013’ (“**2009 Agreement**”) and/or ‘Airservices Australia Enterprise Agreement 2013–2017’ (“**2013 Agreement**”), (collectively, the “**Agreements**”), and thus entitled to the benefit of those Agreements.

The Federal Court has ordered that this notice be published for the information of persons who might be class members and may be affected by the action. **You should read this notice carefully. Any questions you have concerning the matters contained in this notice should not be directed to the Court.**

If there is anything in this notice that you do not understand, you should seek legal advice.

2. What is a class action?

A class action is an action that is brought by one person, the applicant, on his or her own behalf and on behalf of a group of people, class members, against another person or persons, the respondents, where the applicant and the class members have similar claims against the respondents.

Class members are bound by any judgment or settlement entered into in a class action unless they have opted out of the proceeding. This means that:



- (a) if the class action is successful, class members may be eligible for a share of any settlement monies or Court-awarded damages;
- (b) if the class action is unsuccessful, class members are bound by that result; and
- (c) regardless of the outcome of the class action, class members will not be able to pursue their claims against the respondents in separate legal proceedings unless they have opted out.

If you consider that you have claims against Airservices Australia in relation to your employment which are based on your individual circumstances or are otherwise additional to the claims described in the class action, then it is important that you seek independent legal advice about the potential binding effects of the class action before the deadline for opting out (see below).

3. What is Opt Out?

The applicant in a class action does not need to seek the consent of class members to commence a class action on their behalf or to identify a specific class member. However, class members can cease to be class members by opting out of the class action. An explanation of how class members are able to opt out is found below in the section headed “How can you opt out of the class action?”.

4. What is this class action? Are you a class member?

The class action is brought by Ms Duck on her own behalf and on behalf of all persons who are “class members” as defined in the proceedings. Ms Duck alleges:

- (a) Ms Duck and the class are/were covered by the Agreements;
- (b) Airservices recklessly or falsely misrepresented to Ms Duck and the class that the Agreements did not apply; and
- (c) if Ms Duck and the class are or were covered, the Court will determine:
 - (i) how salary is to be ascertained for the purpose of calculating benefits under the Agreement;



- (ii) whether they are owed benefits under the Agreements including any redundancy entitlements.

Airservices denies the allegations and is defending the class action.

You are a class member if you:

- (a) were/are employed by Airservices Australia on or after 17 August 2011;
- (b) held/hold a position that falls within an:
 - (1) ASA Classification, or
 - (2) Technology and Professional Classifications (**'TP Classification'**), under the Agreements;
- (c) were/are on an individual contract of employment which provide(d) less favourable terms and conditions in some respects than those in the Agreements.

You are **not** a class member if you:

- (a) were on an Australian Workplace Agreement ("**AWA**") and did not enter into another contract of employment thereafter; or
- (b) if you were an Air Traffic Controller, Simulator Support Officer, Flight Data Co-Ordinator or an Aviation Rescue Fire Fighters in an operational environment ("**Excluded Roles**") for the period after 17 August 2011.

If you were on an AWA but have since entered into another contract of employment, you are a class member. The Applicant considers another contract of employment can be:

- (a) a management contract;
- (b) another written contract of employment that is not an AWA; or
- (c) a change in the role or position even if you did not receive a written contract of employment.



If you held one or more of the Excluded Roles but have since moved into a position that falls within an ASA or a TP Classification in the period on or after 17 August 2011, you are a class member.

Adero Law (**Adero**) is the law firm conducting the class action on behalf of Ms Duck. If you are unsure whether or not you are a class member, you should contact Adero on **(02) 6189 1022** or at airservices.action@aderolaw.com.au or seek your own legal advice without delay. You do not need to contact Airservices Australia in relation to this notice.

Ms Duck alleges that she and the class are covered by the Agreements and that the individual contracts of employment were less favourable than the Agreements. As a result, Ms Duck on behalf of herself and the class claims that she and the class suffered loss and seeks compensation and penalties. Airservices denies these allegations, including that the class members were covered by the Agreements. Airservices says the class members are not covered either because they do not fall within the classifications or were excluded from coverage because they were employed on individual contracts of employment or AWAs. These are disputes which are matters to be determined by the Court.

There is a dispute between the parties as to whether any or all of the class members were employed by Airservices in positions within the ASA or TP Classifications. Ms Duck's position is that some persons employed on level 3 and level 4 manager contracts, save for the exclusions identified above, were employed in positions within the ASA and TP Classifications. Airservices' position is that none of the persons employed on level 3 and level 4 manager contracts were employed in positions within those classifications. This remains a matter to be determined by the Court.

There may also be a dispute between the parties as to what positions fall within the Excluded Roles. This remains a matter to be determined by the Court.

There is also a dispute about whether employees who were employed under an AWA, who subsequently entered into a contract of employment with Airservices, without the formal termination of the AWA by the Fair Work Commission, are covered by the Agreements



(even on the assumption that such employees were employed in positions within the ASA and TP Classifications, which Airservices denies). Airservices' position is that such employees are not covered by the Agreements. This remains a matter to be determined by the Court.

The mere fact that you are receiving this notice does not amount to a concession by Airservices that you are a class member or were employed within the ASA or TP Classifications.

If the class action is successful or settles, you will need to establish that you are a class member, including that you were employed in a position within the ASA and/or TP Classifications at the relevant times, in order to be eligible for a share of any settlement monies or Court-awarded damages.

5. Common Fund Order

The Court has made a common fund order in this proceeding (**Common Fund Order**). The effect of the Common Fund Order is that, subject to further order, the litigation funder who is funding the proceedings brought by the Applicant will be entitled to receive, out of any settlement or judgment delivered in the proceedings (assuming the Applicant is successful), reimbursement for the costs it has paid plus a commission as consideration for funding the proceedings. The amount of the commission will be determined by the Court after the proceedings are settled or judgment is delivered.

The terms of the Common Fund Order are **attached**.

6. Will you be liable for legal costs?

You will **not** become liable for any legal costs simply by remaining a class member for the determination of the common questions. However:

- (a) if the preparation or finalisation of your personal claim beyond the scope of the class action requires work to be done in relation to issues that are specific to you, you can engage Adero or other lawyers to do that work for you;



- (b) if any compensation becomes payable to you as a result of any order, judgment or settlement in the class action, you will be bound by the terms of the Common Fund Order; and
- (c) class actions are often settled out of court. If this occurs in the class action, you may be able to claim from the settlement amount without retaining a lawyer.

7. What will happen if you do nothing?

Unless you opt out, you will remain a class member and will be bound by the outcome of the class action and the Common Fund Order. If the class action is successful, you will be entitled to share in the benefit of any order, judgment or settlement in favour of Ms Duck and the group members in the class action. You may have to satisfy certain conditions before your entitlement arises. If the action is unsuccessful or are not as successful as you might have wished, you will not be able to sue on the same claims in any other proceedings.

If you wish to remain a class member there is nothing you need to do at the present time. However, if you wish you may contact Adero, on the number above and register as a group member so that future notices about the class action can be sent to your preferred address.

8. What will happen if you opt out?

If you do not wish to remain a class member, you must opt out of the class action. If you opt out you will not be bound by or entitled to share in the benefit of any order, judgment or settlement in the class action, but you will be at liberty to bring your own legal case against Airservices, provided that you issue Court proceedings within the time limit applicable to your claim.

If you wish to bring your own legal case against Airservices, you should seek your own legal advice about your claim and the applicable time limit **prior** to opting out.

If you wish to opt out of the class action and cease to be a class member, you **must** do so by completing an “**Opt out notice**” and returning it to the Registrar of the Federal Court of Australia at the address on the form.



IMPORTANT: the Notice must reach the Registrar by no later than 4.00 pm on 14 December 2018, otherwise it will not be effective.

Each class member seeking to opt out should fill out a separate form.

9. Where can you obtain copies of relevant documents?

Copies of relevant documents, including the opt out notice, application, statement of claim, and defence, may be obtained by:

- (a) downloading them from [link to Adero website to be inserted] ;
- (b) inspecting them between 9am and 5pm at one of the offices of Adero, contact details for which are available from www.aderolaw.com.au or by calling **(02) 6189 1022**;
- (c) inspecting them on the Federal Court website: [insert link];
- (d) visiting the Australian Capital Territory Registry of the Federal Court in Canberra:
Nigel Bowen Commonwealth Law Courts Building
Childers Street
Canberra City ACT 2601;
- (e) calling the Australian Capital Territory Registry on (02) 6267 0666.

This notice is published pursuant to orders of the Federal Court of Australia made on 19 October 2018.



ANNEXURE D

Form 21
Rule 9.34

Opt out notice – Airservices Australia Class Action

No. ACD97/2017

Federal Court of Australia
District Registry: ACT
Division: Fair Work

CATHERINE DUCK

Applicant

AIRSERVICES AUSTRALIA

Respondent

To: The Registrar
Federal Court of Australia
Nigel Bowen Commonwealth Law Courts Building
Childers Street
Canberra City ACT 2601

_____, a group member in this representative proceeding,
gives notice under section 33J of the *Federal Court of Australia Act 1976*, that he/she is
opting out of the representative proceeding.

Class member details

Print name

Date:

Telephone:

Signature

Email:



Address:

If you are signing as the solicitor or representative:

Name:

Date:

Capacity in which you are signing:

Telephone:

Email:

Address: