

## OUTCOME DETAILS

**Supreme Court - Civil  
at Supreme Court Sydney  
on 17 August 2017**

**2016/00086790-001 / Statement of Claim: Australian Retirement Group Pty Limited v  
The Commonwealth Bank of Australia Limited**

Consent short minutes of Order dated 17 August, made by Sackar J on 17 August in chambers. Order that:

1. The directions hearing on 18 August 2017 be vacated.
2. Orders 1, 2 and 3 of the orders dated 24 May 2017 be vacated.
3. The plaintiffs provide security for costs of the Defendant in this proceeding up to the commencement of trial by way of a deed of indemnity in the sum of \$3,300,000 in the form of Annexure A.
4. The stay in relation to this proceedings is lifted.
5. On or before 31 January 2018, the Defendant is to file its lay and expert evidence in this proceeding.
6. The matter be listed for a further case management conference on 9 February 2018.

Justice J Sackar

Signed

Date

Annexure A

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REFERENCE NUMBER 126179201704 DI1

THIS DEED OF INDEMNITY is made on the 2<sup>nd</sup> day of AUGUST 2017

**BETWEEN**

- (1) **AMTRUST EUROPE LIMITED** whose office is at No 2 Minster Court, Mincing Lane, London EC3R 7BB ("**AmTrust**");
  - (2) **COMMONWEALTH BANK OF AUSTRALIA (ABN 48 123 123 124)** of Ground Floor, Tower 1, 201 Sussex Street, Sydney NSW 2000 Australia ("**the Respondent**");
- individually a "**Party**" and together the "**Parties**".

**WHEREAS:**

1. The **Claimant** has issued legal proceedings against the **Respondent**.
2. The **Claimant** has been ordered to provide security for costs to the **Respondent** in the sum of three million and three hundred thousand Australian dollars (AUD\$3,300,000.00).
3. In order to meet this liability **AmTrust** has agreed to indemnify the **Respondent** in accordance with the terms of this **Deed**, up to a maximum of three million and three hundred thousand Australian dollars (AUD\$3,300,000.00) plus interest in accordance with clause 4.

**NOW THIS DEED WITNESSES** as follows:

**Definitions**

1. In this **Deed** the following definitions shall have the following meanings:

"**Business Day**" means a day on which banks generally are open in the City of London for the transaction of normal banking business (other than a Saturday).

"**Claim**" means the **Claimant's** legal claim against the **Respondent** in action number 2016/00086790 in the Supreme Court of New South Wales.

"**Claimant**" means (1) Peter Walsh and (2) Australian Retirement Group Pty Ltd (ACN 097 623 704).

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**“Deed”** means this deed.

**“Demand to Claimant”** means a demand made by the **Respondent** to the **Claimant** in writing and served on the solicitors for the **Claimant** for the payment of any sum or sums which the **Claimant** is legally liable to pay to the **Respondent** in respect of the **Respondent's** costs in the **Claim** pursuant to:

- (a) an order of the court including a summary assessment of costs, or
- (b) an order of the court following a detailed assessment or a final costs certificate issued by the court.

**“Indemnity Demand”** means a written demand from the **Respondent** to **AmTrust** which is expressed to be made under this **Deed** and which:

- (a) is for a sum being the balance of any sum due from the **Claimant** to the **Respondent** pursuant to a specified court order or final costs certificate, where that sum has been the subject of a **Demand to Claimant**,
- (b) is made, after the expiry of fourteen (14) days from the date of the **Demand to Claimant**, and
- (c) which is accompanied by:
  - i. a copy of the **Demand to Claimant**;
  - ii. written confirmation the **Demand to Claimant** or specified part of it remains outstanding after 14 days; and
  - iii. a certified copy of the relevant court order and / or final costs certificate.

**“Notice”** means a notice in writing, including an **Indemnity Demand** given pursuant to this **Deed**.

## **Indemnity**

- 2. Subject to clauses 3. and 4. below, **AmTrust** hereby unconditionally and irrevocably undertakes to pay to the **Respondent** any sum or sums which the **Claimant** is legally liable to pay in respect of the **Respondent's** costs in relation to the **Claim**, pursuant to an order of the court.

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3. It is a condition precedent to **AmTrust's** liability under this **Deed** that the **Respondent** must first have made a valid **Indemnity Demand**.
  4. **AmTrust's** total liability hereunder shall not exceed three million and three hundred thousand Australian dollars (AUD\$3,300,000.00) plus any sum which may be due (if any) solely in respect of simple interest at the rate set from time to time in accordance with Regulation 36.7 of the Uniform Civil Procedure Rules 2005 (NSW) from the date seven (7) **Business Days** following receipt by **AmTrust** of the **Indemnity Demand** until payment by **AmTrust**.
  5. The payment or payment(s) will be made by **AmTrust** within seven (7) **Business Days** of receipt by **AmTrust** of a valid **Indemnity Demand**.
  6. A sealed copy of the relevant court order or a certified copy of the relevant final costs certificate shall be conclusive evidence of the liability of the **Claimant** and binding upon **AmTrust** without further enquiry by **AmTrust**.
  7. **AmTrust** shall be deemed to be a principal debtor and not merely a surety and, accordingly, **AmTrust** shall not be discharged nor shall its liability be affected by any act or thing or means whatsoever (including, without limitation, any defences to payment asserted by, insolvency of, or unenforceability as against the **Claimant**).
  8. For the avoidance of doubt and without prejudice to the foregoing, **AmTrust's** liability under this **Deed** shall not be subject to avoidance on the grounds of fraud or misrepresentation by the **Claimant**, any purported cancellation of the policy of insurance between **AmTrust** and the **Claimant**, whether by **AmTrust** or the **Claimant**, nor shall it be affected by any lack of substance in the claim which has been brought by the **Claimant**.
  9. **AmTrust** undertakes that it will not seek security for its costs in respect of any application made by the **Respondent** in the United Kingdom to register any costs order made in the **Respondent's** favour in relation to the **Claim**.

#### **Notices**

10. **Notices** under this **Deed** shall be in writing and served at the addresses set out below (or to such address as is notified in writing by one **Party** to the others from time to time) by hand or by pre-paid recorded delivery post.

Addresses for service:

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**AmTrust**

Case Manager  
AmTrust Law  
AmTrust Europe Ltd  
No. 2, Minster Court  
Mincing Lane  
London EC3R 7BB

**The Respondent**

Commonwealth Bank of Australia  
c/o Herbert Smith Freehills  
161 Castlereagh Street  
Sydney NSW 2000  
Australia

Attention: Cameron Hanson

11. Notices shall be deemed served:
- (a) if delivered by hand, at the time of delivery to the **Party**; or
  - (b) if sent by pre-paid recorded delivery post, at the expiration of 5 days from despatch.
  - (c) A **Notice to AmTrust** should be copied to the following email address for notification only, but for the avoidance of doubt, an email copy will not constitute service of a **Notice**.  
  
[case.management@amtrustgroup.com](mailto:case.management@amtrustgroup.com),
  - (d) A **Notice to the Respondent** should be copied to the following email address for notification only, but for the avoidance of doubt, an email copy will not constitute service of a **Notice**.  
  
[cameron.hanson@hsf.com](mailto:cameron.hanson@hsf.com)

**General**

12. This **Deed** shall be in addition to and not in substitution for (and shall not be prejudiced by) any rights which the **Respondent** may have against the **Claimant** or any other