

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION

Not Restricted

S CI 2009 04788

CAROL ANN MATTHEWS

Plaintiff

v

AUSNET ELECTRICITY SERVICES PTY LTD  
(ACN 064 651 118) (FORMERLY SPI ELECTRICITY PTY LTD)  
& ORS

Defendants

S CI 2012 04538

KATHERINE ROWE

Plaintiff

v

AUSNET ELECTRICITY SERVICES PTY LTD  
(ACN 064 651 118) (FORMERLY SPI ELECTRICITY PTY LTD)  
& ORS

Defendants

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JUDGE: John Dixon J  
WHERE HELD: Melbourne  
DATE OF HEARING: On the papers  
DATE OF RULING: 9 June 2023  
CASE MAY BE CITED AS: Matthews v Ausnet Electricity Services Pty Ltd & Ors; Rowe v Ausnet Electricity Services Pty Ltd & Ors (Final Ruling)  
MEDIUM NEUTRAL CITATION: [2023] VSC 313

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PRACTICE AND PROCEDURE - Group proceedings - Supervision of Settlement Distribution Scheme - Report of special referee - Costs - Adoption of report - Final report of Scheme Administrator - Donation of residual funds to charity approved - *Supreme Court (General Civil Procedure) Rules 2015 (Vic) r 50.04.*

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HIS HONOUR:

- 1 On 23 December 2014, Osborn JA authorised the plaintiff, Ms Matthews, in S CI 2009 04788, for and on behalf of the group members and each of them, to enter into and give effect to a Deed of Settlement that compromised the proceeding. By that order, J Forrest J was nominated as the supervising judge with respect to the Deed and the Settlement Distribution Scheme (SDS) that it created. Mr Andrew Watson was appointed as the Scheme Administrator.
- 2 On 27 May 2015, Emerton J authorised the plaintiff, Dr Rowe, in S CI 2012 04538, for and on behalf of the group members and each of them, to enter into and give effect to a Deed of Settlement that compromised the proceeding. By that order, I was nominated as the supervising judge with respect to the Deed and the SDS that it created. Mr Andrew Watson was appointed as the Scheme Administrator.
- 3 When J Forrest J retired from the court, I became the supervising judge for both settlement administrations. Since that time, Mr Watson has reported to the court on the progress of the administrations of the SDSs at joint case management conferences and by affidavits.
- 4 Mr Watson filed affidavits sworn 31 May 2023 that detailed the finalisation of the administration of each SDS and explained the remaining issues requiring the attention of the court. I have carefully considered these affidavits.

### **Kilmore East Kinglake**

#### **Unpaid claims**

- 5 The scheme administrator noted the scheme did not grant to him any express power to cancel entitlements in the circumstances I will now discuss.
- 6 Mr Watson reported as follows:
  - (a) All I-D<sup>1</sup> claimants have received their compensation and presented their cheques.

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<sup>1</sup> Personal injury and dependency.

- (b) Of the claimants entitled to receive compensation in the ELPD<sup>2</sup> settlement distribution, only three claims remain unresolved, being:
- (i) Two claimants who shared a 'loss address' and have not returned statutory declarations confirming their instructions as to the allocation split of the assessed losses, despite multiple attempts to follow up with them; and
  - (ii) A claimant that is a deceased estate of an individual who died intestate. Reasonable efforts to track down and deal with potential beneficiaries were made but the distribution of the compensation has not been resolved.
- (c) The combined value of these three claims is \$2,795.23 and in both cases ample warning was given that failing to take steps to deal with the administrator could result in a loss of the entitlement to claim compensation.

7 Given the relatively small value of these claims and the efforts made by the administrator, which I consider reasonable, I direct these claims be deemed to be abandoned and the sum of \$2,795.23 treated as residual funds absorbed back into the general pool of monies in the settlement distribution fund.

8 A further five cheques totalling \$501.09 have not been presented after more than 12 months. Again, those claimants had received reasonable warnings that the cheques would be cancelled if they remained unpresented. I direct that each of those claims be deemed to be abandoned and the sum of \$501.09 treated as residual funds absorbed back into the general pool of monies in the settlement distribution fund.

9 Since 2018, the only substantive aspect of the scheme remaining to be resolved, which is now concluded, has been the dispute with the Australian Taxation Office. Substantially, the performance of the SDS has been as reported in the final report, filed with the court by Mr Watson's affidavit dated 23 November 2018. That report has been

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<sup>2</sup> Economic loss and property damage.

available to group members since December 2018 and the costs of its preparation were borne by Maurice Blackburn and have not been passed onto group members.

### **Contingency fund**

- 10 As authorised by a prior ruling of the court,<sup>3</sup> an amount of \$750,000 was set aside from the distribution sum as a contingency for any errors.
- 11 Two errors have been identified.
- (a) Due to a data error in the I-D pro rata calculation, one claimant was not paid \$521,395.11 in the distribution to I-D claimants. That oversight was rectified by a payment by Maurice Blackburn from its office account.
- (b) Another I-D claimant did not have their claim assessed prior to the I-D distribution. The claim was subsequently assessed at \$48,597.80 and paid from Maurice Blackburn's office account.
- 12 In these circumstances, it is appropriate that the sum of \$570,532.91 be recovered by Maurice Blackburn from the contingency fund and I will direct the scheme administrator to make that payment. The effect of these errors was that I-D claimants were overpaid at the rate of approximately 0.35%. Further, although the contingency was set aside from the ELPD distribution sum, I accept the scheme administrator's submission that it is fair and reasonable to apply a portion of that contingency towards rectifying these errors since the vast majority of I-D claimants are also ELPD claimants and vice versa. Once that overlap has taken into account, the split between I-D and ELPD claimants mandated by clause B1.1 of the SDS has not been materially altered.

### **Costs**

- 13 The overwhelming proportion of the costs incurred since March 2018 have been expended on the legal work necessitated by the scheme administrator's dispute with the Australian Taxation Office's assessment of his obligation to pay tax. Details of why those fees have been incurred have been set out in Mr Watson's affidavit and a

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<sup>3</sup> *Matthews v Ausnet Pty Ltd (Ruling no 45)* [2017] VSC 187, [35].

satisfactory report has been received from the special referee, Mr John White, in his last (fifth) report dated 27 April 2023.

14 I will order that Mr White's report of that date be adopted.

15 Mr Watson observed that while the scheme will continue to incur liabilities until it is finalised, the overwhelming proportion of future costs would be the costs expended on a second distribution, if that be required. Assuming that there be no further distribution to group members, Mr Watson sought approval for a payment not exceeding \$31,050.00 (including GST) for future settlement administration costs to finalisation to cover fees of \$6,050.00 for preparation and lodgement of outstanding tax returns and \$25,000 for overseeing finalisation of the settlement administration process. As I will now explain, I do not intend to authorise any further distribution to group members.

16 In addition to the payments for administration costs that Mr White has assessed as fair and reasonable, Mr White's fees of \$48,950.00 and the tax liability of \$47,000 are also approved payments.

### **Distribution fund balance**

17 The undistributed residue in the settlement account, after adding back the amounts referred to earlier, is calculated as follows:

Current Balance in Settlement Account	\$2,529,769.96
Less	
Unbilled fees and disbursements (1 Dec 2017 to 28 Feb 2023)	\$1,408,560.61
Payment to Maurice Blackburn reimbursing amount expended rectifying errors in calculation of I-D payments	\$570,532.91
Payment to PwC (tax matters)	\$6,050
Payment of tax liability	\$47,000
Payment to John White for Fifth Costs Report	\$48,950
Costs to conclude Administration	\$25,000
<b>Residual Sum</b>	<b>\$423,676.44</b>

## Dealing with the residual sum

- 18 The first question arising is whether there should be a second distribution to group members. Unless any further distribution is shared equally among group members, complicated assessments and calculations are needed and costs will increase. However, a simplified process that could deliver the maximum benefit to the group members is estimated to cost approximately \$202,529.80, leaving approximately \$221,146.64 for distribution. Each group member would receive approximately \$35.00.
- 19 It is not necessary that I set out the details of the proposed distribution process or the work that would be involved and how the estimated costs have been calculated. Group members were advised by correspondence dated 30 October 2020 that it was unlikely that a further distribution would be made. Given that a second distribution is likely to consume approximately 52% of the residual sum, I am not persuaded that it is appropriate to approve that form of distribution of the residue. Although the scheme does not confer any express power upon the scheme administrator to consider alternatives to making a second distribution, the scheme administrator is enabled under clause J1 of the scheme to seek directions from the supervising judge. That is what the scheme administrator is now doing. The court has power under s 33V(2) and/or s 33ZF of the *Supreme Court Act 1986* (Vic) to make such orders as it thinks fit with respect to the distribution of any money, including interest, paid under a settlement and it may, of its own motion or on application by a party, make any order the court thinks appropriate or necessary to ensure that justice is done in the proceeding.
- 20 The scheme administrator has invited the court to consider donating the residual sum to the Australian Red Cross and/or to the Immersive Bushfire Experience Foundation. This foundation is a registered charity that was established by the lead plaintiff, Mrs Carol Matthews. The foundation aims to enhance people's bushfire preparedness and ability to enact a bushfire plan when faced with the threat of a bushfire through an immersive and sensory experience.
- 21 Without wishing in any way to depreciate efforts and commitments of the

Australian Red Cross, the Royal Commission into the Black Saturday Bushfires commented on the importance of planning and preparation in order to survive a bushfire, especially through having and following a bushfire plan. Improving the opportunities for Australians to appropriately develop, and implement, a bushfire plan is an essential tool for reducing the risk of death, injury and property loss. Further, the incidence of bushfires is likely to increase in coming years in Victoria and I am persuaded that this foundation is a worthy charity to put the remaining residual fund to good use and is specifically focussed on providing a benefit for all persons facing potential bushfires.

- 22 I am satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding that I give a further direction as to how the Scheme Administrator should deal with the residue, and that the proper administration of justice is best achieved by returning the residue to the benefit of the community that is substantially comprised of the group members and their neighbours, friends and relatives. This course will avoid a substantial loss of funds in administration costs in order to make a relatively nominal payment while maximising the opportunity for real community benefit generally through the proposed local charity.
- 23 I will direct the scheme administrator to pay the residual sum remaining of the distribution sum, which will be approximately \$423,675, to the Immersive Bushfire Experience Foundation (ABN 76690959861).
- 24 Finally, the settlement distribution will be completed by the payments to be made in accordance with these reasons. The Scheme Administrator will be discharged on completion of these duties and I direct that the proceedings be dismissed with no order as to costs in accordance with paragraph 10 of the orders of the court dated 23 December 2014.

## **Murrindindi**

### **Unpaid claims**

- 25 The Scheme Administrator noted that all I-D claimants have received their

compensation and presented their cheques. Although there were some outstanding entitlements at the time of the Administrator's last report to the court, all of those claimants have now received their compensation and presented their cheques. The Scheme Administrator then followed with a final report on the administration dated 23 November 2018. That report has been made accessible to group members and was prepared without cost to them.

### **Contingency fund**

26 As with Kilmore East Kinglake, a contingency fund of \$750,000 was set aside but no reason has arisen to call on any of the contingency and I agree with the Scheme Administrator's recommendation that the contingency sum be absorbed back into the distribution sum.

### **Taxation issues**

27 Again, as with Kilmore East Kinglake there has been a dispute with the Australian Tax Office over its assessment that the Scheme Administrator is liable to pay tax. This dispute was ultimately resolved in favour of the Commissioner and the overwhelming proportion of costs incurred since the 2018 final report to the court have been expended on the legal work, and litigation, in respect of this assessment. Although tax returns up to and including the 2020 financial year have been lodged and the tax paid, tax returns for FY2021 and FY2022 remain outstanding. In respect of these outstanding returns, PwC have advised the Scheme Administrator that the tax liability will be approximately \$24,000 in total.

### **Costs**

28 The Scheme Administrator has set out, in extensive detail, the nature of the work performed and the disbursements incurred by the team and finalised itemised invoices have been placed before the court. These invoices have been reviewed by the special referee, Mr John White who has assessed the claims as fair and reasonable.

29 I will order that Mr White's final (fifth) report of 27 April 2023 be adopted and that his fees of \$40,150 be paid. I will approve payments of \$1,332,855.20 for settlement administration fees and disbursements incurred for the period 1 December 2017 to



28 February 2023.

30 The costs and disbursements that the Scheme Administrator estimates will be incurred to the point of finalisation of the scheme are:

- (a) \$6,050 for fees payable to PwC for the preparation and lodging of outstanding tax return; and
- (b) \$25,000 anticipated to be incurred by lawyers overseeing the remaining settlement administration processes until finalisation. This assessment assumes that there is no further distribution to group members.

31 I approve the Scheme Administrator making a payment of no more than \$31,050 in respect of these future settlement administration costs.

#### **Distribution fund balance**

32 The undisputed residue in the settlement account is calculated as follows:

Current Balance in Settlement Account	\$2,079,695.73
Less	
Unbilled fees and disbursements (1 Dec 2017 to 28 Feb 2023)	\$1,332,855.28
Payment to PwC (tax matters)	\$6,050
Payment of Tax liability	\$24,000
Payment to John White for Fifth Costs Report	\$40,150
Costs to conclude Administration	\$25,000
<b>Residual Sum</b>	<b>\$651,640.45</b>

#### **Dealing with the residual sum**

33 The same issues arise that I have discussed above in respect of Kilmore East Kinglake. The first question is whether there should be a second distribution to group members to proceed in the same manner as is discussed above. The Scheme Administrator estimates that costs of approximately \$127,825 (incl GST) will be incurred, resulting in a distribution of approximately \$523,815. Distributed equally amongst the group

members, the Scheme Administrator estimates that each group member will receive approximately \$250.

34 Although Mr Watson has provided details in his affidavit of how these costs would be incurred and the mechanism for the second distribution and associated matters, it is not necessary to set those details out in these reasons. Although a second distribution is likely to consume a lesser proportion, approximately 20%, of the residual sum, I am not persuaded that it is appropriate to approve that form of distribution of the residue. I note that group members were advised in correspondence of 30 October 2020 that it was unlikely a further distribution would be made.

35 As with the Kilmore East Kinglake settlement, the scheme does not confer any express power upon the Scheme Administrator to consider alternatives to making a second distribution, but may seek further directions from the court under clause J1 of the scheme and the court may exercise power as discussed above.

36 In respect of this scheme, the Scheme Administrator has invited the court to consider donating the residue sum to one or more appropriate charitable institution, nominating the Australian Red Cross and/or Foundation Murrindindi.

37 Foundation Murrindindi is a registered charity formed in 2012 by the local residents to help the community recover from the Black Saturday Bushfires. The foundation provides grants for various community initiatives. I am informed that Dr Rowe supports the proposal for a donation to Foundation Murrindindi.

38 Foundation Murrindindi has its origins in community advisory committees set up to assist in the allocation of funds by the Victorian Bushfire Appeal Fund. The foundation now provides benefits, not just for Marysville and surrounding communities, but for the wider Murrindindi Shire area by delivering services, making grants and undertaking community leadership and partnership activities.

39 I am persuaded that a donation of the residual sum to this foundation will provide a

significant benefit to a worthwhile charity that will put the remaining residual funds to good use with a specific focus on providing benefits to the area that was greatly affected by the Murrindindi fire.

40 I am satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding that I give a further direction as to how the Scheme Administrator should deal with the residue, and that the proper administration of justice is best achieved by returning the residue to the benefit of the community that is substantially comprised of the group members and their neighbours, friends and relatives. This course will avoid a substantial loss of funds in administration costs in order to make a relatively nominal payment while maximising the opportunity for real community benefit generally through the proposed local charity.

41 I will direct the Scheme Administrator to pay the residual sum remaining of the distribution sum, approximately \$651,640, to the Murrindindi Foundation (ABN 23160630526).

42 Finally, the settlement distribution will be completed by the payments to be made in accordance with these reasons. The Scheme Administrator will be discharged on completion of these duties and I direct that the proceedings be dismissed with no order as to costs in accordance with paragraph 11 of the Orders of the Court dated 27 May 2015.

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### CERTIFICATE

I certify that this and the 10 preceding pages are a true copy of the ruling of the Honourable Justice John Dixon of the Supreme Court of Victoria delivered on 9 June 2023.

DATED this 9th day of June 2023.

  
Associate