

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION

No. 4788 of 2009

BETWEEN:

CAROL ANN MATTHEWS

Plaintiff

and

SPI ELECTRICITY PTY LTD (ACN 064 651 118)
& ORS (according to the schedule of parties)

Defendants

(by original proceeding)

AND BETWEEN:

SPI ELECTRICITY PTY LTD (ACN 064 651 118)

Plaintiff by Counterclaim

And

(ACN 060 674 580)
& ORS (according to the schedule of parties)

Defendants by Counterclaim

(by counterclaim)

AFFIDAVIT OF ANDREW JOHN WATSON

Date of Document:	1 September 2017
Filed on behalf of:	The Plaintiff
Prepared by:	
Maurice Blackburn Lawyers	Solicitor's Code: 564
Level 10, 456 Lonsdale Street	Tel: (03) 9605 2700
Melbourne Vic 3000	DX: 466 Melbourne
	Ref: AW/3052491

I, Andrew John Watson, Solicitor, of Level 10, 456 Lonsdale Street, Melbourne in the State of Victoria, make oath and say as follows:

1. I am a Principal in the firm of Maurice Blackburn Pty Ltd (**Maurice Blackburn**), the solicitors for the Plaintiff in this proceeding and pursuant to the Orders of this Court dated 23 December 2014 I am the Scheme Administrator.

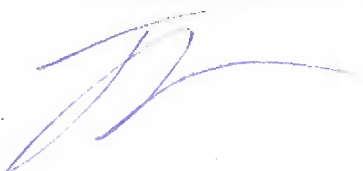
2. I make this affidavit from my own knowledge unless otherwise stated. Where statements are not made from my own knowledge, they are made to the best of my information and belief after due enquiry and I have set out the source of my information.

NATURE OF AND BACKGROUND TO THE TAXATION DISPUTE

3. This affidavit is made to update the Court on the ongoing taxation dispute between myself, as Scheme Administrator, and the Australian Taxation Office (ATO) regarding the taxation liability that arises in respect of interest earned on the Distribution Sum.
4. The dispute essentially relates to the fact that the Scheme Administrator and our taxation advisors disagree with the ATO's interpretation of the *Income Tax Assessment Act 1997* (Cth), as it applies to the interest earned on the Distribution Sum for both the Kilmore East – Kinglake Bushfire Class Action and the Murrindindi Bushfire Class Action.
5. I have provided the Court with information regarding the ongoing taxation dispute in previous affidavits and Case Management Conferences since the issues arose. Specific references to the circumstances leading to the dispute and progress on the matter are contained in the following affidavits:
- (a) Affidavit of Rory John Walsh dated 17 June 2015: paragraphs 77 – 78.
 - (b) Affidavit of Andrew John Watson dated 9 October 2015: paragraphs 147 – 151.
 - (c) Affidavit of Andrew John Watson dated 18 March 2016: paragraph 94.
 - (d) Affidavit of Andrew John Watson dated 17 June 2016: paragraphs 196 – 199.
 - (e) Affidavit of Andrew John Watson dated 7 September 2016: paragraph 109.
 - (f) Affidavit of Andrew John Watson dated 31 October 2016: paragraphs 125 – 132.
 - (g) Affidavit of Andrew John Watson dated 29 November 2016: paragraphs 28 – 39.
 - (h) Affidavit of Brooke Wendy Dellavedova dated 23 January 2017: paragraphs 203 – 207.
 - (i) Affidavit of Andrew John Watson dated 28 February 2017: paragraphs 85 – 87.
 - (j) Affidavit of Andrew J Watson dated 25 May 2017: paragraphs 20 – 21.



6. I set out an abbreviated chronology of the circumstances which gave rise to the dispute, as follows:
- (a) The terms of the Settlement Deed to the Kilmore East – Kinglake Bushfire Class Action required the Settlement Sum, an amount of \$434,666,667.00, to be invested in an interest bearing account. It also provided that the Administration Costs of the Settlement Distribution, being the costs associated with the supervision and administration of the Settlement Distribution Scheme including the assessment of claims and the distribution of compensation, were to be paid from the interest earned on the Distribution Sum before reducing the principal Settlement Sum payable to claimants.
 - (b) The Settlement Distribution Scheme specifies that all taxes arising in connection with the administration of the Scheme are to be paid from the Distribution Sum (SDS section A4.1(a)). This means that any tax payable on the interest earned by the Scheme is to be paid from the Distribution Sum.
 - (c) At all times in the drafting and implementation of the Scheme I have acted consistent with professional tax advice in relation to tax matters.
 - (d) Commencing in February 2015, I instructed our taxation advisors at that time, Pitcher Partners to engage with the ATO on issues relating to the taxation liability arising from interest earned on the Distribution Sum.
 - (e) On 25 May 2016 I decided to retain PricewaterhouseCoopers (**PwC**) to engage with the ATO regarding these issues.
 - (f) In the subsequent months, PwC continued to engage with the ATO on behalf of the Scheme regarding the taxation issues, but it became apparent in approximately November 2016 that the issues would not be resolved prior to the completion of the assessment of Personal Injury and Dependency (**I-D**) claims. Further, it proved to be the case that the issues were not resolved by the time that the Settlement Distribution Team had completed the assessment process for Economic Loss and Property Damage (**ELPD**) claims.
 - (g) The result of the above circumstances was that, by the time individual loss was assessed and compensation money was ready to be distributed, and despite our best efforts and our ongoing dialogue with the ATO, the taxation liability issues had not been resolved. This left me with the choice of either delaying the



distribution of compensation money to group members until the issues were resolved or, alternatively, distributing the settlement money but withholding an amount which represented the largest possible taxation liability plus associated costs, subject to the outcome of the resolution of the taxation dispute.


- (h) Despite the practical difficulties that will inevitably be encountered if the taxation dispute is resolved on favourable terms and a further distribution of settlement monies is required, I felt that it would not be appropriate to delay the receipt of compensation money by group members. This was especially the case considering that the time that the resolution of the taxation issues may take is not clearly ascertainable, even at this date.
- (i) The I-D compensation money was distributed from 14 December 2016, and the ELPD compensation money was distributed from 27 March 2017. An amount of \$16,274,567.00 was withheld from distribution, which represented the sum of the largest possible taxation liability and associated costs that may be payable by the Scheme Administrator in respect of interest earned on the Distribution Sum.

7. As the Scheme Administrator, I have a responsibility to seek the best possible outcome in respect of taxation liability and I will continue to rely on professional taxation advice in pursuit of such an outcome.
8. If the taxation dispute is resolved on terms that are more favourable than the largest possible taxation liability, the Settlement Distribution Team will undertake to distribute any remaining sum to group members as per their pro-rata entitlement to compensation.
9. It should be noted that since this issue arose, our taxation advisors have lodged various applications that have had the effect of extending the periods of time within which taxation returns must be filed, such that certainty can be achieved regarding this issue prior to the lodgment of the relevant taxation returns.
10. It should further be noted that the specific taxation liability that is in dispute belongs to me as Scheme Administrator and not to individual group members to the class action. Thus, the resolution to this dispute will not have any practical effect for the taxation liability of group members to the Kilmore East – Kinglake Bushfire Class Action, save for the possible taxation implications that may result from a further distribution of money by way of compensation.



PROGRESS IN RELATION TO THE TAXATION DISPUTE

11. Since the distribution of compensation money in respect of I-D and ELPD claims, our taxation advisors PwC have continued to liaise with the ATO as a matter of priority in an attempt to resolve the dispute. The advice that we have received and the specific steps being taken by the Scheme Administrator and our taxation advisors are subject to privilege and necessarily confidential.
12. Without waiving any privilege I can state:
- (a) It was PwC's initial view that the best method for quickly resolving the taxation issues was to proceed by way of an application for a declaration regarding the liability for taxation on the interest earned on the Distribution Sum based on agreed facts;
 - (b) Work was done on preparing an application for a declaration and an agreed facts document;
 - (c) PwC engaged with the ATO regarding this proposed approach. The ATO have recently advised they do not favour an application for declaratory relief as the mechanism for resolving the taxation dispute;
 - (d) PwC have had discussions regarding further possible mechanisms by which the taxation dispute may be resolved. At the stage of filing this affidavit those discussions are ongoing and other than to say that:
 - i) It now seems likely that resolution of the taxation dispute will involve some form of litigation; and
 - ii) I am hopeful they will result in an agreement regarding process for resolution of the dispute in the near future
- it is not appropriate at this stage to canvas the nature of those discussions further.
13. I refer to paragraphs 20 – 21 of the May Affidavit and to Confidential Exhibit AJW-2 to that affidavit. I and other members of the SDS Team continue to work closely with our taxation advisors PwC and counsel on the taxation issues relating to the settlement administration.



14. Now produced and shown to me marked "**Confidential Exhibit AJW-1**" is a summary of progress made since the May Affidavit. I make application for this exhibit to be confidential so as to ensure the maintenance of privilege.
15. If an outcome is reached on the taxation dispute which is favourable I will consider further distribution to group members in which each individual group member's entitlement to receive a share of that amount will be calculated with reference to the pro-rata entitlement to compensation that was established through the assessment of claims.
16. Even in the event of success in the taxation dispute, it may not be economically viable for all group members to receive compensation in a second settlement distribution because of the costs of processing such individual payments. We propose to consider that issue further in the event that the dispute resolves on favourable terms and a further distribution is necessary.
17. Unfortunately, the length of time that these issues may take to resolve is not readily ascertainable on the basis that resolution depends on certain outcomes that are outside of our immediate control. It is still possible the dispute may resolve by agreement between the parties as to the correct taxation treatment of interest earned on the Distribution Sum, though at present I regard it as more likely that matters will proceed to litigation. At this stage, the precise form of any litigation has not been resolved.
18. As the Court has previously been advised, we are working as quickly as possible to have the matter resolved and will continue to keep group members apprised of the status of the dispute. Now produced and shown to me marked "**Exhibit AJW-2**" is a copy of an update letter regarding the tax dispute that was circulated on 8 August 2017 to group members who received either I-D or ELPD compensation.

CONFIDENTIALITY OF STEPS TAKEN BY THE SCHEME ADMINISTRATOR

19. As has previously been noted, the specific nature of the discussions that we have had with the ATO to date has been subject to confidentiality. The advice that we have received from our taxation advisors is also confidential, and subject to privilege
20. It is important that confidentiality and privilege is maintained over certain aspects of the taxation dispute because our negotiations with the ATO are sensitive and thus the release of certain information has the potential to create prejudice to the interests of group members in achieving the best outcome possible.

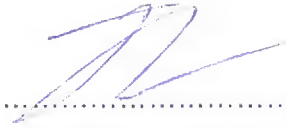


21. In order to ensure that the Court is appropriately updated regarding the status of the taxation dispute, this, and previous affidavits includes a confidential exhibit regarding the taxation dispute.

SWORN by the deponent at)
Melbourne in the State of Victoria)
this 1st day of September 2017)



Before me:


.....
JONATHAN DANIEL PECK
of 456 Lonsdale Street, Melbourne
an Australian Legal Practitioner
within the meaning of the
Legal Profession Uniform Law (Victoria)

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION

No. 4788 of 2009

BETWEEN:

CAROL ANN MATTHEWS

Plaintiff

and

AUSNET ELECTRICITY SERVICES PTY LTD
(ACN 064 651 118)
& ORS (according to the schedule of parties)

Defendants

(by original proceeding)

AND BETWEEN:

AUSNET ELECTRICITY SERVICES PTY LTD
(ACN 064 651 118)

Plaintiff by Counterclaim

And

ACN 060 674 580 PTY LTD
& ORS (according to the schedule of parties)

Defendants by Counterclaim

(by counterclaim)

CERTIFICATE IDENTIFYING EXHIBIT

Date of Document:	1 September 2017
Filed on behalf of:	The Plaintiff
Prepared by:	
Maurice Blackburn Lawyers	Solicitor's Code: 564
Level 10, 456 Lonsdale Street	Tel: (03) 9605 2700
Melbourne Vic 3000	DX: 466 Melbourne
	Ref: AW/3004166

This is the exhibit marked 'Exhibit AJW-2' produced and shown to Andrew John Watson at the time of swearing his affidavit on 1 September 2017 before me:

JONATHAN DANIEL PECK

of 456 Lonsdale Street, Melbourne
an Australian Legal Practitioner
within the meaning of the

Legal Profession Uniform Law (Victoria)

Exhibit 'AJW-2'

Update letter regarding the tax dispute dated 8 August 2017



Our Ref: AJW/3052491
 T: 1800 99 55 70
 F: (03) 9258 9610
 E: bushfireca@mauriceblackburn.com.au

Maurice Blackburn Pty Limited
 ABN 21 105 657 949
 Level 10
 456 Lonsdale Street
 Melbourne VIC 3000
 PO Box 523
 Melbourne VIC 3001
 DX 466 Melbourne
 T (03) 9605 2700
 F (03) 9258 9600

8 August 2017

«Contact_First_Name» «Contact_Last_Name»
 «Contact_Street_Address_1»
 «Contact_Street_Address_2»
 «Contact_Suburb» «Contact_State» «Contact_Post_Code»

[By email – «Contact_Email»]

Dear «Contact_First_Name»,

**Kilmore-East Kinglake Bushfire Class Action Settlement Administration
 Update on taxation dispute**

With the distribution of compensation substantially completed, the primary outstanding issue to be resolved is the taxation dispute we have with the Australian Tax Office ('ATO'). This dispute remains ongoing and we are working closely with our taxation advisors and the ATO to resolve this issue.

If a positive result is achieved, we will be able to distribute the withheld money to group members on a pro-rata basis. However, if we are unsuccessful and the taxation liability is upheld, we will have to pay the withheld money to the ATO.

We confirm that the dispute between the Scheme Administrator and the ATO relates to the taxation liability on the interest earned on the settlement sum and **not** the personal taxation liabilities of individual group members.

Timeframe and further information:

We cannot estimate the length of time that resolution of these issues may require because they depend on certain outcomes outside of our control. We will continue to keep group members who may be entitled to further compensation informed as this issue progresses to resolution.

We will be filing an affidavit to update the court on this matter by 1 September 2017 which will include an update on the situation. This affidavit will be available on the website of the Supreme Court of Victoria at the following link:

<http://www.supremecourt.vic.gov.au/home/law+and+practice/class+actions/kilmore+east+kinglake+bushfire+class+action+settlement/>

Contact details:

You should advise us of any changes to your contact details so that we can continue to update you about the resolution of the taxation dispute and ensure that we have accurate contact details in the event that there is a second settlement distribution.

Please contact the Bushfire Class Action Info-line on 1800 99 55 70 if you have any further questions about this issue.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Andrew Watson', with a long horizontal flourish extending to the right.

Andrew Watson
Scheme Administrator
MAURICE BLACKBURN LAWYERS