

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION

No. S CI 2010 05318

BETWEEN

**ERIN DOWNIE**

Plaintiff

and

**SPIRAL FOODS PTY LTD (ACN 006 292 780)**

First Defendant

and

**MUSO CO. LTD**

Second Defendant

and

**MARUSAN-AI CO. LTD**

Third Defendant

**AFFIDAVIT OF IRINA LUBOMIRSKA**

Date of Document:	20 June 2016
Filed on behalf of:	The Plaintiff
Prepared by:	
Maurice Blackburn, Lawyers	Solicitor's Code: 564
Level 10	Tel: 03 9605 2700
456 Lonsdale Street	Ref: IL/3052513
Melbourne 3000	DX: 466 Melbourne

I, Irina Lubomirska, of Level 10, 456 Lonsdale Street, Melbourne, in the State of Victoria, Solicitor, affirm  
and say as follows:

**PART A – FORMAL MATTERS AND OVERVIEW**

**1. Formal matters**

- 1.1 I am a special counsel of Maurice Blackburn Lawyers Pty Limited ('MB'), solicitors for the plaintiff and, pursuant to Orders of this Court dated 8 May 2015, the Settlement Scheme Administrator. Under the supervision of the principals of MB, I had the care and conduct of the settlement administration of this proceeding.



1.2 Save where otherwise indicated, I make this affidavit from my own knowledge. Where I make statements based on information provided to me by another person, I believe that information to be true.

1.3 I am not authorised to waive privilege and nothing in this affidavit should be construed as a waiver of privilege. To the extent that anything in this affidavit may be so construed, I withdraw and do not rely on that part of the affidavit.

## **2. Purpose of affidavit**

2.1 I make this affidavit for the purpose of:

- (a) Providing the Court with an update in relation to the progress and anticipated completion of settlement administration of this class action;
- (b) Providing the Court with updated information regarding anticipated recovery rates in this class action and reasons for variance from previous forecasts;
- (c) Seeking such orders as the Court deems appropriate for review and approval of Administration Costs; and
- (d) Seeking an interim approval of Administration Costs in the sum of \$424,963, being the approximate amount of interest that will be earned on the Settlement Sum in this financial year.

## **3. Confidentiality**

3.1 I request that paragraphs 51.1 to 51.21 inclusive, be redacted in the affidavit that is placed on the Court file and remain confidential, subject to any further orders of this Court.

3.2 These paragraphs refer to and discuss confidential portions of my affidavit, affirmed 19 February 2015.

## **4. Matters contained in the affidavit**

4.1 **Part B** provides an overview of outcomes of the administration process

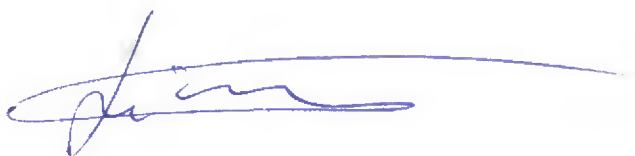


- 4.2 **Part C** provides information regarding the Settlement Distribution Fund
- 4.3 **Part D** provides details of the settlement administration team
- 4.4 **Part E** sets out the systems and structures set up for settlement administration
- 4.5 **Part F** reports on the implementation and outcomes of late registration process
- 4.6 **Part G** reports on procedures applied to Order 15 Registrants and outcomes
- 4.7 **Part H** sets out the processes for the obtaining of records and information and issues encountered
- 4.8 **Part I** describes the assessment process implemented in administering the settlement
- 4.9 **Part J** provides details of the review process, review applications and outcomes
- 4.10 **Part K** sets out the anticipated recovery rates and comparison with prior modelling
- 4.11 **Part L** provides details of Administration Costs to date and variance from prior estimates
- 4.12 **Part M** sets out the application for interim approval of Administration Costs in the sum of interest expected to accrue on the Settlement Sum in this financial year

## **PART B –OVERVIEW OF OUTCOMES OF SETTLEMENT ADMINISTRATION**

### **5. Claims made and assessed**

- 5.1 Following the Late Registrant process (Part F of this affidavit), the claim group numbered 569 Registrants. Of these, 9 were persons under disability (**‘Order 15 Registrants’**).
- 5.2 At the time of affirming this affidavit, 533 claims had been assessed. 36 claims had not completed the assessment process (although many of these have been assessed in part and we are awaiting some piece of information to complete the assessment).
- 5.3 Four claims were referred to counsel for assessment pursuant to discretion in clause 8.11(a) of the Settlement Scheme, of which 3 have completed assessment.
- 5.4 Two claims were referred to counsel as required by clause 11.5(c) of the Settlement Scheme because they concerned Order 15 Registrants. These assessments have been finalised.



**6. Reviews**

6.1 At the time of affirming this affidavit, there have been 21 applications for Independent Review. They are detailed in Part J of this affidavit:

- (a) 3 failed to post the bond and the application did not proceed.
- (b) 1 was withdrawn by the Registrant.
- (c) 1 is presently on hold to allow the Registrant to consult with a specialist and I anticipate the application will be withdrawn.
- (d) 9 applications have failed, 1 application succeeded. 6 applications are yet to be determined.

**7. Administration costs**

7.1 The total Administration Costs (including disbursements) to end of May 2016 are \$3,293,567.69 inclusive of GST (\$\$2,994,645.20 exc GST).

7.2 The total interest earned on the Settlement Sum to end of May 2016 is \$705,752.30. I anticipate that the interest earned for the month of June 2016 will be approximately \$26,889.

**8. Recovery rate**

8.1 On the basis of extrapolation from claims that have completed assessment (approximately 94%) I anticipate that recovery rate will be 100% or greater. The forecast is not expected to be significantly affected by outcome of claims presently under review or the claims remaining to be assessed.

**9. Overall view of the settlement administration process**

9.1 It is my opinion that the settlement administration process to date has worked very well. The Settlement Scheme approved by the Court provided an excellent framework for the efficient assessment of claims and for resolving issues that arose.



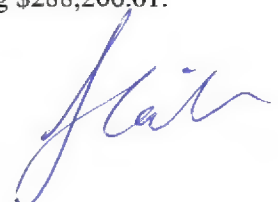
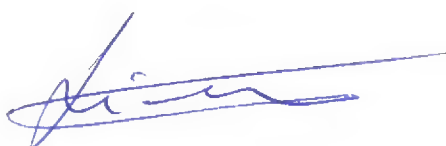
## **PART C – SETTLEMENT APPROVAL AND SETTLEMENT MONEY**

### **10. Settlement and approval**

- 10.1 The Settlement Deed in this proceeding was executed on 17 November 2014.
- 10.2 As part of settlement approval application, I filed an open affidavit and a confidential affidavit, affirmed 19 February 2015. I refer to the confidential affidavit in this affidavit (**‘February 2015 confidential affidavit’**).
- 10.3 On 1 May 2015, at the request of His Honour Justice J Forrest, MB provided to the Court a memorandum containing an estimate of past and future Administration Costs. Now produced and marked **IL-1** is a copy of that memorandum and the Excel workbook that was also sent to the Court (**‘the costs memorandum’**).
- 10.4 On 7 May 2015 His Honour Justice J Forrest handed down judgment and, on 8 May 2015, made Orders approving the Settlement Deed and Settlement Scheme (**‘the approval orders’**).

### **11. Settlement monies and accounts**

- 11.1 Pursuant to clause 2(a) of the Settlement Deed, on 11 November 2014 MB established the Settlement Reserve Fund as a controlled money bank account with Westpac, accruing interest.
- 11.2 The defendants have each paid their respective shares of the Settlement Sum into the Settlement Reserve Fund, in accordance with the Settlement Deed.
- 11.3 As required by the Settlement Deed, MB established the Settlement Distribution Fund as an interest bearing controlled money account with Westpac.
- 11.4 On 12 June 2015, in accordance with clause 8(b) of the Settlement Deed, MB transferred the content of the Settlement Reserve Fund into the Settlement Distribution Fund. The monies transferred totalled \$25,288,266.61 comprising:
- (a) The Settlement Sum of \$25 million; and
  - (b) Interest earned on the Settlement Sum up to 1 June 2015, totalling \$288,266.61.



**12. Interim Administration Costs application**

- 12.1 In June 2015 MB made an application for an interim approval of Administration Costs up to the end of financial year 2015. Approval was sought for \$332,610 of costs. This was the amount of interest accrued on the Settlement Sum during the financial year. The approval was sought to avoid the potential substantial tax liability on the interest earned.
- 12.2 I filed an affidavit dated 17 June 2015 in support of the application ('**June 2015 affidavit**'). I refer to that affidavit in this affidavit.
- 12.3 The interim costs application was approved by Her Honour AsJ Daly by orders of 19 June 2015.

**13. No other applications**

- 13.1 MB did not make any other applications for interim approval of settlement administration costs and the costs were carried by MB until completion of settlement administration.
- 13.2 The reason for not making any applications was to avoid diverting resources from the settlement administration task and to avoid depletion of the Settlement Sum by expending costs on interim applications.
- 13.3 In addition, under the retainer with the plaintiff, MB was entitled to charge interest at the rate of Cash Rate Target + 2% on the common issues costs in the period between February 2015, when the application for approval of costs was made, and 15 September 2015, when the costs were approved.
- 13.4 The interest amounted to approximately \$158,430.
- 13.5 No application for recovery of interest was made. I am informed by Mr Watson that MB does not intend to seek orders for recovery of interest.

**14. Withdrawals from Settlement Distribution Fund**

- 14.1 On 15 June 2015 MB paid to the plaintiff from the Settlement Distribution Fund the Plaintiff's Reimbursement Payment of \$13,470.46, as approved by paragraph 7 of the approval orders.



- 14.2 On 29 June 2015 interim costs of \$332,610 were paid from the Settlement Distribution Fund, pursuant to approval by Her Honour Daly AsJ.
- 14.3 On 9 October 2015 common issues costs of \$6,670,741.13 were paid from the Settlement Distribution Fund, pursuant to orders of His Honour J Forrest J, dated 25 September 2015.
- 14.4 Between February 2016 and present date, 6 applications for interim distribution were received. Each was approved by me pursuant to the provisions of the Settlement Scheme and the monies paid from the Settlement Distribution Fund.
- 14.5 There have been no other withdrawals from the Settlement Distribution Fund.

**15. Interest earned on the settlement distribution fund**

- 15.1 The period of the settlement distribution saw declining rates of interest. The interest rate was 2.5% at the time the Settlement Distribution Fund was established. I am informed by Ms Roisin Lyng, a solicitor working under my supervision, that the present rate of interest earned on the Settlement Distribution Fund is 1.75%.
- 15.2 I am informed by Ms Lyng that the total interest earned up to the end of May 2016 is \$705,752.30. and that the Settlement Distribution Fund presently contains a total of \$18,438,214.65

**PART D – SETTLEMENT ADMINISTRATION TEAM**

**16. MB Team members and rates**

- 16.1 In the costs memorandum exhibited at IL-1 MB set out the names and positions of the staff who it was proposed would conduct the settlement administration process and their charge out rates. The anticipated team was as follows:

Operator	Position	Hourly rate
Andrew Watson	Principal	\$790
Irina Lubomirska	Senior Associate	\$610
Roisin Lyng	Solicitor	\$520



Sally Finlay	Paralegal	\$320
Samantha Camilleri	Paralegal	\$320
Bianca Poynton	Legal Assistant	\$230, but will not be billed

- 16.2 Under the retainer with the plaintiff, MB was entitled to increase its rates from 1 July 2015, however in the costs memorandum MB indicated that settlement administration rates would be kept at the rates of 2014 and no increase rate adjustment would be applied.
- 16.3 There have been the following changes to the settlement administration team:
- (a) One of the paralegals, Ms Finlay, resigned in May 2015. She was not replaced as it was determined that the paralegal workload from that time onwards could be done by the remaining paralegal Ms Camilleri, with assistance of Ms Poynton.
  - (b) Ms Camilleri was admitted to practice on 21 July 2015 and was employed by MB as solicitor from 1 December 2015. She continued working full time on the settlement administration. MB decided that her hourly rate would remain at the paralegal rate (\$320) for the purposes of the settlement administration.
  - (c) I was promoted to Special Counsel on 1 July 2015. Special counsel rate in 2014 was \$720.00 and this rate was applied from 1 July 2015.
  - (d) In addition to persons listed above, the settlement administration required assistance from the MB Litigation Technology team. This is because most of the claimant documents are managed via electronic discovery software called "Summation". This assistance has been provided by Yaseen Iqbal. His rate is \$240 per hour.
- 16.4 Occasionally, members of the settlement administration team have had to seek assistance or advice from other practitioners of MB who have specialised knowledge or who have previously dealt with the issue facing the settlement administration team. Some of these practitioners billed their time to the file and those entries appear on the bills.

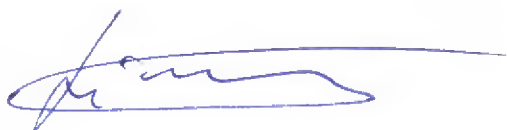



**17. Work allocation and roles**

- 17.1 Mr Watson's involvement in the settlement administration to date has primarily involved dealing with the various applications before the Court in 2015 and dealing with several difficult claimants, who sought to bypass the settlement administration process and contacted him directly.
- 17.2 The day to day settlement administration team comprises three legal staff – myself, Roisin Lyng and Samantha Camilleri, with administrative assistance from Ms Poynton.
- 17.3 The team has been deliberately kept small in order to maximise efficiency, reduce quality assurance requirements and therefore minimise costs. The downside of this approach is that the process takes a longer time to complete.
- 17.4 Only I and Ms Lyng carry out assessments of claims. Consistently with the assurance provided to the Court during the settlement approval process, any assessments conducted by Ms Lyng are supervised and reviewed by me. Further information is provided below.
- 17.5 Ms Camilleri is the primary point of contact for claimants and manages the claimants, unless the issue needs to be escalated to either Ms Lyng or myself. Ms Camilleri obtains instructions, additional documents or other information from claimants on direction from me or Ms Lyng, manages interactions with medical practices and assists with the various issues that arise in the course of settlement administration. Ms Camilleri does not undertake assessments of claims.
- 17.6 Ms Poynton provides administrative assistance and deals with routine enquiries from claimants and medical practices. Her time is recorded, but not billed.

**18. Counsel**

- 18.1 Shortly after the approval of the Settlement Scheme, MB appointed two members of the Victorian Bar as Independent Counsel under the Settlement Scheme.
- (a) Mr Andrew Keogh SC (as he then was), was appointed as the senior independent counsel
- (b) Ms Fiona Ryan was appointed as the junior independent counsel.



- 18.2 Following Andrew Keogh's appointment to this Court, Mr Michael Wilson QC was appointed as senior Independent Counsel.
- 18.3 Counsel bill on their hourly rates. There was no fixed fee arrangement negotiated with counsel.
- 18.4 Details about involvement of counsel are deposed to below.

## **PART E –SYSTEMS AND STRUCTURES FOR SETTLEMENT ADMINISTRATION**

### **19. Computer systems for claims assessment and tracking**

- 19.1 In order to maximise the efficiency of the assessment process, the administration team, in conjunction with the MB IT department, designed and implemented an integrated system for tracking and management of claims and the recording of assessments made and the reasons for those assessments.
- 19.2 System enables claims to be tracked through all stages of the assessment and review process and reports to be generated.
- 19.3 The assessed amounts of damages and the reasons for determination in relation to each head of damage are entered into the system by the assessing solicitor. The system will perform arithmetic calculations once appropriate parameters are entered by the operator and generate the total of damages awarded.
- 19.4 The assessment amounts and the reasons entered onto the system can be merged into the precedent Notice of Assessment. Now produced and marked **IL-2** is the precedent Notice of Assessment into which the content is merged.
- 19.5 MB set up an online survey in order to obtain information regarding private health insurance and Centrelink benefits and the data from the survey was also integrated into the system.
- 19.6 The system integrates with the database used for tracking materials sent and received, statements taken and communications entered into with the registrants or third parties (eg. doctors' practices).



- 19.7 Reports can be generated on determinations made, damages awarded to the claimants, statutory payback obligations and similar information.
- 19.8 The work in setting up the system was primarily undertaken by Ms Lyng, working with MB IT department.
- 19.9 The system has worked very well and there were only a few minor changes that needed to be implemented after the system was brought online. Ms Lyng quickly resolved these with the IT department.

## **20. Document management**

- 20.1 Documents required for claim assessment such as medical records, taxation and financial records and others are uploaded to an electronic discovery system called "Summation".
- 20.2 The software is easy to use with minimal training and MB owns licences to the software, so there is no cost to use the software other than Litigation Technology assistance in processing and uploading documents.
- 20.3 Other documents, such as correspondence with Registrants and electronic file notes are stored on MB's internal document management system, Filesite.
- 20.4 Registrant files are also maintained in hardcopy, however I believe that the electronic system significantly enhances the efficiency and flexibility of the assessment process.

## **21. Precedents**

- 21.1 Precedents were prepared for various stages of the settlement administration process. As well as the Notice of Assessment precedent referred to above, these include, but are not limited to:
- (a) Letters and statutory declarations for the late registration process;
  - (b) Determination letters for late registration process;
  - (c) Appointment of personal representatives of Order 15 Registrants and advice about the process;
  - (d) Covering letters for the Notice of Assessment;



- (e) Request for Review forms;
- (f) Correspondence and notices required in the Review process;
- (g) Authorities for provision of documents;
- (h) Information and document requests to Registrants or to various entities;
- (i) Correspondence and reminders to Registrants who failed to complete particular steps or return authorities; and
- (j) Communications with Private Health Insurers;
- (k) Precedent causation assessments (described below).

21.2 Some precedents varied between Order 15 Registrants and other Registrants.

21.3 The work of creating precedents was undertaken primarily by me and Ms Lyng, although recently Ms Camilleri assisted with some correspondence and precedent drafting.

## **22. Information Booklet**


22.1 MB prepared a 27 page Information Booklet for Registrants, setting out the applicable law, evidentiary principles, details of the settlement administration process, obligations of registrants and potential third party repayment obligations.

22.2 The Information Booklet was drafted by me and Ms Lyng and settled by Andrew Keogh SC.

22.3 The preparation of the booklet was inspired by the PI information booklet prepared in the Kilmore action, but differs significantly in form and substance. The presentation and printing quality are also less sophisticated as professional layout and publication services were not utilised due to high cost.

22.4 The Information Booklet was circulated to all Registrants (and Late Registrants admitted as Registrants) from mid-June 2015 and an electronic copy published on MB website.

22.5 Now produced and marked **IL-3** is a copy of the Information Booklet.



**23. Standardising assessments of general damages**

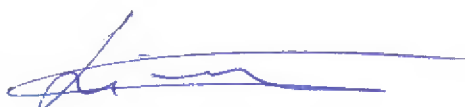
- 23.1 As deposed to above, MB appointed senior and junior Independent Counsel under the Settlement Scheme.
- 23.2 In order to ensure that the solicitors conducting assessments and the Independent Counsel had similar settings regarding the thresholds and the appropriate quantum ranges of general damages, we briefed counsel with a sample of 19 claims and sought their assessment of the damages ranges that they considered appropriate.
- 23.3 Counsel provided written advice and I had some further discussions with Fiona Ryan about aspects of the advice.
- 23.4 The advice was then used as guidance in assessments of damages for pain and suffering.

**24. Expert report in respect of causation of thyroid cancer**

- 24.1 As deposed in paragraph 5.29 of my February 2015 confidential affidavit, the expert reports did not deal with the question of causation of thyroid cancer, although my discussions with the experts and own research indicated that the causal link cannot be established.
- 24.2 I raised this issue with Independent Counsel and, although they were content to proceed on the basis of conclusions deposed to, they advised that it may be of utility to obtain a brief written report from one of the experts.
- 24.3 I requested an expert report from Professor Eastman and he provided a report on the issue. The opinion contained in the report is entirely consistent with the conclusions expressed in paragraph 5.29 of the February 2015 confidential affidavit.

**25. Online survey concerning private health insurance and Centrelink**

- 25.1 MB set up an online survey in order to obtain information regarding private health insurance and Centrelink benefits.
- 25.2 408 Registrants completed the survey.



25.3 160 Registrants were not required to complete the survey because their claims had been determined by the time that the survey was circulated and the assessment was such that no question of private health insurance or Centrelink repayments could arise.

25.4 1 Registrant did not complete the survey as she died. The claim was continued by the estate and was able to be resolved without the survey information.

**26. Bulk payment agreement with Medicare**

26.1 In early 2015 (prior to approval of settlement) MB commenced discussions with Medicare with a view to negotiating a bulk payment arrangement.

26.2 As part of the negotiations MB:

- (a) Provided information to Medicare representatives concerning the types of conditions and injuries involved;
  - (b) Engaged in several telephone conferences with Medicare representatives;
  - (c) provided Medicare with a random sample of 50 claims where there was known to be a compensable injury, complete with information regarding date of injury; and
  - (d) Conducted an internal analysis of approximate benefits paid by Medicare for the sample of 50 (on basis of counting relevant appointments, tests, and the like in the medical records).
- This was done to be able to determine whether any bulk payment proposal from Medicare was reasonable.

26.3 The negotiations with Medicare were carried out by me. The internal analysis of Medicare benefits was carried out in accordance with my instructions by paralegals under supervision of Ms Lyng.

26.4 Medicare representatives proposed a bulk repayment figure of \$210 per claim exceeding \$5,000.

26.5 I formed the view that it was in the interests of the claim group to accept the proposal and communicated that recommendation to Mr Watson.

26.6 The proposal was approved and MB executed the relevant deed on 3 August 2015. Now produced and marked IL-4 is a copy of the deed.



26.7 I believe the bulk payment agreement resulted in very significant savings of time and cost in the settlement administration process.

**27. Centrelink**

27.1 In early 2015 MB entered into discussions with the Department of Human Services with a view to reaching an agreement concerning social security implications of assessments under the Settlement Scheme.

27.2 Agreement was reached to the effect that the Department will accept an assessment of damages which excludes damages for economic loss, as reflected in the Notice of Assessment or Notice of Review, as proof that there is no economic loss. The compensation recovery and preclusion provisions in Part 3.14 of the Social Security Act would not apply to these assessments.

27.3 Upon completion of the assessment process MB will provide to the Department the details of claims where Registrants have been awarded damages for economic loss, as permitted by clause 6.3 of the Settlement Scheme, and the Department will advise the relevant payback obligations and preclusion periods.

27.4 The negotiations were primarily undertaken by me.

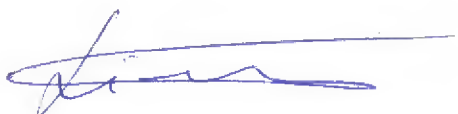
**28. Private health insurers**

28.1 In late 2014 MB was contacted by a large private health insurer (Medibank), requesting a list of all Registrants in the class action, for the purposes of them determining any payback obligation. This was refused.

28.2 After further discussion and correspondence MB agreed to provide to Medibank a list of Registrants who indicated on the electronic survey that they:

- (a) were insured with Medibank; and
- (b) Billed Medibank for medical expenses arising out of Bonsoy-related injury.

28.3 Statements of benefits were obtained for those Registrants.




- 28.4 A similar process was adopted in relation to Registrants who indicated that they billed other health insurers.
- 28.5 MB also attempted to establish a centralised process, where we would deal with one person within Medibank in relation to matters concerning this class action.
- 28.6 I am unconvinced that anything was achieved by these arrangements. We continued receiving queries about repayment obligations of claimants in the class action from multiple persons within Medibank, as well as regular requests for updates from the central person within Medibank.
- 28.7 No attempt was made to establish a centralised process with other insurers as I formed the view that the time required to do so would likely exceed any efficiency gains.
- 28.8 It remains to be seen whether any efficiencies will be attained in finalisation of payback obligations to Medibank compared with other insurers.

**29. Arrangements to facilitate efficient distribution of settlement monies**

- 29.1 Ms Lyng is presently working with the MB IT and accounts departments in order to set up a system whereby:
- (a) Eligible group members will provide banking details via an online survey system; and
  - (b) Payments to eligible group members will be made via electronic transfer.
- 29.2 I am informed by Ms Lyng and believe that the arrangements should be finalised shortly.
- 29.3 The system should enable a more efficient distribution of settlement monies.

**30. Interim distribution**

- 30.1 The Settlement Scheme allows interim distribution to be made when 30% or more claims have completed the assessment process.
- 30.2 There is no formal process established for interim distribution. Registrants who communicate an interest in receiving interim distribution are asked to send in the request in writing. Registrants are not required to submit a statutory declaration or a formal application.
- 30.3 To date, six requests have been made and each has been approved by me.



## **PART F – LATE REGISTRANTS**

### **31. Post-settlement enquiries and late registration**

- 31.1 Following announcement of the settlement agreement, MB received a large number of telephone calls and emails from members of the public wishing to register for the class action.
- 31.2 The precise number of queries cannot be ascertained, but in my June 2015 affidavit I deposed that approximately 132 persons requested and were sent registration materials after the Court-ordered class closure date.
- 31.3 Of those, 84 returned registration forms and became Late Registrants in the class action.

### **32. Late Registrant process and numbers**

- 32.1 On or about 7 May 2015 all 84 Late Registrants were sent a Notice to Late Registrants, setting out the process to be followed if they wished to be included in the class action and attaching a statutory declaration to be completed. Now produced and marked **IL-5** is a copy of those documents. The documents were drafted by Ms Lyng and myself.
- 32.2 I am informed by Ms Camilleri and believe that 78 Late Registrants returned the statutory declaration by the stipulated time, or within an extended time, if I granted an extension.
- 32.3 The Statutory Declarations were reviewed at first instance by paralegals. I gave instructions that:
- (a) persons who failed to register on time because they were not aware of the class action could be admitted into the class action, unless they fell into the next category;
  - (b) I would review the statutory declarations of persons who had prior contact with MB regarding the class action or whose family members had prior contact;
  - (c) I would review the statutory declarations of persons who failed to register for reasons other than not knowing about the class action.
- 32.4 The vast majority of Late Registration applications fell into category (a) above and could be dealt with by paralegals following this instruction.



- 32.5 Statutory Declarations of persons in categories (b) and (c) were examined by me and further enquiries had to be made in respect of most of these Late Registrants. Following these enquiries, I made the determination concerning inclusion of these Late Registrants, as required by clauses 7.4 and 7.5 of the Settlement Scheme.
- 32.6 A total of 72 Late Registrants were admitted as Registrants.
- 32.7 Six Late Registrants were not admitted. These Late Registrants were aware of the action and the class closure orders and did not have a good reason for failure to register.
- 32.8 All Late Registrants subject to the adverse determination were provided with reasons and notified of their rights to have the issue determined by the Court pursuant to clauses 7.6 and 7.7 of the Settlement Scheme.
- 32.9 No Late Registrant took the opportunity to have the issue determined by the Court.

#### **PART G – ORDER 15 REGISTRANTS**

##### **33. Compliance with procedures concerning persons under disability**

- 33.1 Clause 11 of the Settlement Scheme requires certain steps to be taken in relation to Order 15 Registrants. Pursuant to the requirements of the Settlement Scheme MB:
- (a) Identified the Order 15 Registrants. There were nine such registrants (including a Late Registrant who was admitted as Registrant).
  - (b) Appointed personal representatives for the Order 15 Registrants in accordance with clause 11.2 of the Settlement Scheme;
  - (c) Sent to the personal representatives the information required by clause 11.4(c) of the Settlement Scheme, as well as information regarding modifications of the operation of Settlement Scheme in respect Order 15 Registrants;
  - (d) Filed with the Senior Master's Office the notice required by clause 11.4 of the Settlement Scheme.



(e) Prepared the application to the Senior Master's Office, in accordance with clause 11.6 of the Settlement Scheme. The application is supported by affidavit, which provides details of each claim and exhibits relevant materials. I anticipate that the application will be lodged later today.

33.2 I believe that all procedures set out by the Settlement Scheme in relation to Order 15 Registrants have been complied with.

**34. Outcomes of claims of Order 15 Registrants**

34.1 Pursuant to the Settlement Scheme, Maurice Blackburn, as the Administrator, makes the initial determination regarding whether an Order 15 Registrant is a Group Member, as defined in the Amended Statement of Claim.

34.2 If the Order 15 Registrant is determined to be a Group Member, the assessment of damages must be referred to Independent Counsel.

34.3 If the Order 15 Registrant is determined to not be a Group Member, they may seek review by Independent Counsel. There is no costs liability to the Order 15 Registrant or their personal representative in respect of this process. All costs are borne by the Settlement Scheme.

34.4 All group membership determinations were made by me.

34.5 Two Order 15 Registrants were determined to be group members. Their claims were referred for assessment to Fiona Ryan of counsel. Ms Ryan assessed the claims in accordance with the Settlement Scheme. No reviews were sought in respect of these assessments.

34.6 Seven Order 15 Registrants were determined not to be group members. Of those, two sought Independent Review. Both applications were referred to Ms Ryan for Independent Review. Both reviews failed.

34.7 In the affidavit, which I anticipate filing shortly with the Senior Master's Office, I deposed to the details of each claim. In summary, the reasons for failing to establish group membership were:

(a) The claimant did not suffer a compensable illness (4 claimants);

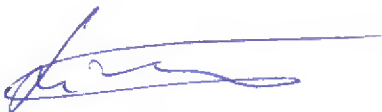


- (b) The claimant was conceived after the Bonsoy recall and was never exposed to excess iodine from Bonsoy (2 claimants);
- (c) The claimant's personal representative failed to sign and return authorities to enable MB to obtain medical records, despite repeated requests to do so, and there was no evidence of a compensable injury (1 claimant).

## **PART H – OBTAINING NECESSARY RECORDS AND INFORMATION**

### **35. Records**

- 35.1 At the time that the Settlement Deed was agreed the claim group comprised 496 Registrants.
- 35.2 From my searches of MB client management database at the time of settlement approval, I believe that MB had at least some medical records for 282 Registrants and taxation records for approximately 138 Registrants.
- 35.3 MB identified and sent documents to the Registrants for whom we did not have medical records, asking them to identify the relevant treating practitioners. MB also sent authorities to enable MB to obtain medical and financial records. MB then requested medical records and ATO records (where economic loss was claimed) for those Registrants who returned signed authorities. This process commenced prior to the approval of the settlement.
- 35.4 Seventy two Late Registrants were admitted as Registrants in the action. MB did not have medical or financial records for these claimants. The process set out in the preceding paragraph was applied to obtain materials for these Registrants.
- 35.5 This process was primarily undertaken by paralegals and administrative assistant under direction of Ms Lyng.
- 35.6 Updated records needed to be obtained for some Registrants for whom MB had previously obtained records and whose conditions were (or were claimed to be) ongoing. Further medical records needed to be requested for some Registrants whose medical records were inadequate to conduct the



assessment. I cannot readily ascertain the number of Registrants for whom updated or further records were required.

35.7 The decision whether to request updated records was made by me or Ms Lyng and the process undertaken by paralegals and administrative assistant.

35.8 Notices of Benefits were obtained from private health insurers for 120 Registrants who indicated that they claimed on their private health insurance in respect of their illness. The process was managed by Ms Lyng and Ms Camilleri.

35.9 Other records needed to be obtained on a case by case basis, including employment records, business profit and loss statements or Centrelink records. The decision as to when this was appropriate was made by me or Ms Lyng.

**36. Registrant interviews and instructions**

36.1 Prior to settlement of the action interviews had been conducted with approximately 110 Registrants.

36.2 Not all Registrants were formally interviewed in the course of the settlement administration process. Whether a Registrant was interviewed by one of the assessing solicitors as part of the settlement administration process depended on the nature of the claim, the amount of information that could be distilled from available records and the instructions already provided.

36.3 For example, if a Registrant had a transient injury, there were adequate medical materials and the damages could be reliably assessed on instructions provided and the claim materials, I considered it inappropriate to expend legal costs on formally interviewing the claimant.

36.4 Interviews were generally conducted with persons who had a significant injury or where there was considerable complexity attending a part of the claim. Interviews took place over the telephone.

36.5 Where finite elements of the claim required clarification, I usually instructed Ms Camilleri to ask specific questions and report the responses to me. I believe that Ms Lyng usually did likewise.

36.6 In some instances, I requested that Registrants provide written responses to specific questions (usually where there were difficulties communicating over the telephone, a history of non-responsiveness or of changing instructions).

36.7 I cannot readily ascertain how many Registrants were formally interviewed and how many provided instructions in via telephone or in writing.

**37. Issues encountered in obtaining records**

37.1 Issues were primarily encountered with obtaining medical records and reports. These issues delayed assessments and increased the workload for paralegals and solicitors and consequently the costs.

37.2 I cannot quantify the workload associated with this part of the process without extensive and time-consuming analysis of billing data, however my subjective impression was that this was the most problematic aspect of the settlement administration process.

*Medical records*

37.3 Obtaining medical records in particular was a lengthy and work-intensive process. Although much of the work involved was able to be done by paralegals and/or administrative assistant, solicitor intervention was often necessary to resolve issues.

37.4 The various issues encountered included:

- (a) Registrants requiring extensive explanations or assistance with completion of authorities (notwithstanding that detailed instructions were provided in correspondence);
- (b) Registrants incorrectly completing authorities, requiring the process to be repeated;
- (c) Registrants being unable to recall or providing inaccurate instructions regarding the doctors consulted in relation to the relevant condition. This resulted in:
  - (i) The need for multiple interactions with these Registrants to attempt to get instructions;
  - (ii) Calls to multiple medical centres to ascertain whether they had any relevant records;



- (iii) Incorrect records being obtained (eg. from doctors who were not consulted during the relevant time) and the process needing to be repeated to attempt to obtain correct records;
  - (iv) The need to obtain medical records from other sources, such as multiple pathologies, in order to identify the correct doctors (these records would reveal the doctor ordering the test).
- (d) Medical records relating to injuries suffered early in the period having been archived, lost or destroyed, particularly where clinics have closed down or doctors retired or died;
- (e) Inadequate medical record keeping by practitioners (eg not keeping specialist correspondence on file), necessitating requests for records to multiple practitioners;
- (f) Uncooperative conduct by medical practices, such as:
- (i) Refusing to provide medical records or ignoring the request for records (in breach of laws requiring production);
  - (ii) Significant delays in provision of medical records (despite numerous reminders and repeat requests);
  - (iii) Losing (or claiming to have lost) the requests for medical materials, sometimes repeatedly;
  - (iv) Providing a letter setting out the practitioner's diagnosis or stating that the medical records do not mention Bonsoy and failing to provide the records themselves;
  - (v) Providing selective records, for example editing out the parts that refer to conditions other than the thyroid illness or cherry-picking the parts the doctor considers relevant;
  - (vi) Providing incomplete records, for example, omitting correspondence with relevant specialists, omitting test results and similar; and
  - (vii) Refusing to provide correspondence from third parties (eg. specialists treating the thyroid illness), citing privacy concerns.



37.5 Although in most instances these problems could be overcome, this often involved significant time and consequently cost.

37.6 The majority of the work could be performed by paralegals and administrative assistant, however some of the above issues could only be identified after examination by the solicitor carrying out assessments (eg. where the practitioner “cherry-picked” the records or the records did not relate to a compensable condition).

*Treating doctor and medicolegal reports*

37.7 The vast majority of claims could be resolved on medical records. Treating doctor (including treating specialist) reports were only requested where medical records were inadequate or where there was an issue in respect of causation or permanency of secondary conditions (eg. cardiac conditions allegedly caused by the thyroid condition).

37.8 Treating doctor (GP or specialist) reports were requested for 8 Registrants and a medicolegal report was requested for one Registrant.

37.9 4 treating doctors provided reports as requested, although the quality of reports varied significantly. One report was requested reasonably recently and may yet be provided.

37.10 The other doctors:

- (a) declined to provide reports;
- (b) failed to respond despite multiple reminders; and
- (c) on one occasion, refused to provide the report despite several requests and then provided a report 11 months after the initial request and 3.5 months after the Notice of Assessment was issued, but backdated the report as though it was issued before the Notice of Assessment.

37.11 Where reports could not be obtained, we proceeded with the assessments on basis of existing information, reports obtained and knowledge accumulated in the course of the proceeding and review of reputable medical literature. For example, this approach was adopted in the situation described in (c) of the preceding paragraph. The report ultimately produced contained the same conclusion as the Notice of Assessment.



*Reports commissioned by Registrants*

37.12 A small number of Registrants provided reports or letters of support from their doctors of their own initiative. Unfortunately, this usually did little to assist the assessment process. Examples of issues included:

- (a) Reports from practitioners who had no relevant expertise;
- (b) Reports from practitioners who treated the Registrant some years after the compensable illness occurred;
- (c) Practitioners not being asked to comply with the Expert Code of Conduct, some failing to make appropriate enquiries or consider medical materials and providing information inconsistent with their own records.

*Fees for accessing medical records*

37.13 A related issue was that occasionally medical practices charged excessive costs for access to medical records, sometimes in contravention of laws establishing fees (for example, charging in excess of \$500 to produce less than 30 pages of records).

37.14 Disputing the fees with intervention of solicitors or even a paralegal would incur legal costs and significantly diminish the benefit to the settlement fund from a reduction of excessive fees.

37.15 I instructed Ms Poynton (whose work was not billed) to contact such practices and to attempt to get them to agree to a fee reduction. However, if she was unsuccessful, the excessive fee would generally be paid in order to avoid incurring legal costs.

**38. Issues encountered in obtaining instructions**

38.1 Most Registrants have been responsive to requests for further information and cooperated with the settlement administration process.

38.2 The most common issues encountered in obtaining instructions included delays in responding to communications or requests for information, failure of recollection and provision of incorrect,



inaccurate or conflicting instructions (I believe usually as a result of failure of recollection rather than any ill intent).

38.3 These issues were not unexpected or unusual, particularly in the circumstances where significant time elapsed since the injury occurred. The usual consequences were the need for multiple interactions with claimants to resolve ambiguities, obtaining of further materials and the need for more detailed explanation of the analysis of the evidence in the drafting of the assessments.

38.4 Where there was repeated failure to supply necessary information, I usually caused to be sent a formal request pursuant to clause 5.1 of the Settlement Scheme, requiring compliance by specified time. If a Registrant failed to comply, the claim was assessed on existing evidence.

#### **39. Non-compliant Registrants**

39.1 Thirteen Registrants failed to return signed authorities despite multiple written and telephone requests and reminders. They were issued zero assessments.

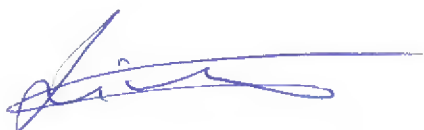
39.2 I am not aware of any requests for review or complaints communicated to MB regarding these assessments and I consider it is likely that these Registrants intended to abandon their claims.

### **PART I – THE ASSESSMENT PROCESS**

#### **40. General process**

40.1 Most assessments were done internally. Four assessments, described below, were referred to counsel. Counsel's advice was sought informally in respect of a number of issues arising in assessments.

40.2 Two solicitors determined the claims and drafted reasons – Ms Lyng and myself. Consistently with the assurance provided to the Court at settlement approval, subject to the qualification in paragraphs 42.5 and 42.10 below, every assessment by Ms Lyng was reviewed and approved by me. The review and approval was a substantive, not a superficial process. Further, Ms Lyng would



always approach me if there were any concerns or doubts about an assessment and I provided instructions or assistance as necessary.

- 40.3 I also asked Ms Lyng to read through my assessments prior to them being finalised. This was a quality assurance measure and also helped to ensure consistency across assessments in matters such as quantum of general damages.
- 40.4 We attempted to distribute the work in such a way that the more complex and larger assessments were done by me and the smaller claims were done by Ms Lyng, however this was not always successful or appropriate.
- 40.5 Some of the claims requiring most complex analysis and reasoning were not, ultimately, large claims. On the other hand, some larger claims were very straight forward and easy to assess.
- 40.6 Ms Lyng and I therefore adopted an informal process of allocation. We would transfer claims between ourselves where this was appropriate and I assisted with or took over the assessment of more complex claims where this was appropriate.
- 40.7 Notices of Assessment are sent to Registrants once the assessment is finalised and approved, usually in batches. Notices of Assessment were initially sent by mail only, however I subsequently changed the process to send the Notices by both email and mail.

#### **41. Registrants who withdrew their claims**

- 41.1 In the course of the assessment process, three claims were withdrawn. Two Registrants notified us that they wished to withdraw their claims. One Registrant died and their executor notified us that they did not wish to pursue the claim.
- 41.2 All three were sent letters confirming their instructions and giving them time to change their mind. After this time elapsed, Notices of Assessment with a zero assessment were issued to the Registrants.



**42. Assessment of causation**

- 42.1 Causation was assessed on the same basis as set out in my February 2015 confidential affidavit, relying on medical materials of the Registrant, the principles set out in the expert reports and the knowledge accumulated over the course of the proceeding and the assessment process.
- 42.2 Registrant instructions concerning consumption of Bonsoy were usually taken as establishing consumption, except where contrary evidence existed. Further investigation was undertaken in those circumstances.
- 42.3 As part of the processes undertaken to estimate group damages and deposed to in my February 2015 confidential affidavit, we identified approximately 43 registrants who, on basis of their medical materials, could not establish causation.
- 42.4 The reasons that causation could not be established could be divided into discrete categories, such as they suffered an illness that was not caused by excess iodine (eg. thyroid cancer). With Ms Lyng's assistance, I drafted precedent reasons for use in assessments falling into the particular causation categories.
- 42.5 This enabled assessments falling into particular categories to be drafted more efficiently. This initial lot of assessments was drafted by Ms Lyng. Because the assessments were created on basis of precedents and on basis of causation determinations that were previously made by me, I did not review each assessment produced as a result of this process. I reviewed the assessments where there was a greater degree of complexity, requiring modifications of the precedent.
- 42.6 The precedent reasons continued to be utilised, where appropriate, in the course of the assessment when we encountered claims falling into the same categories. I reviewed and settled any of these assessments that were drafted by Ms Lyng.

*Registration forms not disclosing a compensable injury*

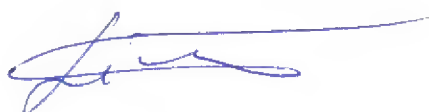
- 42.7 As part of analysis of data from registration forms or the assessment process MB identified 19 additional Registrants whose registration forms did not disclose a compensable injury.



- 42.8 MB sent requests for further information to these Registrants in order to ascertain whether they suffered a compensable condition. A second letter was also sent, again explaining the need for a compensable condition and that, in absence of a response, we would assess the claim as formulated, namely that the Registrant did not suffer a compensable injury. Now produced and marked **IL-6** is a copy of both letters.
- 42.9 Four Registrants responded that they believed they suffered from a compensable condition. Their medical records were obtained and their claims assessed on the basis of the medical records. In all four cases it was found that the Registrants did not in fact suffer a compensable condition.
- 42.10 The other 15 Registrants either did not respond to the correspondence or stated that they did not suffer a compensable condition. These Registrants received zero assessments. These assessments were also based on precedent wording and I did not review every assessment done by Ms Lyng.
- 42.11 In so far as I am aware, none of these Registrants sought a review or contacted MB to complain about the assessment. I considered it likely that these Registrants made claims on basis of a misunderstanding about the conditions that could be caused by Bonsoy consumption and then intentionally abandoned their claims.

### **43. Issues arising in assessment of causation**

- 43.1 Assessment of the cause of the thyroid illness was usually unproblematic once adequate medical records were obtained. In a very small number of more complex cases I sought informal advice from Professor Eastman, who confirmed the conclusions I had reached.
- 43.2 Assessment of which consequences or secondary conditions were caused by the thyroid dysfunction could in almost all instances be resolved by evidence from medical records, principles set out in the expert reports and knowledge accumulated over the course of this action.
- 43.3 Treating specialist reports were sought in a small number of instances and a medico legal expert report was obtained in one instance. The difficulties in obtaining reports from treating doctors have



been deposed to above and in some instances we had to do the best we could on information available.

### *Misdiagnosis*

- 43.4 In the course of the assessments we found that approximately 30 Registrants (at the last count) believed that they had suffered or were suffering an ongoing thyroid condition, but, on the basis of evidence available to us, appeared to have been misdiagnosed and/or incorrectly treated.
- 43.5 In all or almost all instances this occurred when the Registrant consulted an “integrative”, “anti-ageing” or “alternative medicine” practitioner. The usual course was that the practitioner diagnosed hypothyroidism and prescribed thyroid hormones, notwithstanding that tests showed normal thyroid function.
- 43.6 In some instances the dose of the medication was increased until the patient developed factitious hyperthyroidism (due to improper hormone supplementation) and was experiencing symptoms of hyperthyroidism.
- 43.7 Some of these Registrants have been on thyroid hormone supplementation for more than a decade.
- 43.8 In such circumstances, our determination that there was no thyroid dysfunction caused by Bonsoy could be particularly upsetting to the Registrant. In these cases we attempted to set out the history emerging from medical records and the reasoning in more detail than may otherwise be necessary. I have also adopted a practice of suggesting that the Registrant consult a specialist (endocrinologist) and offering to provide any records or information in our possession that the specialist may require.
- 43.9 There is presently one request for review that has been lodged but is on hold and another foreshadowed request where I granted an extension to time in order to allow the Registrants to obtain advice from an endocrinologist.
- 43.10 Although this is causing delays, I considered it necessary to grant extensions of time in order to ensure fairness in these circumstances.



43.11 I sought advice from Professor Eastman and believe that in the cases of misdiagnosis/mistreatment, as described above, thyroid function will almost always normalise if the patient is carefully weaned off the thyroid hormone. It is unlikely that any of these Registrants will have a viable claim for medical negligence against the practitioners.

43.12 There is little we could do to assist these Registrants, beyond suggesting that they seek specialist advice.

#### **44. Damages assessment**

44.1 Damages were assessed in the categories set out in the Settlement Scheme and in accordance with the legal principles, although some principles were not applied stringently or a more permissive approach was adopted than would apply in a contested assessment. For example:

- (a) the minimum requirements for gratuitous services damages (6 hours/6 months) were generally not applied;
- (b) assessment of percentage “of a most extreme case” under the former *Trade Practices Act* was usually more generous than authorities suggest would be applied;
- (c) Persons with permanent conditions who experienced symptoms of more than a brief duration were generally regarded as satisfying the threshold under the Wrongs Act, notwithstanding that they did not experience symptoms while on treatment (for example, a Registrant with injury akin to that described in AMA guidelines 12.2 Class I Example would be assessed as having exceeded 5% impairment, rather than at 5%).

44.2 A greater level of forensic enquiry was applied in the assessments than was able to be undertaken for the purposes of modelling damages prior to settlement approval. However, clause 8.7 of the Settlement Scheme was utilised to estimate damages where obtaining and analysing comprehensive evidence would be too impractical or costly (most usually in estimating medical expenses).

44.3 Further, where small damages were claimed but obtaining comprehensive evidence would be costly or impractical, the damages were generally awarded without full forensic analysis. For example, if



a Registrant claimed that they required a week off work, but was not able to quantify how much was taken as sick leave and how much as unpaid leave, we would usually award loss of earnings for the full week.

**45. Determination of private health insurance obligation**

45.1 In the electronic survey deposed to above, 121 Registrants indicated that they claimed on their private health insurance in respect of Bonsoy injury. One Registrant later withdrew her claim. Notices of Benefits were obtained in respect of the remaining 120 Registrants.

45.2 We did not send the Notices of Benefits to the Registrants and require them to tick the items related to the thyroid illness. The experience in this action suggested that this task was very likely to be completed incorrectly by most Registrants. This is because most Registrants are not able to assess whether the need for particular treatment is caused by Bonsoy or another illness.

45.3 The Notices of Benefits were examined by the solicitor assessing the claim. Where necessary, instructions were sought from the Registrants regarding items in the Notice of Benefits (such as the identity of practitioners and treatment listed).

45.4 The assessing solicitor determined what, if any, items in the Notice of Benefits were related to the illness caused by Bonsoy and quantified the estimated payback obligation.

45.5 Of claims assessed to date, I believe there are only 15 Registrants where, on proper analysis, there is an obligation to repay the insurer. I am aware of one more claim where the assessment is not yet complete where there will be an obligation to repay the insurer.

**46. Claims referred to counsel**

46.1 Apart from assessments of Order 15 Registrants, which had to be referred to counsel, there were 4 claims where I considered it was preferable for the assessment to be conducted by counsel. These claims included:

- (a) A potentially large claim, which was affected by section 28F of the Wrongs Act, as it then stood. This claim was discussed in paragraphs 12.4 to 12.6 of my February 2015 confidential



affidavit. As anticipated in that affidavit, the claim was referred to senior counsel for assessment of economic loss. Other components of the claim were determined by me.

The assessment of economic loss was conducted by Mr Andrew Keogh SC, as he then was.

The Registrant sought review of this component of the assessment. Mr Michael Wilson QC was appointed as Independent Counsel for the review. He agreed with the initial assessment and dismissed the review.

- (b) A claim by a young woman who suffered very severe consequences due to the thyroid illness and there were substantial complexities with the claim. I determined causation of thyroid illness in favour of the Registrant and referred the remainder of the assessment to Fiona Ryan of counsel.

Ms Ryan assessed the claim as requested. No review was sought.

- (c) A potentially large claim, which was also affected by the application of section 28F of the Wrongs Act, as it then stood, as well as other legal and factual complexities. I determined causation in favour of the Registrant and referred the remainder of the assessment to Fiona Ryan of counsel.

Ms Ryan assessed the claim as requested. No review was sought.

- (d) A claim involving an injury that was allegedly caused by a cardiac condition that was secondary to thyroid condition caused by Bonsoy. Treating specialist and medicolegal expert reports were obtained, however the claim was unusually complex, and involved multiple legal and factual issues. I determined causation of the thyroid condition in favour of the Registrant and referred the remainder of the assessment to Fiona Ryan of counsel.

This assessment has not yet been completed.

46.2 I sought counsels' advice in relation to discrete issues in a number of other claims, without a formal referral.

46.3 There were a number of reasons why only a limited number of claims were referred for external assessment:



- (a) The vast majority of claims were well within our competence to assess;
- (b) There was significant in-house knowledge concerning factual and medical issues attending the claims, which made it more efficient to conduct the assessments internally;
- (c) The work involved in assembling briefs, ensuring completeness of information and distilling known information in order to brief counsel was significant;
- (d) Once the work required to brief counsel was undertaken, we were in the position to assess the claim in-house, avoiding the double-up of work;
- (e) Independent Counsel appointed had significant limitations on availability, due to engagement in the Kilmore and Murrindindi assessments. They were appointed on basis of excellent, proven, track record and I did not believe it would enhance the quality of the assessment process to appoint counsel on basis of availability, where the quality of their work was otherwise unknown.

46.4 In my opinion the internal assessment process, with capacity to obtain advice and/or to refer assessments to counsel has worked extremely well. I believe that the settlement administration process would not be as advanced as it is, had the Court adopted an external assessment process (wholly conducted by counsel), particularly in the circumstances where much of the personal injuries bar is engaged in the bushfires assessments.

## **PART J – INDEPENDENT REVIEW PROCESS**

### **47. Overview**

47.1 Review numbers have been low.

47.2 At the time of affirming this affidavit, there have been 21 applications for Independent Review. This is approximately 4% of assessed claims.

47.3 One further application has been foreshadowed but has not been lodged because extension of time was granted to the Registrant in order to enable her to see an endocrinologist for advice. I granted




the extension because I believe the Registrant was misdiagnosed and put on thyroid medication when her thyroid function was normal.

47.4 Most applications concerned determinations of causation or related to small claims. All but two applications have been referred to Fiona Ryan of counsel, as set out below.

47.5 Each application for review was considered by me to determine whether grounds for review should be accepted pursuant to clause 9.3 of the Settlement Scheme and the review was then referred to counsel.

#### **48. Review outcomes**

48.1 Of the lodged applications, 3 Registrants failed to post the bond in accordance with paragraph 9.3 of the Settlement Scheme and the application did not proceed.

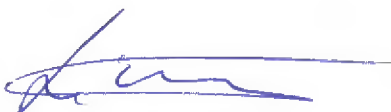
(a) Two of those applications related to causation determinations. I do not have information regarding the Registrants' financial status, but I believe the applications had negligible prospects of success.

(b) One application related to assessment of economic loss. The Registrant was not impecunious. I believe the application had low or negligible prospects of success.

48.2 One application was withdrawn by the Registrant. I believe it was lodged on the basis of a misunderstanding/misreading of some aspects of the Notice of Assessment and the Registrant withdrew the application after I clarified those matters for her.

48.3 One application is presently on hold. The Registrant posted a bond, however I encouraged the Registrant to consult with an endocrinologist before proceeding with the review. I did this because I believe that the Registrant was misdiagnosed and put on thyroid medication when her thyroid function was normal and I wanted to ensure that the Registrant was acting on correct advice and was receiving competent treatment. I anticipate the review will be withdrawn once the Registrant is advised by a specialist. If this occurs, the bond will be refunded in full.

48.4 Of the remaining 16 applications:



- (a) Nine applications failed. Eight were from assessments by MB and were determined by Ms Ryan. One was from assessment of Andrew Keogh SC and was determined by Mr Wilson QC.


In at least three of these applications, where we considered the application had no prospects of success, we encouraged the Registrant to consult with a medical practitioner before proceeding with the review and/or to consider the matters set out in the Information Booklet.

- (b) One application succeeded. Review was from an assessment by MB and was determined by Ms Ryan. Damages awarded for domestic care were increased by approximately \$600, which was more than 10% of the assessment value.
- (c) 6 applications are yet to be determined. Of those, three were referred to Ms Ryan, two are about to be referred to Ms Ryan.

One application was referred to Mr Wilson QC, with Ms Ryan appointed as his junior (at Mr Wilson's request). The application concerns a large claim affected by significant causation issues. Extensive submissions in support of the application were drafted by a member of the Bar and for this reason I considered it was appropriate for the application to be referred to senior counsel.

#### **49. Costs of unsuccessful reviews**

- 49.1 Two of eight failed reviews concerned causation/group membership determination for Order 15 Registrants, with no bond required or costs liability.
- 49.2 Three reviews concerned causation/group membership determination and one review concerned assessment of damages, where MB's assessment was reduced to nil on review. For these reviews I determined to not pursue costs over and above the bond amount from these Registrants, in order to not expend costs on enforcement and to avoid distress to the Registrants.



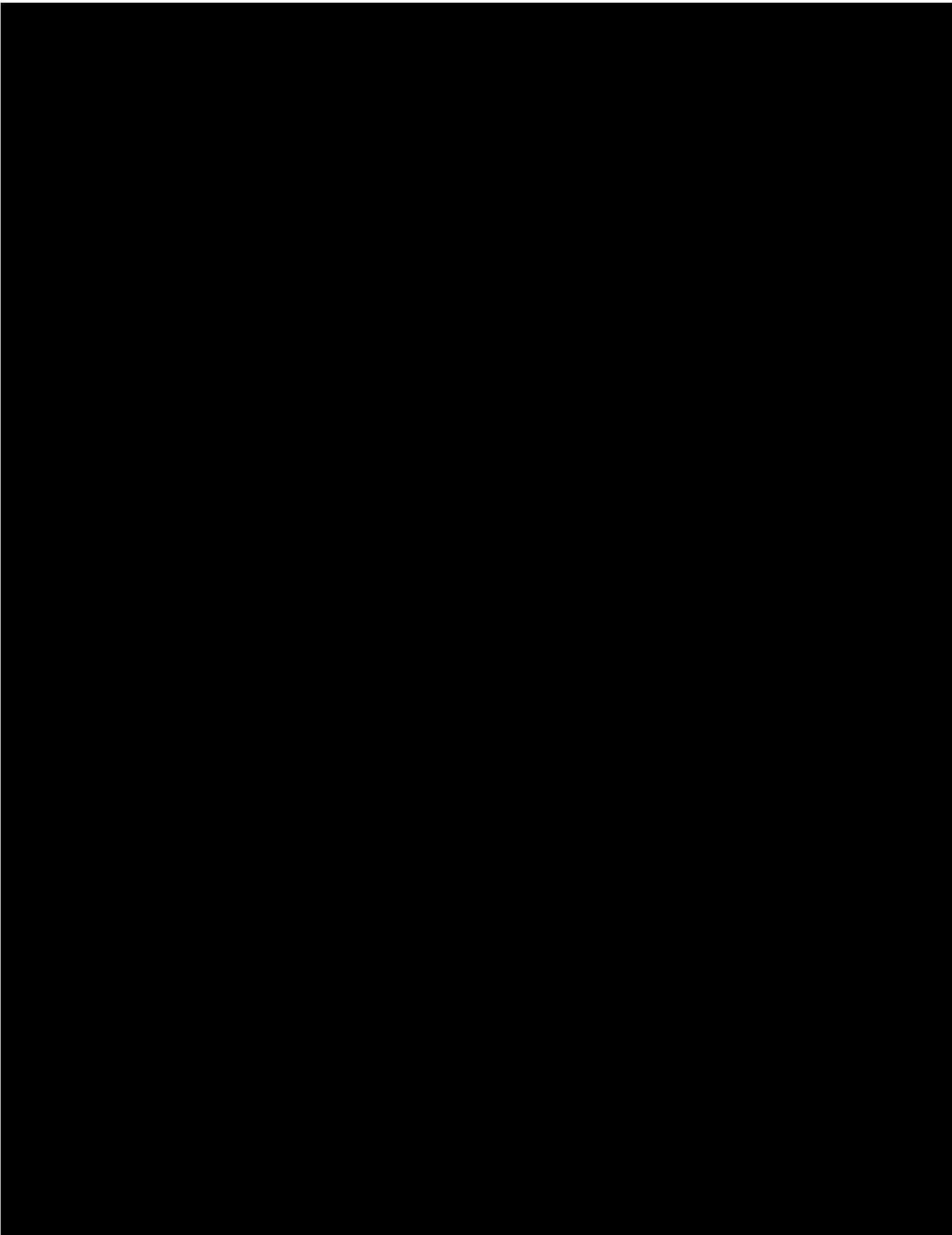
- 49.3 One review concerned assessment of damages, where MB assessment was reduced on review and one review was a review from the determination of senior counsel. The costs of the review over the bond amount (capped at \$3,000) will be deducted from the assessment values on distribution.
- 49.4 One review concerned assessment of damages, where MB assessment was upheld on review. The Notice of Review was received on 17 June 2016 and I have not yet had the opportunity to consider the appropriate course of action in respect of costs expended over the bond amount.

## PART I – ANTICIPATED RECOVERY RATES

### 50. Pre-approval vs present forecast of recovery rates

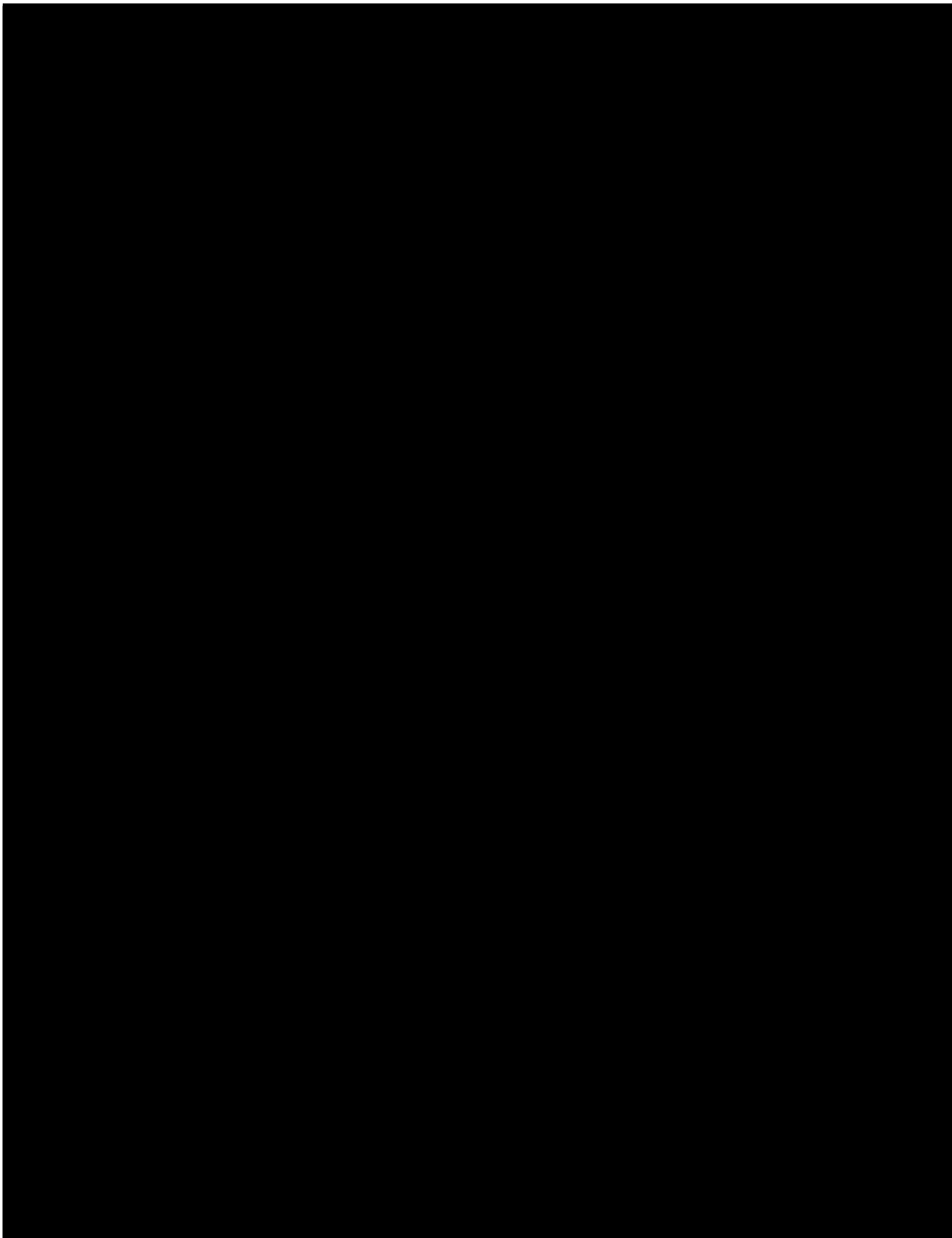
- 50.1 In my February 2015 confidential affidavit I deposed to the modelling the group loss that was undertaken prior to approval (**‘pre-approval modelling’**). Pre-approval modelling and the estimate of administration costs provided to the Court in the costs memorandum led to the estimate that group members would recover approximately 60 to 70% of their assessed loss.
- 50.2 Approximately 94% of claims have now been assessed. On the basis of extrapolation from claims assessed at the present time (**‘current modelling’**) and the costs, as recorded up to the end of May 2016, I estimate that the final recovery rate for eligible group members will be in the vicinity of 110%.





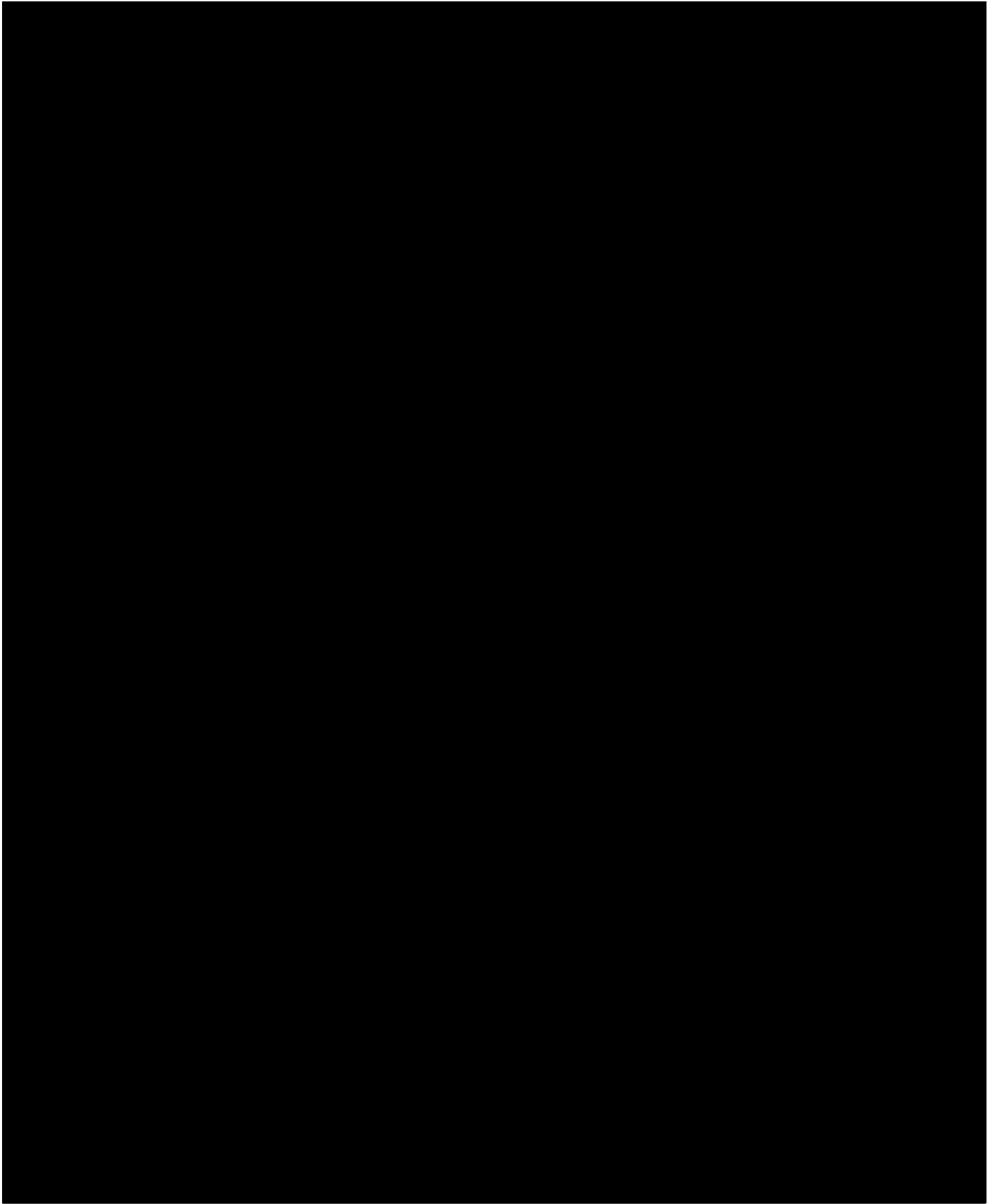
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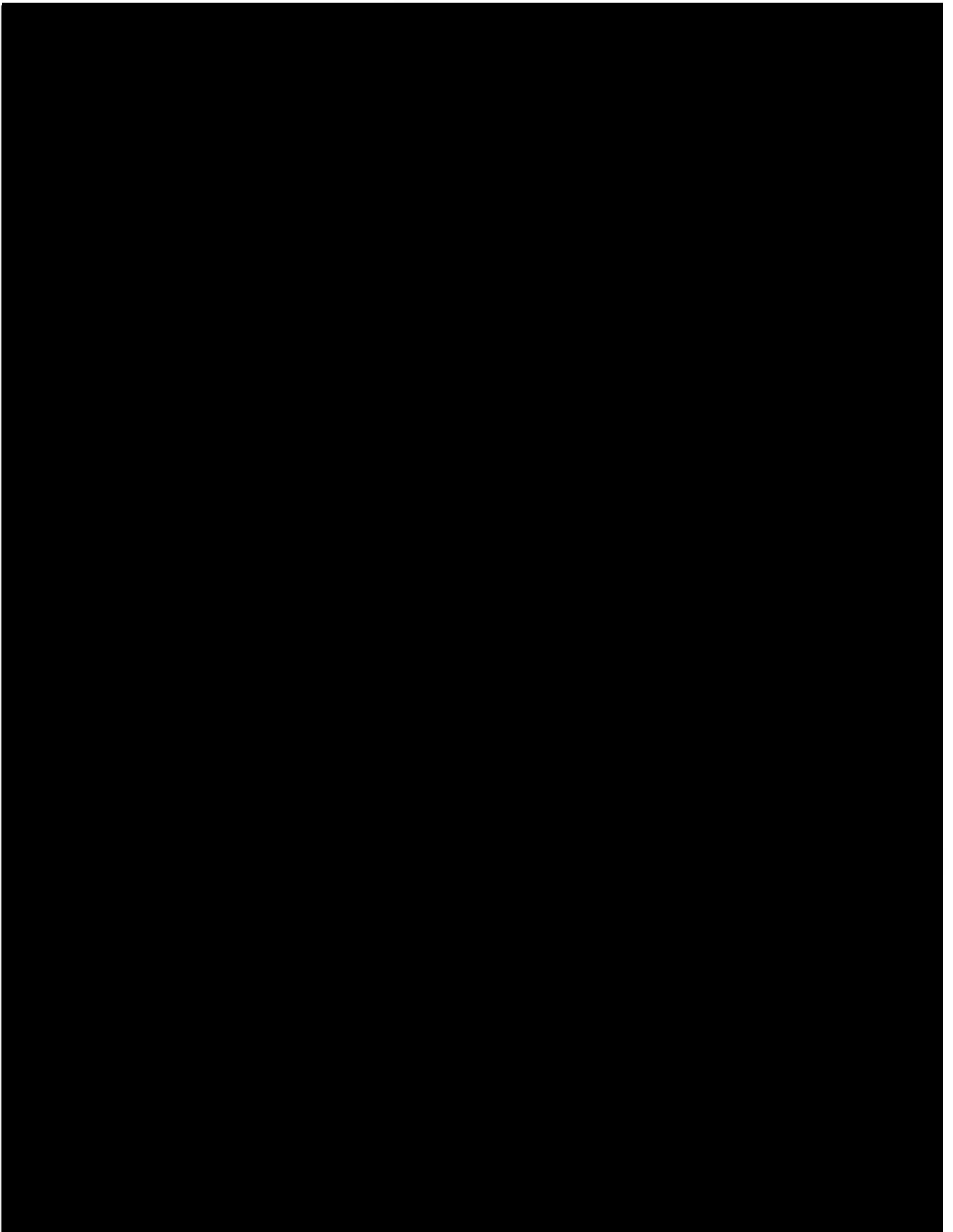
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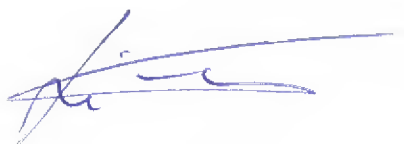
## PART L – SETTLEMENT ADMINISTRATION COSTS

### 52. The costs and disbursements

52.1 I am informed by Ms Lyng and believe that as at the end of May 2016 the fees and disbursements on the Settlement Administration file were as follows:

	Ex GST	Incl GST
Billable Fees	\$2,770,345.59	\$3,047,380.15
Disbursements	\$224,299.61	\$246,187.54
<b>Total Billable</b>	<b>\$2,994,645.20</b>	<b>\$3,293,567.69</b>
Total billed in June 2015	\$302,372.73	\$332,610.01
<b>Total unbilled</b>	<b>\$2,692,272.47</b>	<b>\$2,960,957.68</b>
Fees foregone	\$246,491.00	\$271,140.10

52.2 “Fees foregone” refers to the time recorded for legal assistance, primarily by Ms Poynton. Consistently with MB’s advice to the Court in the costs memorandum, administrative assistance time was not billed to the file and the costs were absorbed by MB.



52.3 Fees billed in June 2015 were the costs subject to interim approval by Her Honour AsJ Daly on 19 June 2015.

52.4 As deposited to under heading 13 above, interest on common issues costs in the amount of approximately \$158,430 has not been claimed and is not sought by MB.

52.5 Total interest earned on the settlement sum to date is \$705,752.30.

52.6 The Administration Costs, minus interest earned are \$2,587,815.39 (inclusive of GST).

### **53. Time recording and invoices**

53.1 MB staff working on the matter record time in the computer billing system called "Elite". Disbursements are also recorded on Elite when the invoice for the disbursement is received.

53.2 An invoice for the costs and disbursements is generated each month as a Proforma bill.

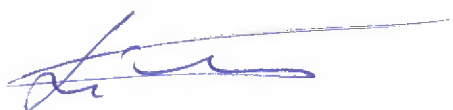
53.3 Now produced and marked **IL-7** is an index of all Proformas of Administration Costs to date. The index was provided to me by Ms Knight and I believe it to be accurate, but I have not undertaken any independent checks as I do not have the requisite expertise in operation of the Elite system.

53.4 Now produced and marked **IL-8** is a copy of all proforma invoices generated between December 2014 and end of May 2016. The invoices set out all time entries made by operators, the rates of relevant operators and all disbursements incurred during the relevant month. The invoices are generated by Ms Poynton from the Elite system and reviewed by Ms Lyng. I believe them to be accurate.

### **54. Work to which the Administration Costs relate**

54.1 The Administration Costs from December 2014 to date predominantly relate to work in the following primary categories:

- (a) Obtaining settlement approval;
- (b) Management of group member records and communications;
- (c) Establishment of systems and precedents for settlement administration;
- (d) Negotiating agreements and arrangements with third parties;



- (e) Obtaining records and information necessary for assessment of claims;
- (f) Undertaking the late registrant process in accordance with the Settlement Scheme;
- (g) Compliance with procedures concerning persons under disability;
- (h) Interim costs application in June 2015;
- (i) Assessment of claims;
- (j) Applications for Independent Review;
- (k) All other tasks deposited to above.

54.2 I cannot reliably estimate the quantum of costs that relates to each particular category, without detailed and time consuming analysis of billing data.

54.3 In the costs memorandum exhibited at **IL-1** and in my 17 June 2015 affidavit I estimated that approximately \$721,500 of Administration Costs and disbursements had been incurred prior to 1 May 2015 and that in excess of \$250,000 professional fees and approximately \$88,400 of disbursements relate to the settlement approval application.

54.4 I am not presently in a position to provide reliable estimates in respect of any other categories.

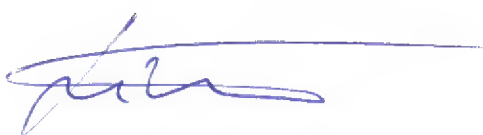
**55. Comparison with estimate of administration costs on 1 May 2015**

55.1 In the costs memorandum I endeavoured to estimate Administration Costs utilising time-based and file-based methodologies, assuming group size of 500 persons.

55.2 On time-based methodology I estimated Administration Costs at approximately:

- (a) \$2,193,000 (excl GST), on an assumption of a 6 month administration process (\$1,767,000 after offset by interest on settlement sum);
- (b) \$3,366,000 (excl GST) on an assumption of a 12 month administration process (\$2,715,000 after offset by interest on settlement sum)

55.3 On file-based methodology I estimated Administration Costs at approximately \$2,004,715 (excl GST) on an assumption of group size of 500 (\$1,578,716 after interest offset over 6 months).



55.4 Billable costs to date are very close to the forecast on the time-based methodology with 12 month duration of administration process.

55.5 The costs are higher than the forecast for a 6 month administration process or the forecast for file-based methodology (which was a similar figure to that derived on assumption of 6 month administration process).

55.6 Without attempting to undertake a comprehensive analysis, I consider the most likely reasons for the divergence from the 6 month and file-based methodology forecasts are as follows:

- (a) The final claim group was larger (569, rather than 500 claimants);
- (b) The time required for group member management and tasks such as communications and correspondence with group members, obtaining of records, dealing with queries and day to day management of files was greater than the estimate in the costs memorandum.

I had estimated 2 hours of paralegal time per file for 500 files (total 1000 hours)

My review of billing data is that approximately 1790 hours have been billed by paralegals since May 2015, which is approximately 3 hours per file (for 569 files).

This does not include the time that solicitors had to devote to resolve complexities arising from these tasks. I have deposed to the issues and complexities above.

- (c) The time required for assessment of causation of claims other than those already considered prior to settlement approval and for assessment of small claims was greater than anticipated.

I have not attempted to confirm this by any numerical analysis. However, my experience has been that:

- (i) A significant number of claims that ultimately failed on causation involved review of very voluminous medical records (sometimes many hundreds of pages). Often records from multiple practitioners had to be obtained and reviewed before causation could be determined. I believe this was particularly so for the "Later Registrant" cohort, who were more likely to provide inaccurate instructions regarding diagnosing practitioners.



- (ii) A disproportionate amount of work was often required to resolve some small claims that were masquerading as large claims. Greater analysis and more detailed reasons were required for some of these claims than for many large claims. Registrants making these claims also tended to be more high maintenance.

For example, in relation to one small claim (on assessment), there were approximately 850 documents (many with multiple pages) that had to be analysed and multiple issues addressed due to the nature of claims made by the Registrant. The Registrant complained that we did not obtain sufficient materials to assess the claim, but ultimately did not pursue a review. This is one of the more extreme examples, but it is not an isolated issue.

- (d) Fourth, the estimated costs in the costs memorandum did not include tasks outside the assessment process – for example systems and precedent development, late registrant process, processes in respect of Order 15 Registrants, interim costs application and similar matters.

## **56. Costs per claim**

56.1 In the costs memorandum, I estimated that the “future costs” (that is, Administration Costs and disbursements other than \$721,500 already expended as at 1 May 2015) would be approximately \$2,600 to \$3,000 per claim, excluding GST.

56.2 As at end of May 2016, the figure is  $(2,992,937 - 721,500)/569 = \$3,992$  (excluding GST).

56.3 The various uncertainties were set out in the costs memorandum and some of the reasons for the divergence between the forecast and the costs have been deposed to above.

## **57. Approval of Administration Costs**

57.1 I respectfully request the Court to make orders for appointment of an auditor or costs assessor or such other process as the Court considers appropriate to enable the Court to determine whether the



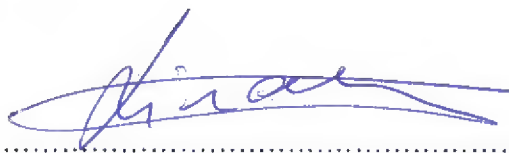
Administration Costs incurred to completion of administration are reasonable and ought to be approved.

#### **PART M – INTERIM APPROVAL OF ADMINISTRATION COSTS**

- 57.2 I am informed by Ms Lyng and believe that the interest accrued on the Settlement Sum in the present financial year will be approximately \$424,962.54.
- 57.3 Although I anticipate that the outstanding assessments will be completed shortly, the distribution of settlement monies will not take place in this financial year.
- 57.4 For reasons that I set out in my June 2015 affidavit, I understand that any interest on the Settlement Sum that remains in the Settlement Distribution Fund at the end of financial year will be subject to tax of 49% unless defrayed by expenses incurred.
- 57.5 The most effective way to ensure that the Settlement Distribution Fund does not incur the tax liability is to seek the Court's approval of a portion of Administration Costs up to the amount of interest accrued in the present financial year.
- 57.6 This amount can be accounted for in the subsequent final approval of Administration Costs and I believe there will be no detriment to the group members resulting from the making of the order.

**AFFIRMED** by the deponent  
at Melbourne  
in the State of Victoria  
this 20<sup>th</sup> day of June 2016

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Before me:

  
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**SAMANTHA JANE CAMILLERI**  
of 456 Lonsdale Street, Melbourne  
an Australian Legal Practitioner  
within the meaning of the  
Legal Profession Uniform Law (Victoria)