

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

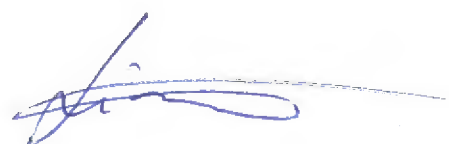
Date of Document:	2 November 2016
Filed on behalf of:	The Plaintiff
Prepared by:	
Maurice Blackburn, Lawyers	Solicitor's Code: 564
Level 10	Tel: 03 9605 2700
456 Lonsdale Street	Ref: IL/3052513
Melbourne 3000	DX: 466 Melbourne

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 completion of the assessment process in this class action, including final recovery rate;
- (b) Seeking orders for distribution in two stages – an initial distribution of approximately 100% of assessed damages and a subsequent top-up distribution upon resolution of currently outstanding taxation issues.
- (c) Seeking orders for approval of Administration Costs, in the amount deemed appropriate by the report of Special Referee, Mr John White;

3. Matters contained in the affidavit

3.1 **Part B** provides a summary of outcomes of the Settlement Administration (paragraphs 4.1 to 8.2);

3.2 **Part C** sets out the monies contained in the Settlement Distribution Fund and transactions that occurred since the last affidavit (paragraphs 9.1 to 12.18)

3.3 **Part D** provides details of assessment and review processes and outcomes (paragraphs 13.1 to 16.4)

3.4 **Part E** sets out the steps taken and arrangements made to prepare for settlement distribution (paragraphs 17.1 to 24.5)

3.5 **Part F** deals with Administration Costs (paragraphs 25.1 to 28.11)



- 3.6 **Part G** sets out the rate of recovery for eligible group members and methodology for calculation of the rate of recovery (paragraphs 29.1 to 30.2)
- 3.7 **Part H** sets out the taxation issues that impact the Settlement Distribution Fund and the arrangements for distribution of settlement (paragraphs 31.1 to 31.11)
- 3.8 **Part I** proposes arrangements for distribution of settlement and orders to effect same (paragraphs 32.1 to 33.2).

PART B – SUMMARY OF OUTCOMES OF SETTLEMENT ADMINISTRATION

4. Settlement Administration team

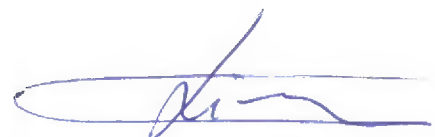
- 4.1 I refer to the team composition and their billing rates, set out in paragraphs 16.1 to 16.4 of my affidavit affirmed 20 June 2016 (**'20 June 2016 affidavit'**).
- 4.2 There have been no changes to the settlement administration team. As the assessment process was completed and the workload required reduced, Ms Lyng and Ms Camilleri have been assigned to assist with the Kilmore settlement administration.
- 4.3 They continue to perform tasks on the Bonsoy settlement administration as required.

5. Assessment outcomes

- 5.1 The claims of 569 Registrants, who comprised the claim group, have been assessed in accordance with the Settlement Scheme.
- 5.2 A total of 377 Registrants have been found to be eligible for compensation. The last assessment was finalised on 15 August 2016.

6. Review outcomes

- 6.1 There have been 26 applications for Independent Review:
- (a) 2 applications were withdrawn by the Registrant;
 - (b) 5 did not proceed for failure to post bond;



(c) Of the remaining 19 applications:

(i) 1 succeeded; and

(ii) 18 failed.

6.2 More detailed information about assessments and reviews is contained in Part D below

7. Administration costs

7.1 The total billable Administration Costs (including disbursements) recorded on file to end of September 2016 are \$3,758,431.14 inclusive of GST (\$3,417,265.14 ex GST).

7.2 Pursuant to Court Orders dated 19 June 2015 and 21 June 2016 Maurice Blackburn has been paid \$332,610.00 and \$424,963.00, respectively.

7.3 The total interest earned on the Settlement Sum to end of September 2016 is \$804,302.37.

7.4 Mr John White has been appointed Special Referee to determine what costs are reasonable. At the time of affirming this affidavit I have not received a copy of Mr White's report. Maurice Blackburn only seeks the approval of such costs as are deemed reasonable by Mr White.

8. Recovery rate

8.1 On the assumption that the interest on the Settlement Sum does not incur tax liability, the recovery rate for eligible group members, after costs (as recorded on file to end of September 2016), is approximately 103%.

8.2 The calculation of the recovery rate is set out in Part G of this affidavit. The issues concerning taxation are set out in Part H below.

PART C – SETTLEMENT DISTRIBUTION FUND

9. Settlement monies



9.1 In the 20 June 2016 affidavit I deposed to the handling of the monies in the Settlement Distribution Fund.

9.2 Since that date until 31 October 2016, the following changes occurred to the monies in the Settlement Distribution Fund:

- (a) Administration Costs of \$424,963 were paid out of the fund, pursuant to Court orders of 22 June 2016;
- (b) Seven interim payments were made, totalling \$550,067.75; and
- (c) \$98,550.07 of interest accrued to the fund account.

9.3 The Settlement Distribution Fund currently contains \$17,559,687.97.

10. Bonds paid on review requests

10.1 The bonds paid in relation to requests for review were paid into the MB trust account and identified as associated with the Bonsoy settlement administration. If the review was unsuccessful and the bond was forfeited, the money remained in the trust account. If the review was successful, the money was refunded to the Registrant, pursuant to the terms of the Settlement Scheme.

10.2 A total of \$14,000 is held in the trust account associated with Bonsoy settlement administration. This money will be transferred into the Settlement Distribution Fund prior to distribution.

11. Interim distributions

11.1 Between February 2016 and present date, 13 applications for interim distribution were received and approved by me. Total amount distributed via the interim distribution mechanism was \$802,816.81.

11.2 An inadvertent breach of the Settlement Scheme occurred in relation to interim distribution to one Registrant, which resulted in the Registrant getting a payout in excess of her entitlement. I set out the details below.

12. Inadvertent breach of Settlement Scheme

- 12.1 An inadvertent breach of clauses 12.3(b) and 13.2(b) of the Settlement Scheme occurred in respect of one Registrant. The consequences of the breach will be remedied and do not compromise the settlement distribution. Nevertheless, it is appropriate that I disclose the circumstances of the breach to the Court.
- 12.2 As I deposed in the 20 June 2016 affidavit, interim payment applications could be made via email and did not require a formal process. The ordinary process was that any request was forwarded to me and approval of interim payment was made by me. My usual practice was to approve interim payments of 50% (for large claims) or 60% (for small claims) of assessment value.
- 12.3 The process of making the payment was then managed by Ms Lyng, with assistance of Ms Poynton. Ms Lyng kept a spreadsheet tracking the interim payments made.
- 12.4 The particular Registrant's claim was assessed at \$11,215.60. The Notice of Assessment was sent on 16 February 2016. On 11 May 2016 the Registrant contacted Maurice Blackburn enquiring when she might be able to receive money because she was experiencing significant financial hardship.
- 12.5 At that time more than 30% of claims had been finalised, as required by clause 12.1 of the Settlement Scheme, and in the circumstances I considered it appropriate to approve an interim payment to the Registrant.
- 12.6 On 11 May 2016 I approved the interim payment to the Registrant in the amount of 60% of Assessment Value (the maximum permitted by clause 12.3(b)). At this time Ms Lyng was away on leave and I communicated the decision to release the interim payment to Ms Camilleri, who managed the process instead of Ms Lyng. The payment was duly made on 12 May 2016 and was recorded in the spreadsheet tracking interim payments.
- 12.7 On 7 September 2016 the Registrant emailed Ms Poynton and advised that she was experiencing severe hardship due to need to move house, for which she did not have funds. She enquired about the possibility of advance payment of her damages.



- 12.8 Ms Poynton forwarded the email to me with a query whether the request for advance payment was ok. Ms Lyng was copied on the correspondence, but Ms Camilleri was not.
- 12.9 I did not recall that this Registrant had previously received an interim payment and also did not check the spreadsheet tracking payments, as I ought to have done.
- 12.10 I considered that the circumstances justified making an interim payment. I approved an interim payment at 60% of assessment value and communicated that decision to Ms Lyng and Ms Poynton.
- 12.11 I understand from Ms Lyng that, on this particular occasion, she instructed Ms Poynton to take the steps necessary to process the payment and that neither Ms Lyng nor Ms Poynton checked the spreadsheet of interim payments.
- 12.12 The second, erroneous, interim payment was therefore processed.
- 12.13 The error was a result of a combination of memory failure on my part and failure to follow the normal administrative process by me and my team (whose actions are my responsibility).
- 12.14 As a consequence of the error:
- (a) The Registrant received a total of \$13,458.72, or \$2,243.12 more than her assessment value; and
 - (b) The Registrant received interim distribution amounting to 120% of her assessment value, being in excess of the 60% limit stipulated by clause 12.3(b) of the Settlement Scheme.
- 12.15 Ms Lyng became aware of the error on 22 September 2016, as a result of auditing the interim payments made. She immediately notified me of the error and I immediately notified Mr Andrew Watson.
- 12.16 I had formed a view that, in light of the ongoing financial difficulties she was experiencing, it was unlikely that the Registrant would be in a position to repay the amount of overpayment (or in a position to do so without financial hardship) and informed Mr Watson of this view.
- 12.17 Mr Watson decided that MB would pay into the Scheme the difference between the Registrant's entitlement (following pro-rating) and the actual distribution made to this Registrant.
- 12.18 The consequences of the error will therefore be remedied by MB.

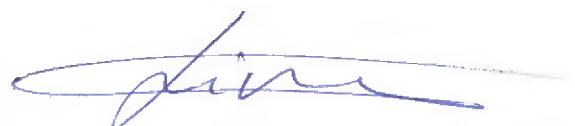
PART D – DETAIL OF ASSESSMENT AND REVIEW OUTCOMES

13. Assessment process and outcomes

- 13.1 In the 20 June 2016 affidavit I deposed to the process of assessment of claims. The process continued to be followed in respect of claims that were outstanding at the time of affirming that affidavit.
- 13.2 Of the 569 claims made:
- (a) Two claims were referred to Independent Counsel for assessment because they related to Order 15 Registrants found to be group members;
 - (b) Four claims were referred to Independent Counsel for assessment pursuant to clause 8.11(a) of the Settlement Scheme, because I considered this to be the appropriate course in view of complexity of those claims.
- 13.3 Informal advice from Independent Counsel was sought in respect of several claims on an as needs basis. I cannot readily ascertain the number of claims where this occurred.
- 13.4 All claims have now completed the assessment process. The last assessment was finalised and sent to the Registrant on 15 August 2016.
- 13.5 Of the 569 Registrants, 377 have been found to have an entitlement to compensation under the Settlement Scheme. The remaining Registrants either failed to establish causation or, in one claim, failed to establish any loss (the modest damages awarded by MB were reduced to zero on review).

14. Review process and outcomes

- 14.1 There have been 26 applications for Independent Review, which is approximately 4.6% of assessed claims.
- 14.2 One review was determined by Mr Michael Wilson QC, one was determined by Mr Wilson QC with Ms Fiona Ryan briefed as his junior (at Mr Wilson's request) and the remaining applications were determined by Ms Ryan.



14.3 Of the 26 applications for review, 2 applications were withdrawn by the Registrants prior to referral to counsel. They were the applications deposed to in paragraphs 48.2 and 48.3 of my 20 June 2016 affidavit.

- (a) One application was lodged on basis of a misunderstanding and was withdrawn after clarification (and before payment of bond).
- (b) One application was withdrawn after the Registrant consulted with an endocrinologist. I encouraged the Registrant to consult a specialist after forming a view that the Registrant was misdiagnosed and put on thyroid medication when her thyroid function was normal. Review timeframes were extended to enable the Registrant to act on correct advice. The Registrant is now under care of a respected specialist. The bond paid by the Registrant was refunded when the review was withdrawn.

14.4 Of the 26 applications for review, 5 did not proceed as Registrants failed to post the required bond:

- (a) Three of those are deposed to in paragraph 48.1 of the 20 June 2016 affidavit and I believe the review applications had no or negligible prospects of success.
- (b) One related to a causation determination made by me and was the claim referred to in paragraph 47.3 of the 20 June 2016 affidavit. I believe that the application had no or negligible prospects of success.
- (c) In one case the Registrant posted the bond via cheque and then put a stop on the cheque. The Registrant ceased communication with MB and did not communicate the reason for her action. However, she previously indicated that she would be consulting a solicitor regarding her review. In my opinion, any solicitor, who was acting competently, would have advised the Registrant that the review application had no or negligible prospects of success.

14.5 The remaining 19 applications were referred to Independent Counsel:

- (a) 1 application succeeded. It is the application referred to in paragraph 48.4 of my 20 June 2016 affidavit. MB's award for domestic care damages was increased by approximately \$600, which was more than 10% of the assessment value.
- (b) 18 applications failed. One was a review from assessment of Mr Keogh SC (as he then was) and was determined by Mr Wilson QC. The remaining reviews were from assessments by MB.



- 14.6 The last review was completed on 14 October 2016.
- 14.7 The time lag between the completion of assessments and the completion of reviews was a function of timeframes for reviews in the Settlement Scheme, the fact that several reviews that were lodged near the end of the assessment process were of above average complexity and the need to obtain an expert report in respect of one of the reviews.
- 14.8 In my opinion the time lag was not a function of any deficiency on part of Independent Counsel (or of any other practitioner involved).

15. Costs of reviews and medicolegal assessments

Bonds paid on review

15.1 As set out in paragraphs 10.1 and 10.2 above, the bonds paid on review are held in a trust account. The account presently contains \$14,000 of bonds that have been forfeited on unsuccessful review and these will be paid into the Settlement Scheme prior to distribution.

15.2 The reason why the amount in trust is \$14,000, when there were 18 unsuccessful reviews is that:

- (a) Two reviews related to minors, who were not required to post the bond;
- (b) In respect of two review requests, the Registrants indicated that they would have difficulties paying the bond amount up front.

Both reviews concerned assessment of damages, rather than causation, and I considered that there was little risk that the Settlement Fund would be unable to recover the costs from the Assessment Values if the reviews failed.

In order to enable the Registrants to access the rights of review, while maintaining the protection for the Settlement Fund, I did not require an upfront bond pursuant to clause 9.3(b) of the Settlement Scheme, but preserved the liability for costs of up to \$3,000 to be deducted from the Assessment Value, pursuant to clauses 10.1 and 10.3 of the Settlement Scheme, if the review failed.

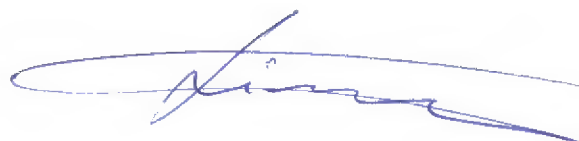


Residual costs of reviews

- 15.3 Where the unsuccessful review concerned assessment of causation and the costs of review exceeded the amount of bond, MB determined to not pursue outstanding costs against the Registrant. The same approach was adopted in respect of one review where damages assessment was reduced to zero on review.
- 15.4 In respect of the remainder of the unsuccessful reviews, the funds owing to the Settlement Scheme will be deducted from the amounts otherwise payable to the Registrants, in accordance with clause 10.3 of the Settlement Scheme. This was communicated to the Registrants at the time of forwarding to them the Notice of Review and will be communicated again on distribution.

Medicolegal report costs

- 15.5 Two medicolegal reports had to be obtained in the course of assessments and reviews.
- 15.6 In respect of one claim, which was referred to counsel for assessment due to complexity, MB obtained a report from a medicolegal cardiologist. This was done because the report of treating specialist was inconclusive at best and resolution of the particular issue would have a very significant impact on damages of the Registrant.
- (a) MB informed the Registrant that he was required to pay the medico-legal costs; however that discretion would be exercised to waive those costs pursuant to clause 9.7 of the Settlement Scheme if the medicolegal report was unfavourable. The Registrant agreed to this course.
- (b) The report obtained was sufficient to enable assessing counsel to determine certain critical matters in favour of the Registrant. The costs of the medicolegal report will be paid by the Registrant from final distribution.
- 15.7 In respect of one review, Independent Counsel required MB to obtain a medicolegal report from an endocrinologist, because the Registrant's treating practitioner (not an endocrinologist) provided an opinion that was at odds with certain causation findings on assessment. I declined to exercise the discretion in clause 9.3(a) to accept those grounds for review.
- 15.8 On instructions of Independent Counsel, a medicolegal report was obtained from Professor Eastman, who agreed with the findings on assessment and the review was consequently dismissed.



15.9 I exercised the discretion in clause 9.7(a) of the Settlement Scheme to not require the Registrant to pay the costs of the medicolegal report. I did so because of the Registrant's personal circumstances and the possibility that the Registrant was, at least in part, a victim of misguided medical advice.

16. Non-participating Registrants

16.1 A total of five Registrants withdrew their claims in the course of the assessment process.

16.2 Three withdrew prior to the assessment of their claims. They were given time to change their minds and were issued Assessment Notices with zero Assessment Value.

16.3 Two Registrants elected to not receive distribution of their Assessment Value, well after their Notices of Assessment were issued. They were advised of the consequences of this election (ie that they would not receive the monies to which they are entitled) and were given time to change their mind.

16.4 It is proposed to treat the distribution that would otherwise be made to these Registrants as unpresented cheques under clause 13.3 and to pay these amounts to the Australian Thyroid Foundation in accordance with clause 13.4 of the Settlement Scheme. The amount in question is less than \$1,500.

PART E – STEPS TAKEN TO PREPARE FOR DISTRIBUTION OF SETTLEMENT

17. Arrangements to facilitate distribution via EFT

17.1 Ms Lyng worked with MB IT and accounts departments to set up a system to:

- (a) Obtain banking details from eligible group members via online survey; and
- (b) Make payments to eligible group members via electronic transfer.

17.2 On 24 June 2016 MB sent correspondence to group members, who had been determined to be eligible for compensation, requesting that they complete the survey.



- 17.3 Group members whose claims completed assessment after this date were sent the letter immediately after their Notice of Assessment (if they were determined to be eligible for compensation).
- 17.4 A reminder letter to complete the survey was sent on 20 July 2016.
- 17.5 Ms Poynton was tasked with auditing the survey results to identify instances where the details provided appeared incorrect or where the bank account appeared to be in the name of a person other than the eligible group member. Ms Poynton contacted the group members to verify correct payment details. She also contacted Registrants who had not completed the survey asking them to provide payment details.
- 17.6 At the end of the process, MB is able to make electronic transfer payments to all Registrants with the exception of the following:
- (a) 5 Registrants who failed to provide account details;
 - (b) 4 Registrants who do not have accounts in their name or who have requested the transfer be made into account of another person (which MB declines to do).
 - (c) 2 Registrants who are deceased and the distribution will be made to their estates as set out below.
 - (d) 2 Order 15 Registrants, where payment will be made into Court.
- 17.7 In these instances MB will make distribution by way of cheque.

18. Order 15 Registrants

- 18.1 As deposed to in the 20 June 2016 affidavit, there were nine Order 15 Registrants (all by reason of minority). Two were found to be Group Members and their claims were assessed by Independent Counsel.
- 18.2 On 20 June 2016 I filed with the Senior Master's Office ('SMO') a confidential affidavit deposing to the details of each claim made on behalf of Order 15 Registrants.



18.3 On 5 August 2016 the Court made orders approving settlement of the claims of Order 15 Registrants.

18.4 Shortly afterwards I had a telephone discussion with Mr Tim West of the SMO, who requested that we contact the Senior Master's Office after the assessment process is complete to facilitate the processing of payments into Court.

18.5 On 25 October 2016 I emailed details of the two eligible Order 15 Registrants to Mr West and to Ms Susan May. Mr West responded with instructions for making distribution in relation to these Registrants.

18.6 The compensation of these Registrants will be paid into Court, in accordance with the Court orders and the instructions provided by the SMO.

19. Estates

19.1 There were two Registrants who are deceased and distribution will be made to their estates.

19.2 Ms Camilleri obtained the wills and probate documents and liaised with executors of the estates in respect of payment arrangements.

19.3 Ms Camilleri informed me and I believe that both executors did not want cheques with settlement distribution to be sent to their probate solicitors, due to cost concerns.

19.4 One executor requested that the settlement money be paid in equal shares to the two beneficiaries of the Will. The other requested that a cheque be made payable to the Estate of the Registrant.

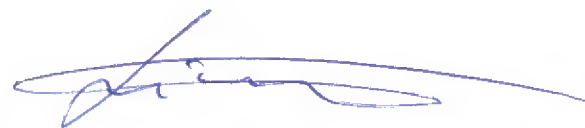
19.5 Ms Camilleri informs me that she sought advice from the MB Wills department and confirmed that these arrangements are acceptable.

19.6 MB will made distribution in accordance with the instructions of the executors.

20. Medicare

20.1 In paragraphs 26.1 to 26.7 of my 20 June 2016 affidavit I deposed to the bulk payment agreement with Medicare.

- 20.2 On 3 October 2016 I sent to Medicare branch of the Department of Human Services ('DHS') correspondence with a schedule of all claims assessed at \$5,000 or above.
- 20.3 Now produced and marked IL-1 is a copy of letter sent to Medicare (without attachments).
- 20.4 On 18 October 2016 I exchanged several emails and had a telephone conversation with Ms Schumacher, manager of Medicare Compensation Recovery. Ms Schumacher provided EFT details for payment and requested that MB provide Medicare numbers for all compensable persons, to facilitate attribution of payments on the Medicare system.
- 20.5 These numbers are not stored in a database and I instructed Ms Poynton to manually identify and enter the numbers into the schedule of compensable persons.
- 20.6 I anticipate forwarding the amended schedule to Ms Schumacher shortly after affirming this affidavit.
- 20.7 An amount of \$210 will be withheld from each affected claim on distribution and paid to Medicare in accordance with the bulk payment agreement. I calculated that the total sum due to Medicare is \$58,380.
- 20.8 Negotiation and implementation of the bulk payment agreement was at all times cooperative and unproblematic. I believe that the bulk payment agreement resulted in very significant savings of time and cost.
- 21. Centrelink**
- 21.1 In paragraphs 27.1 to 27.3 of my 20 June 2016 affidavit I deposed to the agreement reached with the DHS in respect of Centrelink obligations.
- 21.2 On 12 October 2016 I had a telephone discussion with Mr Surawski, Assistant Director of Debt Management Branch at the DHS. Following that conversation, I sent to Mr Surawski correspondence and a confidential spreadsheet of Registrants who have been awarded damages for economic loss, containing details necessary to assess the Registrants' obligations.
- 21.3 Now produced and marked IL-2 is a copy of letter sent to Centrelink (without attachments).



- 21.4 On 14 October 2016 Mr Surawski sent me an email setting out the process for managing the assessments and resulting communications.
- 21.5 On 20 October 2016 Mr Surawski emailed me the names of the Registrants in whom Centrelink had an interest and recovery notices for each affected Registrant. He also provided EFT details for transfer of funds to the DHS.
- 21.6 On the same day I discovered a typographical error in the date of injury for one of the affected Registrants and notified Mr Surawski. An amended recovery notice was issued for this Registrant the next day.
- 21.7 The money due to Centrelink will be withheld from the compensation due to the affected claimants and will be paid to Centrelink in bulk.
- 21.8 The approach of DHS to reaching and implementing the agreement concerning Centrelink repayments was at all times very cooperative and efficient. I believe that the agreement resulted in significant time and cost savings in the settlement administration.

22. Department of Veteran's Affairs ('DVA')

- 22.1 Two Registrants had repayment obligations to the DVA in respect of medical expenses.
- 22.2 MB obtained the treatment history reports in respect of these Registrants, identified the treatment items related to the compensable injury and determined the amount of repayment as part of the assessment.
- 22.3 The DVA accepted the determinations and agreed to the payment of the relevant amounts directly to the DVA. The two claims did not involve a permanent injury and consequently there were no issues regarding future treatment.
- 22.4 The money due to Veteran's Affairs will be withheld from the compensation to these Registrants and paid to the DVA by MB.




23. Private health insurers

- 23.1 In paragraphs 45.1 to 45.5 of my 20 June 2016 affidavit I deposed to the process adopted for quantifying the payback obligation to private health insurance.
- 23.2 Notices of Benefits were obtained for 120 Registrants, who indicated that they claimed on their private health insurance in respect of the compensable injury. In requesting the Notices of Benefits MB communicated to the insurers that the determination of whether particular medical expenses are in fact compensable will be made in accordance with the Settlement Scheme. Now produced and marked **IL-3** is a sample copy of the letter (omitting the schedule of Registrants).
- 23.3 The determination of what, if any, services in the Notice of Benefits were related to the compensable injury was made in the course of the assessment (or review) of the Registrants' claims. The repayment obligation was quantified in this process.
- 23.4 MB did not require the Registrants to tick items on Notices of Benefits that they believed were compensable or to complete compensation questionnaires or similar attestations to the private health insurer.
- 23.5 We departed from the ordinary process because the experience in this action suggested that most Registrants will not be able to correctly assess whether particular services are compensable in the action.
- 23.6 Further, I formed the view that the Registrants' attestation as to what services they believed were compensable is of limited utility in the circumstances where the Settlement Scheme requires that this determination be made by MB or Independent Counsel and the determination is binding on the Registrant after the process in the Settlement Scheme is complete.
- 23.7 A total of 21 Registrants were found to have an obligation to repay their private health insurer as part of this process.
- 23.8 Once the claims of all Registrants insured with a particular insurer were finalised, MB sent a letter to the insurer setting out the repayment obligations for each insured, as determined.



- 23.9 Where there was no repayment obligation found in respect of any Registrant insured with the particular insurer (11 different insurers), MB informed the insurer of that fact and advised the insurer to contact the Registrants directly if they required verification of the determination (eg. provision of the Notice of Assessment). Now produced and marked **IL-4** is the template letter that was sent in such cases. All insurers sent this letter accepted the outcome and did not require further documentation.
- 23.10 Where there was a repayment obligation in respect of Registrants insured with the particular insurer (8 separate insurers), MB sent a letter annexing the Statement of Benefits for those Registrants, with relevant items ticked.
- 23.11 The letter gave the insurer the option to have MB withhold the amounts due to the insurer in the settlement administration process and to pay those amounts directly to the insurer (bulk payment option). This was conditional on the insurer not requiring further administrative steps, such as individual verification from Registrants. If the insurer required additional administrative steps to be undertaken, the insurer would need to deal directly with the Registrants to secure documents and repayments. Now produced and marked **IL-5** is a template copy of this letter (omitting attachments).
- 23.12 Each insurer agreed to the bulk payment option. One insurer (Medibank Private) requested that MB obtain completed Compensation Questionnaires from all Registrants who had indicated that they claimed on their health insurance. MB declined to undertake this task and the insurer agreed to the bulk payment option.
- 23.13 The monies due to private health insurers will be withheld from the distribution to the relevant Registrants and will be paid directly to the insurers pursuant to this agreed process.
- 23.14 As deposed to in the 20 June 2016 affidavit, MB did not establish a centralised process with insurers, other than Medibank, in advance. I do not believe that establishment of centralised processes with other insurers would have resulted in appreciable efficiency gains.



24. Data extraction, audit and analysis

24.1 In late September 2016 I instructed Ms Lyng to organise the extraction and audit of assessment figures (including any repayment obligations).

24.2 In conjunction with MB IT department, Ms Lyng extracted the assessment data from the assessment database into Excel Workbook format and consolidated into the workbook (**'the Master Workbook'**) all other information necessary to calculate precise entitlements and distribution amounts (such as interim distributions made, outstanding review costs, repayment obligations and like information).

24.3 Ms Lyng audited the assessment figures against a separate spreadsheet where she had manually recorded assessment outcomes. In doing so, she found that the data exported from the assessment database contained an error in respect of a small number of claims. The error only occurred during export of data and was not visible when these claims were viewed within the database.

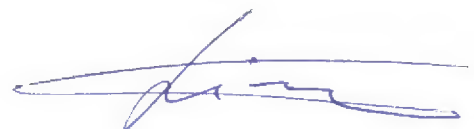
24.4 Ms Lyng worked with MB IT department to successfully remedy the issue and the figures agreed on subsequent audit. Ms Lyng also instructed Ms Poynton to compare a random selection of Notices of Assessment against exported data to ensure that figures agreed. I am informed by Ms Lyng and believe that no issues were identified in the course of this audit.

24.5 Ms Lyng and I arrived at the formulae required to calculate the recovery rate, the deductions and the total distribution to be made to each Registrant and incorporated these into the Master Workbook. After final checks and any amendments required to costs figures as a result of Court orders, the Master Workbook will be used to make settlement distribution.

PART F – ADMINISTRATION COSTS

25. Summary of costs and disbursements

25.1 The costs to end of September 2016 (being the last finalised invoice) are as follows:



	Ex GST	Incl GST
Billable Fees	\$3,169,591.35	\$3,486,550.49
Disbursements	\$247,673.79	\$271,880.66
Total Billable	\$3,417,265.14	\$3,758,431.14
Billed in June 2015	\$302,372.73	\$332,610.01
Billed in June 2016	\$386,365.41	\$424,963.00
Total unbilled	\$2,72,8527	\$3,000,858.13
Fees foregone	\$285,913	\$314,504.30

- 25.2 “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.
- 25.3 Fees billed in June 2015 and June 2016 are the interim Administration Costs approved by the Court on 19 June 2015 and 22 June 2016.
- 25.4 No interest is sought on costs and disbursements.
- 25.5 Now produced and marked **IL-6** are the proforma invoices for months June 2016 to September 2016, inclusive. Now produced and marked **IL-7** is the index of all proformas.
- 25.6 It was recently brought to my attention by Mr White that there is a discrepancy between the index of proformas referred to above and the totals in some of the proformas that were in the exhibit **IL-8** to my affidavit of 20 June 2016. The reason for the discrepancy is that disbursement invoices were received after the creation of the proformas exhibited to my 20 June 2016 affidavit and were retrospectively inserted into those proformas and into the index.
- 25.7 The index exhibited as **IL-7** of this affidavit contains the correct record of costs. Mr White has been provided with revised copies of all affected proformas.




25.8 The costs and disbursements recorded on the billing system for the month of October 2016 are \$59,786.76 (incl GST), however these costs have not been reviewed or subject to examination by the Special Referee and are not included in the figures above.

26. Publicity in The Australian newspaper about costs

26.1 I refer to an article in the Australian on 15 August 2016 reporting various complaints from Mr Singer. Now produced and marked **IL-8** is a copy of the electronic form of the article.

26.2 Mr Singer is not a group member in the class action. His wife, Mrs Singer, was found to be a group member. Mr Singer handled the claim on his wife's behalf (MB verified that this was with her authority).

26.3 Mrs Singer's claim was assessed jointly by me and Ms Lyng, in accordance with the Settlement Scheme. Application for review of assessment was made by Mr Singer on behalf of Mrs Singer and was referred to Ms Ryan.

26.4 It is unnecessary to set out the issues on review, save to say that it was of greater than average complexity. The review failed.

26.5 The costs of review were capped at \$3,000 in accordance with the Settlement Scheme. The actual costs exceeded that amount. An itemised list of costs was provided to Mrs Singer, together with an explanation of the Settlement Scheme cap.

26.6 Mr Singer contacted MB via email raising various issues. I do not detail the correspondence that ensued, but ultimately I formed the view that further correspondence would be unproductive informed Mr Singer that MB would be unable to assist him further with the issues raised.

26.7 I infer that Mr Singer contacted a journalist from the Australian newspaper to air various grievances and a number of allegations were then communicated to MB by the journalist on 12 August 2016.

- 26.8 The allegations communicated to MB and the allegations reported in the article regarding the costs of handling Mrs Singer's case are incorrect in every particular. The suggestion that Mrs Singer was asked to be the lead plaintiff is also incorrect.
- 26.9 As part of the response to the journalist, I compiled documentary evidence which I believe demonstrates that each allegation in respect of costs reported in the article is incorrect. The documents were not provided to the journalist (due to confidentiality), but the journalist was informed of the existence of this evidence.
- 26.10 Because of duties of confidentiality owed to Mrs Singer, I have not exhibited the abovementioned evidence in this affidavit. If the Court requires me to do so, I am in a position to supply documentary evidence relevant to these allegations.
- 26.11 I have informed Mr John White of the claims made in the article and have supplied to him a copy of the article and the documentary evidence concerning costs of review, to enable him to scrutinise MB's conduct in this respect.
- 26.12 Through the course of settlement administration, a number of Registrants who were dissatisfied with their assessment or review outcomes, threatened to go to the media (among other things). I believe that it would be inconsistent with MB's duties in administering the Settlement Scheme to provide any Registrant with more favourable treatment or outcome as a consequence of such threats and I confirm that this did not occur in the course of this settlement administration.

27. Complaint from group member regarding review process or outcome

- 27.1 At approximately 10.53am on 2 November 2016 I received an email from the Court forwarding an email that was sent directly to the Court by one of the Registrants. I will refer to the Registrant by her initials "JD" to preserve her confidentiality. JD's email indicated that she wished to make submissions to the Special Referee, Mr White regarding (unspecified) concerns about the way that Maurice Blackburn assessed the claims and concerns about the Independent Counsel's claim review process.



- 27.2 I am unable to ascertain from JD's email to the Court whether her concerns are regarding costs or about other aspects of the settlement administration process. As instructed by the Court, I provided Mr White's details to JD and forwarded to Mr White the recent correspondence with JD. Now produced and marked **IL-9** is the email sent to Mr White, which attaches MB's correspondence with JD. I have redacted JD's full name and contact details.
- 27.3 Due to nonspecific nature of "concerns" it is difficult for me to determine what information concerning this claim I ought to provide to the Court. I set out a brief background and can provide any other information that the Court requires.
- 27.4 JD is one of the Late Registrants in the action, admitted as a Registrant. Her claim was affected by significant uncertainties in relation to causation, as well as other issues, and was assessed jointly by me and Ms Lyng. The claim was determined in favour of JD, utilising clause 8.6 of the Settlement Scheme - the "borderline case" clause.
- 27.5 JD sought a review and this was referred to Ms Ryan. JD provided three sets of submissions on review, several academic publications and further medical records and reports from her treating practitioners.
- 27.6 The review failed. Ms Ryan reduced the damages awarded by Maurice Blackburn for pain and suffering, leading to a reduction in the total sum awarded to the Registrant. Although it is not my place to comment on determinations of Independent Counsel, I did not find the reduction surprising in light of the materials provided by the Registrant with the review request.
- 27.7 The outcome of the review was communicated to JD on 17 October 2016. She responded with a terse email on the same day. I am not aware of any communications with JD between that time and 31 October 2016.
- 27.8 At approximately 2.04pm on 31 October 2016 Ms Poynton forwarded to me an email from JD seeking a response to a number of questions. From time stamps on emails, I note that JD's email to MB was sent after her email to the Court.

- 27.9 The response to that email was not able to be finalised that day and was sent to JD on 2 November 2016. The email and response are exhibited at **IL-9**.
- 27.10 JD's email to MB raised issues about costs of review, which I have endeavoured to address in the response. The costs of review required to be paid by JD were in accordance with the Settlement Scheme. The reasonableness of MB's costs is now a matter for review by Mr White and I do not propose to comment further on this.
- 27.11 JD's email also raised issues regarding the appointment, independence and/or performance of Independent Counsel (on this occasion, Ms Ryan).
- 27.12 Independent Counsel (including Mr Keogh, as he then was, Mr Wilson and Ms Ryan) were appointed in accordance with the approved Settlement Scheme and met the requirements of the Settlement Scheme.
- 27.13 The majority of the reviews were done by Ms Ryan for reasons of cost and time efficiency and because the matters were well within her capacity. From my interactions with Ms Ryan during the process, I know that she was well aware of her duties to independently review MB's decisions and has always acted consistently with those duties. Although it is not my place to comment on substantive performance of Independent Counsel, I have formed an opinion that Ms Ryan performed her role with a high level of diligence and competence.
- 27.14 In so far as the Registrant seeks to raise concerns about the independence or performance of Independent Counsel, I believe that such concerns are completely misconceived.

28. Audit of Administration Costs

- 28.1 On 27 July 2016 the Court made orders appointing Mr John White as a Special Referee to consider the following questions:
- (a) Are the costs sought in relation to administration of the settlement distribution scheme reasonable?
 - (b) If not, in what amount should the costs be disallowed?



- 28.2 On 15 August 2016, MB forwarded to Mr White a brief comprising 3 folders of relevant material, together with a memorandum providing background to the action. Now produced and marked **IL-10** is a copy of the memorandum and of the index to the brief.
- 28.3 On 8 September 2016 MB emailed to Mr White the finalised proforma invoice for August 2016 and a brief update on the status of the action. A hardcopy of the invoice, with an updated index to the brief, was sent separately.
- 28.4 On 6 October 2010 MB emailed to Mr White the proforma invoice for September 2016.
- 28.5 On 7 October 2010 a small error was identified in the August 2016 proforma and I emailed a revised invoice to Mr White, together with an explanation.
- 28.6 On 14 October 2010 I had a telephone conversation with Mr White, in which we discussed the status of the settlement administration and his requirements of MB. I made Mr White aware of the allegations the subject of paragraphs 26.1 to 26.11 above and offered to provide relevant documents to him for review, if he considered necessary.
- 28.7 On 17 October 2010 I emailed Mr White the documents referred to in the previous paragraph.
- 28.8 On 20 October 2010 I emailed Mr White information giving him access to MB systems for Bonsoy class action files (both the main file and the settlement administration file).
- 28.9 On 24 October 2010 I emailed Mr White an excel workbook with all recorded fees and disbursements to end of September 2016.
- 28.10 In the period between 28 October 2010 and the time of affirming this affidavit I have had several communications with Mr White and provided updated proformas and information as requested.
- 28.11 I understand that Mr White will provide his report directly to the Court, with a copy to MB. At the time of affirming this affidavit I have not received a copy of the report.



PART G – RATE OF RECOVERY

29. Calculation of rate of recovery

29.1 The rate of recovery was calculated by means of formulae within the Master Workbook. The calculation assumed no tax liability on the settlement fund. If the position changes, the formulae can be easily adjusted.

29.2 I set out the nature of the calculation below.

29.3 The amount contained in the Settlement Distribution Fund is \$17,559,687.97 (**'Sum in Fund'**)

29.4 The sum of Final Values of all claims is \$14,896,375.93. (**'Total losses'**)

29.5 The administration costs recorded on the system to end September 2016, but not yet billed are \$3,000,858.13 (**'Outstanding costs'**). At the time of affirming this affidavit I do not know yet what costs are considered reasonable by Mr White. The amount considered reasonable will need to be substituted as the amount of "Outstanding Costs" in the calculation.

29.6 \$25,202.00 is owing to the Settlement Distribution Fund from group members on account of costs of unsuccessful reviews (excluding bonds) and medicolegal fees. This amount will be withheld from the individual distributions, in accordance with the Settlement Scheme. (**'Costs owing'**).

29.7 \$14,000 is bonds of unsuccessful reviews, held on trust, which will be paid into the Settlement Distribution Fund (**'Bonds owing'**)

29.8 \$802,816.81 has already been paid in interim distributions (**'Interim distributions'**)

29.9 The rate of recovery was estimated by the formula:

$$\text{Sum in Fund} + \text{Interim distributions} + \text{Costs owing} + \text{Bonds owing} - \text{Outstanding costs}$$

Total losses



29.10 The rate of return to eligible group members is therefore approximately 103%, assuming no tax liability of the settlement fund. If the fund is liable to tax, the amount of tax needs to be deducted from the numerator in the formula. The rate of return then becomes approximately 100.7%.

30. Comparison with prior estimates

30.1 As anticipated in the 20 June 2016 affidavit, the rate of recovery is higher than the estimates provided to the Court at the time of settlement approval.

30.2 In the 20 June 2016 affidavit I deposed to my opinions as to the reasons for this difference. I have not undertaken further work on this issue and continue to hold the view that the factors identified in that affidavit are predominantly responsible for the divergence from prior modelling.

PART H – TAXATION ISSUES

31. Tax status of interest earned on the Settlement Amount

31.1 All matters concerning taxation law below are deposed to on the basis of information provided by Mr Andrew Watson and Ms Kimi Nishimura, who have considered these issues in respect of the Kilmore settlement distribution. I believe that this information is true and correct.

31.2 As I deposed in my affidavits affirmed 17 June 2015 and 20 June 2016, I had been informed by Mr Watson that interest on the Settlement Sum that remained in the Settlement Distribution Fund at the end of financial year would be subject to tax unless defrayed by expenses incurred. I understand that Mr Watson's opinion was based on advice obtained from Pitcher Partners in relation to the Kilmore settlement administration.

31.3 For this reason, in June 2015 and June 2016 MB made applications for interim approval of Administration Costs in the amount of interest accrued in the relevant financial year.

31.4 Mr Watson subsequently informed me that issues were raised regarding that advice and that further advice was sought from Price Waterhouse Coopers ('PwC') in the context of Kilmore



administration. Mr Watson informed me that PwC and members of the Kilmore settlement administration team were engaged in discussions with the ATO concerning the tax status of interest earned on the settlement sum in that action.

- 31.5 I understand that matters under discussion include the question whether interest earned on settlement sum in a personal injury action is assessable income for the purposes of taxation law and, if it is, the effect of payment of Administration Costs on tax liability of the fund.
- 31.6 I have been informed by Mr Watson and Ms Nishimura that a ruling or advice from ATO has been expected for some time now. At the time of affirming this affidavit, no such ruling or advice has been received.
- 31.7 It was hoped that the ATO ruling in the context of Kilmore settlement would be sufficiently informative about the likely tax treatment of interest in the Bonsoy settlement to enable MB to make a call regarding likely taxation outcomes and to distribute the Bonsoy settlement accordingly.
- 31.8 MB did not seek to raise issues regarding the Bonsoy action with the ATO because it was considered more efficient to await the resolution of the issues in Kilmore, as the ATO advice in that case may resolve the position in relation to Bonsoy settlement. Further, MB was concerned that ATO determination in the Kilmore administration may be (further) delayed by opening separate discussions about the status of Bonsoy fund.
- 31.9 If the ruling or advice by the ATO in Kilmore will be inapplicable to Bonsoy and a separate ruling will need to be obtained, MB will engage PwC to undertake the necessary discussions.
- 31.10 Because no ruling or advice has been received from the ATO in relation to Kilmore to date, MB cannot make an informed decision about the tax status of interest earned on the settlement sum.
- 31.11 The total interest earned on the settlement sum to end September 2016 is \$804,302.37. I anticipate that approximately \$22,050 will be earned for the month of October. The potential tax liability is $0.49 \times (\$804,302.37 + \$22,050) = \$404,913$ (rounded to nearest dollar).



PART I – PROPOSED ARRANGEMENTS FOR DISTRIBUTION OF SETTLEMENT

32. Options available for distribution


32.1 I considered that there are three options available to MB in respect of Bonsoy settlement distribution:

- (a) Make full distribution now on the assumption that there will be no tax liability. This option puts MB at risk of becoming liable to the ATO for more than \$400,000 if the assumption regarding tax liability proves to be incorrect.
- (b) Delay distribution until taxation issues are resolved. The period of delay is unknown and not within the control of MB. Experience of the Kilmore team suggests that the delay may not be a short one.
- (c) Quarantine the amount of potential tax liability in the fund and distribute the remainder of the monies on a pro-rata basis (**‘the initial distribution’**). Then make a second distribution of the remainder of funds, if any, following resolution of the taxation issue (**‘the top up distribution’**).

32.2 On 10 October 2016 I emailed Mr Watson regarding available options and recommended option (c) as the preferred option in the circumstances. Following discussion with Mr Watson, we agreed that MB should seek Court orders implementing this option if advice from the ATO was not received by the time that distribution can be made.

32.3 The disadvantage of this course is that greater costs will be expended on undertaking two distributions than if the distribution could be made just once. Because the number of eligible group members is relatively small and, for most group members, the distribution can be made efficiently via EFT, this option remains practical and the costs of distribution should be relatively small.

32.4 The interactions that I and my team have had with group members, lead me to believe that most group members would prefer to receive distribution as quickly as possible. Delaying the distribution until taxation issues are resolved is likely to result in costs needing to be expended on



management of disaffected group members and on handling increased requests for interim distribution.


32.5 I have estimated that the initial distribution will deliver approximately 100% of Assessment Value to eligible group members. If the taxation issues are resolved favourably, the top up distribution should deliver approximately an additional 3% of Assessment Value. I consider that if group members receive 100% of the Assessment Value in the initial distribution, it is unlikely that there will be significant discontent among group members with delay in receiving the top up amount.

33. Mechanism for dual distribution

33.1 I have examined the provisions of the Settlement Scheme and, in my view, it is not obvious that the provisions empower the Administrator to make the two distributions as proposed. Clause 13.3 envisages the possibility of two distributions, however it is unclear whether it applies in the present circumstances and, further, under that clause the top up distribution could not occur until the expiration of at least 180 days.

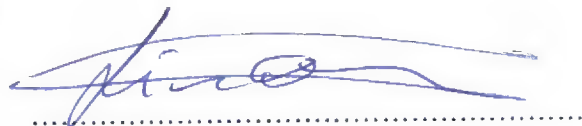
33.2 Consequently, pursuant to clause 15.1 of the Settlement Scheme, the Administrator seeks Court orders to the effect that:

- (a) The following monies remain in the fund:
 - (i) Sum of \$404,913, being the maximum amount of potential tax liability; and
 - (ii) Sum of \$100,000 on account of October costs and potential future costs and disbursements (to be subject to Court approval at a later date)
- (b) Administration Costs be approved in such amount as the Court considers reasonable.
- (c) The funds other than in (a) and (b) above be distributed to eligible group members on a pro-rata basis in accordance with the Settlement Scheme (**‘the initial distribution’**).
- (d) Once the taxation issues are resolved, the remainder of the money, less any costs approved, be distributed to eligible group members in accordance with the Settlement Scheme and such further orders as the Court considers appropriate (**‘the top up distribution’**).

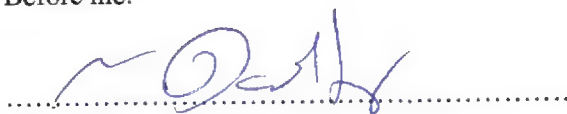


AFFIRMED by the deponent
at Melbourne
in the State of Victoria
this 2nd day of November 2016

)
)
)



Before me:



MICHAEL HAROLD DONELLY
of 456 Lonsdale Street, Melbourne
an Australian Legal Practitioner
within the meaning of the Legal
Profession Uniform Law (Victoria)