

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION

No. SCI 2012 4538

BETWEEN:

KATHERINE ROWE

Plaintiff

and

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

Defendants

(by original proceeding)

AND BETWEEN:

AUSNET ELECTRICITY SERVICES PTY LTD (ACN
064 651 118)

Plaintiff by Counterclaim

And

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

Defendants by Counterclaim

(by counterclaim)

AFFIDAVIT OF ANDREW JOHN WATSON

Date of Document:	29 November 2016
Filed on behalf of:	The Plaintiff
Prepared by:	
Maurice Blackburn Lawyers	Solicitor's Code: 564
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	Ref: AW/3052534

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

1. I am a Principal in the firm of Maurice Blackburn Pty Ltd (**Maurice Blackburn**), the solicitors for the Plaintiff in this proceeding (**the proceeding**) and pursuant to Orders of this Court dated 27 May 2015, I am the Scheme Administrator.




2. I make this affidavit from my own knowledge unless otherwise stated. Where statements are not made from my own knowledge, they are made to the best of my information and belief after due enquiry and I have set out the source of my information.
3. I make this affidavit for the purpose of providing the Court with an update as to:
 - (a) the estimated pro rata recovery of personal injury and dependency ("I-D") Claimants in this proceeding;
 - (b) the estimated pro rata recovery of economic loss and property damage ("ELPD") Claimants in this proceeding;
 - (c) settlement administration costs;
 - (d) taxation issues affecting the Distribution Sum; and
 - (e) communications with group members.

A. ESTIMATED PRO RATA RECOVERY OF PERSONAL INJURY AND DEPENDENCY CLAIMANTS

4. I refer to my comments at the Case Management Conference of 14 November 2016 ("**November CMC**") confirming that:
 - (a) all assessments of I-D Claimants' entitlements, including review assessments, had been finalised; and
 - (b) all that remained to be determined in order to calculate the entitlements of I-D Claimants was the extant costs applications in this proceeding.
5. I refer also to Mr John White, Special Referee, Costs report dated 21 November 2016:
 - (a) which concludes that the Plaintiff's legal costs and disbursements of the proceeding for the period 1 May 2015 to 27 May 2015 are reasonable and should be allowed as claimed;
 - (b) which concludes that all costs sought in relation to this settlement administration are reasonable and that no costs should be disallowed; and



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- (c) which concludes that both the method of calculating and the quantum of the proposed transfer payment from the Murrindindi Settlement Fund to the Kilmore Settlement Fund are reasonable.
6. Whilst the Court in each of the Kilmore and Murrindindi proceedings may ultimately determine to adopt, not adopt or adopt in part each of Mr White's reports, Maurice Blackburn performed a pro rata calculation of I-D Claimants' entitlements assuming the Court's adoption of Mr White's conclusions ("**Estimate of I-D Claimant Recovery**"). Now produced and shown to me and marked "**AJW-1.**" is the Estimate of I-D Claimant Recovery.
7. On 21 November 2016 Maurice Blackburn gave the Estimate of I-D Claimant Recovery to Mr George Kompos of KPMG and instructed him to review the calculations performed.
8. I determined that preparing the Estimate of I-D Claimant Recovery at this point and having it reviewed by Mr Kompos, notwithstanding the extant costs applications, would expedite the I-D settlement distribution, as it would permit Mr Kompos to more quickly review and confirm any amendments to the I-D pro rata calculation required following the Court's consideration of Mr White's reports.
9. The Estimate of I-D Claimant Recovery takes into account each of the following additions to and deductions from the Settlement Fund to enable the calculation of the pro rata entitlements of the I-D Claimants:
- (a) The addition of interest;
 - (b) The deduction of potential taxation liabilities;
 - (c) The addition of interim payments made which would otherwise have remained in the Settlement Fund;
 - (d) The addition of review, bond and other costs payable to the Settlement Fund; and
 - (e) The deduction of settlement administration costs.

Addition of interest

10. The Estimated I-D Claimant Recovery takes into account estimated interest earned on the Settlement Fund up until 30 November 2016 based on estimates provided by the




banks holding each of the funds. I chose the 30 November 2016 calculation date as I anticipate that the funds required to make the settlement distribution to I-D Claimants will be required to be made available shortly after this date to enable claimants to receive funds by the end of 2016.

Deduction of taxation

11. In preparing the Estimate of I-D Claimant Recovery Maurice Blackburn has deducted taxation payable consistent with:
- (a) the ATO's informal decision that all interest earned on the Distribution Sum is assessable and that settlement administration costs are not deductible (referred to further below); and
 - (b) PwC's advice that the applicable rate of taxation is 49%.

Interim payments, review and other costs and bond repayments

12. The Estimated I-D Claimant Recovery takes into account:
- (a) interim payments made to date, treating such payments as deductions which have been made from the Settlement Fund which need to be added back into the fund prior to the calculation of I-D Claimants' entitlements; and
 - (b) outstanding bond, review and other costs payable to the Settlement Fund on account of unsuccessful reviews and other costs incurred under the Settlement Distribution Scheme, as such costs properly form part of the Settlement Fund and as such need to be added back in prior to the calculation of the I-D pro rata recovery rate.

Deduction of settlement administration costs

13. The Estimated I-D Claimant Recovery takes into account all settlement administration costs approved to date and, as foreshadowed above, assumes that all extant costs applications in this proceeding are successful. As such, the estimate takes into account:
- (a) ELPD settlement administration costs up to 30 September 2016;
 - (b) General settlement administration costs up to 31 October 2016;
 - (c) I-D settlement administration costs up to 31 January 2016; and



- (d) The Proposed Transfer Payment.
14. During the November CMC, I commented that in order to calculate the I-D Claimant recovery rate it would be necessary to estimate future ELPD settlement administration costs beyond those which are covered by the outstanding costs application. Since making those comments I have sought to make such estimation and ascertained that:
- (a) so doing at this point in time of the ELPD assessment process required the making of a large number of assumptions and thus was inherently uncertain;
 - (b) in order to ensure consistency of treatment, so doing would require the estimation of future interest on the ELPD Fund up until the final ELPD settlement distribution which also required the making of a large number of assumptions and was also thus inherently uncertain;
 - (c) due to such uncertainties Mr Kompos of KPMG could not reasonably opine on the reasonableness or otherwise of such estimations; and
 - (d) because of the comparative quantum of the I-D Fund and the ELPD Fund, ignoring the future ELPD settlement administration costs and future income on the ELPD Fund served to increase the I-D pro rata recovery by approximately 0.3% whilst only decreasing the anticipated ELPD pro rata recovery (based on current estimates of the total ELPD assessed losses) by 0.045%.
15. In light of the above uncertainties and the minimal impact that ignoring future ELPD costs and income would have on the anticipated ELPD pro rata recovery, I have ignored such future costs and income in calculating the I-D Claimant recovery rate.

KPMG review of draft I-D pro rata calculation of 21 November 2016

16. On 21 November 2016, Mr Kompos advised Maurice Blackburn that he had determined that the Estimated I-D Claimant Recovery had been performed in accordance with the supporting documentation provided to KPMG and that all calculations had been correctly made.
17. I intend to instruct Mr Kompos to file a report confirming this opinion at the same time as he provides an expert opinion as to the individual in-hand assessment



amounts calculated from the final I-D pro rata assessment rate which take into account individual paybacks.

Rate of recovery calculated in draft I-D pro rata calculation of 21 November 2016

18. The rate of I-D Claimant recovery calculated by Maurice Blackburn and verified by Mr Kompos is 63.628%. As noted above, this rate of recovery assumes the Court's adoption in full of Mr White's conclusions. To the extent that such conclusions are not adopted by the Court, this rate of recovery could increase (if any costs are disallowed or if the transfer payment is disallowed in part or in full).
19. The estimated I-D Claimant recovery is slightly lower than the estimated 65% to 75% recovery rate range quoted in the Personal Injury Brochure sent to I-D Claimants.

B. ESTIMATED PRO RATA RECOVERY RATE OF ELPD CLAIMANTS

20. During the November CMC I noted that there remained a small number of ELPD claims which are yet to be assessed. Whilst it will not be possible to calculate the actual ELPD pro rata recovery rate until all claims are assessed, any review assessments have been conducted and future ELPD Fund interest and settlement administration costs are more certain, based on the assessed losses to date and estimates of future costs and interest an ELPD pro rata recovery rate can be approximately estimated.
21. Based on this approximate estimate, it is likely that the actual ELPD Claimant recovery rate will exceed the estimated 50% to 65% recovery rate range quoted in the ELPD notices of assessment sent to ELPD Claimants.
22. In this context, if the ELPD recovery rate substantially exceeds the estimated recovery range and I-D group members receive less than the estimated recovery range, I am considering making an application to the Court for a payment to be made from the ELPD Fund to the I-D Fund to equalise the recovery rate between the two groups.
23. Such application would necessarily involve an amendment to the Settlement Distribution Scheme requiring notice to all group members and sufficient time to permit affected group members to lodge any objections to such a proposal. I intend to revisit the question of whether or not to make such an application following the assessment of the remaining outstanding ELPD claims.



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C. UPDATE AS TO SETTLEMENT ADMINISTRATION COSTS

24. At the time of settlement it was estimated that the settlement administration costs would be defrayed by the interest on the fund. As recorded in Exhibit **AJW-1** total interest on the funds is \$12.4m. If the Proposed Transfer Application is approved, total settlement administration costs for this proceeding are \$11.4m; ELPD costs are \$3.4m with a recovery rate likely to exceed 65%, I-D costs will be \$6.7m and the likely pro rata recovery for I-D claims will be approximately 63.63%.

D. TAXATION ISSUES

Application of interest earned on the settlement sum

25. In accordance with the Settlement Distribution Scheme:
- (a) the settlement funds have been invested for the duration of the settlement administration process (SDS sections A1.1 (i) (iii) and A1.1 (m) (vi)); and
 - (b) interest earned on the settlement funds to date has been used to offset any settlement administration costs which have been approved by the Court (SDS section A4.2).
26. To date all settlement administration costs have been covered by the interest earned on the settlement funds and there has been no reduction to the principal of the settlement funds.
27. The Settlement Distribution Scheme further specifies that all taxes arising in connection with the administration of the Scheme are to be paid from the Distribution Sum (SDS section A4.1(a)). This means that any tax payable on the interest earned by the Scheme is to be paid from the Distribution Sum.
28. In the establishment and conduct of the Settlement Distribution Scheme, Maurice Blackburn acted in accordance with professional tax advice including as to the process of engagement with the ATO.

Prior Advice and Practice

29. Maurice Blackburn has requested and received professional tax advice on multiple occasions that settlement administration costs are deductible expenses against interest income.




30. Consistent with prior advice, Maurice Blackburn has taken steps to ensure that where possible Administration Costs incurred in a given tax year were approved prior to the end of that year. The practical effect of having sought such approvals, if administration costs are held to be deductible, is that the tax liability on the interest earned will have been very significantly reduced.
31. The advice received regarding deductibility of administration costs affected the *timing* of seeking the approval of those costs but would have had no impact on the consideration of the court appointed referee as to whether those costs were properly incurred.

Informal Tax Office Decision

32. I refer to my comments at the November CMC that the ATO had communicated via our taxation advisors PwC that it had reached an informal decision that all interest earned on the Settlement Sum was assessable and that settlement administration costs were not deductible for taxation purposes ("**Informal Decision**"). As is evident from the Estimated I-D Claimant Recovery, the effect of this decision, if it takes effect, is that the taxation liability arising on this Settlement Sum is likely to exceed \$6 million.
33. In the circumstances, I consider it important that:
- (a) Maurice Blackburn take all appropriate steps to investigate whether the ATO's informal decision that interest is assessable and settlement administration costs are not deductible should be challenged; and
 - (b) The issues relating to taxation of interest do not delay the I-D distribution to group members.
34. Accordingly I have determined that the prudent course is to withhold the full amount of the potential tax liability, distribute the I-D settlement as planned, and if the tax position changes make further distributions to group members.
35. I confirm that:
- (a) I have commenced the process of obtaining legal advice regarding these issues; and



(b) I will to seek directions from the Court before commencing any proceedings against the ATO.

36. Now produced and shown to me marked "**Confidential Exhibit AJW-2**" is a document which sets out some further matters in relation to taxation issues. I make application for this exhibit to be confidential so as to ensure the maintenance of privilege.

COMMUNICATIONS WITH GROUP MEMBERS

37. On 14 November 2016, based on preliminary estimates of the I-D and ELPD recovery rates made as at that date, I sent an update letter to group members:

- (a) Updating group members as to the ATO's informal decision regarding the taxation payable on the interest earned on the Settlement Sum;
- (b) Confirming that the I-D Claimant recovery rate would likely be slightly lower than the estimated recovery rate quoted in the Personal Injury Brochure;
- (c) Confirming that the ELPD pro rata recovery rate range of 50% to 65% quoted in the ELPD notices of assessment would likely be attained if not exceeded; and
- (d) Confirming the likely timeframe for the I-D and ELPD settlement distributions.

38. Now produced and shown to me and marked "**AJW-3**" is a copy of the update letter of 14 November 2016. The 14 November 2016 update letter resulted in a high volume of calls and emails about the taxation issues affecting the settlement administration.


39. On 17 November 2016 the Australian newspaper published an article entitled 'Black Saturday: law firm 'should foot huge tax bill'' which stated:

The ATO has told The Australian the liability stems directly from the way the settlement scheme's financial arrangements were established, laying the blame with Maurice Blackburn.

...

The ATO has said tax liabilities do not arise in other instances of compensation payments because the lawyers involved work with the tax office upfront or establish settlement arrangements in a way that avoids adverse tax outcomes.

Now produced and shown to me and marked "**AJW-4**" is a copy of that article.




40. I am surprised by the comments attributed to the ATO as they are inconsistent with my own experience of class action settlements, inconsistent with the professional advice we have received in this case and previously and inconsistent with the tenor of the discussions which were conducted with the ATO.
41. Following the 14 November 2016 letter, I commenced receiving a number of signed pro forma letters raising concerns about the conduct of the settlement administration and the taxation issues from claimants in the Kilmore proceeding (**Pro Forma Letter**). Now produced and shown to me and marked "**AJW-5**" is a copy of the Pro Forma Letter. At the date of swearing this affidavit I have not received any signed letters from claimants in this proceeding.
42. As a result of the queries about the taxation issues, media reporting concerning those issues and the Pro Forma Letter, I decided to send a further update letter to group members clarifying the taxation issues affecting the settlement administration.
43. Whilst the SDS Team were in the process of drafting that update::
- (a) [REDACTED] [REDACTED] [REDACTED] and [REDACTED] sent a letter to the Court on 22 November 2016 (the "**22 November letter**", discussed further below);
 - (b) the Court adjourned the Case Management Conference scheduled for 23 November 2016 to 30 November 2016; and
 - (c) Mrs Matthews (and 51 co-signatories) and Mrs Rowe sent letters to the Court in response to the matters raised in the 22 November letter;

and I referred to those matters in the further update letter to group members. Now produced and shown to me and marked "**AJW-6**" is a copy of the update letter of 25 November 2016.

44. Following the Court's consideration of:
- (a) the matters raised in the 22 November letter and the subsequent submission to the Court of 25 November 2016;
 - (b) the matters raised by Mrs Rowe, Mrs Matthews and the 51 co-signatories to Mrs Matthews' letter;
 - (c) Mr White's reports and evidence; and

(d) the making of any orders or directions consequent upon such evidence;

I intend to send a further update letter to group members.

Response to questions and concerns raised by certain group members

45. I refer to the 22 November letter. I confirm that the matters raised in this letter did not concern this proceeding. These matters have not been raised by any claimant registered in this proceeding and as such I do not propose to address such concerns. If the Court is concerned with any matters raised in the letter please refer to paragraphs 51 – 80 of the Kilmore affidavit.

SWORN by the deponent at)
Melbourne in the State of Victoria)
this 29th day of November 2016)
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Before me:



FILED on behalf of the Plaintiff

MEGAN FLORENCE GREAVES
of 456 Lonsdale Street, Melbourne
an Australian Legal Practitioner
within the meaning of the Legal
Profession Uniform Law (Victoria)