

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMON LAW DIVISION

No. SCI 2012 4538

B E T W E E N:

KATHERINE ROWE

Plaintiff

and

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

Defendants

(by original proceeding)

A N D B E T W E E N :

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**

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<b>Date of Document:</b>	31 October 2016
<b>Filed on behalf of:</b>	The Plaintiff
<b>Prepared by:</b>	Solicitor's Code: 564
Maurice Blackburn Lawyers	Tel: (03) 9605 2700
Level 10, 456 Lonsdale Street	DX: 466 Melbourne
Melbourne Vic 3000	Ref: AW/3052534

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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.

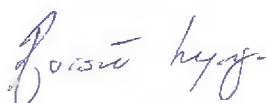



2. I make this affidavit from my own knowledge unless otherwise stated. Where statements are not made from my own knowledge, they are made to the best of my information and belief after due enquiry and I have set out the source of my information.
3. I make this affidavit for the purpose of:
  - (a) providing the Court with an update in relation to the progress made in establishing the processes and mechanisms for the assessment of group member claims under the Settlement Distribution Scheme (**SDS**);
  - (b) providing the Court with an update in relation to work performed by the Scheme Administrator and the Settlement Distribution Scheme team (**SDS Team**);
  - (c) providing the Court with an update in relation to the number of assessments completed and/or underway;
  - (d) providing the Court with an update in relation to interim payments;
  - (e) providing the Court with an update in relation to final settlement distribution payments;
  - (f) providing the Court with an update in relation to group member communications;
  - (g) subject to the outcome of the review of such costs by the Special Referee, Costs, appointed by the Court, seeking approval of Scheme Administration Costs; and
  - (h) making application to the Court for a transfer payment to be made from the Murrindindi settlement fund to the Kilmore settlement fund to ensure equitable payment of setup costs by Kilmore and Murrindindi claimants.

### **PERSONAL INJURY AND DEPENDENCY CLAIMS**

#### **A. OVERVIEW OF THE PERSONAL INJURY AND DEPENDENCY CLAIMS ASSESSMENT PROCESS**

4. As at 26 October 2016, there are in total 425 personal injury and dependency group members.




5. The steps taken to assess each of these 425 personal injury and dependency claims are detailed in my previous affidavits dated 16 March 2016, 16 June 2016 and 12 September 2016.

**B. THE SDS TEAM**

6. Since the last Case Management Conference (**CMC**) and my affidavit dated 12 September 2016, the following change has been made to the SDS Team:

(a) Paralegal staff numbers have reduced from seven to six.

7. The SDS Team members who are responsible for the administration for personal injury and dependency claims assessment under the SDS in this proceeding is currently comprised of:

(a) Andrew Watson, Scheme Administrator. Approximately 5 per cent of his time is directed towards the Murrindindi settlement administration.

(b) Kimi Nishimura, Senior Associate, engaged three days per week. Approximately 50 per cent of her time is directed towards the Murrindindi settlement administration.


(c) Elizabeth Mukherji, Senior Associate, engaged three days per week. Approximately 50 per cent of her time is directed towards the Murrindindi settlement administration.

(d) Simba Makoni, Associate, engaged on a full-time basis. Approximately 40 per cent of his time is directed towards the Murrindindi settlement administration.

(e) Megan Greaves, Lawyer, engaged on a full time basis. Approximately 50 per cent of her time is directed towards the Murrindindi settlement administration.

(f) Timothy Dionyssopoulos, Principal, engaged on a full time basis. Approximately 50 per cent of his time is directed towards the Murrindindi settlement administration.

(g) Patricia McMullan, Associate, engaged on a full time basis. Approximately 40 per cent of her time is directed towards the Murrindindi settlement administration.



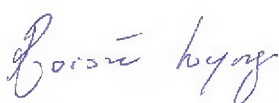

- (h) Six paralegals working an equivalent of four full time positions. Approximately one third of their time is directed towards the Murrindindi settlement administration.
- (i) Four full time administrative assistance. Approximately one third of their time is directed towards the Murrindindi settlement administration.

### **C. CHANGES TO THE TEAM OF ASSESSORS**

- 8. I refer to paragraph 8 of my affidavit dated 12 September 2016. Since the swearing of that affidavit no changes have been made to the team of assessors and all assessments have been submitted.

### **D. SUMMARY OF ASSESSMENT PROCESS TO DATE**

- 9. As at 27 October 2016, 382 of the 425 registered personal injury and dependency group members are proceeding with the assessment of their claim. The remaining 43 group members have either instructed us that they do not wish to proceed with their claim or are uncooperative. Of the 382 group members proceeding with the assessment of their personal injury and dependency claims:
  - (a) 382 detailed personal injury questionnaires have been completed which equates to 100 per cent of registered personal injury and dependency group members.
  - (b) 382 group members have attended a conference with assessing counsel which equates to 100 per cent of registered personal injury and dependency group members.
  - (c) All Notices of Assessments and Statements of Reasons have been received from assessing counsel and sent to group members.
  - (d) 11 requests for review have been received from group members to date. Of these, 8 are quantum reviews and 3 are threshold reviews. 6 of the 8 quantum reviews have been determined, with 4 being in favour of the group member and 2 upholding the original assessment. 2 quantum reviews remain to be determined by review counsel. All threshold reviews have been determined, with 1 being in favour of the group member and 2 upholding the original assessment.



#### **E. PROGRESS OF ASSESSMENTS**

10. Since my affidavit dated 12 September 2016, all assessments have now been received from assessing counsel, reviewed by the SDS Team and sent to group members.
11. The final day for a group member to submit a review was 27 October 2016, being 28 days from the date the last assessment was sent. As at 28 October 2016, all initial assessments have been finalised. The only assessments that remain to be finalised are review assessments.

#### **F. GROUP MEMBERS WHO HAVE INSTRUCTED THEY DO NOT WISH TO PROCEED**

12. I refer to paragraph 17 of my affidavit dated 12 September 2016. Since the swearing of that affidavit there are no updates regarding group members who do not wish to proceed.

#### **G. UNCOOPERATIVE GROUP MEMBERS**

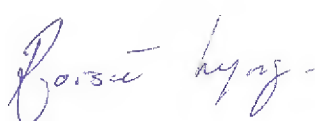
13. I refer to paragraphs 18 – 20 of my affidavit dated 12 September 2016. Since the swearing of that affidavit there are no updates regarding uncooperative group members.

#### **H. STEPS TAKEN TO PREPARE FOR DISTRIBUTION**

14. Since swearing my last affidavit on 12 September 2016, in order to prepare for final distribution the following processes are now being undertaken:

***The Victorian WorkCover Authority, the Transport Accident Commission & the Country Fire Authority***

15. I refer to paragraph 23 of my affidavit dated 12 September 2016. Pursuant to the terms of agreements with the Victoria WorkCover Authority, the Transport Accident Commission and the Country Fire Authority, the SDS team provided the Notice of Assessments and Statement of Reasons for relevant group members to the authorities on 27 October 2016.



**Centrelink**

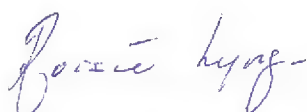
16. I refer to paragraph 24 of my affidavit dated 12 September 2016. Since the swearing of that affidavit the SDS Team continues to remain in contact with Centrelink in preparation for final distribution.
17. The SDS Team continues to provide Centrelink with information regarding interim payments made to any relevant group members.

**Private Health Insurers**

18. I refer to paragraphs 26 and 27 of my affidavit dated 12 September 2016. Since the swearing of that affidavit requests have been sent to all relevant group members and private health insurers to provide updated information relating to bushfire-related medical treatment. The SDS Team have now finalised the pay back figures to be made on behalf of relevant group members to their private health insurers.
19. The SDS Team have now met with, spoken to or emailed all identified private health insurers for the purposes of updating them on the settlement distribution process, providing them with the payback information related to their customers and reaching agreement that the payback figures held on the Matter Centre data base in relation to their customers will not be subject to any further change. The majority of private health insurers have agreed that the payback figures as currently recorded on the Matter Centre data base are now finalised.
20. The SDS Team have now met with, spoken to or emailed all identified private health insurers for the purpose of requesting that they accept repayment figures which are proportionately reduced to reflect group members' recovery. To date, eight private health insurers have agreed to reduce their payback in line with the group members' recovery. The SDS Team is hopeful that the remaining private health insurers will also agree to accept a reduced payback.

**Department of Veteran's Affairs (DVA)**

21. I refer to paragraphs 28 to 35 of my affidavit dated 12 September 2016.
22. We continue to be in regular contact with the DVA in regards to expediting the process for affected group members.



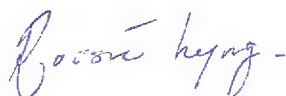
23. At the time of swearing this Affidavit, the DVA has not formally responded to a proposal forwarded under cover of letter dated 2 September 2016.
24. We have pursued the DVA for a response by way of multiple telephone calls and emails. The DVA has indicated:
- (a) That it is unlikely that agreements can be reached given the small number of DVA claimants;
  - (b) They need to consider all claims on an individual basis;
  - (c) They have an appreciation of the need for urgency and dealing with these claims efficiently;
  - (d) They are currently also looking to consolidate the process; and
  - (e) An internal DVA meeting in relation to this matter has been arranged for the week commencing 24 October 2016.
25. The total number of affected group members is three. The SDS Team has provided the DVA with the following in relation to all affected group members:
- (a) Signed consent forms (provided by the DVA); and
  - (b) Details of the assessed losses and likely in-hand amount.
26. We have not received a response from the DVA in respect of all three of the affected group members.

***IT reporting and infrastructure***

27. I refer to paragraph 36 of my affidavit date 12 September 2016. The SDS Team continues to work with Maurice Blackburn's IT department to ensure that the reporting and infrastructure systems are ready for final distribution. This includes ongoing review of various reports to assist with the auditing process and developing a report to determine the pro-rated distribution rate to facilitate the final distribution.

***Contacting all creditors re outstanding invoices***

28. Since my affidavit dated 12 September 2016, the SDS Team has written to all external providers used over the course of the settlement administration process



and requested that all outstanding invoices be submitted by 26 October 2016 in preparation for final distribution. These providers have been advised by the SDS Team that any invoices not submitted prior to this date will not be able to be paid.

29. Notwithstanding this letter, based on Maurice Blackburn's experience in relation to other class actions and class action settlement administrations, I anticipate that a number of invoices will be submitted after this date.

***Engagement of external mailing house to effect final distribution***

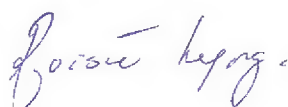
30. The SDS Team have engaged the external mailing house Dynamic Direct to print and distribute settlement cheques and the letters enclosing such cheques to group members.
31. The SDS Team is expecting to provide the data required by Dynamic Direct by the end of November 2016. The SDS Team have been advised that provided that bank approval for the cheques has been obtained prior to this time, it will take approximately three to four weeks from the provision of the data for the settlement money to be sent and received by group members. The SDS Team is presently working with Dynamic Direct to obtain the requisite bank approval with a view to ensuring that I-D claimants receive the settlement monies prior to the end of 2016.

***Contacting all group members living overseas***

32. The SDS Team has identified and contacted all those group members currently living overseas to whom we will not be able to pay settlement money by cheque. These group members will receive payment of settlement monies by electronic funds transfer. The SDS Team is currently liaising with Maurice Blackburn's finance department in order for the necessary information and arrangements to be made.

***Auditing processes***

33. I refer to paragraph 37 and 38 of my affidavit dated 12 September 2016. All internal auditing of the assessment data in the Matter Centre client data base has now been completed.
34. The SDS Team continue to conduct internal audits on an as needs basis when new data such as updated assessment data following a successful review assessments is added to the Matter Centre data base.







**External review of assessment data**

35. I refer to paragraphs 39 to 42 of my affidavit dated 12 September 2016 in which I described the steps being taken to engage KPMG to undertake a review of the proposed schedule of payments to ensure its accuracy prior to final distribution occurring.
36. Since the last Case Management Conference:
- (a) I have retained Mr Kompos, Director in KPMG's Forensics department, as an independent expert to provide a report in this settlement administration. Now produced and shown to me marked '**AJW-1**' is a copy of the letter containing the retainer agreement and instructions to provide an expert report;
  - (b) Senior members of the SDS Team have met with Mr Kompos and members of his team on multiple occasions to discuss the assessment process and his review of the assessment data and accounting data for the settlement fund;
  - (c) Mr Kompos has provided an updated budget (exclusive of GST) in relation to the provision of an expert report in the Kilmore and Murrindindi settlement administrations. Now produced and shown to me marked '**AJW-2**' is a copy of the updated budget;
  - (d) Mr Kompos and members of his team have supervised the extraction of group member assessment data from Maurice Blackburn's Matter Centre database for the purpose of preparing the expert report in this proceeding;
  - (e) Mr Kompos and members of his team have requested and been provided with assessment data reports and extracts from Maurice Blackburn's accounting database and further information regarding such data and reports for the purpose of preparing the expert report in this proceeding; and
  - (f) Mr Kompos has been requested to provide his report on the personal injury assessment data to me in mid-November 2016.

**I. ESTIMATED COMPLETION**

37. Based on the information set out in this affidavit, unless an unforeseen delay occurs in the processing of the settlement monies by the banks and/or the external

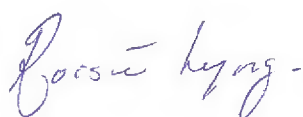



mailing house, the SDS Team remains confident that the distribution of personal injury and dependency settlement monies will take place in December 2016.

### **ECONOMIC LOSS AND PROPERTY DAMAGE (ELPD) CLAIMS**

#### **A. THE SDS TEAM**

38. The SDS Team members who are responsible for the administration of ELPD claims assessment under both the Kilmore SDS and under the SDS in this proceeding is currently comprised of:
- (a) Andrew Watson, Scheme Administrator. Approximately 5 per cent of his time is directed towards the Murrindindi settlement administration.
  - (b) Kimi Nishimura, Senior Associate, engaged three days per week. Approximately 50 per cent of her time is directed towards the Murrindindi settlement administration.
  - (c) Helen Leaf, Senior Associate, engaged on a part-time basis. Approximately 30 per cent of her time is directed towards the Murrindindi settlement administration.
  - (d) Claire Brown, Associate, engaged on a full-time basis. Approximately 30 per cent of her time is directed towards the Murrindindi settlement administration.
  - (e) Patricia McMullan, Associate, engaged on a full-time basis. Approximately 40 per cent of her time is directed towards the Murrindindi settlement administration.
  - (f) Samantha Camilleri, Lawyer, engaged on a full-time basis. Approximately 30 per cent of her time is directed towards the Murrindindi settlement administration.
  - (g) Roisin Lyng, Lawyer, engaged on a full-time basis. Approximately 35 per cent of her time is directed towards the Murrindindi settlement administration.
  - (h) Nikki Macfarlane, Lawyer, engaged on a full-time basis. Approximately 30 per cent of her time is directed towards the Murrindindi settlement administration.



- (i) Jonathan Peck, Trainee Lawyer, engaged on a full-time basis. Approximately 30 per cent of his time is directed towards the Murrindindi settlement administration.
- (j) 15 paralegals working an equivalent of 11.5 full time positions. Approximately one third of their time is directed towards the Murrindindi settlement administration.
- (k) Laura Opperman, Data Analyst, engaged three days per week. Approximately 30 per cent of her time is directed towards the Murrindindi settlement administration.

## **B. CHANGES TO ELPD SDS TEAM**

39. Since the last CMC, the following changes have been made to the ELPD SDS Team:

- (a) Kate McFarlane, Associate, has resigned from Maurice Blackburn;
- (b) Patricia McMullan, Associate, has been redeployed to work primarily with the ELPD SDS Team;
- (c) Nikki Macfarlane, Lawyer, has joined the ELPD SDS Team on a full-time basis;
- (d) Justin Boyd, Trainee Lawyer, has departed from the team. Jonathan Peck, Trainee Lawyer, has joined the ELPD SDS Team on a full-time basis;

40. The duties undertaken by the paralegals and lawyers on the ELPD SDS team are outlined in paragraphs 35 and 36 of my affidavit sworn on 16 June 2016.

## **C. SUMMARY OF ELPD ASSESSMENT PROGRESS TO DATE**

### ***Allocation to ELPD loss assessors***

41. I refer to my affidavit dated 12 September 2016 and confirm that 100% of property claims have been allocated for assessment to the ELPD Assessors.
42. Senior members of the ELPD Team monitor the progress of the allocated assessments and have recently re-allocated some assessments where the assessor has indicated they no longer have capacity to assess an ELPD claim.



***PNOAs issued to above-insurance group members***

43. As at 27 October 2016, approximately 539 (or 84% of all) Provisional Notices of Assessment (**PNOAs**) have been reported by the ELPD Assessors as having been completed and issued to group members. The ELPD Assessors recently reported to the SDS Team that there are approximately 101 PNOAs left to be issued to above insurance group members.
44. I refer to my affidavits dated 16 March 2016, 16 June 2016 and 12 September 2016 regarding the preparation of PNOAs.
45. Pursuant to E4.2 of the SDS, a group member has 14 days to consider their PNOA, and identify any errors or omissions. If a group member wishes to raise any errors or omissions with their PNOA, they are directed to deliver to the ELPD Assessor a written statement outlining the error or omission (**Dispute Notice**).
46. The ELPD Assessors have received only a small number of Dispute Notices in response to the PNOAs which they have issued to date, being approximately 7% of all PNOAs issued to date.
47. Where a Dispute Notice is received by the ELPD Assessor, in many instances this results in a delay in the PNOA being provided to Maurice Blackburn to issue as a Final Notice of Assessment due to the ELPD Assessors taking time to consider the error or omission alleged and amend the assessment where necessary. The SDS Team are working with the ELPD Assessors to minimise such delays.

***PNOAs assessing subrogated-only losses***

48. The ELPD Assessors have nearly completed the assessments of all properties which involve the assessment of subrogated-only losses. There remain a small number of complex subrogated assessments involving council properties which have all been allocated to Crawford to finalise. These assessments are almost finalised and should be issued shortly.
49. The process for issuing PNOAs for subrogated-only losses was outlined broadly in my affidavits dated 16 June 2016 and 12 September 2016. Section E4.2 of the SDS contemplates that the ELPD Assessor will deliver a PNOA directly to the ELPD claimant. In order to facilitate the process of issuing PNOAs to insurers in the most efficient way possible, I have instructed ELPD Assessors to provide

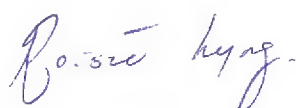


PNOAs pertaining to subrogated claims directly to the ELPD SDS Team. The SDS Team has collated these claims by insurer and issued a single PNOA to each insurer on behalf of multiple ELPD Assessors.

50. As of 27 October 2016, 597 (or 47.95% of all) subrogated ELPD claims have now been assessed and issued as PNOAs to each insurer which has registered claims in this proceeding.
51. Should an insurer identify an error or omission with any of the ELPD claims assessed, they have 14 days to deliver a statement with an explanation of the perceived error or omission to the SDS Team.
52. As of 27 October 2016, the SDS Team has not received any statements detailing a perceived error or omission from the insurers as the review period has not yet expired. In the Kilmore proceeding, most of the errors raised are relatively minor and consist of the following:
  - (a) Incorrect calculations and allocations of payments by the loss assessor;
  - (b) Data entry or data extraction errors;
  - (c) Errors occurring where a loss assessor has omitted payments received for clearing debris, towing or demolition; and
  - (d) Insurer registration issues, which are discussed further below.
53. Based on the dispute rate in the Kilmore proceeding, the SDS Team anticipate that the insurers will raise an error or omission for approximately 5% of the PNOAs issued.

#### Insurer registration issues

54. In the event that insurers raise any insurer registration disputes in this proceeding, the SDS Team will deal with such disputes in this proceeding in the same manner as the manner adopted in the Kilmore proceeding.
55. In paragraph 59 of my affidavit dated 12 September 2016, I noted that where the total assessed value exceeds the amount registered by the insurer at class closure, the PNOA issued to the insurer limits the assessment to the amount as registered.



56. In the Kilmore proceeding, the application of the above limit has resulted in some potential errors where the insurer has registered multiple subrogated claims at the same loss address, and both claims have been assessed together. The ELPD Assessor may not have assessed the claim consistently with how the insurer registered the insurance payment. This can result in one or more of the subrogated claims being assessed at a lower value due to the PNOA issued being limited to the amount registered.
57. The SDS Team are reviewing the insurer registration disputes in the Kilmore proceeding to determine whether the registered claim limit can be revised to reflect the total registered amount by the insurer across all subrogated claims at the loss address, while ensuring the total assessed loss does not exceed the total registered amount for that loss address by the insurer.
58. In the Kilmore proceeding, the SDS Team have identified that approximately 20% of the disputes relate to insurer registration issues which can be more efficiently resolved by the ELPD SDS team rather than being remitted to the relevant ELPD Assessor.
59. The SDS Team have written to the lawyers for the insurers who have raised these disputes in the Kilmore proceeding, and advised them of how the SDS Team proposes to deal with these disputes, and no objections have been received.

#### ***Anticipated timeline for issuing of remaining PNOAs***

60. The ELPD SDS Team are in regular contact with each ELPD Assessor regarding the completion of the remaining PNOAs. A solicitor member of the ELPD SDS Team has been designated to liaise with each of the ELPD Assessors to assist in resolving any bottlenecks in issuing PNOAs.
61. To this end, all ELPD Assessors are sharing detailed data with the SDS Team regarding the status of all outstanding assessments. This data is being reviewed by the SDS Team to assist the ELPD Assessors in progressing outstanding assessments.

#### Cooperation of group members

62. Where a group member has failed to provide documents to an ELPD Assessor after multiple requests for information, the SDS Team requests the ELPD Assessors to finalise the assessment based on the information provided, and to



issue the PNOA to the group member. If the group member disagrees with the assessment, they then have 14 days to raise any errors, and provide additional information or evidence to the ELPD Assessor.

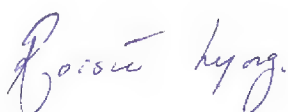
63. The SDS Team have also written to numerous group members advising them that unless they cooperate with the ELPD Assessment process, then the ELPD Assessor will finalise their PNOA in the manner referred to above. Where the SDS Team has more information about a group member's personal circumstances, the SDS Team are trying to assist as much as possible by also contacting the group member, and assisting with the completion of these assessments.
64. The SDS Team are also assisting ELPD Assessors to contact group members who are difficult to contact.

#### Complex assessments

65. The SDS Team are continuing to assist ELPD Assessors with complex assessments where requested.
66. Mr David Geddes has indicated to me that he regards certain matters which arise in the assessment of a large plantation claim allocated to him for assessment as being outside his area of expertise. I have accordingly referred those matters to Mr Min Guo, ELPD Assessor, who will jointly assess this claim with Mr Geddes.

#### Estimated completion date of ELPD Assessments

67. The ELPD Assessors have all been requested to provide the SDS Team with an estimated completion date for the outstanding ELPD assessments, and have indicated as follows:



<b>PNOAs assessing above-insurance group members</b>			
ELPD Assessor	Estimated completion date	Number of assessments to be issued to group members	Number of assessments to be provided to SDS Team
Hall and Wilcox	Mid November	15	38
RMCG	Late November	15	43
Crawford	Late November	37	62
Cunningham Lindsey	Mid to late November	6	6
Mr Min Guo	Late November	19	19
HWL Ebsworth	Mid November	7	18
Mr David Geddes	Mid to late November	2	2

68. In paragraph 72-73 of my affidavit dated 16 June 2016, I noted the weekly reporting requirements of the ELPD Assessors to the SDS Team. The SDS Team compile this information to monitor the performance of each ELPD Assessor.
69. In September, the SDS Team noted a significant drop in the volume of assessments being completed of one ELPD Assessor. I subsequently contacted the Principal at this ELPD Assessment firm to discuss my concerns. To date, their performance has improved, but I remain concerned at their progress. The SDS Team continue to work very closely with this firm.
70. One ELPD Assessor had estimated to the SDS Team that they would not be able to complete assessments until early to mid-December. A solicitor member of the SDS Team has been working very closely with that ELPD Assessor to assist them in finalising these assessments. With direction being provided by the SDS Team, the ELPD Assessor has agreed to take steps to issue all outstanding PNOAs by

*Boisun Lyong -*

*Adrian Lyong*

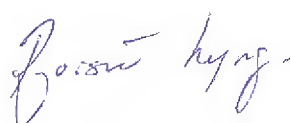


mid-November. However, the SDS Team remains concerned that this ELPD Assessor may not be able to meet the timeframe requested. In order to assist the ELPD Assessor, a small portion of ELPD assessments have been re-allocated to another ELPD Assessor. If the ELPD Assessor does not complete the assessments within the timeframes requested, this could cause delays due to the assessments being issued close to the Christmas period. The SDS Team will continue to closely monitor the ELPD Assessor, and assist them in finalising the outstanding assessments.

71. The ELPD Assessors have been instructed to upload issued PNOAs on a daily basis to reduce delays in sending Final Notices of Assessments (**FNOAs**) to group members.

***Progress of issuing finalised assessments***

72. As at 27 October 2016, the SDS Team estimates it has received finalised assessments for 454 properties with an above insurance claim from the ELPD Assessors. As at 27 October 2016, the SDS Team has issued FNOAs to 306 (48% of all) properties with an above insurance claim, resulting in 517 group members having now been issued with FNOAs.
73. As of 27 October 2016, the SDS Team has not issued any FNOAs to the insurers but it anticipates that a tranche will be sent out shortly.
74. The procedure developed by the ELPD SDS Team for issuing FNOAs is set out in detail in paragraphs 47 to 60 of my affidavit dated 16 June 2016.
75. In paragraphs 61 to 63 of my affidavit dated 16 June 2016, I alerted the Court to the unexpectedly high number and technically complex nature of the errors encountered by the ELPD SDS Team in the course of the initial check and software review process which were causing delays to the process of issuing FNOAs. These errors largely fall into two categories:
  - (a) minor data or administrative errors; and
  - (b) more substantive errors potentially affecting the value of the assessment.



***Minor data or administrative errors identified by the ELPD SDS Team in the process of issuing finalised assessments***

76. The SDS Team continues to review assessments for the errors detected by the First Upload software described at paragraphs 54 to 57 of my 16 June 2016 affidavit. An estimated 50% of assessments continue to be affected by minor data or administrative errors which are typically minor in nature and relatively straightforward to correct. Although minor, I consider it important that these errors be corrected prior to any distribution to ensure that correct payments are made to the correct claimants. These errors include:

- (a) typographical errors in group member names;
- (b) incorrectly transcribed Matter Centre IDs; and
- (c) failure to assess all claims registered at an address in the assessment.

***Substantive errors identified by the ELPD SDS Team in the process of issuing finalised assessments***

77. In the process of issuing finalised assessments, a small number of errors exceeding \$5000 or 5% of the assessed value have been detected. Under my direction, the SDS Team is facilitating the amendment of these assessments in accordance with the orders of this Court dated 17 October 2016.

***Complex assessments***

78. All finalised notices of assessment involving a complex claim, trust or estate are being reviewed by a solicitor or trainee solicitor before being issued to group members.

***Allocation of compensation to trusts, partnerships or companies***

79. In the process of issuing finalised assessments, the SDS Team have identified instances where the contact for an ELPD claim in their capacity as trustee, partner, company director or authorised contact have instructed that \$0 is to be allocated to the entity where there are multiple claims at the address. The SDS Team has written to all claimants who have allocated \$0 to such an entity to remind them that as authorised contact for the company, trust or partnership, they

are under a legal obligation to ensure that any compensation is distributed to its rightful owner.

***De-registered companies***

80. The SDS Team have identified a number of instances where the registered company for an ELPD claim is now de-registered. So as to not delay the ELPD assessment process, these ELPD claims are continuing to be assessed. However, claimants are being advised that in order to recover any compensation for the company, they will need to take steps to re-instate the company. For small company claims, the SDS Team is considering alternate procedures.

***ELPD review process***

81. Under section E5.1 of the SDS, group members may request a review of their FNOA within 42 days of the date shown on the assessment.

82. Under section E5.3 of the SDS, where a request for review has been received, I must give notice to the group member seeking the review and provide 21 days to provide materials in support of the review application.

83. To date, no reviews have been received in respect of the more than 306 issued FNOAs.

***ELPD Assessor audit***

84. In order to ensure that group members are being assessed on a consistent basis, the SDS Team continues to undertake the ELPD Assessor auditing processes described in my previous affidavits filed in the Kilmore proceeding dated 16 March 2016 (paragraphs 61 to 65), 17 June 2016 (paragraphs 86 to 90) and my affidavit filed in this proceeding dated 12 September 2016 (paragraphs 79 to 83).

**D. STEPS TAKEN TO PREPARE FOR FINAL ELPD DISTRIBUTION**

***Internal review***

85. The ELPD SDS Team is currently in the process of undertaking a number of internal audits of all data in preparation for final distribution:

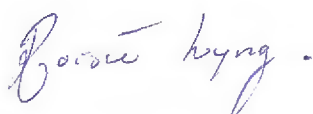
- (a) Assessment data audit - The purpose of this audit is to ensure that the assessment data contained in the Notices of Assessment sent to group members matches the assessment data in the Matter Centre client database.
  - (b) Not Proceeding / Uncooperative Assessments - The purpose of this audit is to ensure that appropriate steps have been taken for all group members in these categories and that these steps have been accurately recorded in the Matter Centre client database.
  - (c) Assessment status audits – Members of the SDS Team are conducting a series of assessment status audits with a view to ensuring that assessments marked in the Matter Centre database as being at a particular stage of the assessment process are in fact at that stage of the assessment process. The purpose of these audits is to ensure that no assessments are inadvertently left unassessed due to an administrative error.
86. The SDS Team expects to have this internal audit completed concurrently with or shortly after the last FNOA has been issued.

#### ***External review***

87. The SDS Team is working to ensure that the reporting and infrastructure systems are ready for Mr George Kompos of KPMG to commence a review as soon as all ELPD assessments have been finalised.

#### **E. ESTIMATED DURATION OF ELPD ASSESSMENT PROCESS**

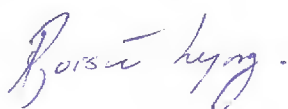
88. As referred to above, we anticipate that all ELPD assessments will be provided to the SDS Team by late November to issue as finalised notices of assessment. The SDS Team are taking steps to ensure that all finalised notices of assessment are issued as soon as possible.
89. The SDS Team estimates that provided that all finalised notices of assessment are provided to the SDS Team by the end of November, all FNOAs will be issued by the end of the first week of December.
90. The Settlement Distribution Scheme provides relatively generous periods in relation to seeking a review of finalised notices of assessment (42 days with a further 21 days to provide materials to the ELPD review assessor).



91. In November, in order to ensure that the final ELPD distribution is not unnecessarily delayed by these review periods, the SDS Team will commence sending claimants a notice to make an election not to exercise any rights of review (**Election Notice**). For all FNOAs issued in late November, a member of the SDS Team will call the claimant to explain the Election Notice, and encourage any claimants who advise that they do not intend to seek a review of their FNOA to return the Election Notice to the SDS Team.
92. I no longer consider it possible to complete a distribution to ELPD claimants **in late 2016**. However, I remain of the view that final distribution to property damage claimants will occur in **early 2017**. Such an outcome remains dependent on the finalisation of PNOAs and FNOAs within the timeframes described above, completion of internal and external audit processes (which can be commenced as soon as all FNOAs are issued), resolution of taxation issues with the ATO and the finalisation of cheques by an external mailing house.

#### **F. ELPD GROUP MEMBERS WHO HAVE INSTRUCTED US THAT THEY DO NOT WISH TO PROCEED**

93. As of 27 October 2016, 27 group members have advised the SDS Team that they do not wish to proceed with an ELPD claim for compensation.
94. These group members fall into two categories:
- (a) Group members who lodged an ELPD claim in error; and
  - (b) Group members who have an ELPD claim but do not want to proceed.
95. The SDS Team has identified that a large proportion of the claims have been lodged in error. Many of these claims were lodged in error because when the group member registered a PI claim, they also registered an ELPD claim as they were unsure whether or not they were required to tick the box indicating economic loss and property loss. These group members often had economic loss claims consequent to their personal injuries, but not any property damage or pure economic loss.
96. As of 27 October 2016, the SDS Team has contacted 26 of these group members in order to explain the settlement process, ensure those group members are not overwhelmed by the process, to offer additional assistance where appropriate and to confirm the group member's instructions.



97. Following these calls, correspondence has been sent to 26 group members confirming their instructions that they do not wish to be assessed and allowing a period of time for them to change their instructions.
98. We have informed these group members that we will be issuing them with \$Nil assessments. To date, 26 \$Nil assessments have been issued.

#### **G. UNCONTACTABLE ELPD GROUP MEMBERS**

99. Paragraphs 92 - 95 of my affidavit dated 12 September 2016 indicated that the SDS Team have identified a number of ELPD claims where we have been unable to contact the relevant person. This may be for the following reasons:
- (a) The contact person's contact details are out of date; and/or
  - (b) The contact person has since passed away.
100. As of 27 October 2016, there are presently 8 registered ELPD group members who are uncontactable. The SDS Team has sent letters to these group members, requesting that they contact Maurice Blackburn in relation to their claim. Australian Electoral Commission (**AEC**) records have been searched for all of these group members. The additional investigations undertaken by the ELPD SDS Team in an attempt to locate uncontactable group members are detailed in paragraph 96 of my affidavit dated 16 June 2016.
101. In respect of 2 of these group members, we have identified some evidence in relation to the losses sustained at the relevant loss address. ELPD Assessors have been directed to complete their assessment based on the evidence available and to issue PNOAs to the group member's last known address. For the remaining group members, it is likely that I will have to issue a \$Nil assessment to their last known address because there is insufficient evidence on file to support a claim. The SDS Team are currently reviewing this.

#### ***FNOAs returned to sender***

102. In addition to the work undertaken in relation to uncontactable group members, the SDS Team has implemented procedures in relation to FNOAs which are returned to the SDS Team as 'return to sender'.



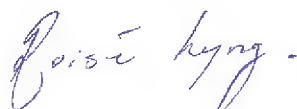
103. In such instances, the SDS Team initially attempts to contact the group member via telephone, email and/or other contact method using the contact details held by the SDS Team and the ELPD Assessor. In most instances, such attempts are successful and the FNOA can subsequently be sent to the group member's updated contact address.
104. Where the SDS Team is unable to contact the group member, the SDS Team implements procedures similar to the uncontactable group member procedure, such as inspecting AEC records.
105. Where an FNOA is reissued to a group member at an updated contact address, it is in some instances appropriate for an extension of time to seek review of the FNOA to be granted.

#### **H. FAMILY LAW DISPUTES AND ELPD ASSESSMENTS**

106. The SDS Team has issued FNOAs to 2 group members who have disputed the allocation of settlement funds. Compensation will be held on trust where group members dispute the allocation of funds. I anticipate that FNOAs subject to complex family law disputes may be held on trust for some time beyond final distribution. This may require additional tasks to be undertaken by the SDS Team following final distribution.
107. Where there is a registered dispute, the SDS Team is requesting family law court orders or statutory declarations detailing the agreed allocation of compensation between group members who are the subject of such disputes.
108. The SDS Team has sought an advice from Bronia Tulloch of counsel regarding the potential impact that certain family law court orders may have on the payment of distribution monies to group members who dispute the allocation of funds.

#### **LATE REGISTRANTS**

109. I refer to paragraphs 109 to 113 of my affidavit dated 16 June 2016 and paragraphs 96 to 98 of my affidavit dated 12 September 2016 in relation to the consideration of applications for late registration to participate in this settlement distribution.
110. Since my last affidavit, there have been no more late registrants accepted. However, a number of group members whose claims were intended to be covered



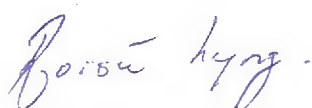
by an existing registration continue to be discovered in the process of reviewing finalised ELPD assessments and as such are registered pursuant to section A7.2 of the SDS.

### **INTERIM PAYMENTS**

111. As at 26 October 2016, I have received 53 applications for interim payment on the basis of exceptional need pursuant to sections D1.4 and F1.4 of the SDS.
112. All of these applicants have been assessed as being eligible to receive compensation from the settlement sum.
113. To date, I have considered the applications of 49 of the group members who have been assessed as being eligible to receive compensation. 48 of these group members have been successful in their applications for an interim payment and 1 has been unsuccessful.
114. The remaining 4 group members who have been assessed as eligible to receive compensation have yet to be assessed for eligibility for interim payment.

### **SENIOR MASTERS OFFICE (SMO)**

115. I refer to paragraphs 102 and 103 of my affidavit dated 12 September 2016.
116. On 19 October 2016, Senior Members of the I-D SDS Team met with employees of the SMO in relation to the approval and payment process for Order 15 personal injury group members.
117. During this meeting, an in principle agreement was reached with the SMO in respect of the following matters:
- (a) The nature, format and provision of the documents required to be provided to the SMO;
  - (b) The contents of and exhibits to the affidavit required to be filed with the SMO;
  - (c) The information and processes required for interim payment applications for Order 15 claimants;
  - (d) The review to be undertaken by the SDS Team as to any minors who may continue to be under a legal incapacity upon turning 18 years of age;





- (e) The information to be provided to Order 15 claimants by the SDS Team;
  - (f) That the SDS Team would work together with the SMO's IT department to facilitate the efficient provision and delivery of information in relation to Order 15 claimants; and
  - (g) The manner in which funds payable in relation to Order 15 claimants would be transferred to the SMO.
118. Since this meeting, the SDS Team has commenced the process of forwarding the final register of all Order 15 claims and the required documentation to the SMO.
119. The SDS Team continue to liaise with the SMO in regards to the precise form of orders to be made by the SMO.

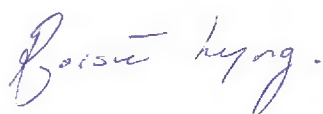
### **ESTATE CLAIMS**

120. As at 31 October 2016, we have identified 47 registered ELPD and/or PI claims made on behalf of estates. Additional estate claims continue to be identified where group members pass away.
121. The processes for managing the assessment of claims made by estates and the distribution of any compensation payable to estates are outlined in paragraphs 124 to 129 of my affidavit dated 16 June 2016 and paragraphs 104 to 107 of my affidavit dated 12 September 2016.

### **GROUP MEMBER COMMUNICATIONS**

#### ***General updates on settlement administration progress***

122. Since the update letter of 6 September 2016, no general update as to the settlement administration progress has been sent to all group members.
123. However, on 6 October 2016 I sent a letter to all registered personal injury group members to advise them that in order to finalise group members' entitlements to compensation and to allow for the distribution of funds, I would not be making any interim payments to personal injury claimants for applications received after 20 October 2016. The letter advised that registered ELPD group members could still make interim payment applications after this date.

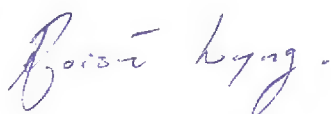


124. I intend to send an update letter to all group members regarding the likely timing of the final settlement distribution prior to the end of November 2016.

### TAXATION ISSUES

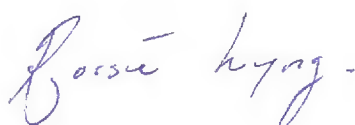
125. I refer to my affidavits dated 9 October 2015 (paragraphs 147 to 151) and 18 March 2016 (paragraph 94) filed in the Kilmore proceeding and to my affidavits dated 16 June 2016 (paragraph 144) and 12 September 2016 (paragraph 109) filed in this proceeding regarding the steps taken to reduce the taxation liability payable from the Distribution Sum.
126. Since the time of swearing my affidavit of 12 September 2016, Kimi Nishimura and PwC employees have contacted the ATO on numerous occasions to request that the ATO resolve the taxation issues raised in relation to this settlement administration by way of letter dated 30 August 2016.
127. On 29 September 2016, I sent a letter to the ATO advising that in order to finalise the personal injury assessment amounts I required the ATO's response to the taxation issues by 14 October 2016. I have never received a formal response to that letter.
128. On several occasions, PwC has been advised by the ATO that it will provide a response to the issues raised within a matter of days, but on each occasion the nominated date had lapsed without such response or any explanation as to why or when the response will be given. The most recent of these nominated dates was 21 October 2016.
129. Now produced and shown to me marked "AJW-3" is a copy of a letter from PwC to me dated 28 October 2016 summarising the position as to the taxation issues in this proceeding as of the morning of 28 October 2016.
130. On the evening of 28 October 2016, I was advised that PwC was contacted by [REDACTED] of the ATO late on 28 October 2016. PwC advised that [REDACTED] had conveyed her informal advice that the position of the ATO would be that all interest earned on settlement monies would be assessable and that no administration expenses would be deductible. PwC requested that written justification of the response be provided and [REDACTED] suggested a meeting to discuss these issues in the week commencing 31 October 2016. It is to be hoped that a more favourable outcome may be arrived at as a result of this meeting.

131. I am profoundly disappointed by the informal indication which the ATO has given of its approach to this matter and of the time it has taken to respond to the matters raised. The consequence for group members in this proceeding is likely to be that the Settlement Distribution Sum will be reduced by approximately \$12m, that interest earned (net of tax) will not be sufficient to cover administrative expenses and that the percentage recovery for group members will be reduced.
132. Unless the ATO's response changes at the meeting in the week commencing 31 October, I effectively have two options:
- (a) to delay the distribution of the personal injury payments until I have obtained legal advice regarding the ATO's proposed position and if necessary take formal legal steps to dispute their assessment. This avoids the possibility of two personal injury distributions but has the obvious drawback of potentially delaying a distribution beyond the end of this year; or
  - (b) effecting the distribution of personal injury settlement moneys on the basis that the maximum potential taxation amount is payable from the settlement distribution fund. In the event that I am advised to pursue options to dispute any assessment and that course is successful I will look at the most effective way to distribute the difference between the amount withheld for the maximum tax liability and the amount actually paid for tax. This has the advantage of ensuring a distribution this year but will result in increased costs associated if there is a need for a second distribution to personal injury claimants.
133. After much consideration, if the ATO does not change from the position it has informally indicated in the next few weeks, I propose to effect the final personal injury settlement distribution on the basis that the maximum potential taxation amount is payable from the settlement distribution fund. I have determined to do so primarily because I think it is important to effect the distribution this year if at all possible. If the taxation issues are ultimately resolved in a more favourable way than this position, I will consider the most effective way to deal with any difference between the amount withheld for tax and the amount payable. This may require seeking directions from the Court.



**COSTS**

134. Subject to the Court receiving a satisfactory report from Mr John White, Special Referee, Costs, appointed by the Court, I now seek approval for Maurice Blackburn to be paid \$4,048,190.14 for settlement administration costs and disbursements comprised of:
- (a) \$952,009.14, being settlement administration costs and disbursements incurred between 1 May and 30 June 2016 in excess of the \$1,100,000.00 approved for costs incurred over this period by His Honour Justice Dixon on 21 June 2016;
  - (b) \$2,496,022.19, being settlement administration costs and disbursements incurred between 1 July 2016 and 30 September 2016;
  - (c) \$258,997.81, being the estimated anticipated General and I-D settlement administration costs and disbursements between 1 October 2016 and 31 October 2016;
  - (d) \$307,948.00, being the estimated anticipated I-D settlement administration costs and disbursements between 1 November 2016 and 31 December 2016; and
  - (e) \$33,213.00, being the estimated anticipated I-D settlement administration costs between 1 January 2017 and 31 January 2017.
135. Now produced and shown to me marked '**AJW-4**' is a copy of the itemised invoices for settlement administration costs and disbursements for work carried out between 1 May 2016 and 30 September 2016.
136. The costs and disbursements incurred to date in the course of the settlement administration have been allocated into three categories, according to whether they relate to:
- (a) processes common to all group members (**General Settlement Administration**);
  - (b) processes specific to the assessment of group members' personal injury and dependency claims (**I-D Settlement Administration**); or



(c) processes specific to the assessment of group members' economic loss and property damage claims (**ELPD Settlement Administration**).

137. These categories correspond to the division of the Distribution Sum into an I-D Claims Fund and an ELPD Claims Fund, as set out in Section B1.1 of the Settlement Distribution Scheme.

138. In previous affidavits I have set out extensive detail regarding the nature of the work performed by the SDS team and the disbursements incurred by the Scheme. This information has been provided to Mr White for the purposes of his review of our costs and I do not propose to repeat it here. In order to effect the I-D distribution it is also necessary to estimate the costs from 1 October 2016 to 31 January 2016, and to this end Mr White has also been provided with an estimate of the costs and a description of the work to be performed over this period.

#### **PROPOSED TRANSFER PAYMENT FROM MURRINDINDI DISTRIBUTION SUM TO KILMORE DISTRIBUTION SUM**

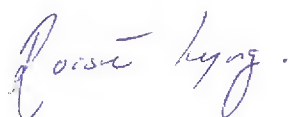
139. Since the last Case Management Conference, together with senior members of the SDS Team I have conducted a review of the costs incurred in the Kilmore and the Murrindindi settlement administrations. This review was motivated by the observation made by senior members of the SDS Team that all aspects of the Murrindindi settlement administration have benefited from the Kilmore settlement administration because they have largely replicated the procedures and systems developed for the Kilmore settlement administration. This has resulted in significantly lower costs both in absolute terms and proportionately being incurred in the Murrindindi matter when compared with the Kilmore matter.

140. As an indicator, settlement administration costs in the Kilmore settlement administration to 30 September 2016 are \$27,824,425.35 and constitute 6.4% of the settlement sum whilst the corresponding figures for the Murrindindi settlement administration are \$7,040,080.47 and 2.5%. In other words as things presently stand I am concerned that the Kilmore Settlement Administration has borne a disproportionate share of the set up and development costs associated with the administration of the two schemes. It is my view that the set up and development costs should be shared equally between the two schemes because they are in the nature of fixed costs and not dependent on claim numbers or settlement size.

*Boisic Lyng*

*John White*

141. In order to ensure that the claimants to this proceeding do not bear a disproportionate share of the set-up and development costs for the two proceedings, I therefore make application for a transfer payment of \$3,782,340.77 (inclusive of GST) to be made from the Murrindindi settlement fund to the Kilmore settlement fund.
142. I do not believe it is costs effective to engage in a line by line examination of the many bills in the two proceedings to assess whether they are appropriately characterised as set up or development costs. This would be unduly time consuming and expensive. I have calculated the amount of the transfer payment on the following basis:
- (a) that I-D professional costs and disbursements prior to 30 June 2015 were all for set up and development work to the benefit of both schemes;
  - (b) that ELPD professional costs before 31 December 2015 were all for set up and development work to the benefit of both schemes;
  - (c) that senior operator time on the General Settlement Administration file has generally been for the benefit of both schemes.
143. In each instance I have calculated the total incurred for each category above on both the Kilmore and Murrindindi files, apportioned that total equally between the two files and calculated the amount which would be required to be transferred from the Murrindindi settlement fund to the Kilmore settlement fund to achieve that outcome. Now produced and shown to me and marked 'AJW-5' is a copy of that calculation. Mr White has also been provided with a copy of this calculation and the data underlying this calculation.
144. Whilst there may be some individual elements of the costs incurred in the above categories which were not incurred for the benefit of both schemes there will be other elements of costs which can be so categorised which are not captured. For example, I consider some of the ELPD disbursements incurred during the period to 31 December 2015 to be for the assessment of prototype ELPD assessments which benefited the Murrindindi ELPD claimants equally to the Kilmore ELPD claimants. However, a high number of disbursements incurred in the Kilmore settlement administration over this period were also attributable to payment of pre-assessed ELPD claims. As such I consider it difficult to ascertain what proportion of the ELPD disbursements incurred over this period can be attributed to the



establishment of the ELPD settlement administration processes and systems and have accordingly not taken such costs into account. In all, I am satisfied that the proposed transfer payment is fair though not precise.

### CONCLUSION

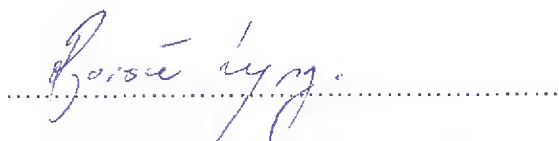
145. In light of the significant progress which continues to be made on each of the I-D and ELPD distributions since my last affidavit, it remains very likely that distributions will occur in the previously advised time frame of by the end of this year or in the early part of next year.

SWORN by the deponent at )  
Melbourne in the State of Victoria )  
this 31<sup>st</sup> day of October 2016 )  
)



Before me:

**ROISIN MARY LYNG**  
of 456 Lonsdale Street, Melbourne  
an Australian Legal Practitioner  
within the meaning of the Legal  
Profession Uniform Law (Victoria)



FILED on behalf of the Plaintiff